Annual Report 2021

Sentencing Trends and Practices

New South Wales
Sentencing Council

NSW GOVERNMENT

NSW Sentencing Council

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1. The Council's projects

1.1 In 2021, we completed two reviews, and had one ongoing review:

- homicide (completed)
- assaults on emergency services workers (completed), and
- fraud (ongoing).

Homicide

Terms of reference

1.2 We received terms of reference from the Attorney General on 23 November 2018:

> The Sentencing Council is to review the sentencing for the offences of murder and manslaughter under sections 19A, 19B and 24 of the Crimes Act 1900 (NSW), in particular:
>
> - the standard non-parole periods for murder and whether they should be increased; and
> - the sentences imposed for domestic and family violence related homicides.

In undertaking this review, the Sentencing Council should consider:

- Sentences imposed for homicides and how these sentencing decisions compare with sentencing decisions in other Australian states and territories;
- The impact of sentencing decisions on the family members of homicide victims;
- The devastating impact of domestic and family violence on our community;
- The application of section 61 of the Crimes (Sentencing Procedure) Act 1999 in the context of life sentences imposed for murder;
- The principles that courts apply when sentencing for these offences, including the sentencing principles applied in cases involving domestic and family violence; and
- Any other matter the Council considers relevant.

Preliminary submissions

1.3 We invited preliminary submissions on 7 December 2018. The deadline for preliminary submissions was 8 March 2019. We received 19 preliminary submissions.

Consultation paper and engagement

1.4 We released a consultation paper on 31 October 2019, with a deadline for submissions of 7 February 2020.

1.5 The consultation paper covered questions about:

- sentencing principles that apply in cases of murder and manslaughter
- sentencing for domestic violence related homicide
- sentencing for child homicide, and
- penalties for murder and manslaughter.

1.6 We received 53 submissions addressing various issues raised in the consultation paper. We also received over 248 submissions in response to the sentencing decision in relation to the murder of Allecha Boyd.[1] These called for amendments to the law so that offenders sentenced for murder are not released from imprisonment if they do not disclose the location of the victim's body.

1. *R v Shephard* [2020] NSWSC 141.

1.7 We also consulted people with experience and expertise in relation to victims and specialist legal practitioners on some specific issues.

Report: Summary of recommendations and conclusions

1.8 We transmitted our report to the Attorney General on 5 May 2021. The report was released on 27 May 2021.[2]

1.9 Overall we found that the sentences imposed for homicide were, generally, appropriate. We affirmed the importance of judicial discretion in sentencing. It is essential that a court has the ability to take into account the individual circumstances of each case. We also noted that whole of life sentences were imposed in the most serious cases of murder, including those involving sexual assault and domestic violence.

1.10 We made one recommendation about the availability of intensive correction orders (ICOs) for manslaughter. We did not recommend reforms on other issues raised in the review.

Recommendation: Intensive correction orders in manslaughter cases

1.11 Recommendation 7.1 was to remove the restriction that prevents courts from imposing ICOs in appropriate manslaughter cases.

1.12 Under the current sentencing regime, the unavailability of ICOs for manslaughter leaves only lesser non-custodial penalties, such as community correction orders and conditional release orders, to deal with cases at the lower end of the scale of criminality. The situation is anomalous. There is no reason why the harsher conditions that are only available for ICOs (when compared with other non-custodial options) and the stricter enforcement procedures that are available for ICOs should not be available for appropriate cases of manslaughter.

Sentencing principles

1.13 We found that the existing approaches to sentencing principles were appropriate. This includes the principle of totality and the aggravating and mitigating factors, which apply to the sentencing of all offences.

1.14 Some submissions supported adding to the list of aggravating factors set out in s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), chiefly in the areas of offences involving domestic violence or offences against young victims. In our view, the existing provisions either adequately covered the field or the courts have been able to take the circumstances into account without needing an express provision.

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2. NSW Sentencing Council, *Homicide*, Report (2021).

Domestic violence context

1.15 A number of submissions pointed to the importance, in homicide cases, of using evidence of domestic violence when assessing offence seriousness, and the appropriate sentence. Such evidence includes social framework evidence and evidence of expert witnesses on the nature and dynamics of domestic violence.

1.16 We concluded that it is not necessary to legislate generally to recognise domestic violence and we did not recommend any changes to the law of evidence or to the standard of proof in sentencing hearings.

1.17 Subject to the fundamental principle that an offender is not to be punished for an offence for which they have not been convicted, a sentencing court can have regard to evidence of domestic violence to assist in understanding the context of an offence, so long as it is admissible in the particular case and meets the relevant evidential standard in accordance with general law.

1.18 In reaching our conclusion, we examined a number of recent cases. The cases we examined demonstrate evidence being used in the sentencing process to show the devastating impact of domestic violence, including evidence of sustained histories of violence and controlling conduct, and evidence of the psychological and psychiatric consequences of domestic violence.

1.19 We observed it is important for all professionals in the criminal justice system to be equipped with the skills to recognise and appropriately discuss domestic violence. This includes being able to recognise the range of behaviours that constitute domestic violence. It is imperative to maintain appropriate educational programs to ensure that people are equipped to support the court in appropriate cases. This includes engaging with peak bodies to develop a proper understanding of the issues, including the effects of trauma.

Standard non-parole periods for murder

1.20 There are three SNPPs for murder: for murder generally (20 years), where the victim was a public official (25 years), and where the victim was a child (25 years). We supported retaining these existing SNPPs. There is a clear rationale for a higher SNPP (25 years) to apply where the victim was a child or a particular type of public official. Their age or occupation exposes them to a special vulnerability.

1.21 We did not support increasing the length of the current SNPPs for murder, as there is insufficient evidence suggesting that the sentences imposed are inadequate. Unlike other offences with SNPPs, the mean non-parole period imposed in murder cases is close to the SNPP prescribed by legislation, and there has been an increase in the mean non-parole periods imposed in murder cases in recent years.

1.22 We did not support introducing additional SNPPs for murder. Matters that could be the subject of a new SNPP, such as the presence of several aggravating factors, can

already be considered when assessing the objective seriousness of the offence. As these factors, along with the existing SNPP for murder, are already taken into account in sentencing, there is no need for new SNPPs.

Life sentences for murder

1.23 Under s 61 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), a court is to impose a sentence of life imprisonment for murder if the court is "satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence".

1.24 There was uncertainty about the operation of s 61, with two broad approaches being adopted by the courts: a two-stage approach, and an approach consistent with instinctive synthesis. As a result, some stakeholders suggested the repeal or amendment of s 61. Two appeals that raise s 61 issues were recently argued in the Court of Criminal Appeal (CCA). The report said that the government should await the outcome of these appeals before deciding whether it is necessary to repeal or amend s 61. We summarise one of these appeals in chapter 3 of this Annual Report.[3]

Mandatory whole of life sentences

1.25 A mandatory whole of life sentence (that is, life imprisonment without parole) is available only for the murder of a police officer in particular circumstances.

1.26 While we accepted that the existing provision is part of the law of NSW, we maintained an in-principle objection to mandatory sentences. The report did not propose any changes to the existing provision, either by extending the categories of victim for which a mandatory whole of life sentence should be imposed or by changing the exceptions (such as that the offender had a significant cognitive impairment when the offence was committed).

Life with parole for murder

1.27 Some submissions argued that parole should be available for life sentences on grounds such as that it would give judges greater discretion and flexibility, encourage rehabilitation, recognise human rights and bring NSW into line with other Australian jurisdictions.

1.28 A majority of the Sentencing Council considered that parole should continue not to be available where the maximum penalty of life imprisonment is imposed for murder.

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3. [3.138]–[3.145].

Indefinite or reviewable sentences

1.29 The report concluded that indefinite sentences for adults should not be introduced in NSW. We expressed our preference for the existing high risk offenders regime, which involves a risk assessment at the end of a sentence.

1.30 Many submissions called for a requirement that a person sentenced for a homicide should be required to reveal the location of the victim's body to be eligible for parole. However, such a requirement may be inflexible and operate unjustly in certain cases and can only be effective so long as there is a parole period available. We concluded that the existing sentencing and parole regimes provide sufficient incentives for a homicide offender to disclose the location of the victim's body.

Manslaughter

1.31 There was insufficient evidence about the general inadequacy of sentencing for manslaughter to justify any proposal for change. Options that we considered, but rejected, included increasing penalties, introducing an SNPP for some categories of manslaughter, introducing mandatory minimum sentences and enacting special child homicide provisions.

Assaults on emergency services workers

Terms of reference

1.32 We received terms of reference from the Attorney General on 27 July 2020:

> The Sentencing Council is to review the sentencing for offences involving assaults on police officers, correctional staff, youth justice officers, emergency services workers and health workers and make recommendations for any reform it considers appropriate.
>
> In undertaking the review, the Sentencing Council should consider:
>
> - Recent trends in assaults on these workers and in sentencing decisions;
> - Characteristics of offenders, including characteristics of reoffending offenders;
> - Sentencing options to deter this behaviour;
> - Sentencing options to reduce reoffending;
> - A comparison of NSW sentencing decisions for assaults on these workers with equivalent sentencing decisions in other Australian jurisdictions;
> - A comparison of NSW sentencing decisions for assaults on these workers with equivalent sentencing decisions for assaults generally;

- Sentencing principles applied by NSW courts; and
- Any other matter the Council considers relevant.

Submissions

1.33 We invited submissions on 5 August 2020. The deadline for submissions was 30 September 2020. We received 22 submissions from emergency services organisations, unions, legal organisations and interested members of the public.

Consultations

1.34 In November–December 2020, we conducted five consultations about issues arising in the sentencing of assaults on emergency services workers with a number of groups, including representatives of the agencies responsible for emergency services workers, unions and professional associations that represent emergency services workers, lawyers, and the courts.

Report: Summary of recommendations and conclusions

1.35 We transmitted our report to the Attorney General on 28 July 2021. The report was released on 1 October 2021.[4]

1.36 In summary, there was strong stakeholder support for treating assaults against emergency services workers separately from other types of assaults. We considered that the existing laws did not not effectively recognise assaults against healthcare workers, including ambulance officers. We therefore recommended there should be new offences for assaults against frontline health workers. This recommendation has since, been implemented.[5]

Reforming offences of assaulting emergency services workers

1.37 We recommended that new offences against "frontline health workers" should be included in the *Crimes Act.* These offences would cover assaults against hospital medical workers and hospital security staff.

1.38 We did not recommend introducing new offences for assaults against other types of emergency services workers, like firefighters and rescue workers. We heard that these workers experience a low level of assaults and new offences would therefore not be necessary.

1.39 We also recommended that the offences against ambulance officers in the *Health Services Act* should be repealed and instead, the new offences against frontline health

4. NSW Sentencing Council, *Assaults on Emergency Services Workers*, Report (2021).
5. *Crimes Act 1900* (NSW) s 60AE inserted by *Crimes Legislation Amendment (Assaults on Frontline Emergency and Health Workers) Act 2022* (NSW) sch 1 [14].

workers should cover assaults against ambulance officers. This was to address several specific problems with the offences in the *Health Services Act.*

1.40 We recommended that the new offences against "frontline health workers" be inserted in Part 3, Division 8A of the *Crimes Act* and should be largely modelled on s 60 of the *Crimes Act.* We recommended seven new offences: a summary offence, three unaggravated assault offences and three aggravated offences for conduct occurring during a public disorder.

1.41 We also recommended that the government should monitor the rate at which any such new offences are charged and proven, and the sentencing outcomes for offenders convicted of these offences with particular regard to Aboriginal people.

1.42 We did not recommend an increase in the maximum penalties for existing offences against police and other law enforcement officers (contained in s 60 and s 60A of the *Crimes Act*). However, we recommended some improvements to these offences:

- all assault and related offences against police officers should be consolidated into s 60 of the *Crimes Act*, requiring the repeal of s 58 and s 546C
- offences against law enforcement officers should be extended to assaults against all correctional staff in correctional centres, and
- there should be aggravated offences for assaults against law enforcement officers occurring during a public disorder.

Reforming sentencing for assaults against emergency services workers

1.43 Under s 56 of the *Crimes (Sentencing Procedure) Act,* when a court sentences a person to imprisonment for an assault against a correctional officer or juvenile justice officer, the sentence is generally to be served consecutively to the offender's existing sentence. However, evidence suggests that s 56 is not being fully implemented by courts. We therefore recommended that there should be more education and guidance for police and prosecutors about this provision. We also recommended that this provision should extend to offences committed by inmates on remand.

1.44 We did not recommend introducing mandatory minimum sentences for assaults against emergency services workers. Arguments against mandatory minimum sentences include that evidence does not demonstrate that harsher sentences and sentences of imprisonment have a deterrent effect.

1.45 We also did not recommend introducing a presumption that assaults against emergency services workers should be sentenced to full-time detention or a supervised order. There is currently a similar presumption for sentencing of domestic violence offences in NSW. The intention of this scheme was to increase the proportion of offenders in supervision, rather than to increase the number of offenders sentenced to imprisonment. However, it may be a way of achieving more appropriate sentences for

assaults against emergency services workers and the government may wish to consider this option further.

1.46 We did not recommend introducing organisational or community impact statements for assaults against emergency services workers. Our view was that emergency services workers who are victims of assaults should be encouraged and supported to make victim impact statements where appropriate, including by being made aware that they can nominate someone else to read a statement on their behalf.

Other ways to manage assaults against emergency services workers

1.47 The report focused on the sentencing of assaults against emergency services workers. However, sentencing only arises because an assault has been committed. It is equally, if not more, important to consider how such offences can be prevented from occurring in the first place.

1.48 We recommended there should be more public education about violence against emergency services workers. This has proved to be an effective way of preventing such assaults.

1.49 We also put forward other violence prevention and mitigation initiatives, drawn from submissions and other reviews, for consideration by government. These include:

- initiatives to improve the interactions between emergency services organisations and members of certain communities
- initiatives to improve the safety of the places and situations in which emergency services workers operate, and
- violence prevention training for emergency services workers.

Fraud

Terms of reference

1.50 We received terms of reference from the Attorney General on 21 September 2021:

> The Sentencing Council is asked to conduct a review of sentencing for fraud and fraud-related offences in New South Wales, especially but not limited to offences in Part 4AA of the Crimes Act 1900 (NSW), and make any recommendations for reform that it considers appropriate.

In undertaking this review, the Sentencing Council should:

1. provide sentencing statistics for convictions over a five year period;
2. provide information on the characteristics of offenders, sentence type and length; and
3. provide background information, including:
    a. the key sentencing principles and reasoning employed by sentencing judges;
    b. the mitigating subjective features of offenders; and
    c. any other significant factors considered in sentencing decisions that explain how courts come to their final decision on sentence (which may be done using case-studies or collation of predominate themes across cases)

Preliminary submissions

1.51 We invited preliminary submissions on 25 October 2021**.** The deadline for submissions was 31 January 2022.

Consultations and consultation paper

1.52 Consultations and the consultation paper were completed in 2022. A summary of this stage of the project will be included in our 2022 Annual Report.

2. Sentencing related research

2.1 This chapter summarises notable research relating to the operation of sentencing in NSW that was conducted in 2021. The research was undertaken or sponsored by a variety of bodies, including the NSW Bureau of Crime Statistics and Research, the Australian Institute of Criminology, and the Australian Housing and Urban Research Institute.

Exiting prison with complex support needs: the role of housing assistance

2.2 This report,[1] published by the Australian Housing and Urban Research Institute, found that evidence in Australia strongly supported that more social housing is needed for people exiting prison, particularly for those with complex support needs. It identified insufficient housing options and support for ex-prisoners as they leave prison. Those with support have better criminal justice outcomes.

2.3 The study linked various sources of de-identified administrative data of 2,713 prisoners from NSW with complex support needs (that is, people leaving prison with a mental health condition and/or a cognitive disability). This data was supplied by NSW government agencies including Bureau of Crime Statistics and Research (BOCSAR),

1. C Martin and others, *Exiting Prison with Complex Support Needs: The Role of Housing Assistance,* Final Report No 361 (Australian Housing and Urban Research Institute, 2021).

Police, Corrective Services, Justice Health and other health areas, Juvenile Justice (now Youth Justice), Legal Aid, Disability, Housing and Community Services.

2.4 The 2,713 people included 623 who received public housing post-release and 612 who received rental assistance post-release.

2.5 Comparing the public housing group with the comparison groups, the study found that former prisoners with public housing had reduced interactions with the criminal justice system, including in relation to:

- police incidents (down 8.9% per year)
- court appearances (down 7.6% per year)
- proven offences (down 7.6% per year)
- time in custody (down 11.2% per year)
- time on supervised orders (following an initial increase, down 7.8% per year), and
- justice system costs per person (down $4996 initially, then a further $2040 per person per year).

2.6 The study identified that for most of these measures, similar improvements are experienced by women, Indigenous people and people with multiple diagnoses.

2.7 It was also found that, over five years, once the cost of public housing is accounted for, housing a former prisoner in public housing generates a net benefit of between $5200 and $35,000, relative to the cost of providing assistance with private rentals or homelessness services.

2.8 The study also interviewed 41 people from corrective services, housing, disability and reintegration workers, and six ex-prisoners with complex needs. The interviews were with personnel from in NSW, Victoria and Tasmania.

2.9 These interviews showed that those who facilitate housing options for ex-prisoners were of the view that there were few housing options for people exiting prison.

2.10 Many interviews identified significant histories of abuse, neglect, trauma and institutionalisation of those with complex support needs. They identified there is an acute need for more widely accessible and affordable support.

2.11 Without options and resources, prisoner pre-release planning is often last minute, insecure, and diverts ex-prisoners and agencies away from addressing other needs, undermining attempts to cease offending.

Reoffending among child sexual offenders

2.12 This study,[2] published by the Australian Institute of Criminology, examined reoffending by 1092 male offenders proceeded against by police for a child sexual offence in NSW between 2004 and 2013, including:

- 863 child sexual assault offenders
- 196 child abuse material offenders, and
- 33 child procurement or grooming offenders.

2.13 The offenders were classified according to the most serious offence at the first police proceeding. Only 48 offenders were proceeded against for more than one category of offences. The study counted reoffending (excluding minor traffic offences) if it occurred at any time between the finalisation of the first police proceeding for child sexual offending and 31 December 2018. It did not account for offences that did not come to the attention of the police.

2.14 The study found that 43% of offenders reoffended either sexually (against adults or children) or non-sexually within 10 years of their first police proceeding for a child sexual offence. Sexual offences were committed by 7% of offenders, while non-sexual offences were committed by 42% of offenders.

2.15 At any point in the follow up period child sexual offenders were over eight times more likely to commit non-sexual offences than sexual offences. The highest risk period for both sexual and non-sexual reoffending was within the first two years.

2.16 The study also examined the differences in sexual reoffending between the categories of child sexual offenders outlined above and found the following sexual reoffending rates applied in the 10 years following the first police proceeding for a relevant child sexual offence:

- child procurement or grooming offenders: 28%
- child abuse material offenders: 9%, and
- child sexual assault offenders: 6%.

2.17 At any time in the follow up period, child procurement or grooming offenders were more likely to reoffend sexually than the other categories of offenders: more than four times

2. C Dowling, A Morgan and K Pooley, *Reoffending among Child Sexual Offenders*, Trends and Issues in Crime and Criminal Justice No 628 (Australian Institute of Criminology, 2021).

as likely as child sexual assault offenders and three times as likely as child abuse material offenders. In relation to non-sexual reoffending, the reoffending rates in the follow up period were:

- child sexual assault offenders: 42%
- child abuse material offenders: 36%, and
- child procurement or grooming offenders: 40%.

2.18 Finally, the study considered predictors of reoffending within the first two years. Generally, it found that offenders were more likely to reoffend non sexually if they had previously engaged in non-sexual violent and non-violent offending, were Indigenous people, or lived in a regional or remote location. These factors also emerged as important in predicting sexual reoffending within the first two years. The study also found that the probability of sexual reoffending was six times higher for those with more than one child sexual offence.

2.19 This study is consistent with other research that shows that: sexual reoffending among child sexual offenders is rare; child sexual offenders were more likely to reoffend non sexually; and the likelihood of any reoffending is highest in the first two years.

2.20 It also supports other research that shows that, for many, child sexual offending is part of a broader pattern of criminal behaviour, based upon antisocial, impulsive and aggressive traits and a lack of empathy. These tendencies also drive offenders' involvement in non-sexual offending.

2.21 The authors suggested that the greater risk of reoffending in the short-term could be attributed to monitoring, where the chance of detection is increased for offenders who are closely supervised immediately following contact with the criminal justice system.

2.22 The authors concluded that the findings:

> highlight the importance of implementing more intensive treatment, incapacitation and monitoring responses in the first few years after criminal justice system contact, and targeting these interventions at those offenders most at risk of reoffending. They also support the utility of interventions addressing criminal and antisocial behaviour broadly, rather than sexual offending specifically.[3]

3. C Dowling, A Morgan and K Pooley, *Reoffending among Child Sexual Offenders*, Trends and Issues in Crime and Criminal Justice No 628 (Australian Institute of Criminology, 2021) 13.

The prevalence of intellectual disability in adult prison

2.23 This study,[4] published in the *Journal of Intellectual Disability Research*, used disability, health and corrections data from 2014 to estimate the prevalence of intellectual disability in adult custody in NSW. The use of administrative data to link information is new for estimating prevalence of an intellectual disability, but the use of this data fails to identify some prisoners.

2.24 The study found that the general adult prison population was 10,566, of which 457 (4.3%) were identified as having an intellectual disability. It also found that the rate of imprisonment for people with an intellectual disability is 3.7 times higher than the general population.

2.25 Prisoners with an intellectual disability were younger, more likely to have previously been in custody, and more likely to be Indigenous than the general prison population.

2.26 This study attributes the over-representation of Indigenous people with an intellectual disability to:

- the relationship between social disadvantage and intellectual disability
- inadequate access to support services, and
- inadequate identification of intellectual disability in Indigenous Australians.

2.27 Prisoners with an intellectual disability have similar risk factors to individuals in the general prison population. Primarily they are often young men, with a history of behavioural problems, psychosocial disadvantage, familial offending, unemployment and co-morbid mental health needs.

2.28 In Australia, studies have shown that prisoners with an intellectual disability are more likely to

- be younger at their first incarceration
- be Indigenous
- experience poorer health outcomes
- have mental health disorders

4. J Trofimovs and others, "Using Linked Administrative Data to Determine the Prevalence of Intellectual Disability in Adult Prison in New South Wales, Australia" (2021) 65 *Journal of Intellectual Disability Research* 589.

- have alcohol and drug issues
- experience early disengagement from education, and
- experience social disadvantage.

2.29 Studies also have shown they are more visible to police, more likely to go to prison at first arrest compared with offenders without an intellectual disability.

2.30 This study did not address changes in sentencing that may divert individuals with milder intellectual disabilities.

The second tranche of the table offences reform: impacts on District and Local Court sentencing outcomes

2.31 This study,[5] published by BOCSAR, examined the impact of the second tranche of the Table Offences Reform on District and Local Court finalisations, time from charge to finalisation, and sentencing outcomes. Here we summarise only the findings related to sentencing outcomes.

2.32 The Table Offences reform involved making certain indictable only offences capable of being dealt with summarily in the Local Court under the tables set out in the *Criminal Procedure Act 1986* (NSW).[6] Table offences must be dealt with summarily in the Local Court, unless either the prosecution (in the case of Table 1 and 2 offences) or the defence (in the case of Table 1 offences) elects to have the matter dealt with in the District Court.

2.33 When tried summarily in the Local Court, offences are subject to a jurisdictional limit of 2 years' imprisonment or 5 years when sentencing for multiple offences.[7]

2.34 The offences included in the second tranche are set out in Table 2.1.

5. C Ringland, *The Second Tranche of the Table Offences Reform: Impacts on District and Local Court Finalisations, Time to Finalisation and Sentencing Outcomes*, Bureau Brief No 156 (NSW Bureau of Crime Statistics and Research, 2021).
6. *Criminal Procedure Act 1986* (NSW) s 6, sch 1.
7. *Criminal Procedure Act 1986* (NSW) s 267, s 268; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 58(1).

Table 2.1: Classification of offences in the second tranche of the Table Offences Reform

Provision	Offence	Post-reform Classification
Crimes Act 1900 s 193B(3)	Recklessly deal with proceeds of crime	**Table 1 (>$5000)** **Table 2 (<=$5000)**
Crimes Act 1900 s 319	Do act or make any omission with intent to pervert the course of justice	**Table 1**
Crimes Act 1900 s 94	Assault with intent to rob	**Table 1**
	Robbery	**Table 1**
Drug Misuse and Trafficking Act 1985 s 25(1)	Supply a prohibited drug (not being cannabis), being more than the indictable quantity	**Table 1**
	Knowingly take part in the supply of a prohibited drug (not being cannabis), being more than the indictable quantity	**Table 1**

2.35 The effect of the Table Offences Reform is therefore that proceedings for these offences are often dealt with in the Local Court, rather than the District Court.

2.36 This study found that the reforms did not impact the likelihood of imprisonment being imposed for offences included in the second tranche, but that the length of the imprisonment terms imposed, decreased.

2.37 The study considered the 18-month periods before and after the offences were reclassified. Data was collected from BOSCAR's Reoffending Database, which contains details for all finalised criminal court appearances in NSW. Figures for the supply of prohibited drug offences were adjusted for offender and offence characteristics, as well as bail status and time in custody before finalisation. However, the volume of other offences was too small to allow for adjustment. Further, with the exception of outcomes for the supply of prohibited drug offences, the study did not compare post-reform sentencing outcomes between the District and Local Courts.

2.38 The study did not account for the impact of any other reforms (including the Early Appropriate Guilty Plea reforms), residual effects from an increased focus on supervision, and any impact of the COVID-19 pandemic on court processes.

2.39 A previous study on the first tranche of the Table Offences Reform found a decrease in the likelihood that penalties of more than 12 months would be imposed following

convictions for those offences. The first tranche of Table Offences Reform reclassified several "break and enter" offences to Table 1.[8]

Sentencing Impacts

2.40 This study found that, after the reforms, there was no significant difference in the proportion of offences that resulted in a prison sentence. In fact, before the reforms, 37.3% of proven offences led to a prison sentence; after the reforms this was 36.8%. There was no significant difference in the likelihood of receiving a prison sentence for any of the individual offences, including in the case of the drug supply offences, once adjusted.

2.41 However, the study did find a decrease in the severity of prison sentences. The median total term for prison sentences dropped from 22 to 15 months; further, the percentage of sentences with a total term of greater than 12 months dropped from 31.3% to 20.9%. Likewise, the median non-parole period dropped from 12 to 9 months and the percentage of sentences with a non-parole period of greater than 12 months dropped from 17.2% to 9.1%. Overall, there was a significant reduction in the likelihood that either a total term or non-parole period of greater than 12 months would be imposed.

2.42 For the supply of drug offences, the study found that, once adjusted, there was a reduction in the likelihood of sentences with a non-parole period of more than 12 months and the likelihood of those with a total term of more than 12 months. However, this reduction was observed only when comparing post-reform Local Court matters with pre-reform District Court matters. There was no significant difference in the likelihood when comparing pre and post-reform District Court matters.

2.43 The author noted that this study was broadly consistent with evaluations of the first tranche of the Table Offences Reform; once strictly indictable offences were reclassified as Table 1 or 2 offences, less severe prison penalties were imposed.

Comparing legal and lay assessments of relevant sentencing factors for sex offences in Australia

2.44 This article,[9] published in the *Criminal Law Journal*, presents findings from the National Jury Sentencing Study. The authors argue that information on public views of

8. See, C Ringland, *Evaluating the First Tranche of the Table Offences Reform: Impacts on District Court Finalisations, Time to Finalisation and Sentencing Outcomes*, Crime and Justice Bulletin No. 231 (NSW Bureau of Crime Statistics and Research, 2020). See also NSW Sentencing Council, *Sentencing Trends and Practices*, Annual Report (2020) [2.34]–[2.41].
9. K Warner and others, "Comparing Legal and Lay Assessments of Relevant Sentencing Factors for Sex Offences in Australia" (2021) 45 *Criminal Law Journal* 57.

sentencing factors is valuable to criminal justice professionals. First, it is valuable for sentencing reviews and formulating sentencing guidance. Secondly, if there is divergence with public views, it informs changing the law's approach if public views can be accommodated.

2.45 The authors discuss the survey results which show considerable alignment between judges and the public on sentencing factors for sex offenders. Where there is divergence, the authors offer views on how aligning judicial practice with the views of the public may be achieved and whether it is desirable. The authors argue that notable differences between judges and the public highlight the need for judges to explain the law's approach to sentencing factors.

Method of the National Jury Sentencing Study

2.46 The study recruited jurors from 128 sex offence and 31 non-sexual violent offence trials in all states and territories except Western Australia and a group of members of the public summoned for jury duty but not selected which the study designates as "non-jurors".

2.47 This article examines Stage 2 of the National Jury Sentencing study which involved a survey. The lay respondents (jurors and non-jurors) were provided with sentencing remarks and a sentencing booklet which included information on sentencing principles, purposes and factors, information on sentencing options, current sentencing practice and jurisdiction-specific sentencing statistics for the offence. Jurors were provided with sentencing remarks from their trials. Non-jurors were provided with sentencing remarks from a real case, which the Stage 1 survey questions were based on. Nine out of ten of these cases involved sex offences.

2.48 The respondents were surveyed on the appropriateness of the sentence imposed by the judge and sentencing remarks. They were asked to comment on how much weight the judge should have placed on listed aggravating and mitigating factors and to identify other relevant factors.

2.49 To enable a comparison with judges' responses, the authors examined sentencing remarks with the assistance of qualitative analysis software. In addition, 20 jurors were interviewed.

Key findings

2.50 Judges, jurors and non-jurors were all much more likely to give a lot of weight to aggravating factors than mitigating factors.

2.51 Prominent aggravating factors in the responses of judges, jurors and non-jurors were breach of trust, emotional injury, victim vulnerability, multiple victims and repeated assault. Jurors and non-jurors gave more weight to aggravating factors than judges.

2.52 In some cases, judges gave weight to breach of trust in circumstances where there was not a sufficient trust relationship. Seventy-one jurors treated abuse of power or trust as

an aggravating factor where the judge determined it did not arise. Similarly, 54 non-jurors gave weight to abuse of power or trust across five cases but in four of these cases this factor did not arise in the view of the judge.

2.53 Lay responses to mitigating factors such as old age, disadvantaged background and mental disorder did not support the stereotype of the public as being particularly punitive in relation to sex offences.

2.54 Jurors and non-jurors were more likely than judges to give these mitigating factors “a lot of weight”. Jurors and non-jurors gave more weight than judges to a difficult or disadvantaged background.

2.55 Where judges identified an offender as having a “mental disorder”, in 57% of cases they gave weight to this factor and all of those judges only gave it “a little weight”. Fifty-seven per cent of jurors gave “mental disorder” mitigating weight but some gave it “a lot of weight” (14%) with 43% giving it “a little weight”. A similar pattern arose from the non-juror results in relation to mental disorder.

2.56 Prior convictions received more weight from jurors and non-jurors than judges. Forty-three per cent of jurors and 18% of judges gave “a lot of weight” to prior convictions. Thirty-six per cent of non-jurors and 25% of judges placed “a lot of weight” on prior convictions. However, the proportions giving no weight to prior convictions were similar among judges and jurors.

2.57 Jurors and non-jurors are more likely than judges not to give weight to good character.

2.58 One of the most common mitigating factors judges relied upon was delay between the commission of the offence and the sentence. Lay respondents rarely picked up on delay and interviewed jurors were dismissive of treating delay as a mitigating factor.

2.59 Respondents viewed a plea of not guilty and lack of remorse as aggravating factors rather than neutral. Jurors most frequently mentioned a plea of guilty and absence of remorse as additional aggravating factors. Absence of remorse was the most frequently mentioned additional aggravating factor for non-jurors. Judges appeared to treat absence of remorse as aggravating in 15% of cases.

Understanding the decline in Aboriginal young people in custody in NSW 2015–2019

2.60 This study,[10] published by BOCSAR, analysed custody data obtained from Youth Justice NSW which showed the average daily number of Aboriginal young people, aged from 10 to 17 years old, in custody declined from 161 in 2015 to 121 in 2019. The study aimed to evaluate the contributing factors to this trend. This data included Aboriginal young people who were sentenced and on remand.

2.61 The study identified a decline in both the number of Aboriginal young people on remand (average annual percentage decline of 5.9%) and in sentenced custody (average annual percentage decline of 8.2%). Three key factors contributed to this trend:

- a drop in the number of Aboriginal young people proceeded against to court by police, particularly for high volume property offences, property damage and traffic matters
- a drop in the number and proportion of Aboriginal young people sentenced to a control order (14% to 10%), due to fewer Aboriginal young people being convicted in court (2986 to 2198), and
- an increase in the percentage of Aboriginal young people who spent one day or less on remand (51.8% to 61.3%), despite an increase in police applications for revocation due to breaches of bail conditions (845 to 1082).

2.62 The following factors were found to have either a neutral or opposing effect on the number of Aboriginal young people in custody:

- an increase in both the number and percentage of young Aboriginal people refused bail by police (34% to 41%) but no overall change in the ultimate bail refusal rate because court bail refusal rates remained stable (21%), and
- an increase in the percentage of Aboriginal young people serving periods of short-term remand (due to higher police bail refusal rates) but no change in the median length of stay for other Aboriginal detainees.

2.63 Despite the overall positive trend, the authors noted an increasing disparity between court and police decisions with regards to bail. For example, over the period studied, police refused bail at higher rates, while courts' bail refusal rates remained the same. This resulted in more short-term remand for young Aboriginal people.

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10. N Donnelly and others, *Understanding the Decline in Aboriginal Young People in Custody in NSW from 2015 to 2019*, Bureau Brief No 153 (NSW Bureau of Crime Statistics and Research, 2021).

2.64 Similarly, police made an increasing number of applications for the revocation of bail for breach of conditions and courts granted lower proportions of these applications over the period studied. Because applications must be granted to take effect, it resulted in a slight decrease in the proportion of Aboriginal young people whose bail was revoked.

2.65 The authors speculated that the increased number of breaches of bail conditions identified by police may have been the result of increasingly onerous bail conditions, or more proactive policing. Although this would have led to more revocation applications, they could not determine the cause of this trend from the available data.

2.66 The authors also noted that the rate of custodial sentences was particularly low in 2019 for many offences, which may (at least in part) be attributable to the opening of the Youth Koori Court in Surry Hills. A review of the court has been undertaken[11] and will be reported in our 2022 Annual Report.

2.67 The authors noted too that changes to custodial sentences may have been affected by recent attempts to improve the knowledge of non-specialist judicial officers, with a three-month rotation through the Children's Court. The effects of these initiatives are only speculated, as further research would be required to ascertain their impact on Aboriginal youth custody numbers.

Vocational training in NSW prisons: exploring the relationship between traineeships and recidivism

2.68 This study,[12] published by BOCSAR, investigated the prison-based employment programs in NSW adult correctional centres. It asserted that inroads are being made to meet the NSW Government's target of a 5% reduction in reoffending among ex-prisoners by 2023.

2.69 The study compared rates of recidivism amongst inmates who completed the traineeship program with that of 34,000 ex-inmates who were eligible but did not participate (the comparison group) between January 2010 and May 2019.

2.70 Currently Corrective Services Industries (CSI) NSW manages prison-based employment programs. In 2018–2019, 84.1% of inmates were employed by CSI in a wide variety of industries including agriculture and construction.

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11. E J Ooi and S Rahman, *The Impact of the NSW Youth Koori Court on Sentencing and Re-offending Outcomes*, Crime and Justice Bulletin No 248 (NSW Bureau of Crime Statistics and Research, 2022).
12. E J Ooi, *Vocational Training in NSW Prisons: Exploring the Relationship between Traineeships and Recidivism*, Bureau Brief No 239 (NSW Bureau of Crime Statistics and Research, 2021).

2.71 The traineeship program is one part of CSI's broader vocational training program. It seeks to build inmates' work skills, boost employability post-release and ultimately reduce recidivism. Traineeships run for 12 months with mentoring and on the job training as well as exposure to real world working environments.

2.72 To be eligible for a traineeship, an inmate must:

- be currently employed in a CSI industry
- have at least 12 months remaining to their earliest possible release date
- have a Core Skill Assessment (CSA) result that meets the requirements of the qualification, and
- be an inmate of the correctional centre where the application was submitted.

2.73 The study concluded that recidivism rates in former trainees were substantially lower than the comparison group in the year, and up to 24 months, following release. This included reduced probability of:

- re-conviction
- committing a personal, property or serious drug offence
- property offending, and
- re-imprisonment within 12 months of release.

2.74 The most significant reduction overall was in the rate of personal, property or serious drug offending (a 5.7 percentage point reduction). In particular, for Aboriginal trainees, there was an even greater 7.9 percentage point reduction in this offending although there was no statistically significant reduction in re-conviction or re-imprisonment.

2.75 The least significant reduction was in the likelihood of re-imprisonment (a 2 percentage point reduction). The reduction was strongest in certain sub-groups including older males and prisoners released from custody to the Sydney Metropolitan area and prisoners assessed at greater risk of re-offending.

2.76 The study noted that the relationship between the traineeship and recidivism should be seen as associative, rather than causative. It was not possible to rule out omitted variable bias nor address possible hidden variables, for example, the fact that trainees are ordinarily carefully screened and selected.

2.77 The study suggested that future research should use a larger sample size to examine how prison based vocational training can reduce recidivism by reference to factors such as its effect on rehabilitation and behavioural change as well as finding steady post-release employment.

Effect of outside temperature on criminal court sentencing decisions

2.78 Does temperature affect the sentencing decisions of criminal courts? That was the question posed by a recent study which examined the effect of outside temperature on 2.8 million criminal cases heard in the Local Court, District Court, Children's Court and Supreme Court in NSW between 1994 and 2019.[13]

2.79 The study was prompted by a previous United States study in 2019,[14] which analysed 207,000 asylum applications and found a higher outdoor temperature influenced indoor decisions and reduced the probability of outcomes favourable to the applicant.

2.80 Specifically, a 10°F (or 12.2°C) increase in temperature reduced the rate of granting asylum applications by 6.55%. Similar conclusions were reached when parole suitability hearings were examined. This was despite proceedings being heard indoors and in climate controlled settings. The authors argued that the sensitivity of outcomes to changes in temperature itself implied inefficiency and affected the constitutional entitlement to a fair trial.

2.81 The NSW study had a different result.

2.82 It concluded there was limited evidence of temperature affecting the probability of a guilty outcome and the severity of sentencing. It identified that a 10°C increase in temperature was only associated with a 0.036 to 0.049 percentage point increase in probability of a guilty outcome.

2.83 Notwithstanding this conclusion, the authors noted that temperature may still affect the quality of decision making and pointed to other literature which has shown the effects of temperature on cognitive performance, mood and decision-making.

13. S Evans and P Siminski "Effect of Outside Temperature on Criminal Court Sentencing Decisions" (2021) 1 *Series of Unsurprising Results in Economics* 1.

14. A Heyes and S Saberian, "Temperature and Decisions: Evidence from 207,000 Court Cases" (2019) 11 *American Economic Journal: Applied Economics* 238.

3. Cases of interest

3.1 This chapter sets out cases of interest related to sentencing decided by the High Court of Australia, the NSW Court of Criminal Appeal (CCA) and the Supreme Court of NSW in 2021.

Purposes and principles

Community protection

3.2 One of the purposes of sentencing identified in the *Crimes (Sentencing Procedure) Act 1999* (NSW) is to protect the community from the offender.[1] There are two cases relevant to this purpose of sentencing, one in particular showing that the offender's history of domestic violence before and after the offence can be relevant to community protection.

R v Dong [2021] NSWCCA 82

3.3 The offender pleaded guilty to one count of murder.[2] He was sentenced to 18 years' imprisonment with a non-parole period of 13 years 6 months.

3.4 The prosecution appealed on two grounds; first, that the sentencing judge failed to take into account the protection of the community; and second, that the sentence imposed was manifestly inadequate.

3.5 The CCA found that, in circumstances where the offender had committed a premeditated murder which was the result of their mental illness, protection of the community needed to be addressed expressly.[3] The court noted that while general and specific deterrence and community protection can overlap, in cases where the offender's mental illness or other circumstances makes them a potential danger, the need to protect the community can be a significant factor which may need to be considered separately.

1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(c).
2. *Crimes Act 1900* (NSW) s 18.
3. *R v Dong* [2021] NSWCCA 82 [53].

3.6 The court found that the sentence was manifestly excessive on other grounds. The offender was resentenced to 21 years' imprisonment with a non-parole period of 15 years 8 months.

R v French [2021] NSWSC 1531

3.7 The offender pleaded guilty to manslaughter.[4] He received a sentence of 9 years' imprisonment with a non-parole period of 6 years.

3.8 The Supreme Court concluded that the offender's history of violence towards women before and after the offence demonstrated a need for community protection. The court noted that the sentence would protect the community during the offender's incarceration and that this was relevant to determining the head sentence and the non-parole period.[5] The court found that "a departure from the usual proportion" between the head sentence and non-parole period was necessary to provide the offender with "additional support" in re-integrating, which would assist with protecting the community after his release.[6]

Aggravating factors and matters going to seriousness

Age as an aggravating factor – sexual intercourse with a 17 year old

Gale v R [2021] NSWCCA 16

3.9 The offender pleaded guilty to having sexual intercourse with a person under special care aged 17 years.[7] The offender received an aggregate sentence of 1 year 8 months' imprisonment with a non-parole period of 1 year (which included a 25% discount for the early guilty plea).

3.10 One of the grounds of appeal was that the judge erred in assessing the objective seriousness of the offending in the mid-range. One point alleged in support was that the victim was at the upper end of the age range covered by the offence. The CCA rejected this point, noting that, while it is true that the maximum penalty would have been twice as much had the victim been 16 and there was no offence if the victim was 18:

> That does not mean that there is a sliding scale of seriousness of offences committed against 17-year-olds from most serious to least serious as the victims approach their 18th birthday.[8]

4. *Crimes Act 1900* (NSW) s 24.
5. *R v French* [2021] NSWSC 1531 [88].
6. *R v French* [2021] NSWSC 1531 [82]–[83], [94].
7. *Crimes Act 1900* (NSW) s 73.
8. *Gale v R* [2021] NSWCCA 16 [48].

3.11 While younger age is taken into account as an aggravating factor in offences that involve a broader range of ages, the court was not aware of any authority "that similar reasoning applies where the statutory provision specifies a range of age as narrow as 12 months",[9] adding:

> It is difficult to conceive of the offences being measurably more serious if they occurred when the victim was 17 years and 1 month, as opposed to when she was 17 years and 11 months.[10]

3.12 The court dismissed the appeal on all grounds.

Presence of a child

Johnson v R [2021] NSWCCA 13

3.13 The offender pleaded guilty to 10 counts of child sexual activity with two underage female victims, with a number of further charges for each victim on a Form 1, and received an aggregate sentence of 28 years' imprisonment with a non-parole period of 21 years (including a 15% discount for the guilty plea).

3.14 One ground of appeal was that the sentencing judge erred in finding that certain offences occurred in the presence of children (an aggravating factor under the *Crimes (Sentencing Procedure) Act 1999* (NSW)[11]).

3.15 The agreed facts showed that one count occurred while the offender's three children, aged 6, 4 and 3, were present in the same room playing on the floor. It was alleged that the agreed facts did not support a finding of aggravation, since there was no evidence that the children saw or were otherwise aware of the offending. The CCA allowed the ground of appeal in relation to that count. While the terms of the aggravating factor appear to allow that the "mere physical presence of a child is sufficient", the court observed that the preferred interpretation was "the child must be of an age and have a level of awareness such as to have been conscious of the offending so that the offending will have had, or be likely to have had, an adverse consequence on the child".[12]

3.16 The prosecution conceded that there was no evidence of the presence of other children in relation to any other count. The court, having established error, resentenced the offender to a reduced aggregate sentence of 24 years' imprisonment with a non-parole period of 18 years.

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9. *Gale v R* [2021] NSWCCA 16 [49].
10. *Gale v R* [2021] NSWCCA 16 [50].
11. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(ea).
12. *Johnson v R* [2021] NSWCCA 13 [52].

Moral culpability and objective seriousness

Zreika v R [2021] NSWCCA 243

3.17 The offender was found guilty by a jury of dangerous driving occasioning death[13] and dangerous driving occasioning grievous bodily harm.[14] He was sentenced to 6 years' imprisonment with a non-parole period of 4 years.

3.18 The offender appealed on the basis that the sentencing judge erred in assessing the objective seriousness of the offence by failing to take into account the nature and extent of the injuries suffered by the victim of the dangerous driving occasioning grievous bodily harm charge; and by taking into account matters personal to the offender.

3.19 The majority of the CCA held that the sentencing judge did consider the nature and extent of the victim's injuries by describing them as "very serious" and "grievous"; and that it was not necessary for the court "to 'rate' the level of seriousness on some form of notional scale".[15]

3.20 However, the majority held that the sentencing judge did err in taking into account matters personal to the offender when assessing objective seriousness. The offender's licence was suspended at the time of the offending because, although he had served his suspension period, he had not completed the Driver Knowledge Test. The majority found that, while the offender's suspended licence may have gone to his moral culpability, it was a "non-causative and unrelated factor" in the context of the objective seriousness of the offence; and that the sentencing remarks suggested that this factor had been "double-counted as going to both objective seriousness and other sentencing considerations". The majority commented that while "the concepts of moral culpability and objective seriousness of an offence may overlap and interact, they are not co-extensive".[16]

3.21 The offender was resentenced to 5 years 6 months' imprisonment with a non-parole period of 3 years 8 months.

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13. *Crimes Act 1900* (NSW) s 52A(1)(c).
14. *Crimes Act 1900* (NSW) s 52A(3)(c).
15. *Zreika v R* [2021] NSWCCA 243 [40].
16. *Zreika v R* [2021] NSWCCA 243 [55].

Grievous bodily harm on an infant

R v SS [2021] NSWCCA 56

3.22 The offender pleaded guilty to recklessly causing grievous bodily harm by shaking his four-week-old baby.[17] He was sentenced to 1 year 9 months' imprisonment with a non-parole period of 12 months.

3.23 The prosecution appealed the sentence. One of the grounds was that the sentencing judge erred in assessing the objective seriousness of the offence.

3.24 In relation to the objective seriousness ground, the CCA found that the seriousness of the offence was elevated because the victim was a baby, was "utterly defenceless and completely dependent upon her parents".[18] The fact that the injuries were extremely severe, including brain damage for life, further elevated the seriousness and suggested that it was impossible to reduce the offence's objective seriousness to below the middle of the range. This was compounded by the fact that the offender was a mature adult who was aware that shaking a child could have serious effects.

3.25 The sentence was found to be manifestly inadequate. The court noted that the starting point of 3 years 6 months "completely fails to reflect the magnitude of the harm caused which transcends by a large margin the threshold for the definition of grievous bodily harm".[19] The fact that the offender did not intend to cause the harm was irrelevant. If he had, the offence would have been even more serious.

3.26 The offender was resentenced to 4 years 6 months' imprisonment with a non-parole period of 3 years.

Drugs at music festivals

Naberezhnov v R [2021] NSWCCA 142

3.27 The offender pleaded guilty to ongoing supply of a prohibited drug,[20] offering to supply a prohibited drug in a quantity greater than the large commercial quantity,[21] and supplying a prohibited drug in a quantity greater than the indictable quantity.[22] He was sentenced to 12 years' imprisonment with a non-parole period of 8 years.

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17. *Crimes Act 1900* (NSW) s 35(2).
18. *R v SS* [2021] NSWCCA 56, 104 NSWLR 454 [37].
19. *R v SS* [2021] NSWCCA 56, 104 NSWLR 454 [95].
20. *Drug Misuse and Trafficking Act 1985* (NSW) s 25A(1).
21. *Drug Misuse and Trafficking Act 1985* (NSW) s 25(2).
22. *Drug Misuse and Trafficking Act 1985* (NSW) s 25(1).

3.28 The offender appealed on the ground that the sentencing judge had erred in assessing the objective seriousness of the offences.

3.29 In assessing the objective seriousness of the third offence, the offender contended that the judge had considered irrelevant factors, including that:

- drugs are supplied to attendees at music festivals, and a number of those persons had died as a result of consuming them
- these kinds of offences occurred on a fairly regular basis, and
- many of those who commit such offences were young people, sometimes with good educational backgrounds, and no prior criminal convictions.

3.30 The CCA found that objective seriousness must be assessed "wholly by reference to the nature of a person's offending".[23] The sentencing judge erred by taking these factors into account since they did not relate to the applicant's offending.

3.31 The court found that notwithstanding error, some of the grounds considered remained relevant to general deterrence. However, the court decided that a lesser sentence was not warranted.

Other considerations

Self-inflicted injury as extra curial punishment

Soro v R [2021] NSWCCA 326

3.32 The offender pleaded guilty to aggravated break and enter into any house and commit serious indictable offence (namely, assault occasioning actual bodily harm).[24] He was sentenced to 3 years 2 months' imprisonment with a non-parole period of 1 year 6 months.

3.33 In the course of offending, the offender punched a door and unintentionally broke his hand. One of the grounds of appeal was that the sentencing judge erred in finding that the principles of extra-curial punishment did not apply because the injury to the offender was self-inflicted. The CCA upheld this ground but did not re-sentence the offender, concluding that:

> There is something distinctly unsatisfactory about mitigating a sentence because of a self-inflicted injury by an offender (even if not intentionally

23. *Naberezhnov v R* [2021] NSWCCA 142 [49].
24. *Crimes Act 1900* (NSW) s 112(1)–(2).

> inflicted) in the course of committing the offence, particularly as … extra-curial punishment … ordinarily applies where the punishment is inflicted by a third party.[25]

3.34 However, the court found that the principle was too firmly established to change.

3.35 In resentencing, the court considered the extra-curial punishment, but ultimately did not consider it a significant mitigating factor. The original sentence was affirmed.

Bail conditions amounting to quasi-custody

R v Quinlin [2021] NSWCCA 284

3.36 The offender pleaded guilty to manslaughter by an unlawful and dangerous act,[26] and was sentenced to 12 months' imprisonment.

3.37 The sentencing judge observed that the offender had spent 6 months on remand followed by 21 months on conditional bail. Those conditions included a curfew and prohibitions on going to licensed premises and drinking. The judge considered these conditions amounted to a 21-month period of punishment constituting quasi-custody, equivalent to 6 months' imprisonment. Given this, the judge found that the non-parole period in effect expired on the day of sentence, making the offender eligible for immediate release.

3.38 One of the grounds of appeal was that the judge erred by taking into account the offender's time on bail as quasi-custody when determining the commencement of the sentence. The court noted that "bail conditions that were imposed would normally not have justified the judge's finding of quasi-custody".[27]

3.39 However, the CCA ultimately found that, when considering the offender's mental health issues and the 21 months of conditional bail, it was open to the sentencing judge to make the findings that he did, noting that "[a]s in many aspects of the difficult task faced by sentencing judges, reasonable minds might otherwise differ".[28]

Protective custody

BR v R [2021] NSWCCA 279

3.40 The offender pleaded guilty to 13 child sexual offences. He received a sentence of 30 years' imprisonment with a non-parole period of 22 years 6 months.

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25. *Kaisuva v R; Soro v R* [2021] NSWCCA 326 [113].
26. *Crimes Act 1900* (NSW) s 18(1)(b).
27. *R v Quinlin* [2021] NSWCCA 284 [98].
28. *R v Quinlin* [2021] NSWCCA 284 [98].

3.41 The offender's sole ground of appeal was that the sentence imposed was manifestly excessive. He argued the length of the sentence did not account for, among other things, the likelihood of him being in protective custody. While in protective custody, he witnessed violence daily and had difficulty being moved safely around the prison.

3.42 The sentencing judge found that the offender's circumstances of imprisonment did not warrant mitigation because they were no different than for other sex offenders.

3.43 The CCA rejected this reasoning and held the relevant comparison was between the conditions in which the offender was to serve his sentence compared to that of the general prison population. The offender was therefore entitled to have court take into account the restrictions he experienced as a prisoner in protective custody.

3.44 The court concluded the original sentence was manifestly excessive. The offender was resentenced to 28 years' imprisonment with a non-parole period of 20 years.

Prospects of rehabilitation and likelihood of reoffending

Meoli v R [2021] NSWCCA 213

3.45 The offender pleaded guilty to six offences, being three Commonwealth offences of importing a marketable quantity of a border controlled drug[29] and three NSW offences, including one offence of supplying a prohibited drug,[30] one offence of supplying a commercial quantity of a prohibited drug,[31] and one offence of possessing a prohibited weapon,[32] as well as being dealt with for breaching a s 9 bond, breaching a Community Correction Order and driving while disqualified.[33] The offender was sentenced to aggregate sentences in relation to the Commonwealth and State offences, which were, respectively, 4 years 9 months imprisonment with a non-parole period of 3 years; and 5 years' imprisonment with a non-parole period of 2 years 6 months.

3.46 One of the grounds of appeal was that the sentencing judge failed to assess whether the offender was unlikely to reoffend.

3.47 The CCA accepted the prosecution's submission that, in circumstances where neither party had raised the issue of the offender's unlikelihood of reoffending, the sentencing judge was not required make a determination on this issue.[34]

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29. *Criminal Code* (Cth) s 307.2.
30. *Drug Misuse and Trafficking Act 1985* (NSW) s 25(1).
31. *Drug Misuse and Trafficking Act 1985* (NSW) s 25(1).
32. *Weapons Prohibition Act 1998* (NSW) s 7(1).
33. *Road Transport Act 2013* (NSW) s 54(1)(a).
34. *Meoli v R* [2021] NSWCCA 213 [41]–[42].

3.48 While the court accepted that prospects of rehabilitation and unlikelihood of reoffending are "separate and distinct" factors,[35] it commented that the evidence will often be, "if not co-extensive, then significantly overlapping", and that the conclusions in respect of each would likely be consistent.[36] The court found that it was "inherent" in the adverse findings about the offender's prospects of rehabilitation, that there were also doubts about his unlikelihood of reoffending.[37] In rejecting this ground, the court nevertheless found that the evidence did not support a finding that the offender was unlikely to reoffend.

3.49 The court also found that the sentences were not manifestly excessive.

Failure to consider background and circumstances

Rossall v R [2021] NSWCCA 200

3.50 The offender pleaded guilty to indecent assault[38] and intimidation with intent to cause fear of physical or mental harm,[39] with a charge of common assault taken into account on a Form 1. The sentencing judge imposed an aggregate sentence of 2 years 4 months' imprisonment, with a non-parole period of 14 months.

3.51 The offender appealed on the ground that a miscarriage of justice was occasioned by the failure of his legal representatives to obtain or tender an assessment and expert opinion as to the offender's mental health.

3.52 The CCA found that the mere fact that more fulsome material could have been presented to the sentencing judge is not of itself sufficient to result in a successful appeal. However, in this case, the failure of the solicitor to present evidence of the offender's mental health deprived the judge of a proper consideration of the offender's background and circumstances.

3.53 The court found that failure to present the evidence before the sentencing judge meant that the sentencing process was significantly unfair, and a miscarriage of justice had occurred. The fact that an offender is or was suffering from a mental disorder can reduce their moral culpability, and "have an ameliorating effect on general deterrence, retribution and denunciation".[40]

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35. *TL v R* [2020] NSWCCA 264 [369].
36. *Meoli v R* [2021] NSWCCA 213 [43].
37. *Meoli v R* [2021] NSWCCA 213, [43].
38. *Crimes Act 1900* (NSW) s 61L.
39. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13(1).
40. *Rossall v R* [2021] NSWCCA 200 [84].

3.54 The court resentenced the offender to an aggregate sentence of 1 year 6 months' imprisonment with a non-parole period of 9 months.

Bugmy considerations

3.55 Two cases of interest have dealt with considerations according to the principles established in *Bugmy v R* (*Bugmy*).[41] In *Bugmy,* the High Court held that the principles stated by Justice Wood in *Fernando*[42] stand for the proposition that "an Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence".[43] Thus, while not all Aboriginal offenders come from backgrounds characterised by the abuse of alcohol and alcohol-fuelled violence, the fact that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate a sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way.[44] The High Court also accepted that the effects of profound deprivation do not diminish over time and should be given full weight in the determination of an appropriate sentence in every case.[45]

Hoskins v R [2021] NSWCCA 169

3.56 The offender pleaded guilty to two counts of reckless wounding and one count each of affray, aggravated break, enter, and commit serious indictable offence, and assault occasioning actual bodily harm.[46] He received an aggregate sentence of 5 years 6 months' imprisonment with a non-parole period of 3 years 6 months.

3.57 The offender appealed on the ground that the sentencing judge failed to apply *Bugmy*.

3.58 The CCA allowed the appeal. It found that despite clear evidence, the sentencing judge failed adequately to consider the effects of the offender's childhood deprivation. Although the offender had a stable childhood up until the age of 12, the court found that "an upbringing does not end at twelve",[47] and the judge erred in failing to consider the momentous psychological impact of the offender's discovery that his aunt and uncle (in whose care he was initially raised) were not his parents. The judge also failed to consider the impact of the offender's move to his biological mother's care at age 13, where criminal conduct and substance use was normalised.

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41. *Bugmy v R* [2013] HCA 37, 249 CLR 571.
42. *R v Fernando* (1992) 76 A Crim R 58.
43. *Bugmy v R* [2013] HCA 37, 249 CLR 571 [37].
44. *Bugmy v R* [2013] HCA 37, 249 CLR 571 [40].
45. *Bugmy v R* [2013] HCA 37, 249 CLR 571 [42]–[43].
46. *Crimes Act 1900* (NSW) s 112(2), s 59(1), s 93C(1), s 35(4).
47. *Hoskins v R* [2021] NSWCCA 169 [63].

3.59 The court discussed the *Bugmy* principles and confirmed that:

> there is no magic in the word "profound", and it is not necessary to characterise an offender's childhood as one of "profound deprivation" before the principle is engaged.[48]

3.60 The main point of the principle is that social disadvantage may reduce an offender's moral culpability, particularly if the offending is impulsive or indicative of a learned response arising from the circumstances of social disadvantage. This means that *Bugmy* principles may not be engaged when the offence involves significant premeditation or planning, such as the offence of drug cultivation or supply.

3.61 The court also noted that the *Bugmy* principles do not depend on establishing a causal link between the circumstances of disadvantage and the offending.

3.62 The court resentenced the offender to 5 years' imprisonment with a non-parole period of 3 years.

Nasrallah v R [2021] NSWCCA 207

3.63 The offender pleaded guilty to armed robbery in company[49] and to malicious damage committed in the course of the robbery.[50] She was sentenced to 2 years 9 months' imprisonment with a non-parole period of 1 year 4 months.

3.64 One of the grounds of appeal was that the sentencing judge erred by failing to find that the evidence of the offender's upbringing engaged the *Bugmy* principles and by failing to give full weight to the offender's deprived background.

3.65 The majority of the CCA found that it was open to the sentencing judge to consider that the background of the offender did not amount to "profound deprivation" as articulated in *Bugmy*. Despite finding that the *Bugmy* principles were not engaged, the sentencing judge still gave adequate consideration to the offender's childhood as a mitigatory factor in the overall sentencing decision.

3.66 The majority assumed, but did not decide, the correctness of the statement in *Hoskins v R* (above) that "[t]here is no magic in the word 'profound', and it is not necessary to characterise an offender's childhood as one of 'profound deprivation' before the principle is engaged".[51] The use of the word 'profound' in *Bugmy* was simply to emphasise a very high degree of deprivation.

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48. *Hoskins v R* [2021] NSWCCA 169 [57].
49. *Crimes Act 1900* (NSW) s 97(1).
50. *Crimes Act 1900* (NSW) s 195(1)(a).
51. *Nasrallah v R* [2021] NSWCCA 207, 105 NSWLR 451 [8].

3.67 The majority discussed the application of *Bugmy*, noting that its application is generally confined to cases where an offender's childhood deprivation occurred over a lengthy period of time, rather than a single instance of trauma or abuse. Such singular instances can be taken into account as a mitigating factor but are unlikely to enliven the *Bugmy* principles. However, the court found that in this case it was not necessary or desirable to delimit the exact boundaries of *Bugmy*.

3.68 In dissent, Justice Hamill considered that the emphasis on the qualifier "profound" had distracted the sentencing judge from properly considering the extent to which the offender's traumatic past reduced her moral culpability. He stated that undue emphasis should not be placed on the word profound, and the question of whether there was "profound" deprivation should not be treated as a threshold test.

3.69 Justice Hamill also disagreed with the suggestion that the *Bugmy* principles require that the offender had a "sustained" period of deprivation. He noted that the relevant consideration is the impact of the childhood trauma on the offender's development and "the course her life took as a result".[52]

3.70 The appeal was allowed on other grounds and the offender's sentence dates were adjusted to take into account a period of pre-sentence custody unknown to the sentencing judge.

Guideline judgments

3.71 This year, there have been two CCA cases that have considered the use of the guideline judgment of *R v Whyte*[53] (*Whyte*) which relates to dangerous driving. Guideline judgments are governed by Part 3 Division 4 of the *Crimes (Sentencing Procedure) Act 1999* (NSW). *Whyte* was handed down in 2002. The last guideline judgment was handed down in 2004.[54]

Stanton v R [2021] NSWCCA 123

3.72 The offender pleaded guilty to two offences of dangerous driving causing grievous bodily harm while under the influence of an intoxicating drug.[55] He received an aggregate sentence of 4 years 6 months' imprisonment with a non-parole period of 3 years.

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52. *Nasrallah v R* [2021] NSWCCA 207, 105 NSWLR 451 [111].
53. *R v Whyte* [2002] NSWCCA 343, 55 NSWLR 252.
54. *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 3 of 2002)* [2004] NSWCCA 303, 61 NSWLR 305.
55. *Crimes Act 1900* (NSW) s 52A(3)(a).

3.73 One of the grounds of appeal was that the sentencing judge failed to apply *Whyte* as required by the *Crimes (Sentencing Procedure) Act 1999* (NSW).[56]

3.74 The CCA found that the guideline judgment had been adequately taken into account. They noted that there may be changes in the sentencing regime and practice between the time a guideline judgment is decided and the present. This will affect the way the judgment is considered. For example, since *Whyte*, the manner in which a guilty plea is to be treated is now specified by statute.

3.75 The court also noted that the failure of the sentencing judge to address explicitly some of the factors listed in *Whyte* did not amount to a failure to apply it. The balance of his judgment made clear that he had engaged appropriately with *Whyte*. This was particularly so given that most of the factors the judge did not expressly refer to were not relevant to the case.

3.76 The offender's appeal ultimately succeeded on the ground that the original sentence was manifestly excessive. The court considered that the starting point for each of the indicative sentences was too high and resentenced him to an aggregate sentence of 3 years 4 months' imprisonment with a non-parole period of 2 years 3 months.

R v Bortic [2021] NSWCCA 138

3.77 The offender pleaded guilty to two counts of aggravated dangerous driving occasioning death[57] and one count of causing bodily harm by misconduct in charge of a motor vehicle.[58] He was sentenced to 6 years' imprisonment with a non-parole period of 2 years 9 months.

3.78 The DPP appealed on three grounds. The first was that the sentencing judge erred in assessing the objective seriousness of the offending at the mid-range of objective seriousness. Grounds 2 and 3 were that the aggregate sentence and the non-parole period were manifestly inadequate.

3.79 The CCA upheld the appeal on all grounds. It found that while the sentencing judge engaged with the factors outlined in *Whyte*, he did not give them enough weight. In particular, *Whyte* makes clear that a finding that an offender has abandoned moral responsibility is reserved for very serious cases which are characterised as above the mid-range of seriousness. There was thus an incongruity in the fact that the sentencing judge found that the offender had abandoned moral responsibility, yet the judge went on to characterise the offence as in the mid-range of seriousness.

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56. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 42A(a).
57. *Crimes Act 1900* (NSW) s 52A(2).
58. *Crimes Act 1900* (NSW) s 53.

3.80 The court resentenced the offender to an aggregate sentence of 8 years' imprisonment with a non-parole period of 4 years 9 months.

Self-induced intoxication

R v Fisher [2021] NSWCCA 91

3.81 The offender was found guilty by a jury of sexual intercourse without consent.[59] He was sentenced to a community corrections order for a period of 3 years.

3.82 One of the grounds of the prosecution's appeal was that the judge erred in taking into account the defendant's self-induced intoxication as a mitigating factor.

3.83 The majority of the CCA found that the sentencing judge had wrongly placed significant weight on the offender's intoxication by permitting that fact to inform his finding that the offender honestly believed that the complainant was consenting. The sentencing judge also used the offender's intoxication to reject the prosecution's case that the offender had deliberately deceived the complainant. The majority concluded that:

> the sentencing judge was obliged to disregard the [offender's] intoxication entirely when enquiring into the [offender's] state of mind, awareness or perception at the time of the offending, where that enquiry was undertaken for the purposes of assessing the objective seriousness of his offending.[60]

3.84 The majority also noted that the fact that the sentencing judge repeatedly claimed that he had not taken the offender's intoxication into account was not significant. The question is whether as a matter of substance, not form, the sentencing judge took the offender's intoxication into account.

3.85 In dissent, Justice Brereton suggested that the sentencing judge could consider the applicant's intoxication to contribute to his conclusion that the offender had not practised deliberate deception on the complainant. He stated that since the judge clearly stated he was not considering the intoxication as a mitigating factor, the CCA should believe him. He further considered that the sentencing judge could consider intoxication in order to negate an aggravating factor.

3.86 The court allowed the appeal and resentenced the offender to 5 years' imprisonment with a non-parole period of 3 years.

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59. *Crimes Act 1900* (NSW) s 61I.
60. *R v Fisher* [2021] NSWCCA 91 [74].

Notice of resources required for parole

Tuesley v R [2021] NSWCCA 58

3.87 The offender pleaded guilty to two indictable offences and four summary offences. The two indictable offences were assaulting a police officer in the execution of their duty occasioning actual bodily harm,[61] and assaulting a police officer in the execution of their duty.[62] He received an aggregate sentence of 20 months' imprisonment. The judge did not fix a non-parole period.

3.88 Some of the grounds of appeal related to the judge's failure to fix a non-parole period. In particular, the offender argued that in declining to fix a non-parole period, the judge had taken into account the irrelevant consideration that parole would be a waste of resources due to the high likelihood of the offender reoffending. The offender argued that such a finding was not open to the judge as there was no evidence that parole would be a waste of resources.

3.89 In dismissing the appeal, the CCA found that the sentencing judge's findings were clearly open. The examination of the offender's criminal history provided strong evidence that he was likely to reoffend. Moreover, the court found that the judge was entitled to take the fact that parole requires significant resources on judicial notice.

Prospects of rehabilitation without acknowledgement of wrongdoing

Sigalla v R [2021] NSWCCA 22

3.90 The offender was found guilty by a jury of 24 counts of dishonestly using his position as a director of a company with intent to gain a benefit for himself or a third party.[63] He was sentenced to 10 years' imprisonment with a non-parole period of 6 years.

3.91 One of the grounds of appeal was that the sentencing judge erred in holding that the offender's failure to acknowledge wrongdoing prevented a finding that he had any prospects of rehabilitation.

3.92 The CCA allowed this ground, finding that while an absence of remorse may reduce the prospects of rehabilitation, it does not entirely remove them. The court also observed that a plea of not guilty does not disentitle an offender from a finding that they have prospects of rehabilitation. Other factors, such as the offender's prior good character, education, and relationship with his family, all pointed to the prospect of rehabilitation.

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61. *Crimes Act 1900* (NSW) s 60(2).
62. *Crimes Act 1900* (NSW) s 58.
63. *Corporations Act 2001* (Cth) s 184(2)(a).

3.93 The offender was resentenced to 9 years 6 months' imprisonment, with a non-parole period of 5 years 9 months.

Discounts

3.94 There have been some cases of interest relating to the various discounts available at sentencing, including those for assistance to the authorities and guilty pleas.

Limits to discount for assistance

Buckley v R [2021] NSWCCA 6

3.95 The offender pleaded guilty to ten offences relating to armed robbery and drug possession. The offender received an aggregate sentence of 9 years' imprisonment with a non-parole period of 5 years. The early pleas entitled the offender to a 25% discount. In relation to five of the armed robbery offences the sentencing judge found that the offender was entitled to an identifiable discount for assistance to the authorities.[64] For these matters, the judge considered that a combined discount of around 40% for both the early guilty plea and the assistance was appropriate, in the absence of circumstances beyond the norm.

3.96 One of the offender's grounds of appeal was that the judge erred by assuming that sentencing principles restricted him to a combined discount of 40%.

3.97 In allowing the appeal, the CCA observed that:

> the effective constraint upon the extent of any discount for assistance is not a rigid or mechanical sentencing principle that the maximum permissible percentage is 40%, when taken together with the discount applicable for a plea of guilty, in the absence of "circumstances beyond the norm.[65]

3.98 The court further observed that the actual constraint is established by the *Crimes (Sentencing Procedure) Act 1999* (NSW),[66] which provides that any lesser penalty must not be "unreasonably disproportionate to the nature and circumstances of the offence".

3.99 In resentencing the offender, the court proposed a combined discount of 50% for the five armed robbery offences. The court observed that, since it was imposing an aggregate sentence that included offences for which the offender did not provide similar assistance, the combined discount for the five offences was "not in all the

64. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23.
65. *Buckley v R* [2021] NSWCCA 6 [87].
66. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23(3).

circumstances unreasonably disproportionate to the nature and circumstances of those offences".[67]

3.100 Taking into account other relevant considerations, the court imposed an aggregate sentence of 7 years 6 months' imprisonment with a non-parole period of 4 years.

Application of discounts when offences are dealt with summarily

Park v R [2021] HCA 37

3.101 The appellant pleaded guilty to multiple offences, including the offence of taking and driving a vehicle without consent. The offender was sentenced in the District Court to an aggregate sentence of 11 years, with a non-parole period of 8 years.

3.102 The maximum penalty for the offence of taking and driving a vehicle without consent is 5 years' imprisonment, but it was dealt with as a "related offence" in accordance with s 165 of the *Criminal Procedure Act 1986* (NSW). This meant the District Court's sentencing power was limited to the maximum penalty of two years' imprisonment that the Local Court could have imposed for the offence.

3.103 The offender appealed against the sentence on two grounds, including that the aggregate sentence was manifestly excessive. In determining whether the sentence was manifestly excessive, the CCA considered the indicative sentence for the offence of taking and driving vehicle without consent, which was two years' imprisonment, with a 25% discount applied for the offender's guilty plea. Without the discount, the indicative sentence would have been 2 years and 8 months' imprisonment, which exceeded the jurisdictional maximum of 2 years.

3.104 Section 22(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) authorises the court, when an offender pleads guilty, to "impose a lesser penalty than it would otherwise have imposed". The offender argued that the sentence of 2 years 8 months was not one that the judge "would otherwise have imposed" and that the discount should have been applied to an indicative sentence that was within the jurisdictional limit.

3.105 The majority of the CCA rejected this narrow literal construction of s 22(1). The majority concluded that the expression "would otherwise have imposed" referred to the sentence a court considers appropriate, taking into account the maximum penalty and all the facts and circumstances of the case. This sentence would then be subject to any discount and only then would the question arise whether any jurisdictional limit applied.

3.106 The offender appealed the CCA's decision to the High Court, arguing that the majority erred in interpreting s 22(1). The High Court held that the sentence the court "would

67. *Buckley v R* [2021] NSWCCA 6 [97].

otherwise have imposed" is the appropriate sentence determined in accordance with the *Crimes (Sentencing Procedure) Act* and without regard to any jurisdictional limit.

3.107 The High Court concluded that a jurisdictional limit relates to the sentencing court, not to the task of identifying and synthesising the relevant factors that are weighed to determine the appropriate sentence. Any relevant jurisdictional limit should be applied by the sentencing judge after the judge has determined the appropriate sentence for an offence in accordance with s 21A of the *Crimes (Sentencing Procedure)* Act.

Discount for guilty plea (new provisions)

Ke v R [2021] NSWCCA 177

3.108 The offender pleaded not guilty to the offence of knowingly dealing with the proceeds of crime. Before being committed for trial, the offender indicated that she would plead guilty to recklessly dealing with the proceeds of crime. The prosecution initially rejected the offer, stating that it would only accept a plea in relation to the more serious charge. The prosecution accepted the plea following further negotiations and the matter was then committed for sentence.

3.109 The earlier offer was not recorded in the case conference certificate which meant that the sentencing judge was unaware that it had been made. The offender was, therefore, sentenced to 2 years 3 months' imprisonment with a non-parole period of 18 months after applying a 10% discount for the later guilty plea. The earlier unrecorded plea would have entitled the offender to a 25% discount.

3.110 One of the grounds of the offender's appeal was that failing to apply the appropriate discount resulted in a sentence that was manifestly excessive. The prosecution argued for a literal construction of the appropriate early guilty plea provisions which required that an offer to plead must be "recorded in a negotiations document" in order for a sentencing judge to apply the required discount.[68]

3.111 The CCA rejected this approach, concluding that the phrase "an offer recorded in a negotiations document" should be construed as meaning "an offer which was recorded or which was required to be recorded in a negotiations document".[69] This interpretation would avoid an unjust outcome and was consistent with the legislative intention that offers to plead should be recorded.

3.112 In resentencing the offender, the court accepted the findings of the sentencing judge and applied the 25% discount for the early plea resulting in a sentence of 22 months' imprisonment with a non-parole period of 14 months.

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68. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25E(2)(a).
69. *Ke v R* [2021] NSWCCA 177 [339].

Error in declining to indicate lesser penalty

Facenfield v R [2021] NSWCCA 128

3.113 The offender pleaded guilty to 13 property and drug related offences before the Drug Court of NSW. He received an aggregate sentence of 4 years 2 months' imprisonment with a non-parole period of 2 years 1 month.

3.114 The offender received a discount for early guilty pleas for all offences except one, the goods in custody offence. The sentencing judge reasoned that there was no real utility value in the plea because the offender had been "caught red handed" with the goods and his guilty plea was therefore inevitable. The judge held it was appropriate to impose the maximum penalty of 6 months' imprisonment for the goods in custody offence.

3.115 One of the grounds of appeal was that the judge had erred in failing to apply a discount for the guilty plea in relation to the goods in custody charge. The CCA upheld this ground, noting that the discretion that judges have as to whether to apply a discount under the guilty plea provisions of the *Crimes (Sentencing Procedure) Act 1999* (NSW)[70] was not unlimited; the matters set out[71] must be considered and, if a lesser penalty is imposed, it must not be unreasonably disproportionate to the nature and circumstances of the offence.[72] The reasons offered by the sentencing judge for not imposing a lesser sentence were contrary to established principle which supports the position that "a recognition of the inevitable may qualify the extent of genuine contrition but it does not qualify the utilitarian value of the plea of guilty".[73]

3.116 In resentencing, after applying the 25% discount for the early guilty plea, the sentence imposed for the goods in custody offence was reduced from 6 months to 3.5 months. The aggregate sentence was reduced to 3 years 9 months' imprisonment with a non-parole period of 23 months.

Homicide

3.117 This year has seen a number of cases of interest relating to sentencing for manslaughter and murder, in particular motor vehicle manslaughter.

70. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22.
71. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(1)(a)–(c)
72. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(1A).
73. *Facenfield v R* [2021] NSWCCA 128 [41].

Manslaughter

Paterson v R [2021] NSWCCA 273

3.118 The offender pleaded guilty to manslaughter. He received a sentence of 16 years 6 months' imprisonment with a non-parole period of 12 years 5 months, after a 25% discount for the early guilty plea.

3.119 The offender and a co-offender chased the 21-year-old victim who was abusive to them after being ejected from licenced premises for drunken anti-social behaviour. Upon catching up with him the co-offender punched the victim and the offender kicked and stomped on the victim's head. They left the victim in a bicycle lane where one vehicle collided with him. He was found to be unresponsive and transferred to hospital where he was diagnosed with severe traumatic brain injury before dying. The facts supported joint criminal enterprise manslaughter by unlawful and dangerous act. The sentencing judge characterised the offending "at the highest end of culpability".

3.120 On appeal, one of the offender's contentions was that the sentencing judge erred in characterising the seriousness of the offending.

3.121 In allowing the appeal the CCA concluded:

> Serious as it was, the offender's conduct did not warrant any characterisation of it as something close to or towards the worst category of manslaughter. A sentence of imprisonment of 22 years prior to any allowance for the plea was manifestly excessive.[74]

3.122 The court resentenced the offender to 12 years' imprisonment with a non-parole period of 9 years after applying the 25% discount.

Sentencing for motor vehicle manslaughter

3.123 The following cases relate to appeals against:

- the severity of a sentence for manslaughter involving a motor vehicle, which was rejected, and
- the inadequacy of a sentence for motor vehicle manslaughter, which was allowed.

3.124 The cases show that relatively serious sentences can be imposed for manslaughter involving motor vehicles.

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74. *Paterson v R* [2021] NSWCCA 273 [51].

DPP (NSW) v Abdulrahman [2021] NSWCCA 114

3.125 The offender pleaded guilty to manslaughter, with two possession offences on a Form 1, and one offence of driving while disqualified on a s 166 certificate.[75] The offender was speeding and affected by drugs when his vehicle struck and killed a 12-year-old boy. As a result of previous convictions for driving under the influence and resisting a police officer in execution of their duty, the offender was subject to an intensive correction order and disqualification from driving at the time of the offending. In the aftermath, the offender did not provide assistance to the victim.

3.126 The sentencing judge imposed an aggregate sentence of 6 years 10 months' imprisonment, with a non-parole period of 4 years 6 months. The indicative sentence for the manslaughter offence was 6 years 9 months' imprisonment.

3.127 The prosecution appealed the offender's sentence on two related grounds:

- ground 1 was that the sentencing judge failed to take into account the need for general deterrence, specific deterrence and to protect the community, and
- ground 2 was that the sentence imposed by the sentencing judge was manifestly inadequate.

3.128 The CCA upheld the first ground of the appeal in part. The court was not satisfied that the sentencing judge failed to have regard to considerations of general deterrence. However, the court was satisfied that the sentencing judge failed to take into account the need for specific deterrence and to protect the community against further offending of similar nature, which were especially strong factors in this case.

3.129 The court found that the sentencing judge had treated the offender's criminal history and substance abuse only as factors disentitling him to any leniency, instead of as potentially relevant to the sentencing purposes of retribution, deterrence and community protection. The judge had also failed to make any express finding about the offender's prospect of reoffending.

3.130 The court upheld the second ground of appeal. It accepted that it was a very serious example of vehicular manslaughter and the offender's moral culpability was very high, given the manner and circumstances of the offender's driving, his drug usage and the fact he was on conditional liberty for the same conduct. There was also a lack of any real evidence that the offender had any prospect of rehabilitation.

3.131 The court allowed the appeal and resentenced the offender to an aggregate sentence of 10 years 2 months' imprisonment, with a non-parole period of 6 years 8 months. The indicative sentence for the manslaughter offences was 10 years 1 month.

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75. *Criminal Procedure Act 1986* (NSW) s 166.

Byrne v R [2021] NSWCCA 185

3.132 Two offenders pleaded guilty to a single charge of manslaughter arising from a collision during a street race. Each offender was sentenced to an identical sentence: a head sentence of 10 years 6 months' imprisonment with a non-parole period of 7 years.

3.133 The sentencing judge considered that there was no difference in criminality between the conduct of the offenders, as each of them embarked on the criminal conduct deliberately. The judge considered that each offender was equally culpable and had the same level of objective seriousness. The objective seriousness of the matter was held to be in the mid-range for matters of this type.

3.134 Each offender appealed on the ground that the sentence was manifestly excessive. The CCA held that the sentence imposed, while heavy, was not unreasonable or plainly unjust. It was within the range available to the sentencing judge.

3.135 The court considered the offence to be a most serious example its kind as:

- two vehicles were involved, meaning there was a real risk that the offenders would collide with each other
- at one stage, one of the vehicles was driving on the wrong side of the road
- the offence took place in a built-up area in the middle of a regional city, where there was likely to be other road users and pedestrians, and there were passengers in one of the cars, and
- one of the vehicles was at one stage travelling at 143km per hour. and the other vehicle was, at one stage, travelling at no less than 100 km/h, when the speed limit in the area was 50 km per hour.

3.136 The court concluded that, although the conduct was opportunistic, it:

> occurred in circumstances where each of the applicants engaged, quite deliberately, in a reckless disregard for the safety of others, of whom there were likely to be many, who were in the vicinity.[76]

3.137 The court considered that the circumstances of the offence called for significant general deterrence, and at least in relation to one of the offenders, some significant specific deterrence. The court dismissed the appeals.

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76. *Byrne v R* [2021] NSWCCA 185 [119].

Applying s 61 of the *Crimes (Sentencing Procedure) Act 1999* (NSW)

McNamara v R [2021] NSWCCA 160

3.138 The offender was convicted by a jury of murder and supplying a large commercial quantity of drugs. He was sentenced to life imprisonment for the murder.

3.139 The offender appealed against the life sentence for murder. One of the grounds of appeal was that the sentencing judge erred in the application of s 61(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

3.140 Under s 61(1), a court is to impose a sentence of life imprisonment for murder if "satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence". It was submitted that the sentencing judge erred in adopting and applying a two-stage test to the application of s 61(1).

3.141 While the application of s 61 has been subject to different interpretations,[77] the CCA held that the proper approach to s 61(1) is the two-stage test stated by Justice Bell in *R v Harris*[78] and Justice Adamson in *CC*:[79]

- The **first stage** is to assess whether the offender's culpability warrants a life sentence, by reference to the circumstances surrounding or causally connected to the offence. Such circumstances include the objective seriousness of the offence, the motive, the offender's background, criminal history and mental state.
- The **second stage** is to assess whether a lesser sentence is warranted because of other matters such as remorse, confessions, pleas of guilty and prospects of rehabilitation.

3.142 The court considered that this approach reflects Parliament's intention in enacting the predecessor to s 61(1). The court also distinguished it from the form of two-stage test that was rejected in *Markarian*,[80] where the High Court held that starting with an objective sentence, and then adjusting it "mathematically" based on other factors in the case, was an inappropriate approach. The majority of the High Court preferred an

77. See, eg, *R v Harris* [2000] NSWSC 285 [84]; *R v Harris* [2000] NSWCCA 469, 50 NSWLR 409 [60]; *R v Quami* [2017] NSWSC 774 [192]–[193].
78. *R v Harris* [2000] NSWCCA 469, 50 NSWLR 409 [60].
79. *CC v R* [2021] NSWCCA 71 [81]–[83].
80. *Markarian v R* [2005] HCA 25, 228 CLR 357.

instinctive synthesis approach, where a sentencing court, after weighing all the relevant factors, reaches a conclusion that a particular penalty should be imposed.[81]

3.143 The CCA noted that "care must be taken" in differentiating between the "objective gravity" of the offending and the offender's subjective circumstances. The court explained what differentiates the two stages of the test:

> is whether the relevant factor is a "*circumstance surrounding or causally connected to the offence*" and that can include matters such as the offender's mental state, motive or personal background. Some matters may be relevant to both stages.[82]

3.144 The court found that the sentencing judge did not err in applying s 61(1). The judge not only considered the objective factors surrounding the offending, but also assessed the offender's motives. Otherwise, the judge considered all the factors relevant to sentencing in determining whether a life sentence should be imposed.

3.145 The court dismissed the appeal.

Intensive Correction orders

3.146 There have been a number of cases of interest involving the imposition of intensive correction orders (ICOs). If a court decides to sentence an offender to up to 2 years' imprisonment for a single offence or to an aggregate or effective sentence of up to 3 years for multiple offences, it may instead order that the offender serve the sentence in the community by way of an ICO.[83]

Whether to impose an ICO where the risk of reoffending is low

Muniandy v R [2021] NSWCCA 305

3.147 The offender was found guilty by a jury of the statutory alternative of kidnapping with actual bodily harm. His co-accused was found not guilty of all offences. The offender was then sentenced to 20 months' imprisonment with a non-parole period of 10 months.

3.148 One of the offender's grounds of appeal was that the sentencing court erred by holding that he was disentitled to an ICO because such a sentencing option was lenient and no additional punishment by way of conditions could be reasonably imposed.

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81. *Markarian v R* [2005] HCA 25, 228 CLR 357 [36]–[39].
82. *McNamara v R* [2021] NSWCCA 160 [636] (emphasis in original).
83. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7, pt 5.

3.149 The sentencing judge considered where an offender's risk of reoffending is low, the consideration of what becomes more likely to address the offender's risk of reoffending[84] becomes neutral and the sentencing judge is left to assess the matter by reference to the purposes of sentencing in s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW). The sentencing judge considered that the need for punishment, denunciation, general deterrence, and the recognition of harm to the victim would not be sufficiently recognised by an ICO and commented that, as a statement of principle, "the imposition of a sentence to be served by way of ICO reflects a significant degree of leniency".

3.150 The CCA did not find an error in the sentencing judge's reasoning or his conclusion that an ICO was not appropriate in the applicant's case. The court, however, found the sentence to be manifestly excessive and resentenced him to 12 months' imprisonment with a non-parole period of 7 months.

Imposing an ICO when the offender has served a period of full-time custody

Mandranis v R [2021] NSWCCA 97

3.151 The offender pleaded guilty to:

- the ongoing supply of prohibited drugs,[85] for which he was sentenced to 3 years' imprisonment, with a non-parole period of 2 years, and
- organising drug premises,[86] for which he was sentenced to 6 months' imprisonment.

3.152 The sentences were to be served wholly concurrently. The CCA upheld the single appeal ground that the sentencing judge erred in sentencing the offender on the basis that a standard non-parole period (SNPP) of 5 years applied to the ongoing supply of prohibited drugs offence, when no such SNPP applied.

3.153 In resentencing the offender, the court considered this was an appropriate case for an ICO. However, the court identified an issue with imposing an ICO where an offender has served a period of full-time custody in relation to the offence (either before sentencing or pending an appeal). Under s 70 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), the term of an ICO is the same as the term or terms of imprisonment in respect of which the ICO is made (unless it is revoked sooner). Under s 71(1), an ICO commences on the date it is made.

3.154 The court considered that these provisions make it "virtually impossible" for a court to take into account a period of custody served in the usual way (by backdating the

84. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 66(2).
85. *Drug Misuse and Trafficking Act 1985* (NSW) s 25A(1).
86. *Drug Misuse and Trafficking Act 1985* (NSW) s 36Z(1)(a).

sentence of imprisonment) and making an ICO. This means that an offender who has already served a substantial period in custody "may be forced to choose between seeking an ICO and having the sentence backdated".[87]

3.155 The court suggested a solution to this issue: where an ICO is found to be appropriate, the term could be adjusted by deducting the period equalling the term of pre-sentence custody, so that the ICO commences on the day it is made (to comply with s 71) and is co-extensive with the term of imprisonment (as required by s 70). The court adopted this process in resentencing the offender to an aggregate sentence of 19 months' imprisonment, to be served by way of an ICO.

R v Edelbi [2021] NSWCCA 122

3.156 The offender pleaded guilty to a range of fraud offences and one offence of participating in a criminal group,[88] and received an aggregate sentence of 3 years' imprisonment with a non-parole period of 2 years.

3.157 The offender appealed on several grounds, including that the sentencing judge, in imposing a sentence of full-time imprisonment, failed appropriately to consider the option of an ICO. The CCA allowed the appeal on this ground.

3.158 The offender had already served a significant period of full-time imprisonment. The court noted two different approaches to imposing an ICO that take account of a period of full-time custody served:

- in *Blanch,*[89] where an ICO was backdated to the date that the sentence commenced, so as to include the period that had been served, and
- in *Mandranis,*[90] where it was acknowledged that an ICO must commence from the date it was made, but the sentence could be reduced to take account of the period of full-time custody served.

3.159 The court adopted the approach in *Mandranis*. Accordingly, the court reduced the 3-year aggregate sentence by 13 months, and resentenced the offender to 1 year 11 months' imprisonment, to be served by way of an ICO.

87. *Mandranis v R* [2021] NSWCCA 97 [56].
88. *Crimes Act 1900* (NSW) s 93T(1), s 192G(b), s 192E(1)(b).
89. *Blanch v R* [2019] NSWCCA 304.
90. *Mandranis v R* [2021] NSWCCA 97.

Practice and procedure

Costs orders in WHS prosecutions

SafeWork NSW v Williams Timber Pty Ltd [2021] NSWCCA 233

3.160 The offender companies, in separate matters, pleaded guilty to work health and safety offences. Although costs were agreed and the prosecutor at each hearing asked the court to make an order for the payment of costs, the sentencing judge did not impose any such order. In each case the sentencing judge took into account the difficulty that each offender would have in paying any fine. In one case, waiving the prosecutor's costs was said to form "a balance between the need for general deterrence, specific deterrence and the defendant's somewhat limited capacity to pay".[91] In the other case, the judge found that reducing the fine significantly would not provide sufficient specific and general deterrence in light of the objective seriousness of the offending.

3.161 In each case, the prosecutor appealed the failure to make an order for costs. The appeals were heard jointly by the CCA as the issue was the same in each complaint. While there were a number of appeal grounds, the heart of the complaint was that the sentencing judge denied the prosecutor procedural fairness on the question of any costs order and "misapprehended the function and purpose of such an order by treating it as part of the punishment imposed".[92]

3.162 The court found that, in failing to make the costs orders, the sentencing judge denied the prosecutor procedural fairness by not allowing them the opportunity to provide evidence and submissions in support of their application for costs. The court also found that the sentencing judge incorrectly "treated the payment of costs as part of the punishment for the offence or offences, rather than as compensation for legal expenses".[93] The court commented that, where the offender's capacity to pay is an issue, the court should reduce the fine imposed, rather than reduce the amount of costs payable to the prosecutor.

3.163 Despite these findings, the court ultimately exercised its residual discretion not to intervene with the decisions, in light of the following factors:

- there was delay in bringing the appeals
- the offenders would find it difficult to pay a costs order, and

91. *SafeWork NSW v Williams Timber Pty Ltd* [2021] NSWCCA 233 [15].
92. *SafeWork NSW v Williams Timber Pty Ltd* [2021] NSWCCA 233 [26].
93. *SafeWork NSW v Williams Timber Pty Ltd* [2021] NSWCCA 233 [27].

- as the appeals were only in respect of the sentencing courts' failure to impose a costs order, if the court were to intervene, there would be no adjustment to the fines imposed, which would be unfair to the offenders in circumstances where the sentencing court tried to reduce the amount payable.

Judicial notice of the impact of the COVID-19 pandemic

Doudar v R [2021] NSWCCA 37

3.164 The offender pleaded guilty to being an accessory after the fact to murder.[94] He was sentenced to 4 years 6 months' imprisonment with a non-parole period of 3 years 4 months.

3.165 One of the grounds of appeal was that the sentencing judge erred in failing to take into account the effects of the COVID-19 pandemic because there was no evidence as to the effect the restrictions had upon the applicant.

3.166 The CCA held that the effect of the pandemic should be taken into account when sentencing. The sentencing judge took the effect of the pandemic on judicial notice, noting the restrictions in place for contacting family and friends and the reduction in rehabilitative programs. The court held that in the absence of evidence concerning the offender's particular case, the judge was not required to do anything further.

3.167 None of the grounds of appeal were made out and the appeal was dismissed.

Judicial role in sentencing

McLaren v R [2021] NSWCCA 12

3.168 The offender pleaded guilty to 17 counts of dishonestly obtaining a financial advantage by deception,[95] and one count of knowingly dealing with proceeds of crime.[96] For the first 17 offences, the offender received an aggregate sentence of 16 years' imprisonment with a non-parole period of 12 years. For the second offence, he was sentenced to 7 years 6 months' imprisonment, to be served concurrently with the aggregate sentence.

3.169 The offender appealed on the ground that the sentencing process was unbalanced due to the judge's focus being entirely on the objective criminality. He argued that the judge failed to consider his early plea of guilty, subjective circumstances or prospects of rehabilitation.

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94. *Crimes Act 1900* (NSW) s 349(1).
95. *Crimes Act 1900* (NSW) s 192E(1)(b).
96. *Crimes Act 1900* (NSW) s 193B(2).

3.170 The appeal was upheld. The CCA found that the judge had made a series of remarks throughout the sentencing hearing which, taken together, gave the appearance of a "lack of temperance and impartiality".[97] The judge used excessively emotive language and at the end of the hearing asked the media to report on the full length of the sentence he had handed down. The court stressed that sentencing judges must maintain an unemotional approach to sentencing, even in the most serious of cases.

3.171 The appeal also succeeded on the ground that the sentence was manifestly excessive. The court found that the sentence was substantially out of proportion with similar cases, and that it did not account for any of the offender's subjective circumstances.

3.172 The offender was resentenced to 12 years' imprisonment with a non-parole period of 9 years.

97. *McLaren v R* [2021] NSWCCA 12 [68].

4. Sentencing trends

4.1 This chapter sets out general data relating to the Local Court and higher courts' use of penalties in 2021, with a particular focus on gender and Aboriginal status as well as the regional location of offenders.

4.2 It also sets out available data on successful discharge of intensive correction orders (ICOs) and the breach and revocation of ICOs and non-custodial sentencing orders – community correction orders (CCOs) and conditional release orders (CROs).

Use of penalties

4.3 2021 was the third full year of operation of the new sentencing regime, which commenced in September 2018. The following penalties are available under this regime:

- imprisonment[1]
- ICO[2]
- fine[3]
- CCO[4]
- CRO with a conviction recorded,[5] and
- conviction with no other penalty[6]
- CRO without a conviction recorded,[7] and
- no conviction (dismissal).[8]

4.4 Other sentencing outcomes include compulsory drug treatment detention,[9] deferral of sentencing for rehabilitation, participation in intervention programs or other purposes,[10] and a sentence to the rising of the court.

4.5 This part of the chapter sets out data for 2021 relating to each sentencing option both generally and in relation to particular offender categories (based on gender, Aboriginal status and region).

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1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5, pt 4.
2. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7, pt 5*; Crimes (Administration of Sentences) Act 1999* (NSW) pt 3, pt 7 div 1.
3. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 2 div 4.
4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8, pt 7; *Crimes (Administration of Sentences) Act 1999* (NSW) pt 4B.
5. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9, pt 8; *Crimes (Administration of Sentences) Act 1999* (NSW) pt 4C.
6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10A.
7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9, s 10(1)(b), pt 8; *Crimes (Administration of Sentences) Act 1999* (NSW) pt 4C.
8. *Crimes Sentencing Procedure Act 1999* (NSW) s 10(1)(a).
9. *Crimes Sentencing Procedure Act 1999* (NSW) s 5A; *Drug Court Act 1998* (NSW) pt 2A.
10. *Crimes Sentencing Procedure Act 1999* (NSW) s 11.

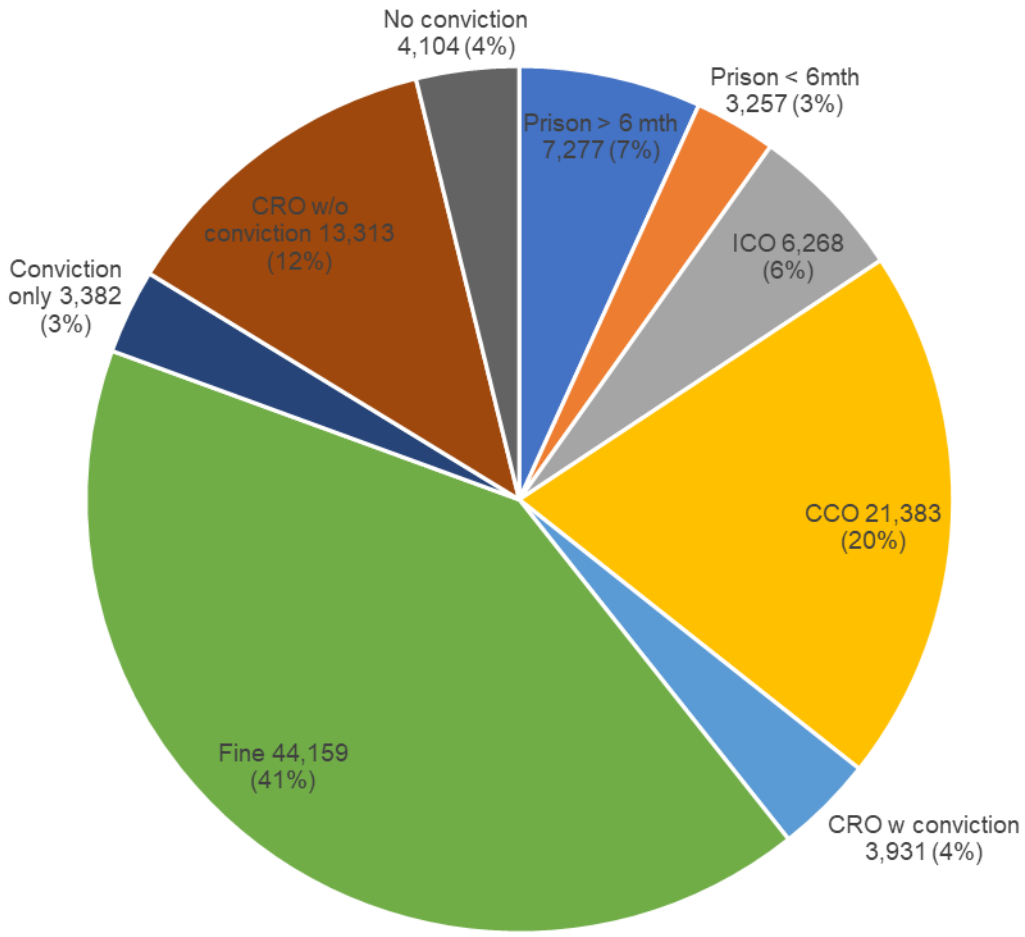
General

4.6 We have identified 107,074 occasions on which offenders received one of the relevant penalties in the Local Court and higher courts in NSW. Figure 4.1 sets out the percentage of offenders who received each penalty.

4.7 The most common penalty is a fine (41.2%), followed by a CCO (20%), and CRO without a conviction (12.4%). Imprisonment accounts for 9.8% of penalties imposed (3% for sentences of 6 months or less and 6.8% for sentences of more than 6 months).

4.8 This year, we have excluded outcomes where the breach of a non-custodial sentencing order is treated as the principal offence. We now deal with these breaches separately at the end of this chapter.

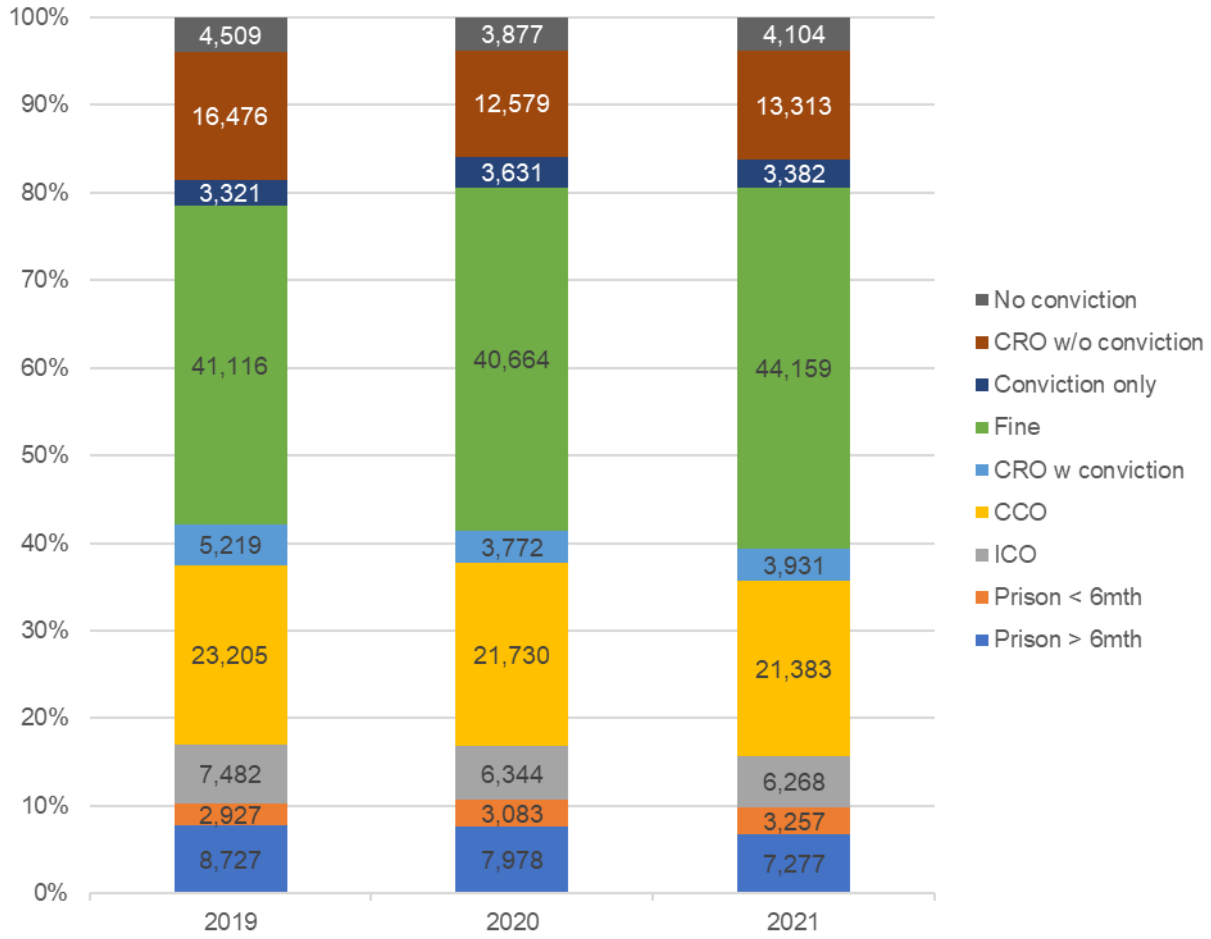
Figure 4.1: NSW higher and local criminal courts, penalties imposed, 2021



Source: NSW Bureau of Crime Statistics and Research, reference 22-21387.

4.9 Figure 4.2 shows the proportion of penalties imposed in each calendar year since the introduction of the new sentencing regime.

Figure 4.2: NSW higher and local criminal courts, penalties imposed for each year, 2019 – 2021



Source: NSW Bureau of Crime Statistics and Research, reference 22-21387.

4.10 The following trends can be observed in 2019 – 2021:

- a decline in the use of imprisonment of more than 6 months (from 7.7% to 6.8%)
- a decline in the use of ICOs (from 6.6% to 5.9%)
- a decline in the use of CROs with a conviction (from 4.6% to 3.7%)
- a decline in the use of CROs without a conviction (14.6% to 12.4%), and
- an increase in the use of the fine (from 36.4% to 41.2%).

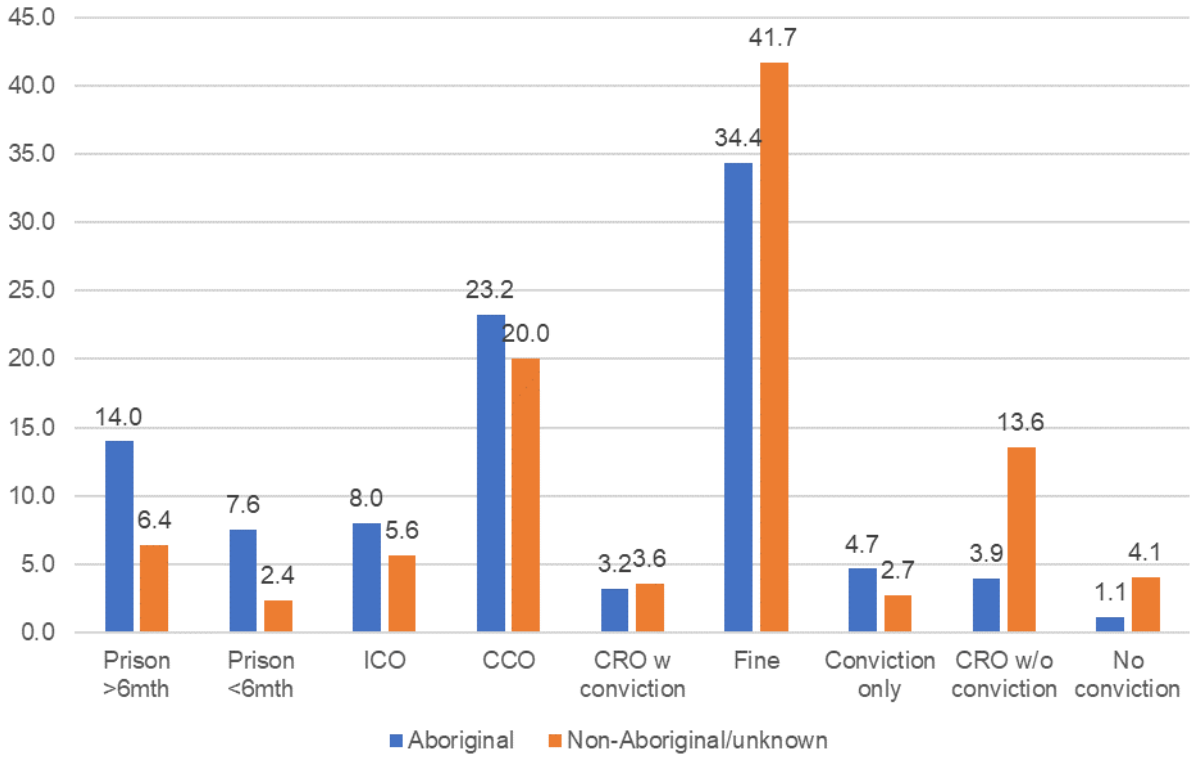
Gender and Aboriginal status

Aboriginal male offenders

4.11 We have identified 18,429 occasions on which Aboriginal men received a relevant sentence in 2021, compared with 63,756 male offenders who were not Aboriginal or whose Aboriginal status was unknown. According to these numbers, 22.4% of all male offenders were recorded as Aboriginal. Aboriginal men represent 3.5% of the male resident population in NSW.[11]

4.12 Figure 4.3 shows the proportion of penalties imposed on male offenders by Aboriginal status. Compared with other male offenders, a significantly greater proportion of Aboriginal men received sentences of imprisonment (21.6% compared with 8.8%) and a significantly smaller proportion of Aboriginal men received a sentence that did not involve a conviction (5% compared with 17.7%).

Figure 4.3: NSW higher and local criminal courts, proportion of penalties imposed on Aboriginal and other male offenders, 2021



Source: NSW Bureau of Crime Statistics and Research, reference 22-21387.

11. Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians* (Catalogue No 3238.0.55.001, June 2016).

4.13 Figure 4.4 shows the percentage of Aboriginal men who received each penalty, compared with those who are not Aboriginal or whose Aboriginal status is not known.

4.14 Considering that 22.4% of all male offenders were recorded as Aboriginal:

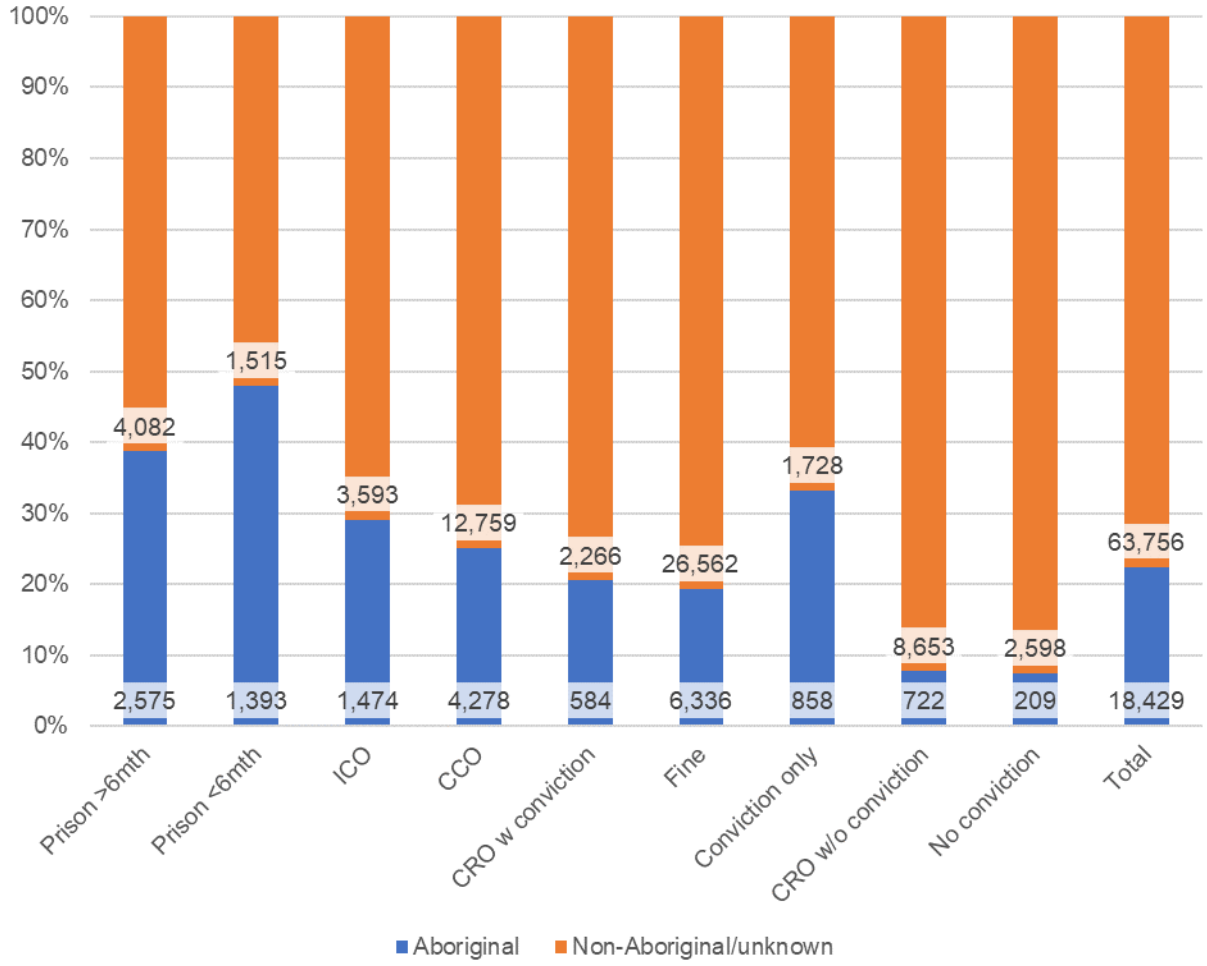
- a large proportion (47.9%) of the 2908 male offenders who received a sentence of imprisonment of 6 months or less were recorded as Aboriginal, and
- a large proportion (38.7%) of the 6657 male offenders who received a sentence of imprisonment of more than 6 months were recorded as Aboriginal.

4.15 By contrast:

- a very small proportion (7.7%) of the 9375 male offenders who received a CRO without a conviction were recorded as Aboriginal, and
- a very small proportion (7.4%) of the 2807 male offenders who had no conviction recorded were recorded as Aboriginal.

4.16 We also note that, of the 2586 male offenders who received a conviction only, a large proportion (33.2%) were Aboriginal.

Figure 4.4: NSW higher and local criminal courts, proportion of each penalty imposed on Aboriginal and other male offenders, 2021



Source: NSW Bureau of Crime Statistics and Research, reference 22-21387.

Aboriginal female offenders

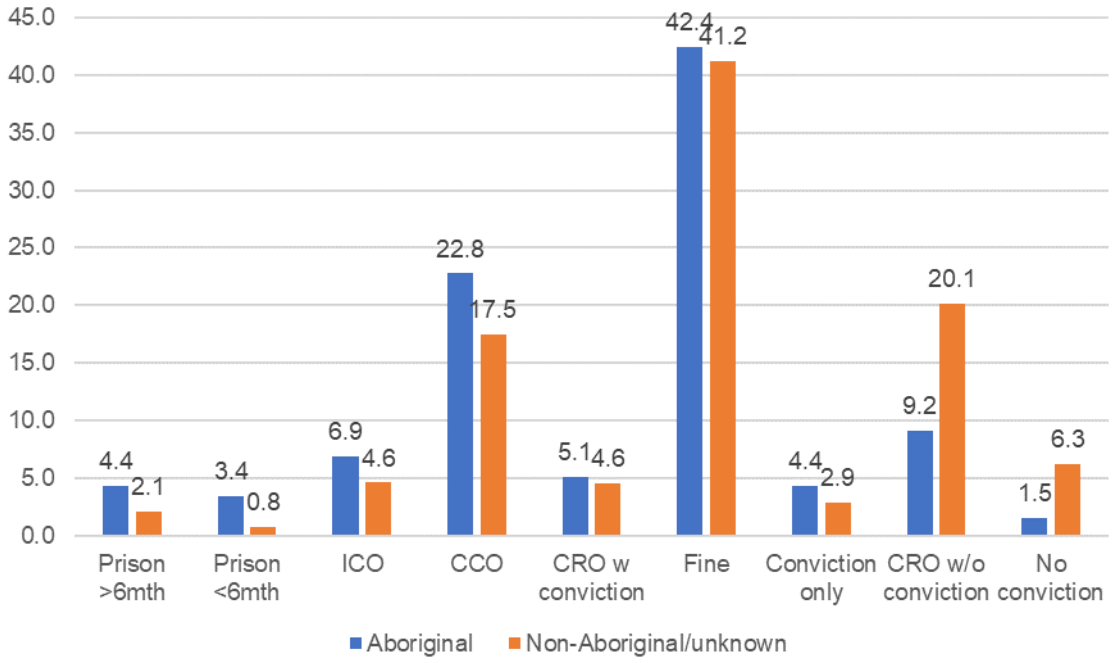
4.17 We have identified 6424 occasions on which Aboriginal women received a relevant sentence in 2021, compared with 16,454 women who were not Aboriginal or whose Aboriginal status was unknown. 28.1% of all female offenders were recorded as Aboriginal. Aboriginal women represent 3.4% of the resident female population in NSW.[12]

4.18 Figure 4.5 shows the proportion of penalties imposed on female offenders by Aboriginal status. A significantly greater proportion of Aboriginal women received sentences of

12. Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians* (Catalogue No 3238.0.55.001, June 2016).

imprisonment (7.8% compared with 2.9%) and a significantly smaller proportion of Aboriginal women received a sentence that did not involve conviction (10.7% compared with 26.4%).

Figure 4.5: NSW higher and local criminal courts, percentage of penalties imposed on Aboriginal and other female offenders, 2021



Source: NSW Bureau of Crime Statistics and Research, reference 22-21387.

4.19 Figure 4.6 shows the percentage of Aboriginal female offenders who received each penalty compared with other female offenders.

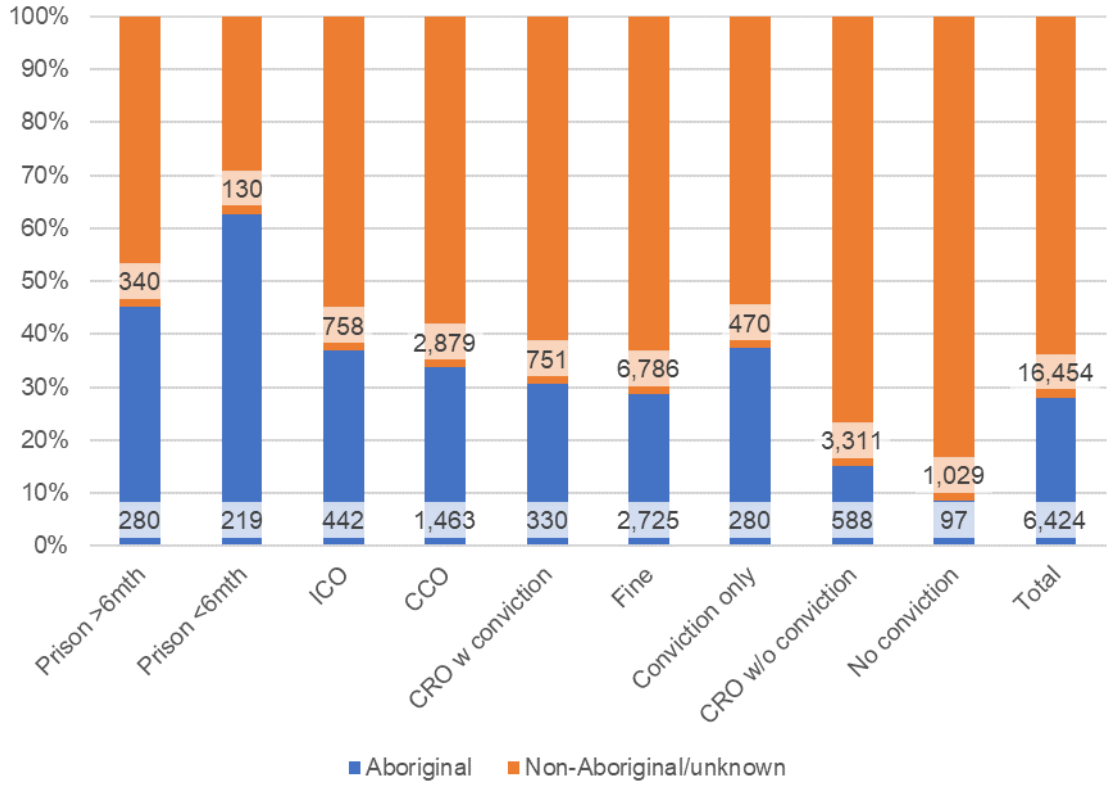
4.20 Considering that 28.1% of all female offenders were recorded as Aboriginal:

- a large proportion (62.8%) of the 349 female offenders who received a sentence of imprisonment of 6 months or less were recorded as Aboriginal, and
- a large proportion (45.2%) of the 620 female offenders who received a sentence of imprisonment of more than 6 months were recorded as Aboriginal.

4.21 By contrast:

- a small proportion (15.1%) of the 3899 female offenders who received a CRO without a conviction were recorded as Aboriginal, and
- a small proportion (8.6%) of the 1126 women who had no conviction recorded were recorded as Aboriginal.

Figure 4.6: NSW higher and local criminal courts, percentage of each penalty imposed on Aboriginal and other female offenders, 2021



Source: NSW Bureau of Crime Statistics and Research, reference 22-21387.

Regional data

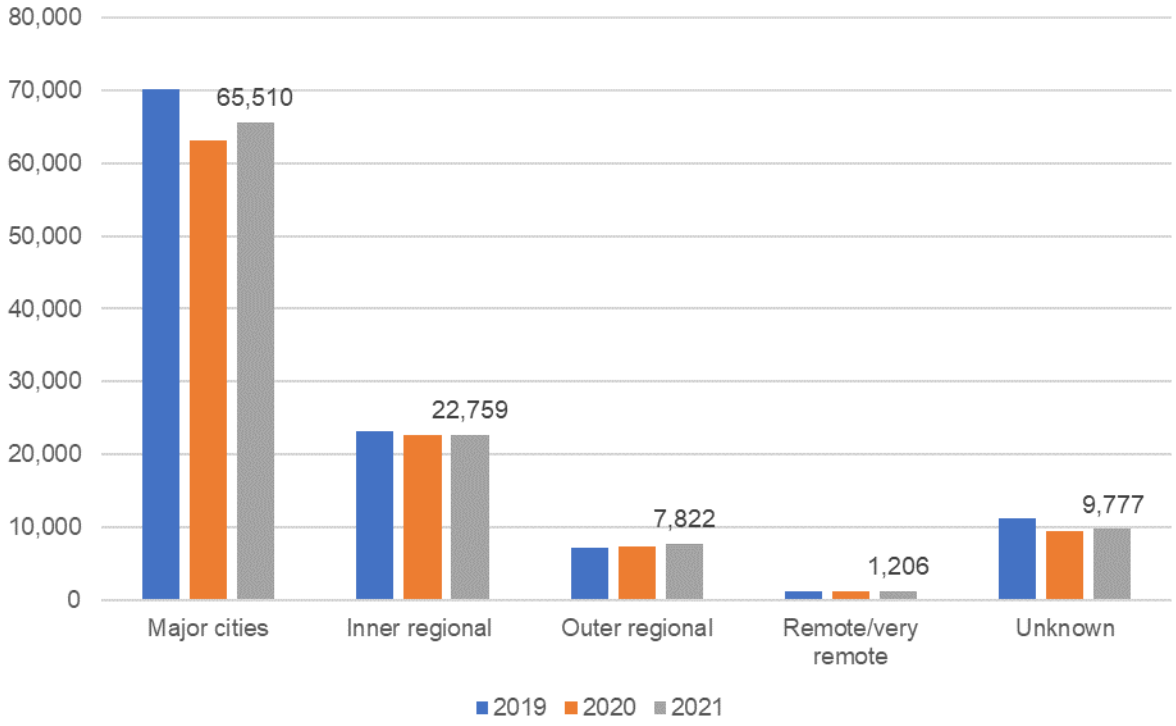
4.22 Figure 4.7 sets out the total number of offenders who received a relevant penalty in each region in 2019 – 2021.

4.23 The regions are identified using the accessibility/remoteness index, which measures a place's accessibility to goods, services and opportunities for social interaction:

- **major cities** — relatively unrestricted accessibility to a wide range of goods, services and opportunities for social interaction
- **inner regional** — some restrictions to accessibility to some goods, services and opportunities for social interaction
- **outer regional** — significantly restricted accessibility to goods, services and opportunities for social interaction
- **remote** — very restricted accessibility to goods, services and opportunities for social interaction, and

- **very remote** — very little accessibility to goods, services and opportunities for social interaction.

Figure 4.7: NSW higher and local criminal courts, number of offenders sentenced in each region, 2019 – 2021



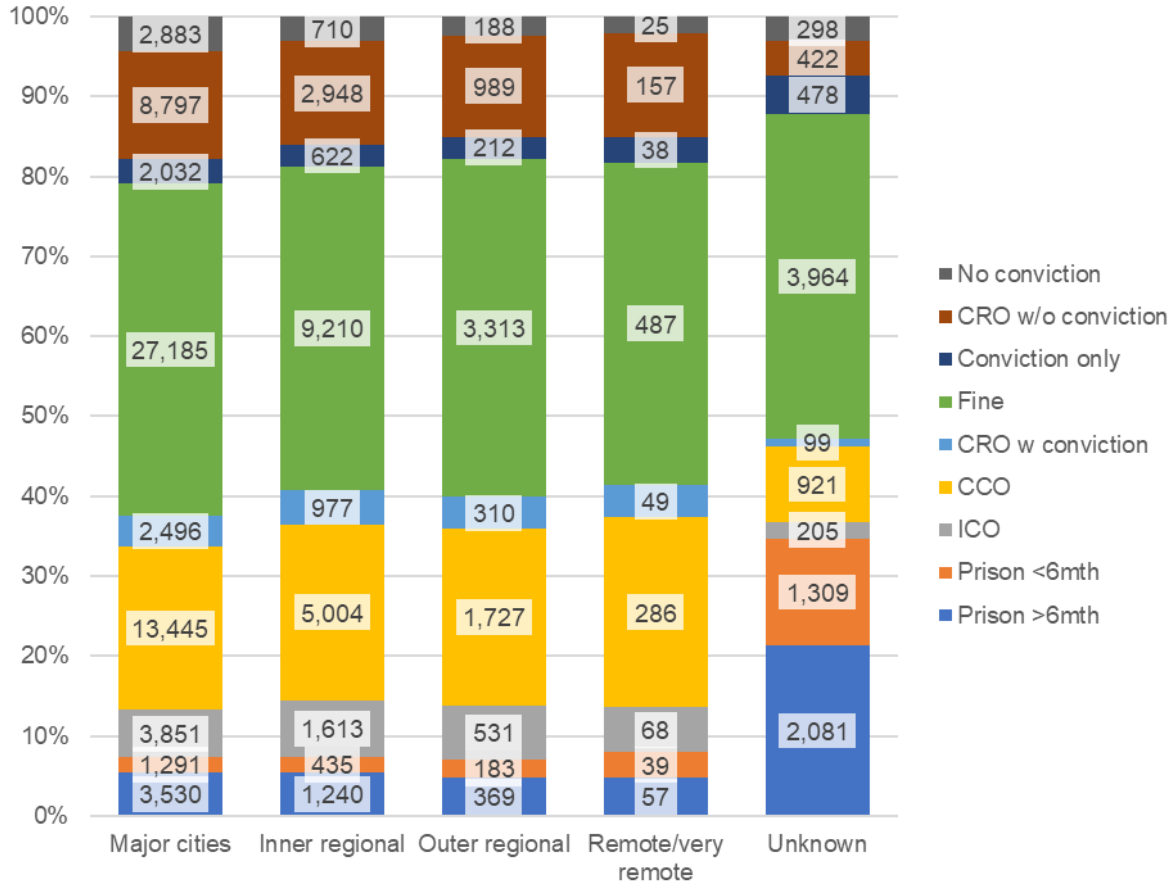
Source: NSW Bureau of Crime Statistics and Research, reference 22-21387.

4.24 Figure 4.8 sets out the proportion of each penalty imposed by region in 2021.

4.25 Shows a generally even proportional distribution of penalties in the various regions. Note particularly that the more resource-intensive options, the ICO and the CCO, are relatively equally available regardless of region. The two penalties were imposed in 26.4% of cases in major cities and in 29.3% of cases in remote and very remote communities.

4.26 We note that a large number of offenders do not have a region recorded. The bulk of these are those who received sentences of imprisonment. Further investigation is required to determine why region has not been recorded.

Figure 4.8: NSW higher and local criminal courts, proportion of penalties imposed in each region, 2021



Source: NSW Bureau of Crime Statistics and Research, reference 22-21387.

Discharge of sentencing orders

4.27 This section shows the data from Corrective Services NSW on the discharge of sentencing orders (ICOs, CCOs and CROs) showing the number that were:

- successfully completed
- revoked for breach, and
- discharged for other reasons.

4.28 In presenting this data, we note that:

- The counts are of orders, not offenders, so offenders with multiple orders have been counted multiple times.
- The data relates to the first full three years of operation of the new sentencing orders.

- The data for 2020 and 2021 may reflect the impact of COVID-19 on conditions, compliance and enforcement.

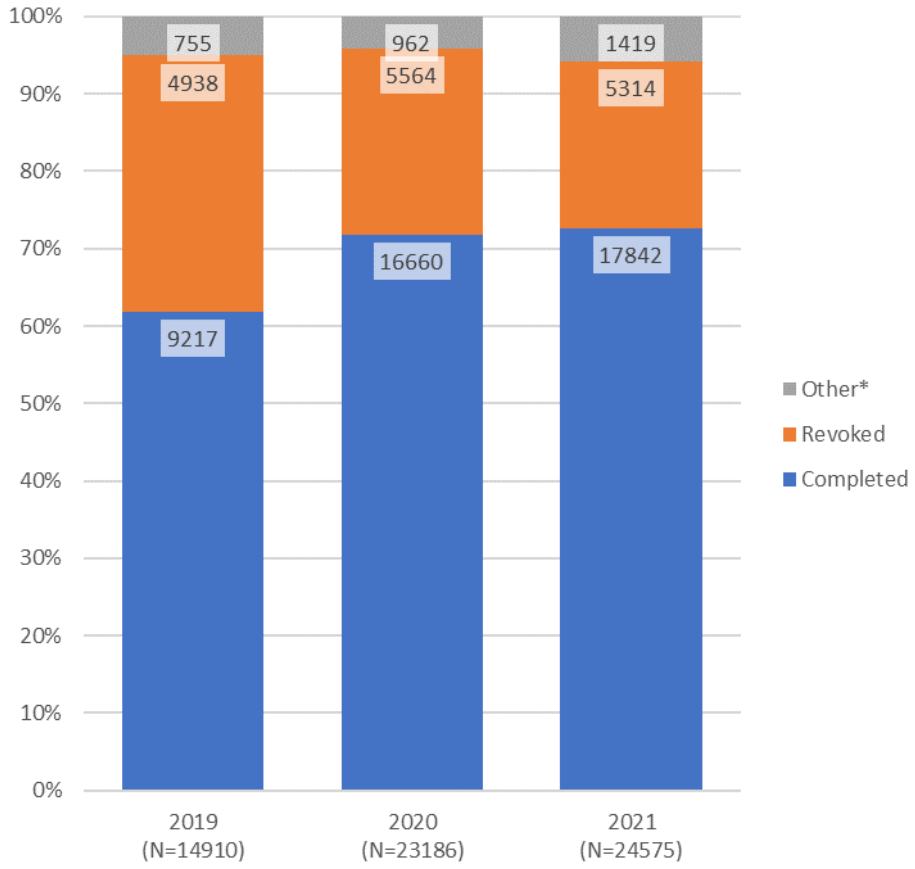
Intensive correction orders

4.29 Figure 4.9 shows the numbers of ICOs that were discharged 2019 – 2021.

4.30 In 2021, 24,575 ICOs were discharged. Of this number:

- 17,842 (73%) were discharged as the result of completing the ICO
- 5314 (22%) were revoked, and
- 1419 (6%) were discharged for other reasons.[13]

Figure 4.9: Discharge of intensive correction orders, 2019 – 2021



Source: Corrections Research Evaluation and Statistics.
* "Other" includes transfers, deceased and other.

13. "Other reasons" include transfers, deceased and other.

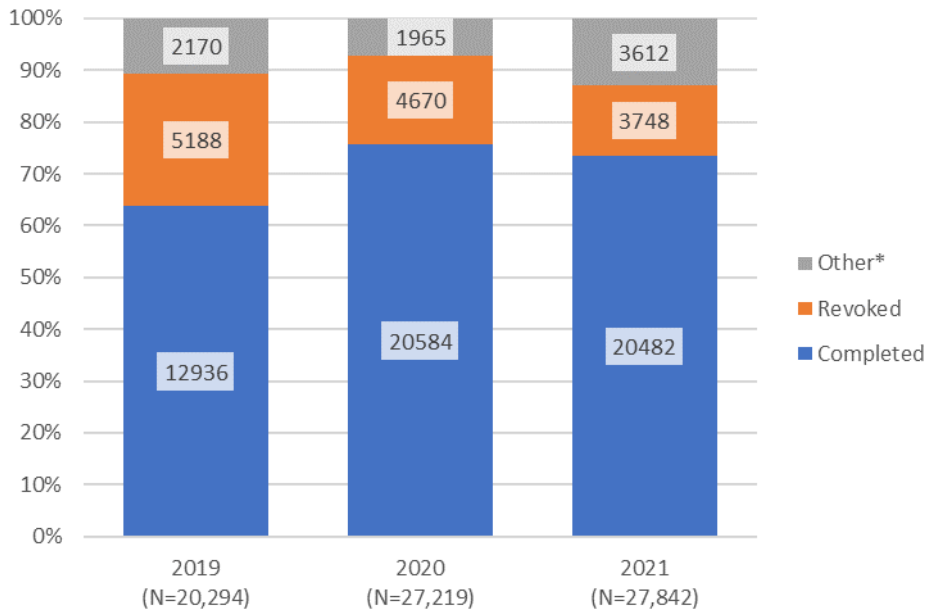
Community correction orders

4.31 Figure 4.10 shows the numbers of CCOs that were discharged in 2019 – 2021.

4.32 In 2021, 24,264 CCOs were discharged. Of this number:

- 20,482 (74%) were discharged as the result of completing the CCO
- 3748 (13%) were revoked, and
- 3612 (13%) were discharged for other reasons.

Figure 4.10: Discharge of community correction orders, 2019 – 2021



Source: Corrections Research Evaluation and Statistics.
* "Other" includes transfers, deceased and other.

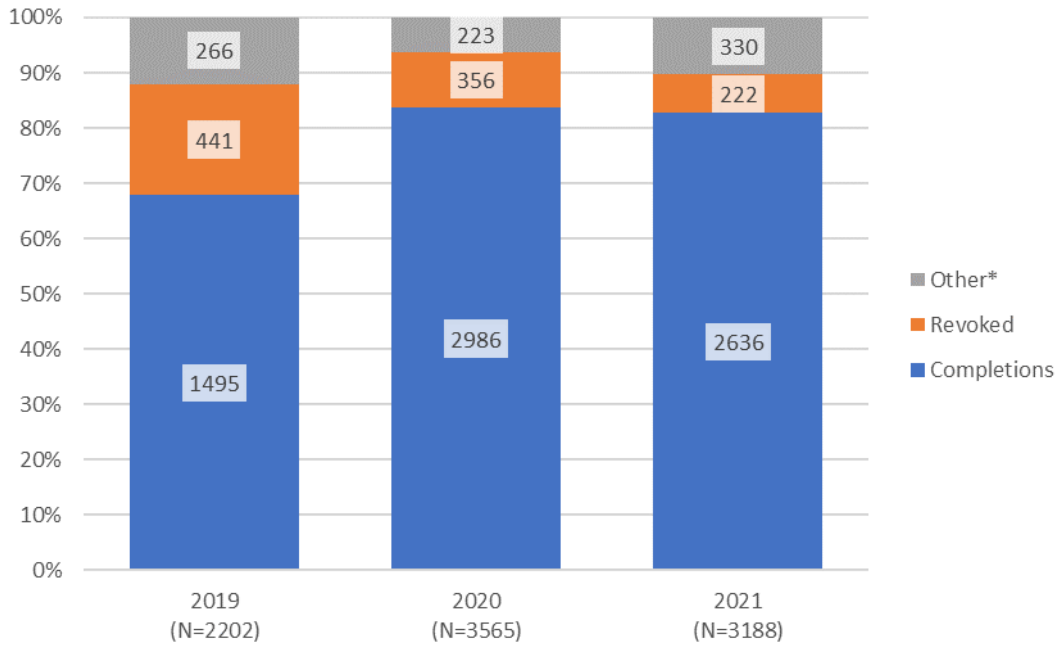
Conditional release orders

4.33 Figure 4.11 shows the numbers of CROs that were discharged 2019 – 2021.

4.34 In 2021, 3188 CROs (both with and without a conviction) were discharged. Of this number:

- 2636 (83%) were discharged as the result of completing the CRO
- 222 (7%) were revoked, and
- 330 (10%) were discharged for other reasons.

Figure 4.11: Discharge of conditional release orders, 2019 – 2021



Source: Corrections Research Evaluation and Statistics.
* "Other" includes transfers, deceased and other.

Breach and revocation of sentencing orders

4.35 This section looks in more detail at how the courts deal with breaches of sentencing orders.

4.36 In presenting this data, we note:

- The orders breached include orders imposed before the 2018 sentencing reforms that were converted to the new orders for administrative purposes. Different risk profiles may apply to offenders who are subject to the converted orders.
- The COVID-19 pandemic may impact on conditions, compliance and enforcement in 2020 and 2021.

Conditional release orders

4.37 CROs may be imposed with or without a conviction.

4.38 An offender who is subject to a CRO may be called to appear before a court, if it is suspected that the offender has failed to comply with any of the conditions of the CRO.[14]

4.39 If the court is satisfied that the offender failed to comply with a condition, the court may:

> (a) … decide to take no action in respect of the failure to comply, or
>
> (b) … vary or revoke any conditions of the order (other than standard conditions) or impose further conditions on the order, or
>
> (c) … may revoke the order.[15]

4.40 If the court revokes a CRO, it may sentence or re-sentence the offender for the offence to which the revoked order relates.[16]

Number of CROs where breach established by the courts

4.41 The following figures set out the number of CROs that a court has found to have been breached. They are divided into CROs without a conviction and CROs with a conviction.

4.42 Figure 4.12 shows the number of **CROs without a conviction** that a court has found to have been breached in 2019-2021 (indicated by the orange line).

4.43 The figure records findings in relation to each CRO. It may be that a single offender has breached multiple CROs that were running concurrently. In 2021, offenders breached one or more CROs without a conviction on 1665 appearances. Of these, 1246 (74.8%) involved breach of one order. The remainder (25.2%) involved breaches of two or more orders.[17]

4.44 In 2021, 23,283 **CROs without a conviction** were found to have been breached. By way of comparison, in 2021, the courts issued 17,997 CROs without a conviction (these are indicated by the blue columns). Note that some of the breaches in 2021 will relate to CROs that were issued in years before 2021.

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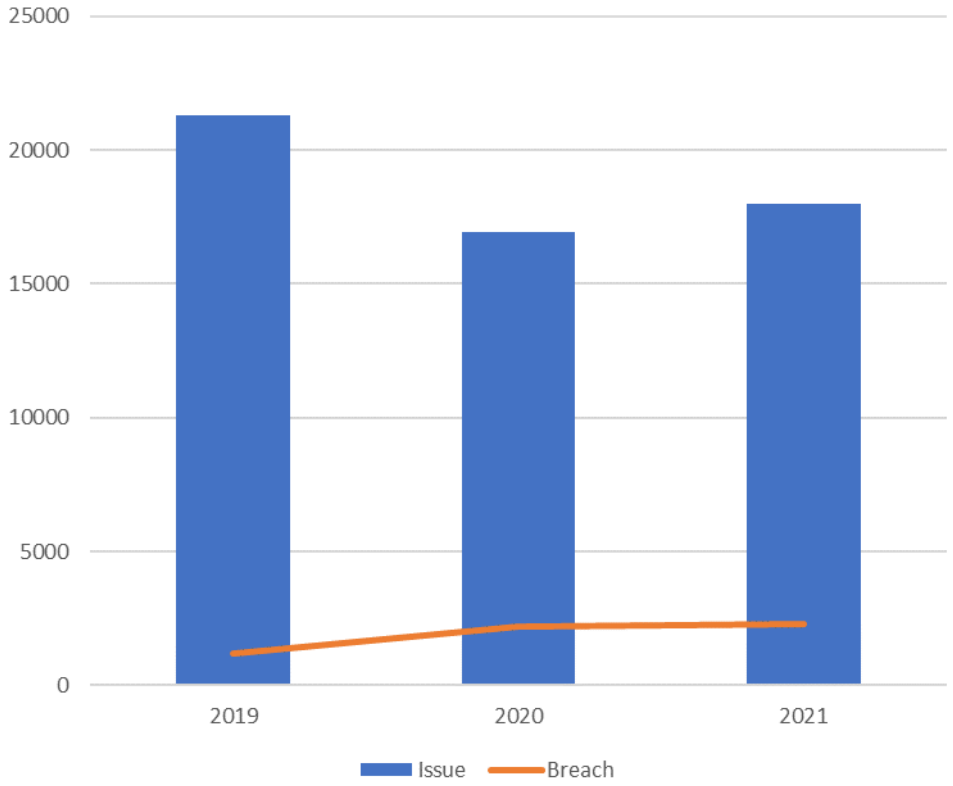
14. *Crimes (Administration of Sentences) Act 1999* (NSW) s 108C(1).
15. *Crimes (Administration of Sentences) Act 1999* (NSW) s 108C(5).
16. *Crimes (Administration of Sentences) Act 1999* (NSW) s 108D.
17. NSW Bureau of Crime Statistics and Research, reference 22-21390.

Figure 4.12: Number of conditional release orders without a conviction breached, compared with number issued, 2019 – 2021



Source: NSW Bureau of Crime Statistics and Research, reference ac22-21389.

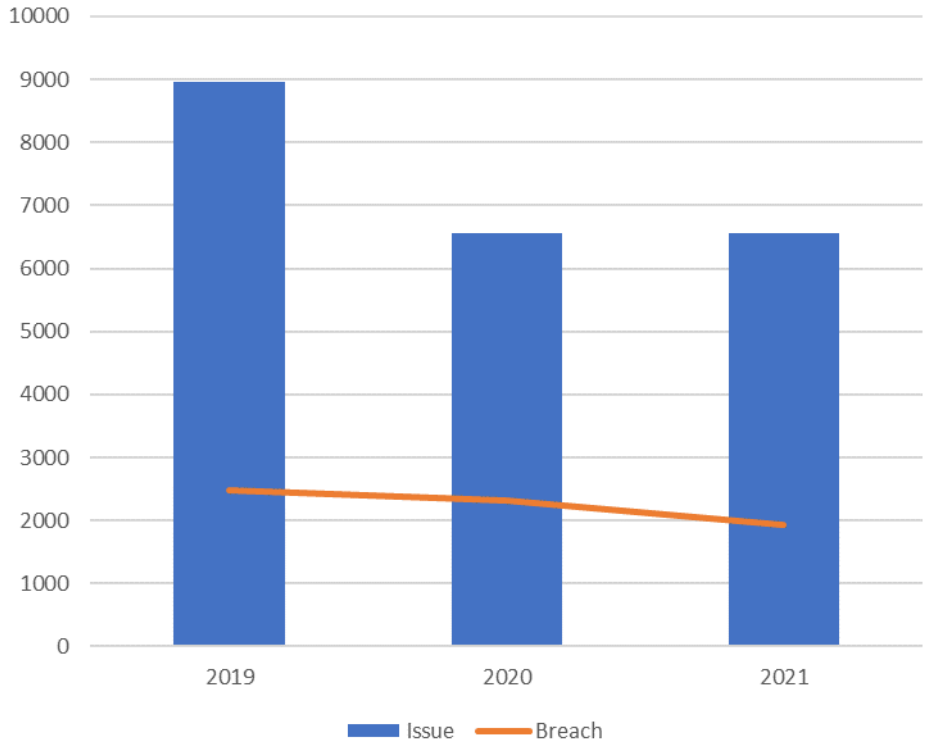
4.45 Figure 4.13 shows the number of **CROs with a conviction** that a court has found to have been breached in 2019-21 (indicated by the orange line).

4.46 The figure records findings in relation to each CRO. It may be that a single offender has breached multiple CROs that were running concurrently. In 2021, offenders breached one or more CROs with a conviction on 1228 appearances. Of these, 813 (66.2%) involved breach of one order. The remainder (33.8%) involved breaches of two or more orders.[18]

4.47 In 2021, 1928 CROs with a conviction were found to have been breached. By way of comparison, in 2021, the courts issued 6563 CROs with a conviction (these are indicated by the blue columns). Note that some of the breaches will relate to CROs that were issued in years before 2021.

18. NSW Bureau of Crime Statistics and Research, reference 22-21390.

Figure 4.13: Number of conditional release orders with a conviction breached, compared with number issued, 2019 – 2021



Source: NSW Bureau of Crime Statistics and Research, reference ac22-21389.

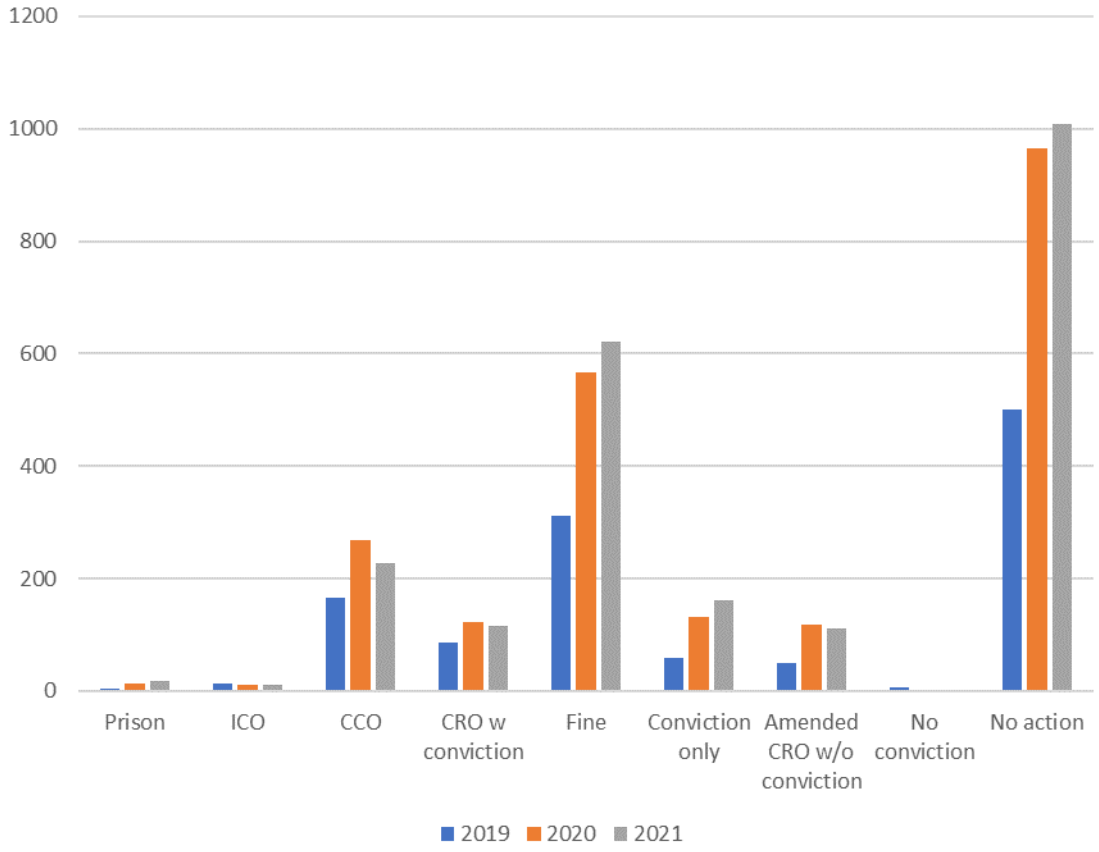
Outcomes of breaches that were referred to the courts

4.48 The following figures show the number of outcomes for each breached CRO in 2019 – 2021. They are divided into CROs without a conviction and CROs with a conviction.

4.49 The very small numbers of cases of imprisonment may have been imposed primarily in relation to the offences by which the offender breached the CRO.

4.50 Figure 4.14 shows the number of options employed by the courts when offenders breach the conditions of **CROs without a conviction recorded** in 2019 – 2021.

Figure 4.14: Outcomes (number) of breach of each conditional release order without a conviction, 2019 – 2021



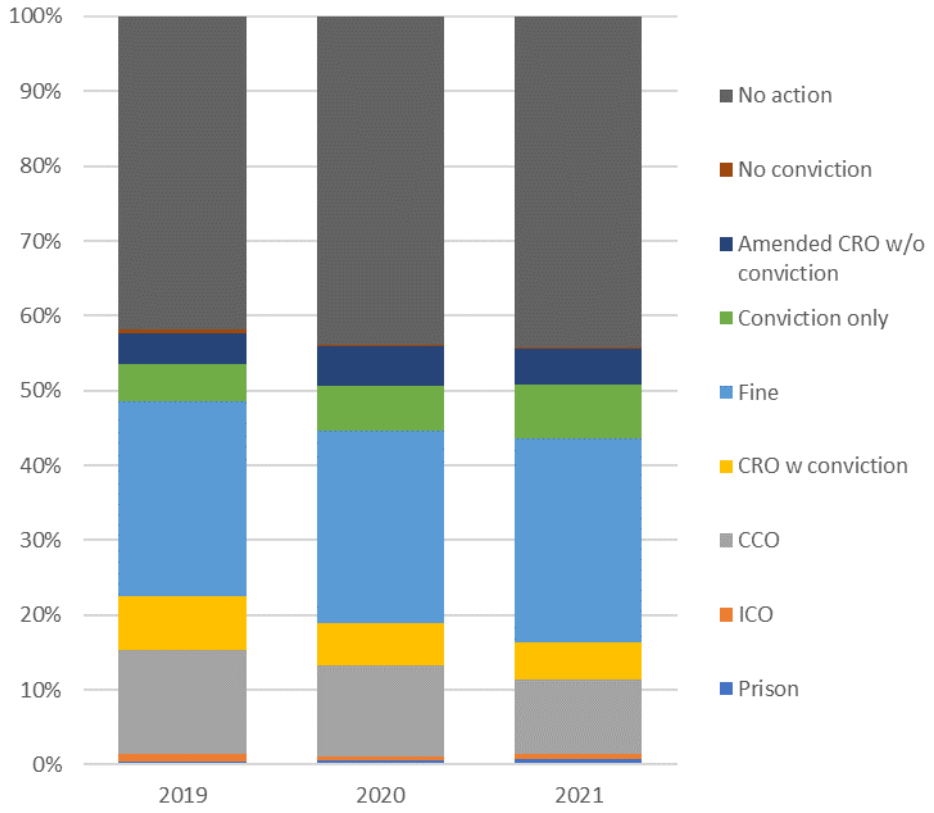
Source: NSW Bureau of Crime Statistics and Research, reference ac22-21389.

4.51 Figure 4.15 shows the proportion of outcomes for each breached **CRO without a conviction**. In 2021, the courts decided to take no action on 44.2% of the breached orders. For 27.2% of the breached orders the courts imposed a fine. The court changed the conditions of the order in only 4.9% of cases.

4.52 There is a proportionately greater reliance on fines when dealing with breaches of CROs without a conviction when compared with CROs with a conviction.

4.53 There has been a decline in the proportion of CCOs imposed as a result of breaching a relevant order since 2019 (from 13.9% to 9.9%).

Figure 4.15: Outcomes (proportion) of breach of each conditional release order without a conviction, 2019 – 2021

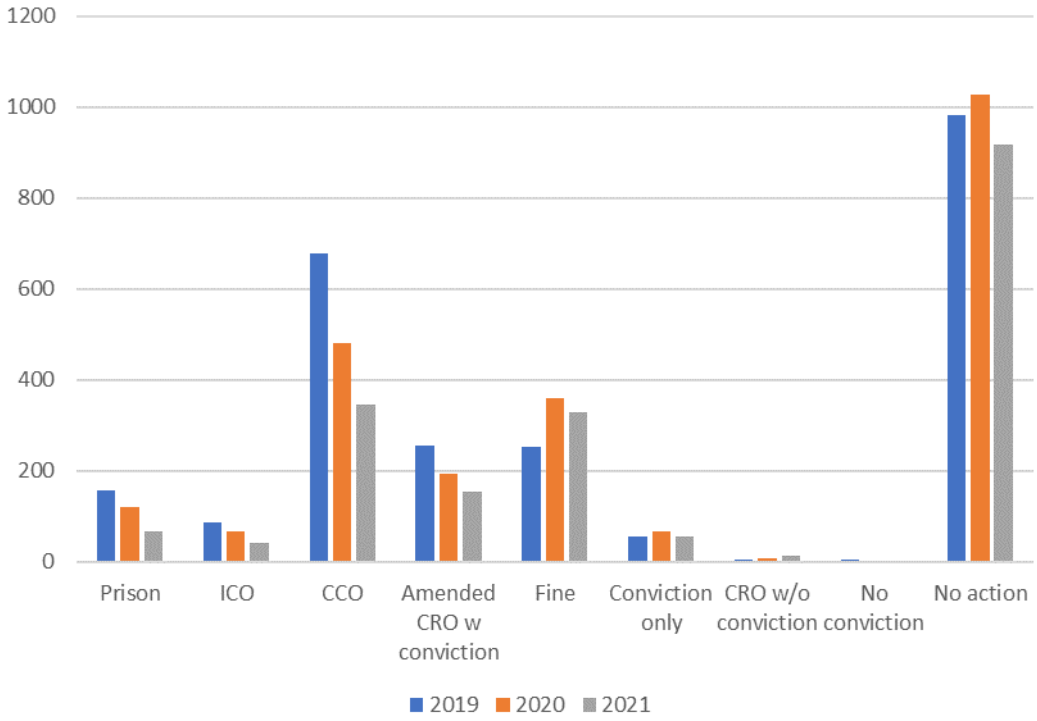


Source: NSW Bureau of Crime Statistics and Research, reference ac22-21389.

4.54 Figure 4.16 shows the number of options employed by the courts when offenders breach the conditions of **CROs with a conviction** recorded in 2019-2021.

4.55 It shows a declining number of orders breached which is consistent with the decline in number of orders issued and breached shown in Figure 4.13.

Figure 4.16: Outcomes (number) of breach of each conditional release order with a conviction, 2019 – 2021



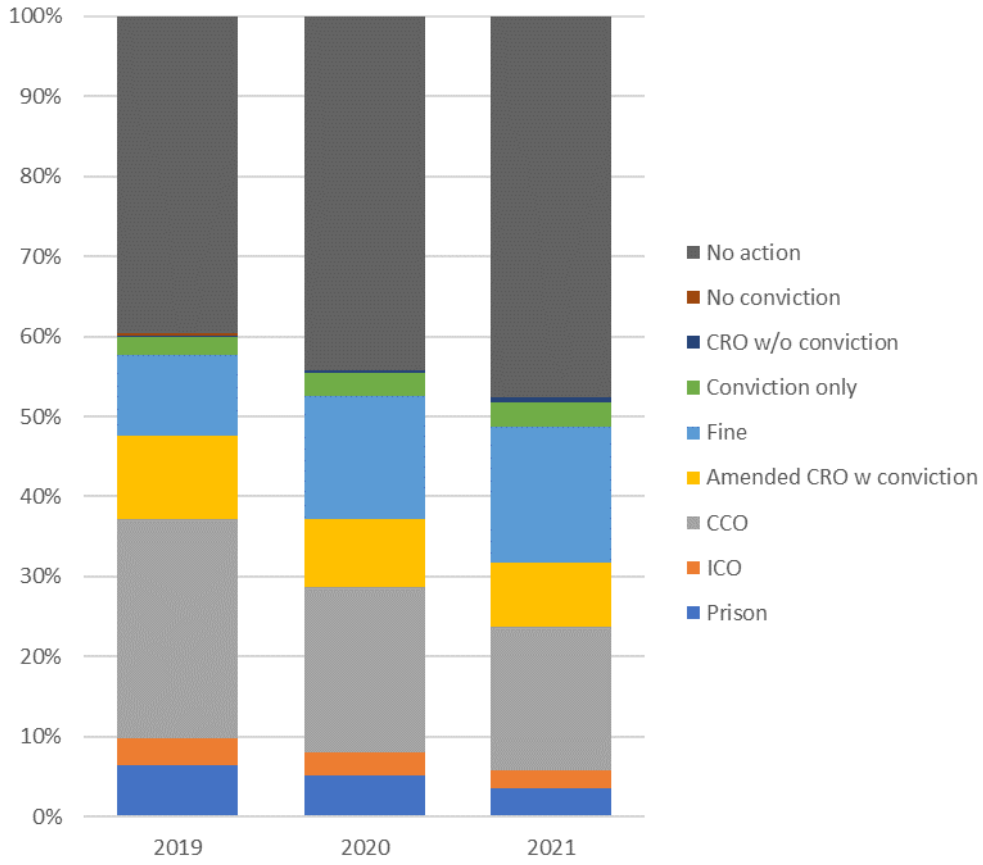
Source: NSW Bureau of Crime Statistics and Research, reference ac22-21389.

4.56 Figure 4.17 shows the proportion of outcomes for each breached **CRO with a conviction**.

4.57 In 2021, the courts decided to take no action on 47.6% of the breached orders. The courts imposed a CCO for 18% of the breached and a fine for 17.1% of the breached orders. The court changed the conditions of the order in only 8% of cases.

4.58 There has been an increase in the proportion of breaches responded to by no action since 2019 (from 39.6% to 47.6%). There has also been a decrease in the proportion of breaches for which the courts have imposed a CCO (from 27.4% to 18%).

Figure 4.17: Outcomes (proportion) of breach of each conditional release order with a conviction, 2019 – 2021



Source: NSW Bureau of Crime Statistics and Research, reference ac22-21389.

Community correction orders

4.59 An offender who is subject to a CCO may be called to appear before a court, if it is suspected that the offender has failed to comply with any of the order's conditions.[19]

4.60 If the court is satisfied that the offender failed to comply with a condition, the court may:

> (a) … decide to take no action in respect of the failure to comply, or
>
> (b) … vary or revoke any conditions of the order (other than standard conditions) or impose further conditions on the order, or
>
> (c) … revoke the order.[20]

19. *Crimes (Administration of Sentences) Act 1999* (NSW) s 107C(1).

4.61 If the court revokes a CCO, it may re-sentence the offender for the offence to which the revoked order relates.[21]

Number of CCOs where breach established by the courts

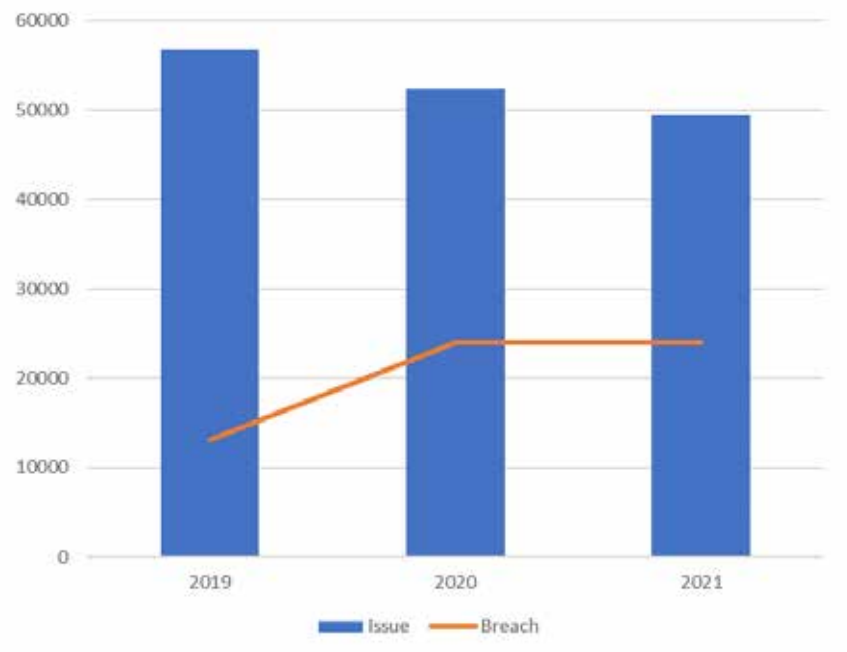
4.62 Figure 4.18 shows the number of instances where the conditions of a CCO were found by a court to have been breached in 2019-2021 (indicated by the orange line).

4.63 The figure records each finding in relation to each CCO. It may be that a single offender has breached multiple CCOs that were running concurrently. In 2021, offenders breached one or more CCOs on 10,529 appearances. Of these, 4778 (45.4%) involved breach of one order. The remainder (54.6%) involved breaches of two or more orders.[22]

4.64 In 2021, 24,006 CCOs were found to have been breached. By way of comparison, in 2021, courts issued 49,389 CCOs.

4.65 The increase in numbers between 2019 and 2020 (13,156 to 23,980 CCOs breached) is to be expected as more CCOs enter the system. The numbers appear to have levelled out in 2021.

Figure 4.18: Number of community correction orders breached, compared with number issued, 2019 – 2021



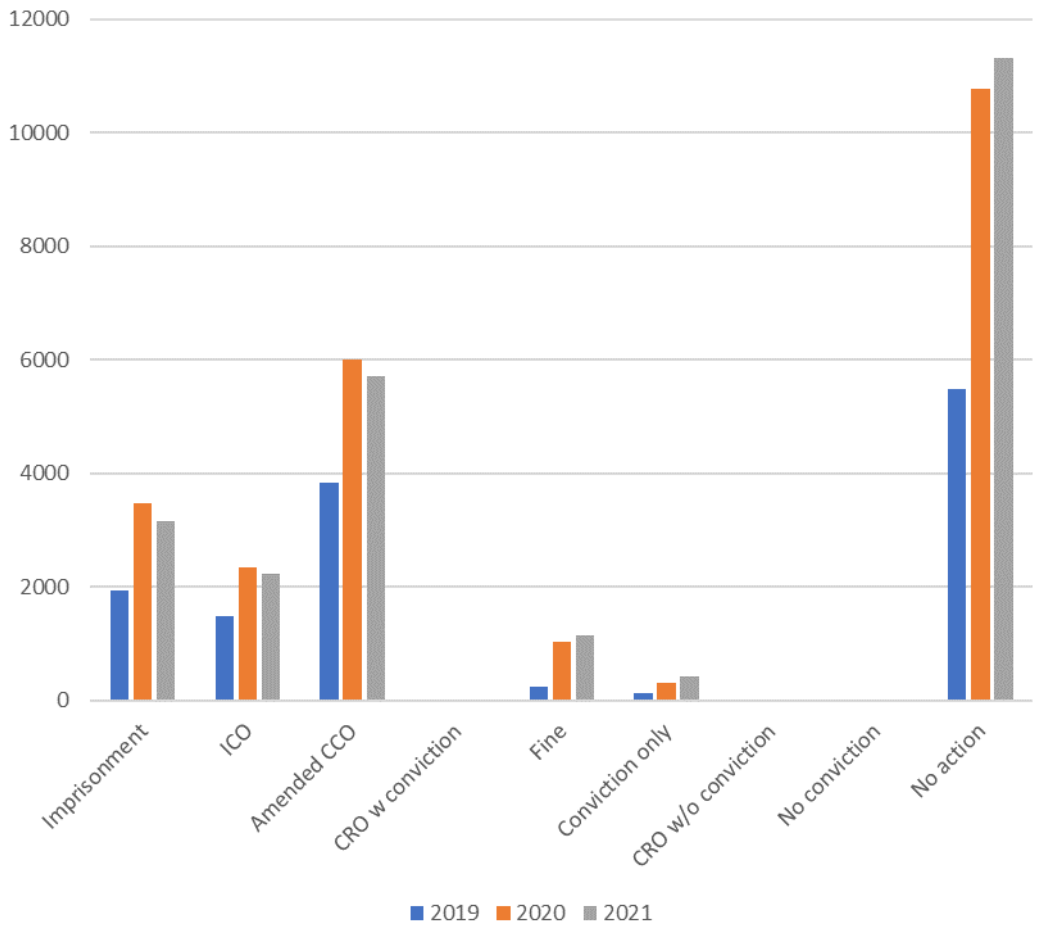
20. *Crimes (Administration of Sentences) Act 1999* (NSW) s 107C(5).
21. *Crimes (Administration of Sentences) Act 1999* (NSW) s 107D.
22. NSW Bureau of Crime Statistics and Research, reference 22-21390.

Source: NSW Bureau of Crime Statistics and Research, reference ac22-21389.

Outcomes of breaches that were referred to the courts

4.66 Figure 4.19 shows the number of outcomes for each breached CCO in 2019 – 2021.

Figure 4.19: Outcomes (number) of breach of each community correction order, 2019 – 2021

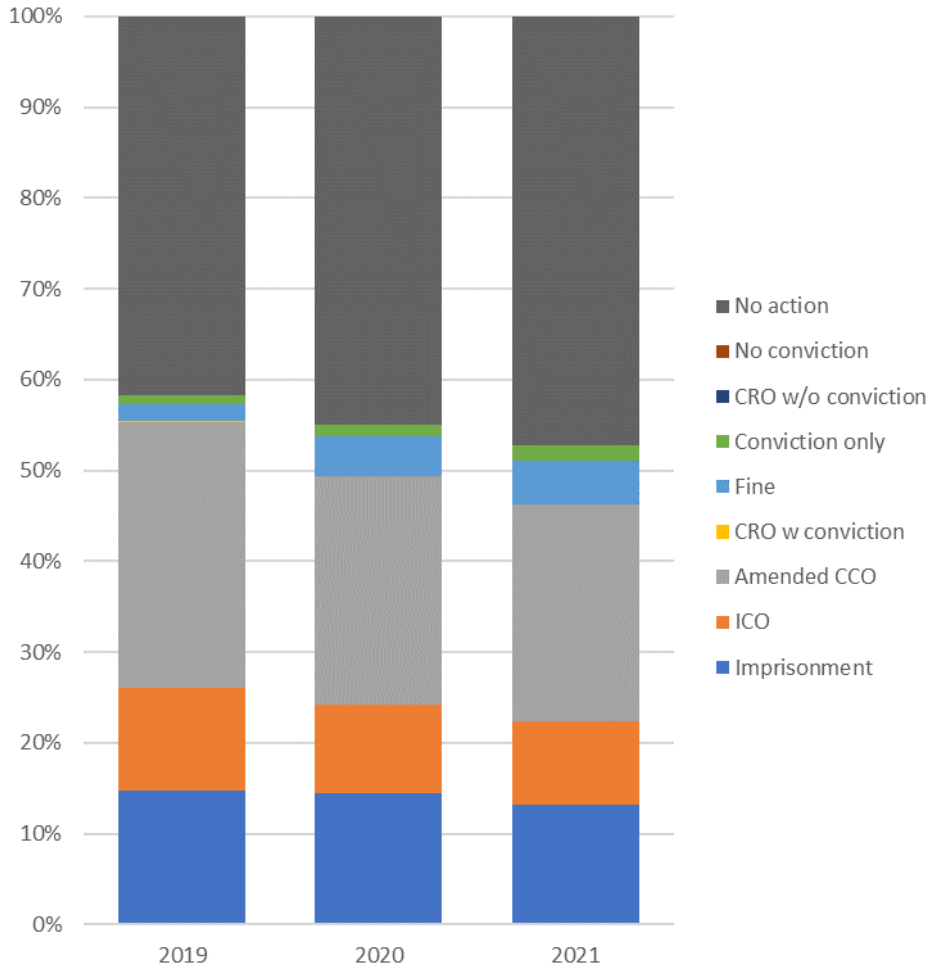


Source: NSW Bureau of Crime Statistics and Research, reference ac22-21389.

4.67 Figure 4.20 shows the proportion of outcomes for each breached CCO. For 47.2% of breached orders, in 2021, the courts decided to take no action on the breach. For 23.8% of breached CCOs the court amended one or more conditions of the CCO. In a further 22.4%, the court imposed a harsher penalty – either an ICO or imprisonment.

4.68 An increasing proportion of the responses are to take no action.

Figure 4.20: Outcomes (percentage) of breach of each community correction order, 2019 – 2021



Source: NSW Bureau of Crime Statistics and Research, reference ac22-21389.

Intensive correction orders

4.69 There are two responses to breaches of obligations under ICOs that relate to NSW offences:

- for less serious breaches: they are managed locally by Community Corrections, and
- for more serious breaches: they are referred to the State Parole Authority (SPA) for determination.

4.70 The conditions that may be breached include the standard conditions that apply to all ICOs:

- the offender must not commit any offence, and
- the offender must submit to supervision by a community corrections officer.[23]

4.71 Additional conditions that a court impose, include:

- a home detention condition
- an electronic monitoring condition
- a curfew condition
- a community service work condition
- a condition requiring the offender participate in a rehabilitation program or to receive treatment
- a condition requiring the offender refrain from using alcohol and/or drugs, and
- a place restriction condition.[24]

4.72 When a matter comes before SPA, SPA must be satisfied that there has been a breach. If SPA is satisfied that there has been a breach, it may take any of the following actions:

(a) record the breach and take no further action,

(b) give a formal warning to the offender,

(c) impose any conditions on the intensive correction order,

(d) vary or revoke any conditions of the intensive correction order, including conditions imposed by the sentencing court,

(e) make an order revoking the intensive correction order (a revocation order).[25]

Breached conditions

4.73 In relation to the ICOs revoked by SPA, the majority of revocations were for breaches of two or more conditions.

4.74 The two most commonly breached conditions in 2021 were the standard conditions that apply to all ICOs:

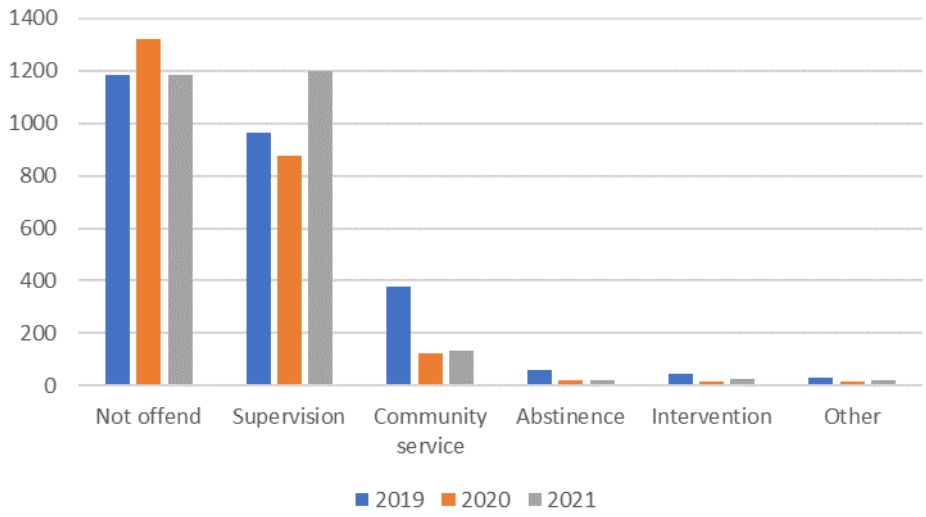
---

23. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 73(2).
24. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 73A(2)
25. *Crimes (Administration of Sentences) Act 1999* (NSW) s 164(2).

- the offender must not commit any offence – found at 1184 hearings, and
- the offender must submit to supervision by a community corrections officer – found at 1199 hearings.

4.75 Figure 4.21 shows the number of breaches of conditions that led to the revocation of an ICO in 2019 – 2020.

Figure 4.21: Conditions breached resulting in revocation of an ICO in 2019 – 2021



Source: Corrections Research Evaluation and Statistics.
"Other": Home detention, Electronic monitoring, Non association, Curfew, Place restriction

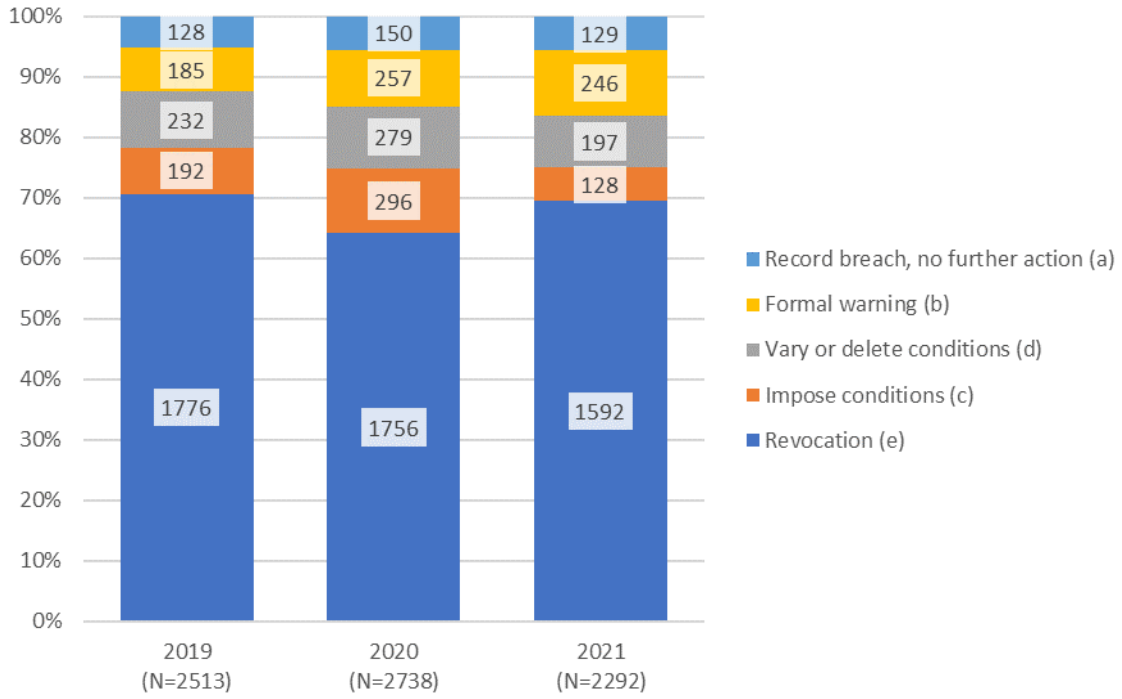
Outcomes of breaches that were referred to the Parole Authority

4.76 In 2021, there were 2292 hearings where SPA was satisfied that an offender had breached an ICO condition and ordered one of the outcomes permitted by the *Crimes (Administration of Sentences) Act 1999* (NSW). The most common outcomes were:

- revocation – at 1592 hearings (69%)
- issuing a formal warning – at 246 hearings (11%), and
- varying or deleting conditions – at 197 hearings (9%)

4.77 Figure 4.22 shows the outcomes of hearings where SPA was satisfied that a breach of an ICO condition had occurred in 2019–2021.

Figure 4.22: Outcomes where Parole Authority was satisfied a breach occurred, 2019 - 2021



Source: Corrections Research Evaluation and Statistics.

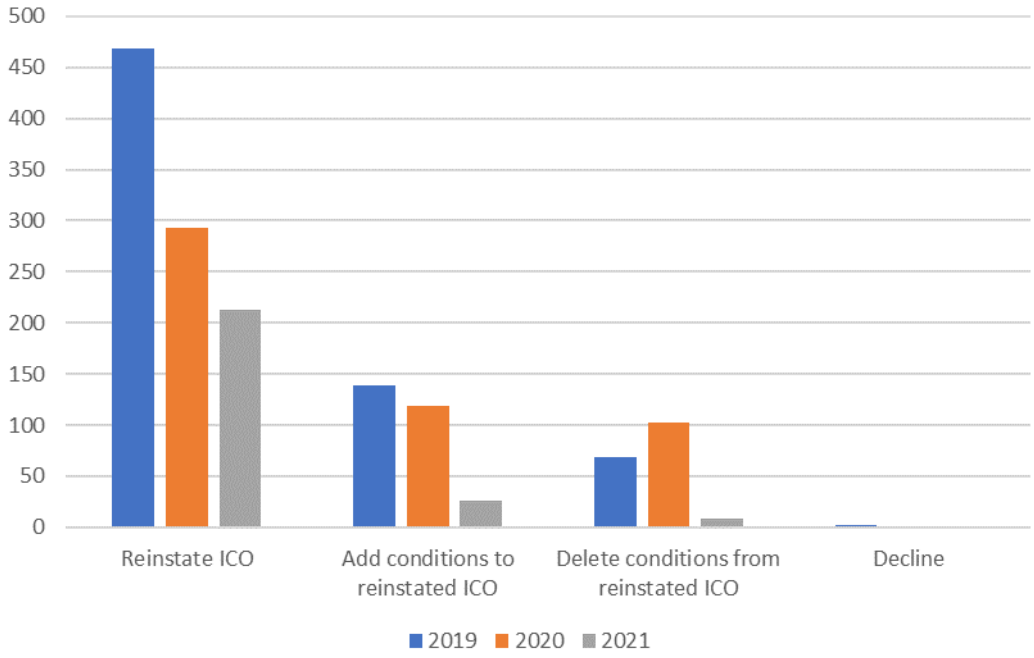
Reinstatement after revocation

4.78 After an ICO has been revoked and an offender has served at least one month in full-time custody, SPA may, on an offender's application, reinstate the ICO.[26] The application must state "what the offender has done, or is doing, to ensure that the offender will not fail to comply with the offender's obligations under the intensive correction order in the event that it is reinstated".[27]

4.79 Figure 4.23 shows the outcomes of reinstatement applications for ICOs in 2019–2021. In 2021, SPA reinstated ICOs on 248 occasions. On 26 of these occasions, SPA added conditions to the ICO. On 9 of these occasions, SPA deleted conditions from the ICO. These numbers show a considerable drop from previous years' figures.

26. *Crimes (Administration of Sentences) Act 1999* (NSW) s 165.
27. *Crimes (Administration of Sentences) Act 1999* (NSW) s 165(2)(b).

Figure 4.23: Outcomes of reinstatement applications for intensive correction orders, 2019–2021



Source: Corrections Research Evaluation and Statistics.

5. Functions and membership of the Council

Functions of the Council

5.1 The Sentencing Council has the following functions under s 100J(1) of the *Crimes (Sentencing Procedure) Act 1999* ("CSPA"):

(a) to advise and consult with the Minister in relation to offences suitable for standard non-parole periods and their proposed length,

(b) to advise and consult with the Minister in relation to:

(i) matters suitable for guideline judgments under Division 4 of Part 3, and

(ii) the submissions to the Court of Criminal Appeal to be made by the Minister in guideline proceedings,

(c) to monitor, and to report annually to the Minister on, sentencing trends and practices, including the operation of standard non-parole periods and guideline judgments,

(d) at the request of the Minister, to prepare research papers or reports on particular subjects in connection with sentencing,

(e) to educate the public about sentencing matters.

Council members

5.2 The CSPA provides that the Sentencing Council is to consist of members with various qualifications.[1]

5.3 The Council's members (and their qualifications) at the end of 2021 are set out below.

Chairperson

The Hon Peter McClellan AM, KC	Retired judicial officer

Members

Assistant Commissioner Scott Cook APM	Member with expertise or experience in law enforcement
Ms Sally Dowling SC	Member with expertise or experience in criminal law or sentencing – prosecution
Ms Belinda Rigg SC	Member with expertise or experience in criminal law or sentencing – defence
Ms Christina Choi	Member with expertise or experience in criminal law or sentencing
Ms Felicity Graham	Member with expertise or experience in criminal law or sentencing
Ms Karly Warner	Member with expertise or experience in Aboriginal justice matters
Mr Howard Brown OAM	Community member - experience in matters associated with victims of crime
Ms Thea Deakin-Greenwood	Community member - experience in matters associated with victims of crime
Associate Professor Tracey Booth	Community member
Ms Moira Magrath	Community member
Mr Peter Severin	Member with expertise or experience in corrective services
Mr Wayne Gleeson	Member with expertise or experience in juvenile justice
Mr Mark Follett	Representative of the Department of Justice
Professor John Anderson	Member with relevant academic or research expertise or experience

1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100I(2).

5.4 Mr Paul McKnight resigned as representative of the Department of Communities and Justice on 30 August 2021. Mr Mark Follett was appointed to the position on 30 August 2021.

5.5 Mr Damian Beaufils was appointed deputy to Ms Karly Warner (member with expertise or experience in Aboriginal justice matters) from 23 August 2021 until 31 January 2022.

5.6 Mr Lloyd Babb SC resigned as member with expertise or experience in criminal law or sentencing (prosecution) on 17 July 2021. Ms Sally Dowling SC was appointed to the position on 11 October 2021.

5.7 The appointment of Mr Howard Brown OAM as a community with experience in matters associated with victims of crime expired on 31 December 2021.

5.8 His Honour Acting Judge Paul Cloran resigned as the retired magistrate member on 9 September 2021.

Staffing

5.9 Staff of the Law Reform and Sentencing Council Secretariat (a part of the Policy, Reform and Legislation Branch of the Department of Communities and Justice) support the Council's work.

Council business

Meetings

5.10 Council meetings are scheduled on a monthly basis with business being completed at these meetings and out of session.

5.11 Owing to the COVID-19 pandemic, all meetings were held by remote connection in 2021.

Community education: Podcast

5.12 In July 2021, we commenced work on fulfilling our community education function by developing a series of podcasts on sentencing. The primary target audience was expected to be secondary school students taking Legal Studies in year 11 and 12, but the podcast would also be of interest to a broader audience.

5.13 We received approval for a budget of $5000 for technical production and editing costs. The Secretariat also engaged with the media and communications team in the Department of Communities and Justice.

Collaboration

5.14 We have maintained close working relationships with the Bureau of Crime Statistics and Research, the Secretariat's colleagues within the Policy, Reform and Legislation Branch, Corrections Research Evaluation and Statistics, and other parts of the NSW Department of Communities and Justice.