Annual Report 2022

Sentencing Trends and Practices

NSW Sentencing Council

NSW Sentencing Council

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1. Sentencing trends

1.1 This chapter sets out general data relating to the Local Court and higher courts' use of penalties in 2022, with a particular focus on gender and Aboriginal status as well as the regional location of offenders.

1.2 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

1.3 2022 was the fourth 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]
- conviction only (with no other penalty)[6]
- CRO without a conviction recorded,[7] and
- no conviction (dismissal).[8]

1.4 This part of the chapter sets out data for 2022 relating to each sentencing option both generally and in relation to particular offender categories (based on gender, Aboriginal status and region).

1.5 In chapter 2 we summarise a study by the NSW Bureau of Crime Statistics and Research that examines whether the 2018 sentencing reforms have reduced the risk of reoffending.[9]

General sentencing outcomes

1.6 We have identified 117,958 occasions on which offenders received one of the relevant penalties in the Local Court and higher courts in NSW in 2022. The majority of cases were finalised in the Local Court. Many were for fine-only offences (which

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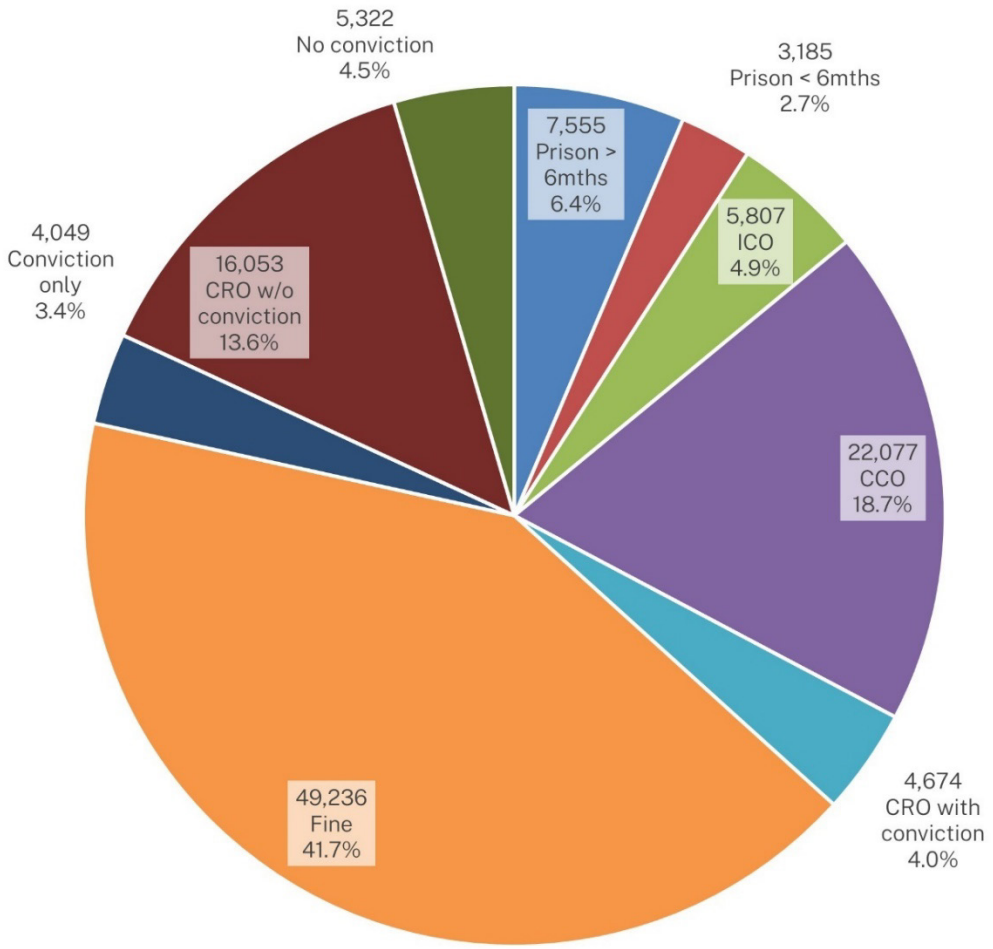
1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5, pt 4.
2. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7, pt 5; *Crimes (Administration of Sentences) Act 1999* (NSW) pt 3, pt 7 div 1.
3. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 2 div 4.
4. *Crimes (Sentencing Procedure) Act 1999* (NSW) 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. [2.19]-[2.35].

means that imprisonment, ICOs and CCOs are not available penalties). Figure 1.1 sets out the percentage of offenders who received each penalty.

1.7 As has been the case for the previous three years, in 2022, the most common penalty was a fine (41.7%), followed by a CCO (18.7%), and CRO without a conviction (13.6%). Imprisonment accounts for 9.1% of penalties imposed (2.7% for sentences of 6 months or less and 6.4% for sentences of more than 6 months).

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

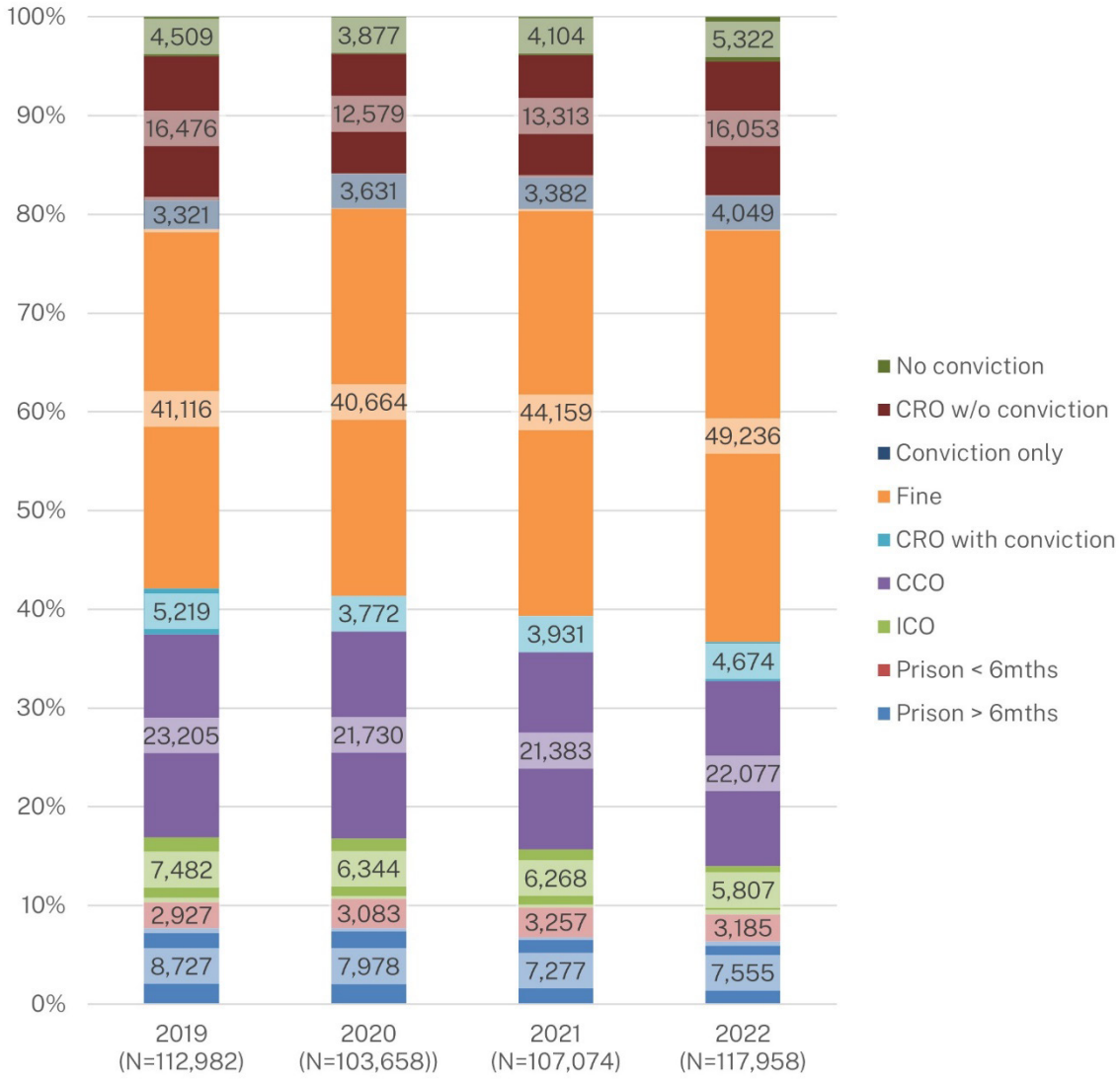
Figure 1.1: NSW higher and local criminal courts, penalties imposed, 2022



Source: NSW Bureau of Crime Statistics and Research, reference 23-22438.
The data tables for this figure are in Appendix A.

1.9 Figure 1.2 shows the proportion of penalties imposed in each calendar year since the introduction of the new sentencing regime.

Figure 1.2: NSW higher and local criminal courts, penalties imposed for each year, 2019 – 2022



Source: NSW Bureau of Crime Statistics and Research, reference 23-22438.
The data tables for this figure are in Appendix A.

1.10 The following trends can be observed in 2019–2022:

- a continuing decline in the use of imprisonment of more than 6 months (from 7.7% to 6.4%)
- a continuing decline in the use of ICOs (from 6.6% to 4.9%)
- a continuing increase in the use of the fine (from 36.4% to 41.7%).

1.11 The decline observed for 2019-2021 in the use of CROs is not apparent for 2022.

Gender and Aboriginal status

1.12 The data outlined below shows a continuing over-representation of Aboriginal offenders in NSW.

1.13 Some of the studies summarised in chapter 2 deal with questions around the imprisonment and reoffending rates of Aboriginal People, in particular:

- the impact of the NSW Youth Koori Court on custodial outcomes and reoffending for Aboriginal young offenders,[10]
- the persistent rates of imprisonment of Aboriginal women and the need to reduce rates of contact for these offenders with the criminal justice system,[11] and
- the impact of access to mental health services on reoffending and the need for Aboriginal offenders to have access to culturally appropriate mental health and other community support services.[12]

Aboriginal male offenders 2022

1.14 We have identified 21,450 occasions on which Aboriginal men received a relevant sentence in 2022, compared with 68,297 male offenders who were not Aboriginal or whose Aboriginal status was unknown. According to these numbers, 23.9% of male offenders were recorded as Aboriginal. Aboriginal men represent 4.2% of the male resident population in NSW.[13]

1.15 Figure 1.3 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 (20.6% compared with 7.8%) and a significantly smaller proportion of Aboriginal men received a sentence that did not involve a conviction (6.0% compared with 20.0%).

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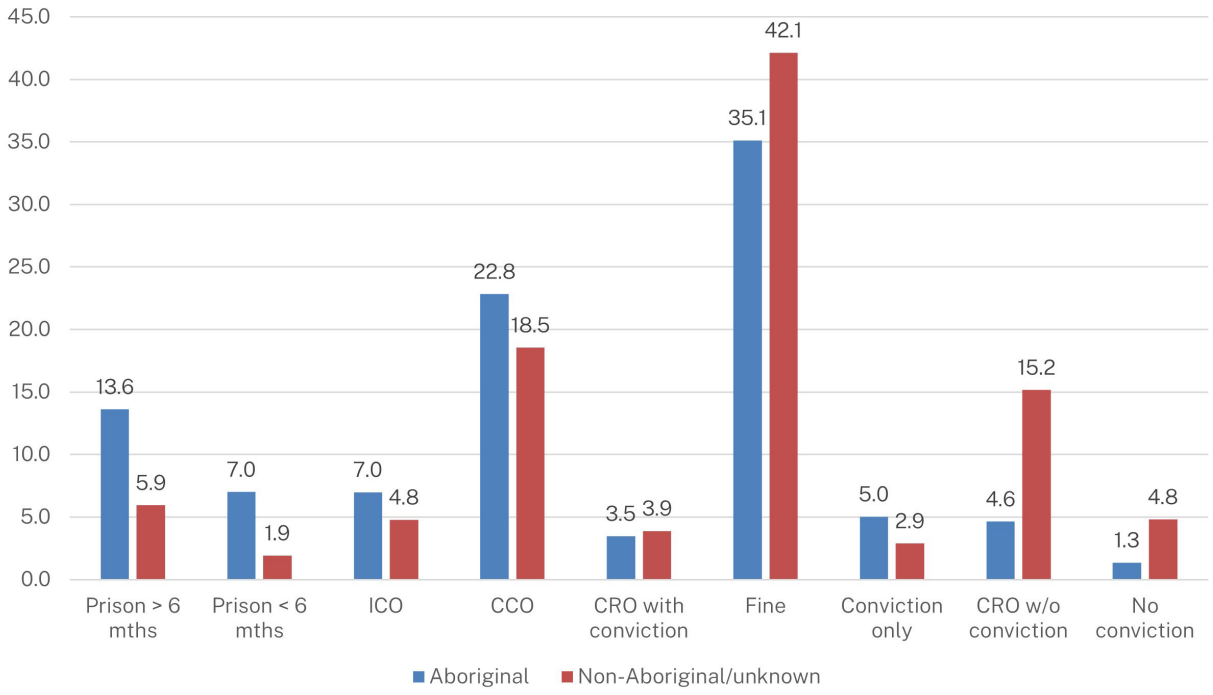
10. [2.2]-[2.9].
11. [2.41]-[2.47].
12. [2.90].
13. Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians* (3238055001DO001_2021, June 2021).

Figure 1.3: NSW higher and local criminal courts, proportion of penalties imposed on Aboriginal and other male offenders, 2022



Source: NSW Bureau of Crime Statistics and Research, reference 23-22438.
The data tables for this figure are in Appendix A.

1.16 Figure 1.4 shows the percentage of Aboriginal men who received each penalty, compared with those who are not Aboriginal or whose Aboriginal status is not known.

1.17 Considering that 23.9% of all male offenders were recorded as Aboriginal:

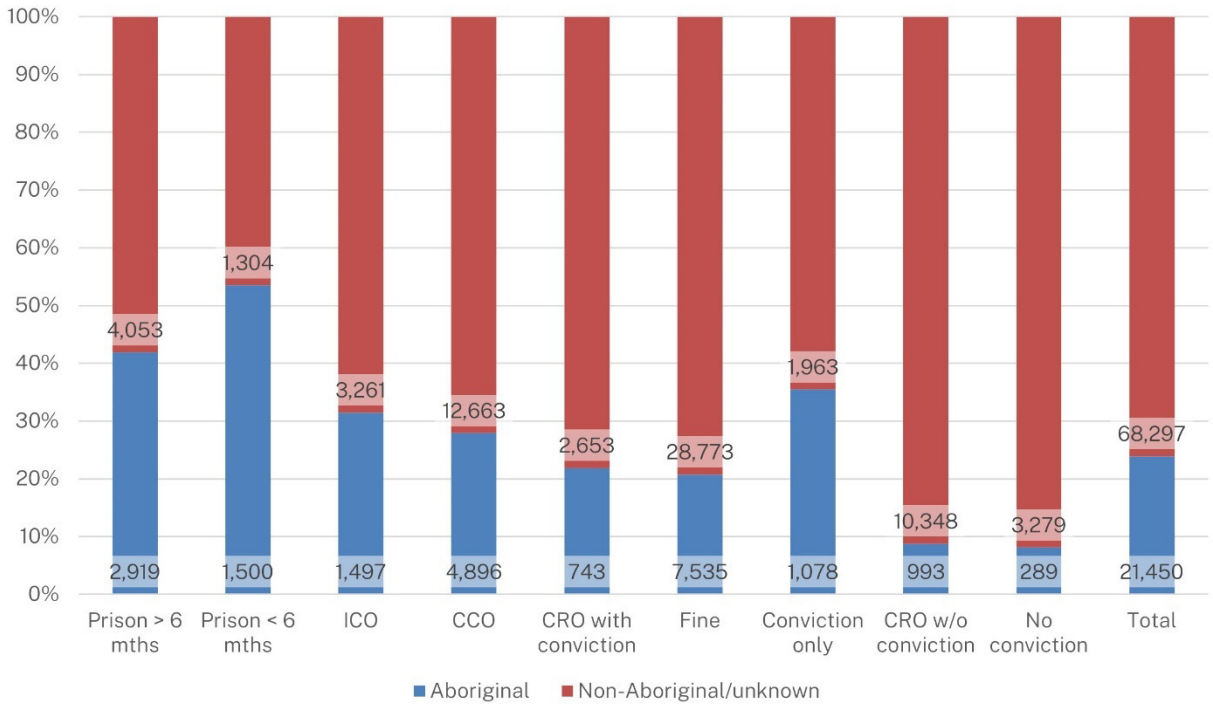
- a large proportion (53.5%) of the 2804 male offenders who received a sentence of imprisonment of 6 months or less were recorded as Aboriginal, and
- a large proportion (41.9%) of the 6972 male offenders who received a sentence of imprisonment of more than 6 months were recorded as Aboriginal.

1.18 By contrast:

- a very small proportion (8.8%) of the 11,341 male offenders who received a CRO without a conviction were recorded as Aboriginal, and
- a very small proportion (8.1%) of the 3568 male offenders who had no conviction recorded were recorded as Aboriginal.

1.19 We also note that, of the 3041 male offenders who received a conviction only, a large proportion (35.4%) were Aboriginal.

Figure 1.4: NSW higher and local criminal courts, proportion of each penalty imposed on Aboriginal and other male offenders, 2022



Source: NSW Bureau of Crime Statistics and Research, reference 23-22438.
The data tables for this figure are in Appendix A.

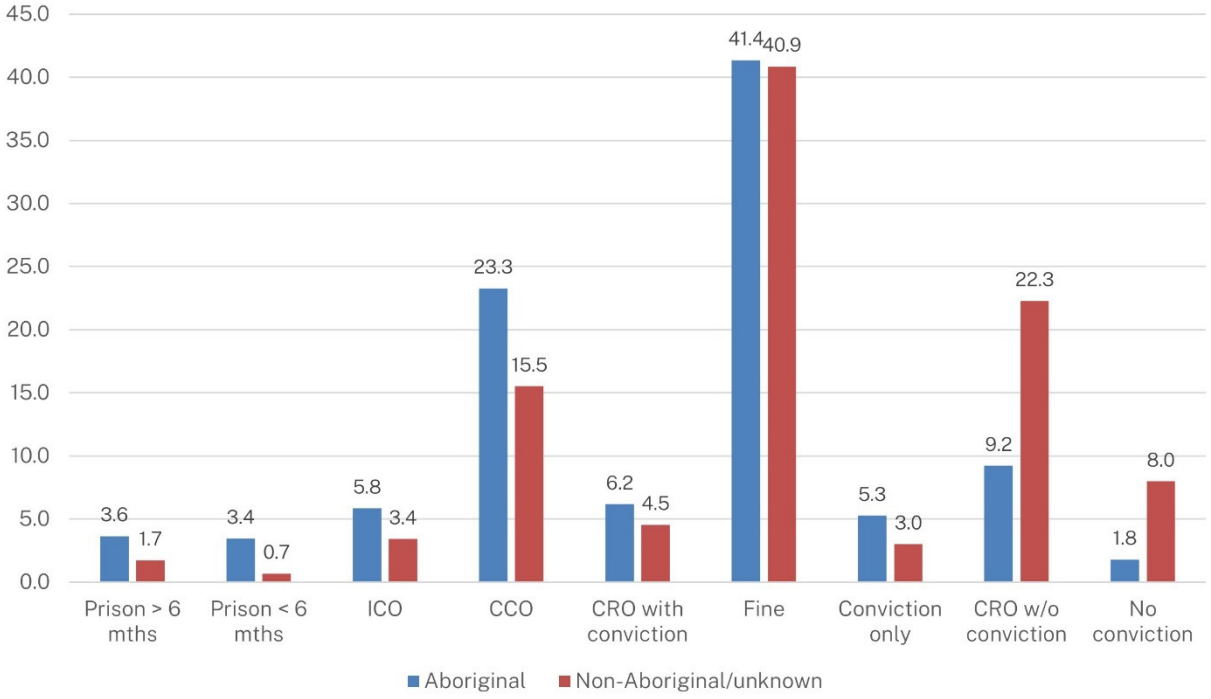
Aboriginal female offenders 2022

1.20 We have identified 7511 occasions on which Aboriginal women received a relevant sentence in 2022, compared with 17,847 women who were not Aboriginal or whose Aboriginal status was unknown. 29.6% of all female offenders were recorded as Aboriginal. Aboriginal women represent 4.2% of the resident female population in NSW.[14]

1.21 Figure 1.5 shows the proportion of penalties imposed on female offenders by Aboriginal status. A significantly greater proportion of Aboriginal women received sentences of imprisonment (7.1% compared with 2.4%) and a significantly smaller proportion of Aboriginal women received a sentence that did not involve conviction (11.0% compared with 30.3%).

14. Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians* (3238055001DO001_2021, June 2021).

Figure 1.5: 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 23-22438.
The data tables for this figure are in Appendix A.

1.22 Figure 1.6 shows the percentage of Aboriginal female offenders who received each penalty compared with other female offenders.

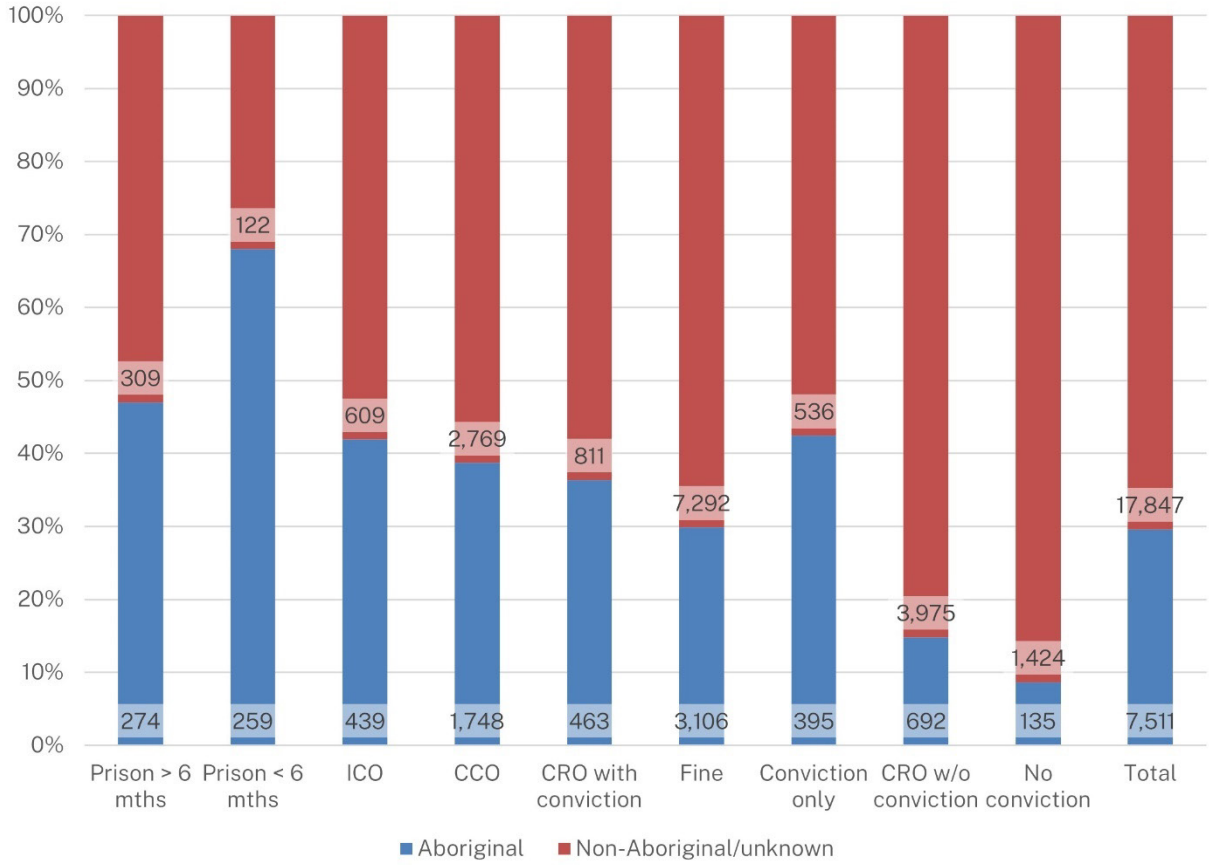
1.23 Considering that 29.6% of female offenders were recorded as Aboriginal:

- a large proportion (68.0%) of the 381 female offenders who received a sentence of imprisonment of 6 months or less were recorded as Aboriginal, and
- a large proportion (47.0%) of the 583 female offenders who received a sentence of imprisonment of more than 6 months were recorded as Aboriginal.

1.24 By contrast:

- a small proportion (14.8%) of the 4667 female offenders who received a CRO without a conviction were recorded as Aboriginal, and
- a small proportion (8.7%) of the 1559 women who had no conviction recorded were recorded as Aboriginal.

Figure 1.6: NSW higher and local criminal courts, percentage of each penalty imposed on Aboriginal and other female offenders, 2022



Source: NSW Bureau of Crime Statistics and Research, reference 23-22438.
The data tables for this figure are in Appendix A.

Trends in imprisonment for Aboriginal offenders 2019 – 2022

1.25 The following paragraphs look at the trends in imprisonment for Aboriginal people over 2019-2022. Of particular concern are the increasing number and proportion of Aboriginal offenders who are sentenced to imprisonment for 6 months or less. While there may be many reasons for such sentences, including to take account of time already spent in custody on remand, there are concerns about the effectiveness of such sentences.

1.26 One concern arises from the fact that courts cannot set a non-parole period for sentences of 6 months or less,[15] meaning that the offender is released at the end of their sentence without the support provided by parole supervision. Other concerns relate to:

- the undesirable influences arising from incarceration with other offenders

15. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 46.

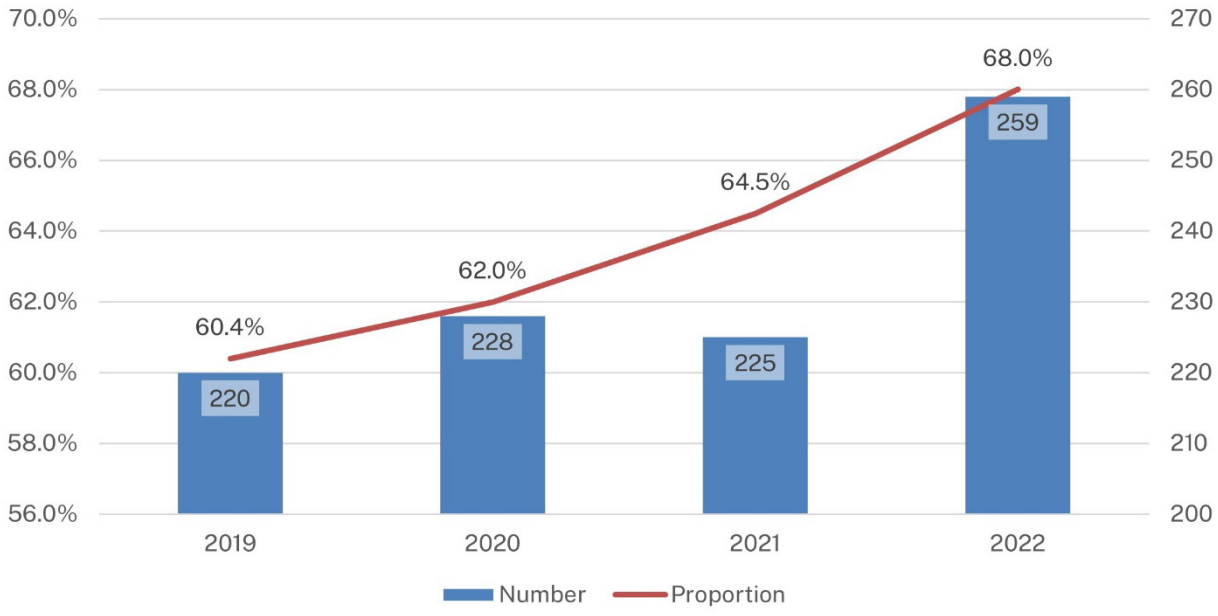
- the limited time to engage in programs while in custody, and
- the significant disruption that short sentences can cause for employment and family and support arrangements (including loss of public housing), without providing any significant degree of community protection or any opportunity to engage in rehabilitation programs.[16]

Female offenders

1.27 The data relating to female offenders is set in the context of a declining number of women overall being sentenced to imprisonment – from 1188 in 2019 to 964 in 2022.

1.28 Figure 1.7 shows the proportion of all female offenders who were sentenced to imprisonment for 6 months or less in 2019–2022 who were Aboriginal (the red line) and the number of female Aboriginal offenders sentenced to imprisonment for 6 months or less (the blue columns). Despite the smaller number of female offenders, both also show an upward trend over the four years – from 220 Aboriginal women to 259 and from 60.4% of female offenders to 68.0%.

Figure 1.7: Number and proportion of Aboriginal female offenders receiving sentences of imprisonment of 6 months or less, 2019 – 2022



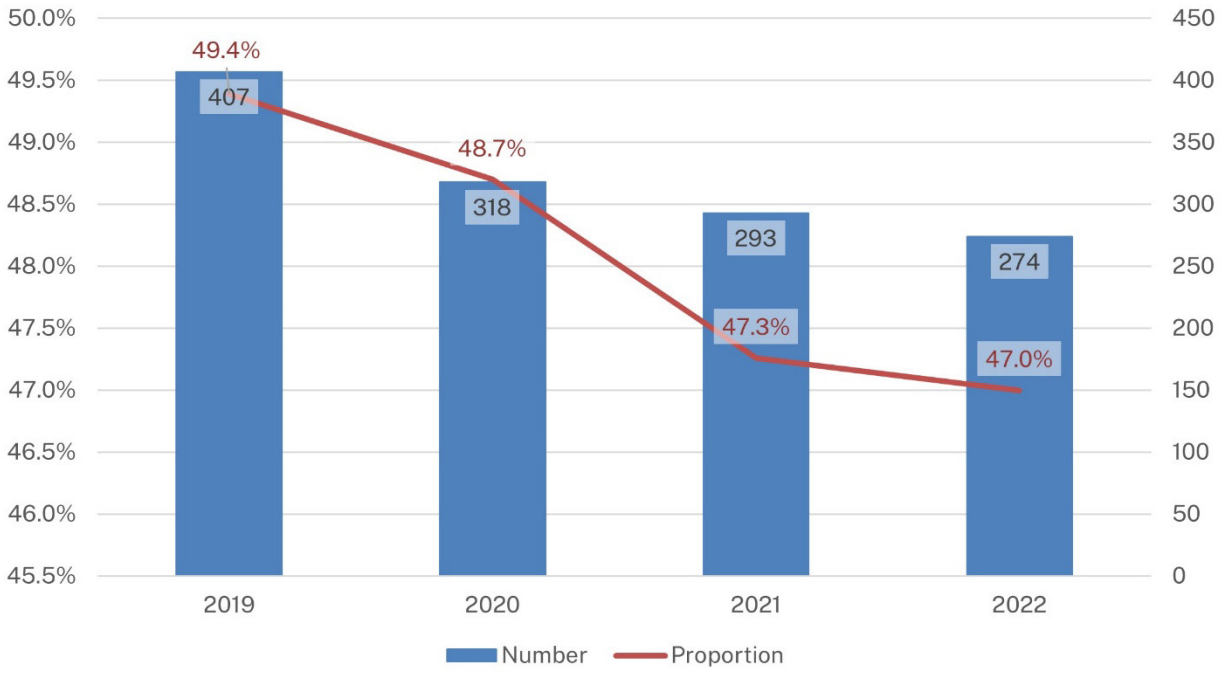
Source: NSW Bureau of Crime Statistics and Research, reference 23-22438.
The data tables for this figure are in Appendix A.

1.29 Figure 1.8 shows the proportion of all female offenders who were sentenced to imprisonment for more than 6 months in 2019 – 2022 who were Aboriginal (the red

16. NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less*, Report (2004) 10; NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [6.96].

line) and the number of female Aboriginal offenders sentenced to imprisonment for more than 6 months (the blue columns). Both show a downward trend over the four years – from 407 Aboriginal women to 274 and from 49.4% of female offenders to 47.0%.

Figure 1.8: Number and proportion of Aboriginal female offenders receiving sentences of imprisonment of more than 6 months, 2019 – 2022

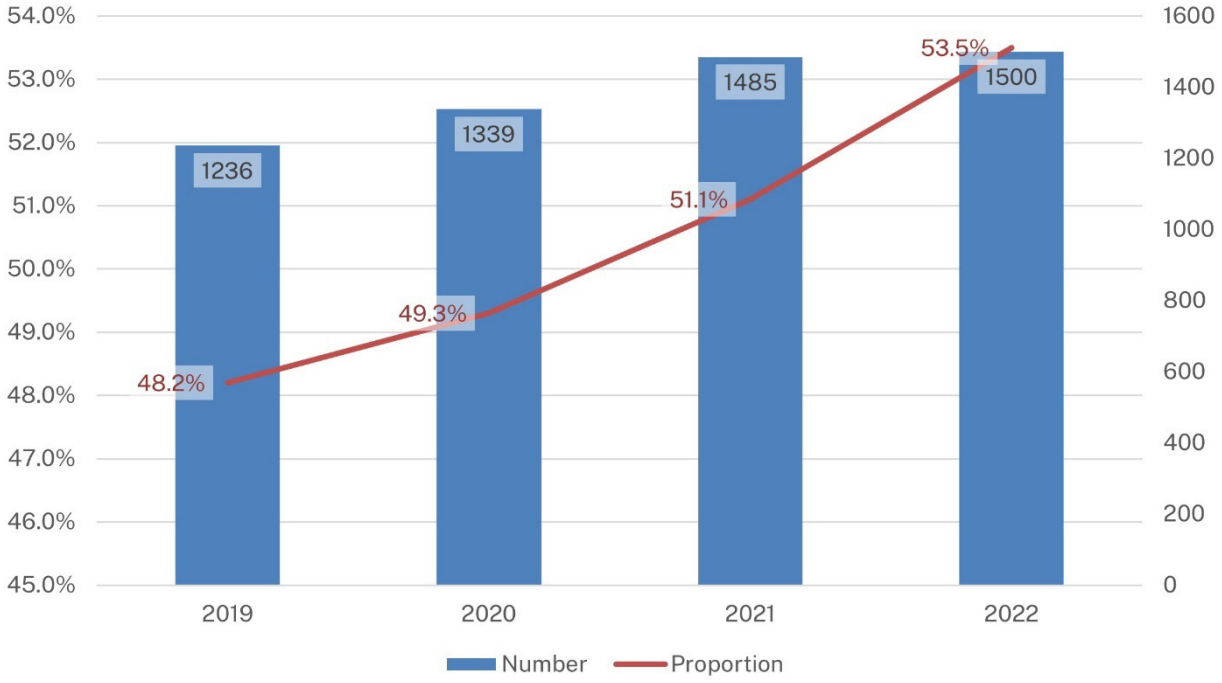


Source: NSW Bureau of Crime Statistics and Research, reference 23-22438.
The data tables for this figure are in Appendix A.

Male offenders

1.30 Figure 1.9 shows the proportion of all male offenders who were sentenced to imprisonment for 6 months or less in 2019–2022 who were Aboriginal (the red line) and the number of male Aboriginal offenders sentenced to imprisonment for 6 months or less. Both show a continuing upward trend over the four years – from 1236 Aboriginal men to 1500 and from 48.2% of male offenders to 53.5%.

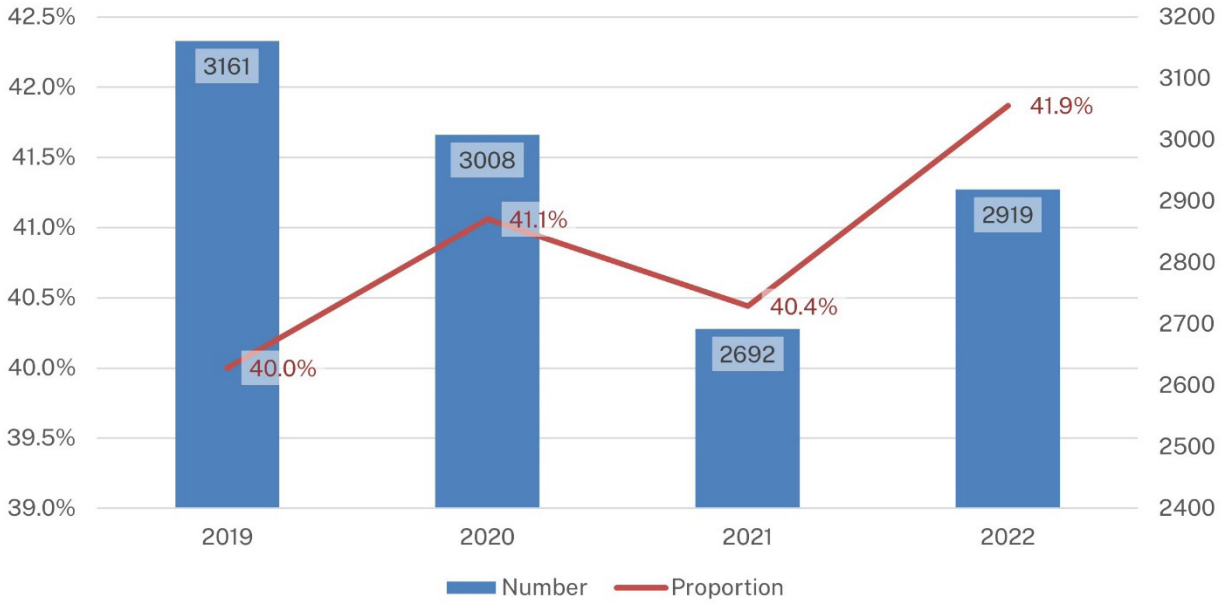
Figure 1.9: Number and proportion of Aboriginal male offenders receiving sentences of imprisonment of 6 months or less, 2019 – 2022



Source: NSW Bureau of Crime Statistics and Research, reference 23-22438.
The data tables for this figure are in Appendix A.

1.31 Figure 1.10 does not show a clear trend for Aboriginal male offenders.

Figure 1.10: Number and proportion of Aboriginal male offenders receiving sentences of imprisonment of more than 6 months, 2019 – 2022



Source: NSW Bureau of Crime Statistics and Research, reference 23-22438.
The data tables for this figure are in Appendix A.

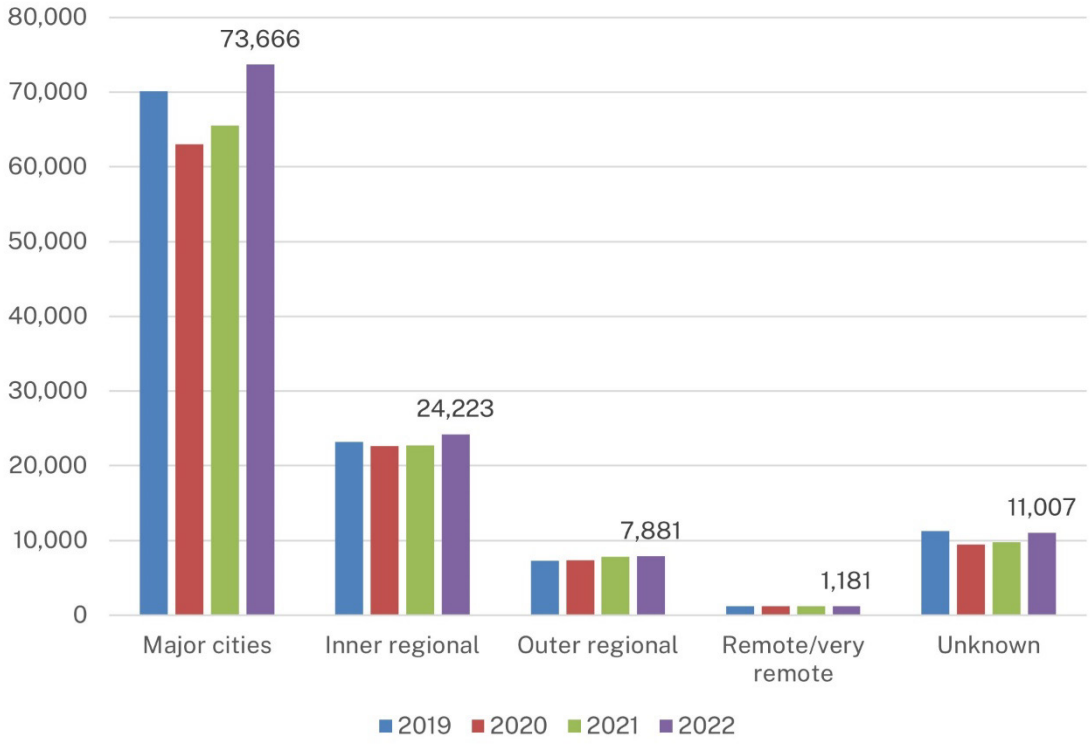
Regional data

1.32 Figure 1.11 sets out the total number of offenders who received a relevant penalty in each region in 2019 – 2022.

1.33 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 1.11: NSW higher and local criminal courts, number of offenders sentenced in each region, 2019 – 2022



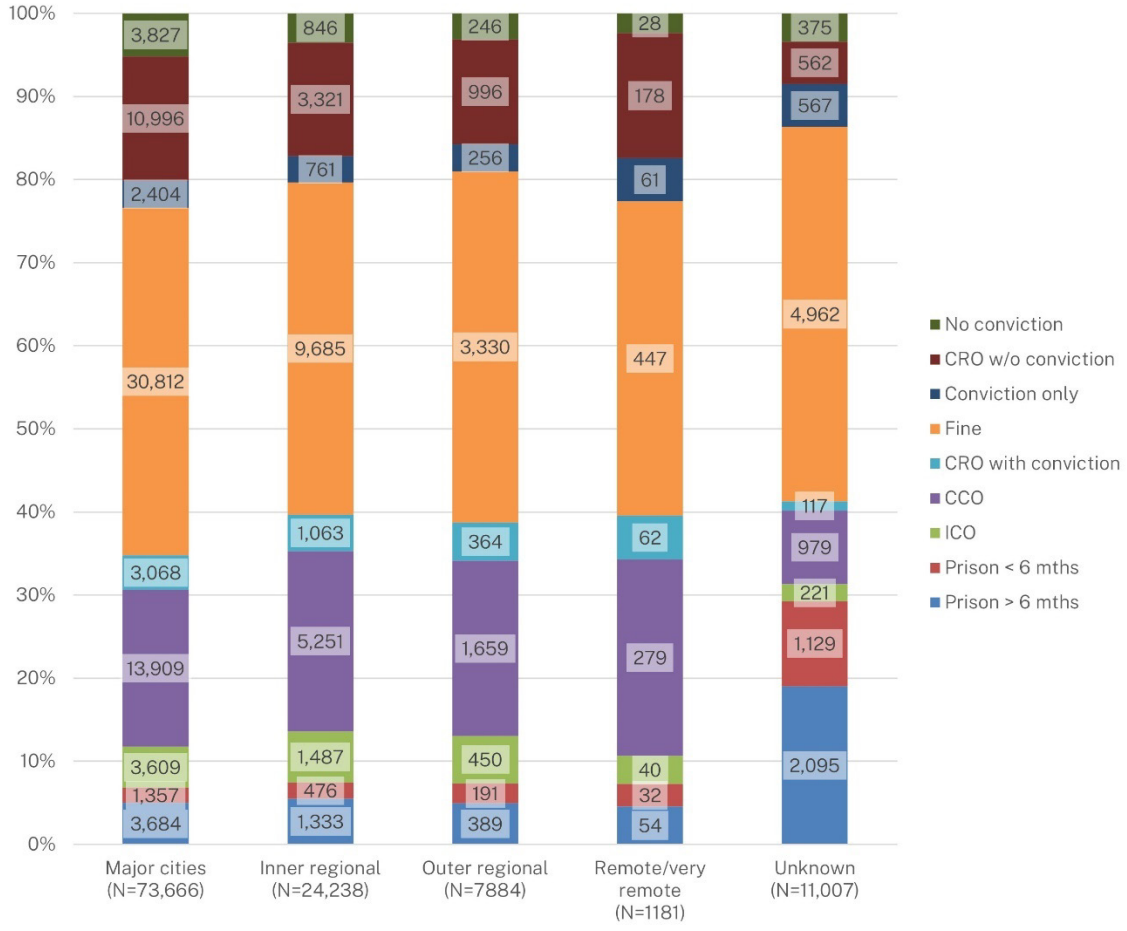
Source: NSW Bureau of Crime Statistics and Research, reference 23-22438.
The data tables for this figure are in Appendix A.

1.34 Figure 1.12 sets out the proportion of each penalty imposed by region in 2022.

1.35 It shows a generally even proportional distribution of penalties in the various regions. The more resource-intensive options, the ICO and the CCO, are relatively equally available in areas outside of major cities. The two penalties were imposed in 27.8% of cases in inner regional communities, in 26.8% of cases in outer regional communities and in 27.0% of cases in remote and very remote communities. On the other hand, they are imposed in proportionately fewer cases in major cities – in 23.8% of cases.

1.36 We note that a large number of offenders do not have a region recorded. Many of these received sentences of imprisonment.

Figure 1.12: NSW higher and local criminal courts, proportion of penalties imposed in each region, 2022



Source: NSW Bureau of Crime Statistics and Research, reference 23-22438.
The data tables for this figure are in Appendix A.

Discharge of sentencing orders

1.37 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.

1.38 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 four 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.

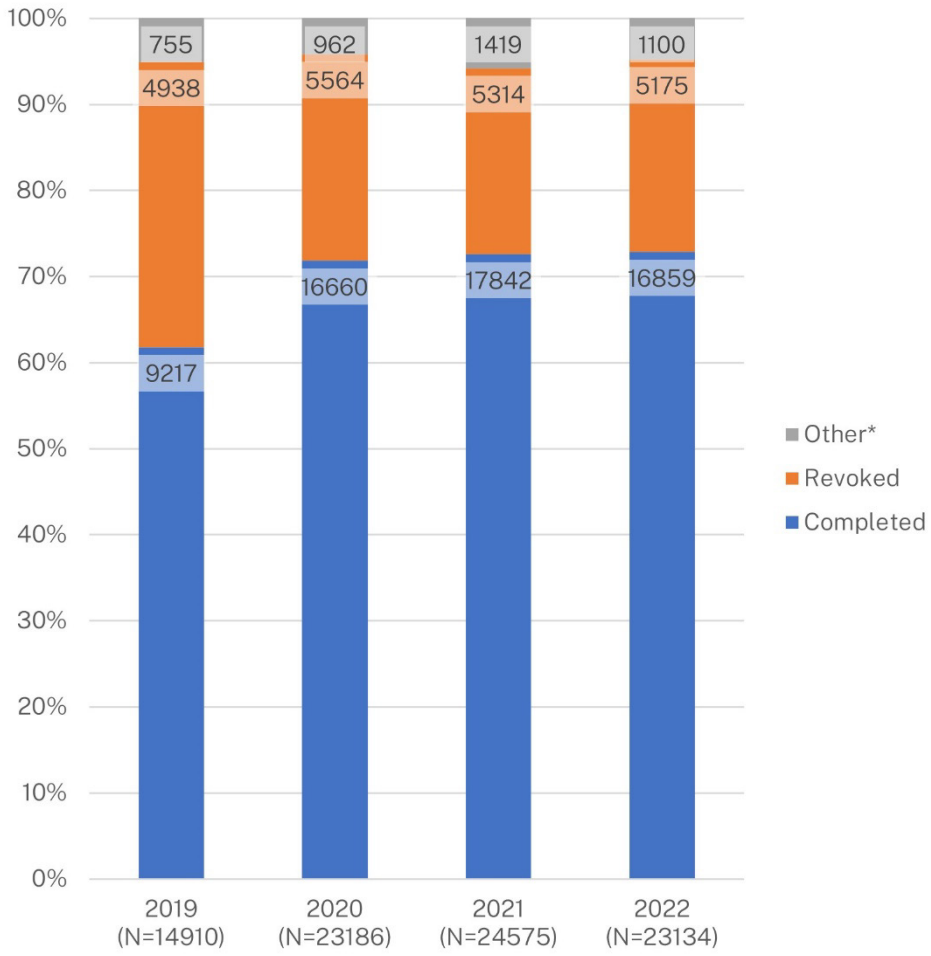
Intensive correction orders

1.39 Figure 1.13 shows the numbers of ICOs that were discharged 2019 – 2022.

1.40 In 2022, 23,134 ICOs were discharged. Of this number:

- 16,859 (72.9%) were discharged as the result of completing the ICO
- 5175 (22.4%) were revoked, and
- 1100 (4.8%) were discharged for other reasons (including transfers and deceased).

Figure 1.13: Discharge of intensive correction orders, 2019 – 2022



Source: Corrections Research Evaluation and Statistics.
* "Other" includes transfers, deceased and other.
The data tables for this figure are in Appendix A.

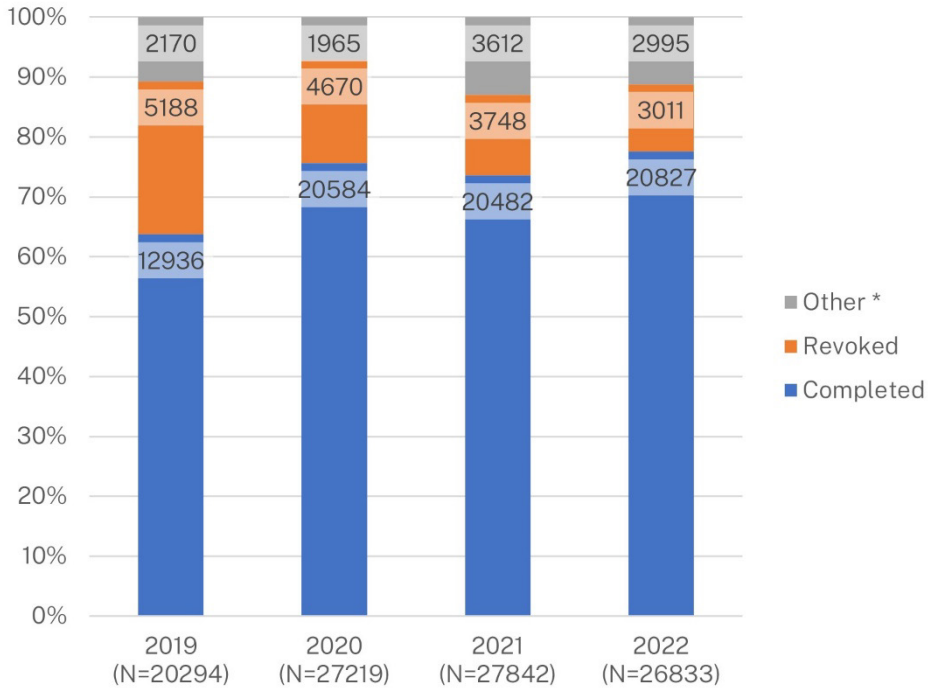
Community correction orders

1.41 Figure 1.14 shows the numbers of CCOs that were discharged in 2019 – 2022.

1.42 In 2022, 26,833 CCOs were discharged. Of this number:

- 20,827 (77.6%) were discharged as the result of completing the CCO
- 3011 (11.2%) were revoked, and
- 2995 (11.2%) were discharged for other reasons.

Figure 1.14: Discharge of community correction orders, 2019 – 2022



Source: Corrections Research Evaluation and Statistics.
* "Other" includes transfers, deceased and other.
The data tables for this figure are in Appendix A.

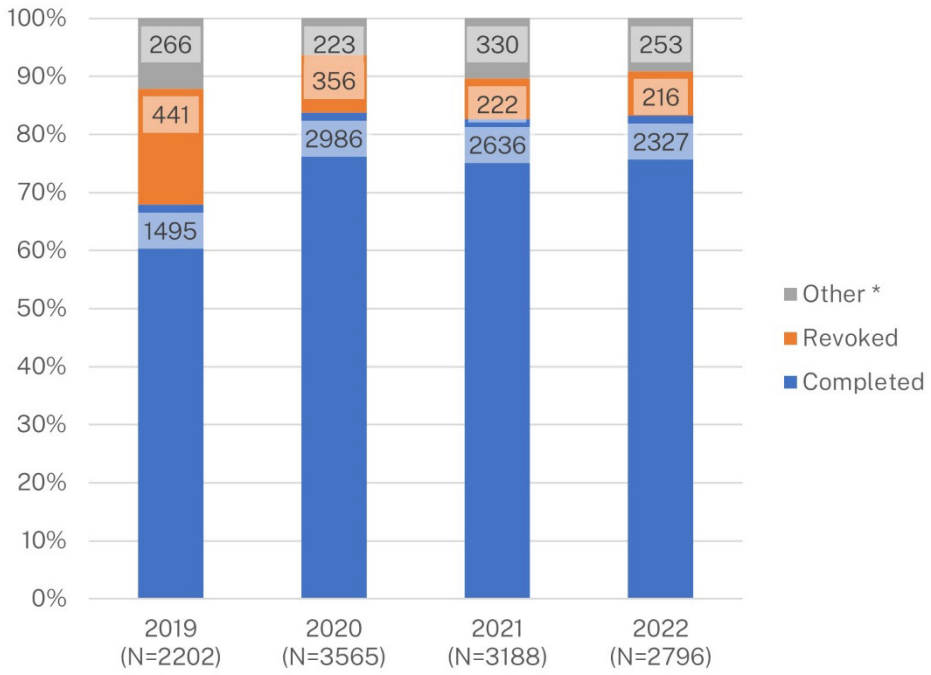
Conditional release orders

1.43 Figure 1.15 shows the numbers of CROs that were discharged 2019 – 2022.

1.44 In 2022, 2796 CROs (both with and without a conviction) were discharged. Of this number:

- 2327 (83.2%) were discharged as the result of completing the CRO
- 216 (7.7%) were revoked, and
- 253 (9%) were discharged for other reasons.

Figure 1.15: Discharge of conditional release orders, 2019 – 2022



Source: Corrections Research Evaluation and Statistics.
* "Other" includes transfers, deceased and other.
The data tables for this figure are in Appendix A.

Breach and revocation of sentencing orders

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

1.46 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

1.47 CROs may be imposed with or without a conviction.

1.48 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.[17]

17. *Crimes (Administration of Sentences) Act 1999* (NSW) s 108C(1).

1.49 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.[18]

1.50 If the court revokes a CRO, it may sentence or re-sentence the offender for the offence to which the revoked order relates.[19]

Number of CROs where breach established by the courts

1.51 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.

1.52 Figure 1.16 shows the number of **CROs without a conviction** that a court has found to have been breached in 2019-2022 (indicated by the orange line).

1.53 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 2022, offenders breached one or more CROs without a conviction on 1809 appearances. Of these, 1374 (76.0%) involved breach of one order. The remainder (24.0%) involved breaches of two or more orders.[20]

1.54 In 2022, 2477 **CROs without a conviction** were found to have been breached. By way of comparison, in 2022, the courts issued 21,394 CROs without 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 2022.

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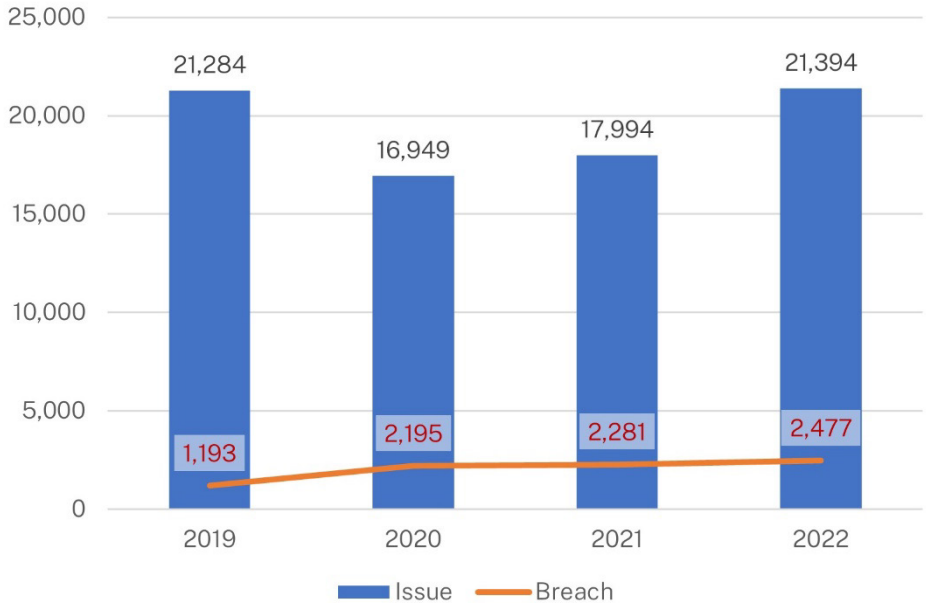
18. *Crimes (Administration of Sentences) Act 1999* (NSW) s 108C(5).
19. *Crimes (Administration of Sentences) Act 1999* (NSW) s 108D.
20. NSW Bureau of Crime Statistics and Research, reference 23-22443.

Figure 1.16: Number of conditional release orders without a conviction breached, compared with number issued, 2019 – 2022



Source: NSW Bureau of Crime Statistics and Research, reference kf23-22440.
The data tables for this figure are in Appendix A.

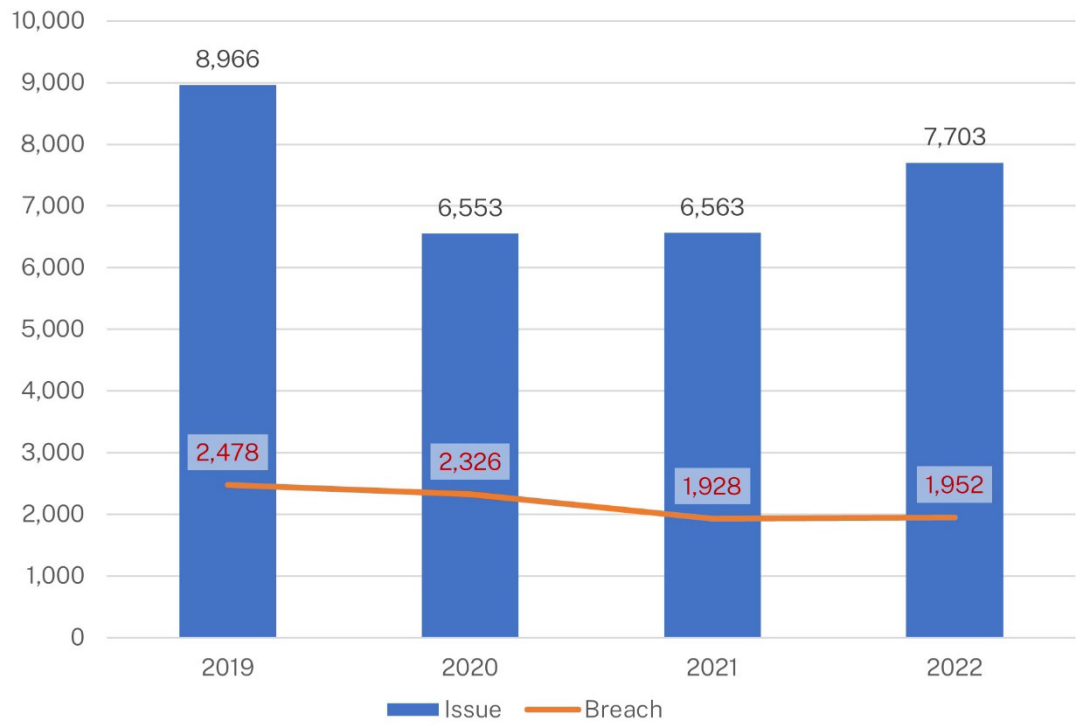
1.55 Figure 1.17 shows the number of **CROs with a conviction** that a court has found to have been breached in 2019-22 (indicated by the orange line).

1.56 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 2022, offenders breached one or more CROs with a conviction on 1221 appearances. Of these, 828 (67.8%) involved breach of one order. The remainder (32.2%) involved breaches of two or more orders.[21]

1.57 In 2022, 1952 CROs with a conviction were found to have been breached. By way of comparison, in 2022, the courts issued 7703 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 2022.

21. NSW Bureau of Crime Statistics and Research, reference 23-22443.

Figure 1.17: Number of conditional release orders with a conviction breached, compared with number issued, 2019 – 2021



Source: NSW Bureau of Crime Statistics and Research, reference kf23-22440.
The data tables for this figure are in Appendix A.

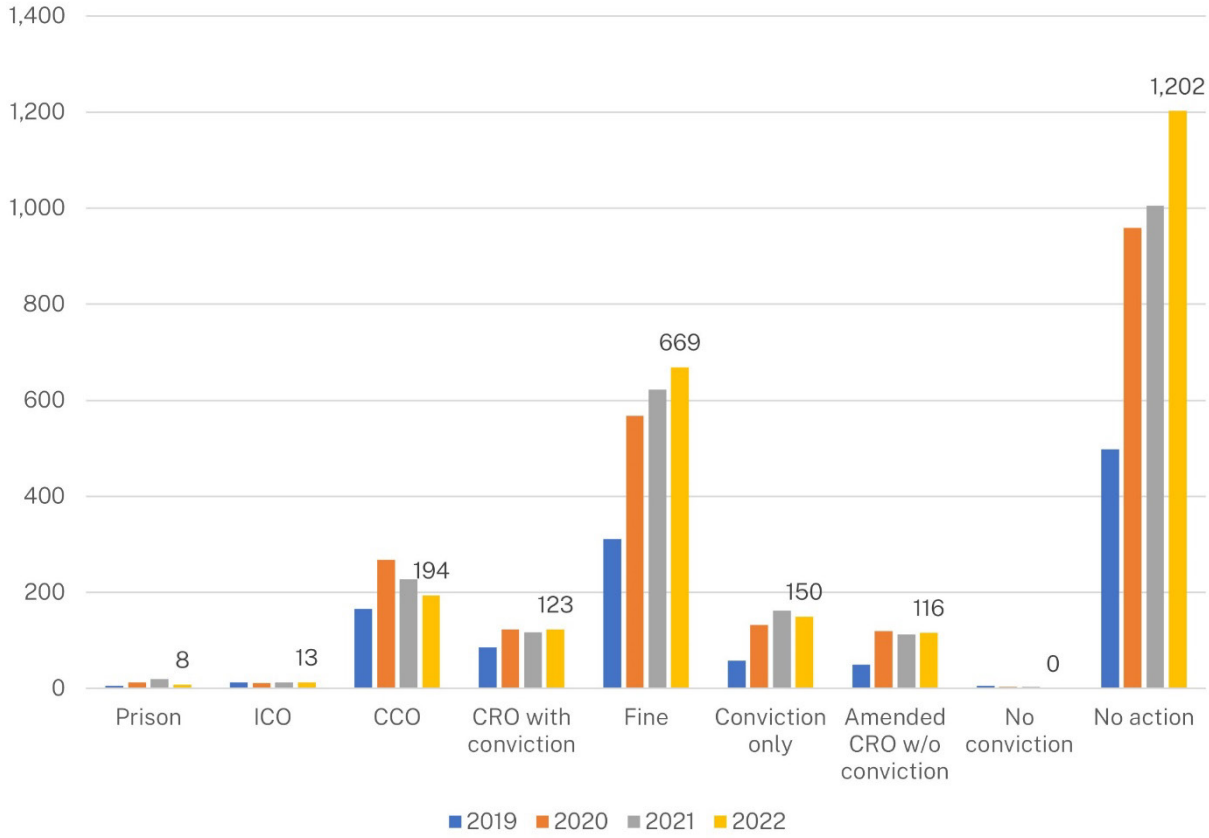
Outcomes of breaches that were referred to the courts

1.58 The following figures show the number of outcomes for each breached CRO in 2019 – 2022. They are divided into CROs without a conviction and CROs with a conviction.

1.59 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.

1.60 Figure 1.18 shows the number of options employed by the courts when offenders breached the conditions of **CROs without a conviction recorded** in 2019 – 2022.

Figure 1.18: Outcomes (number) of breach of each conditional release order without a conviction, 2019 – 2022



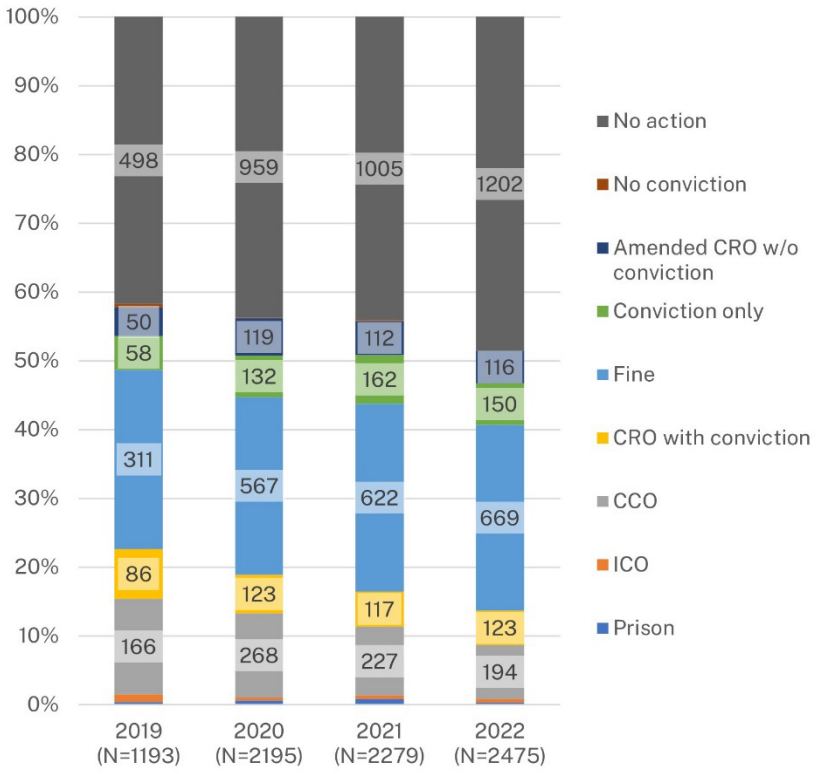
Source: NSW Bureau of Crime Statistics and Research, reference kf23-22440.
The data tables for this figure are in Appendix A.

1.61 Figure 1.19 shows the proportion of outcomes for each breached **CRO without a conviction**. In 2022, the courts decided to take no action on 48.6% of the breached orders. For 27.0% of the breached orders the courts imposed a fine. The court amended the conditions of the order in only 4.7% of cases.

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

1.63 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 7.8%).

Figure 1.19: Outcomes (proportion) of breach of each conditional release order without a conviction, 2019 – 2022

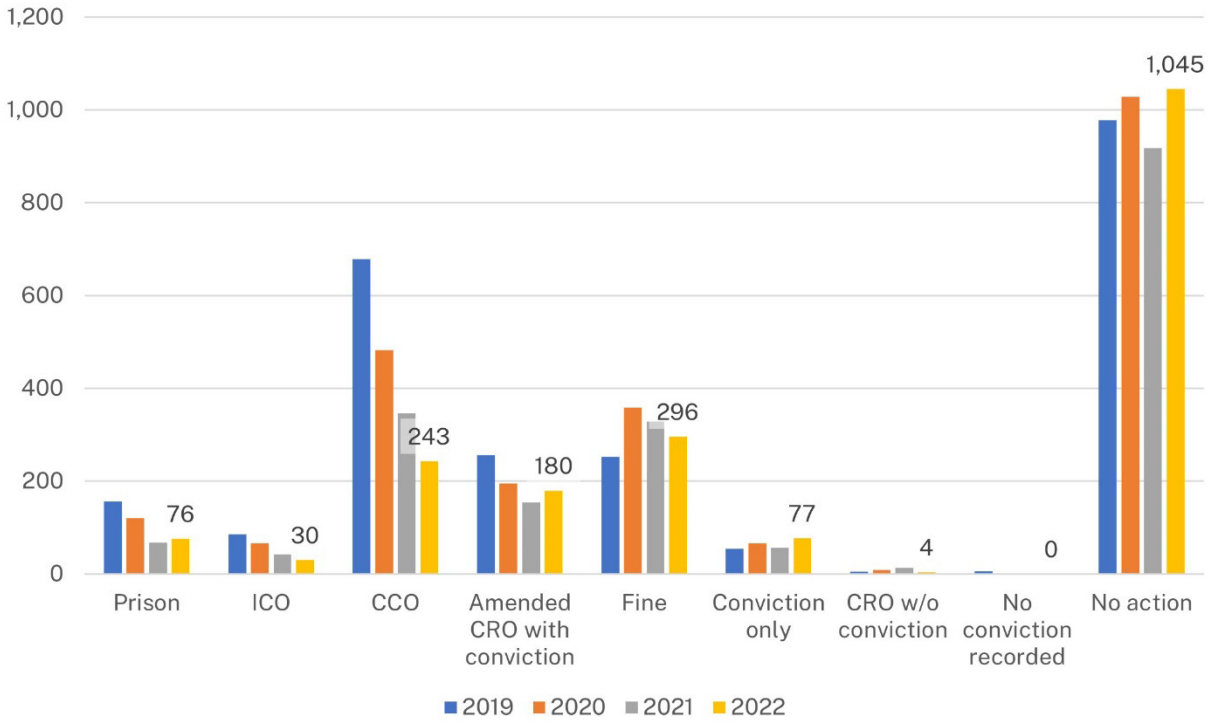


Source: NSW Bureau of Crime Statistics and Research, reference kf23-22440.
The data tables for this figure are in Appendix A.

1.64 Figure 1.20 shows the number of options employed by the courts when offenders breach the conditions of **CROs with a conviction** recorded in 2019-2022.

1.65 It shows a declining number of orders breached which is consistent with the decline in number of orders issued and breached shown in Figure 1.13.

Figure 1.20: Outcomes (number) of breach of each conditional release order with a conviction, 2019 – 2022



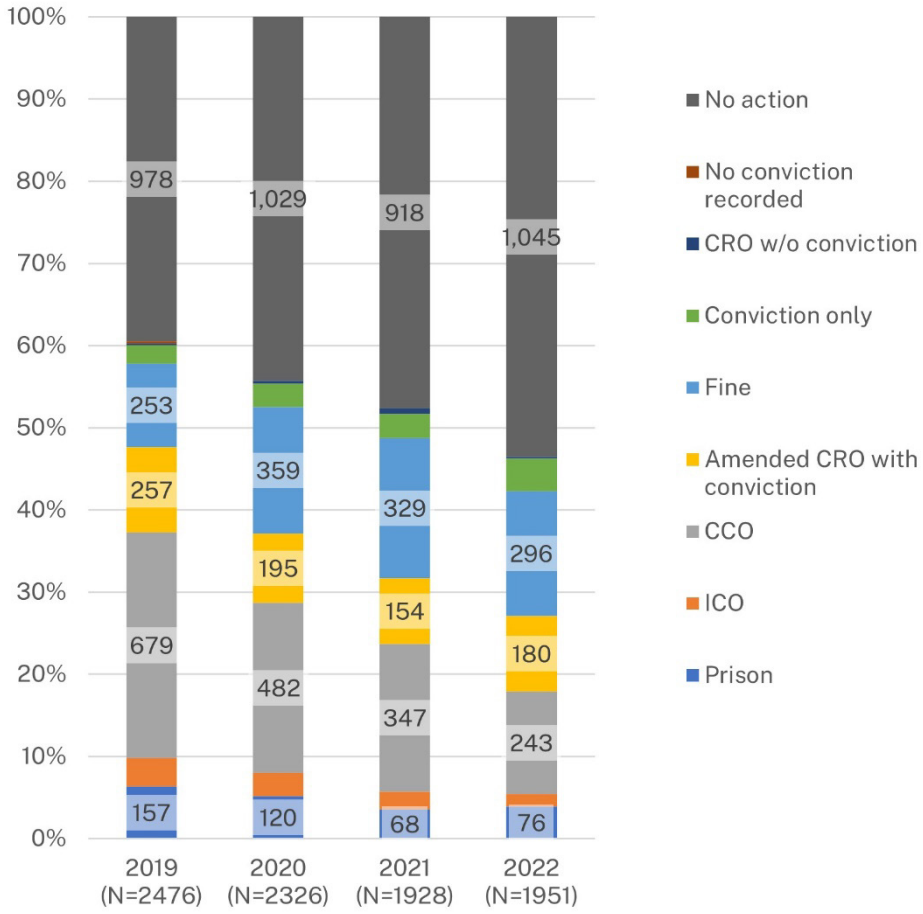
Source: NSW Bureau of Crime Statistics and Research, reference kf23-22440.
The data tables for this figure are in Appendix A.

1.66 Figure 1.21 shows the proportion of outcomes for each breached **CRO with a conviction**.

1.67 In 2022, the courts decided to take no action on 53.6% of the breached orders. The courts imposed a fine for 15.2% of breached orders and a CCO for 12.5% of breached orders. The court amended the conditions of the order in only 9.2% of cases.

1.68 Since 2019, there has been an increase in the proportion of breaches responded to by no action (from 39.5% to 53.6%) and by a fine (from 10.2% to 15.2%). There has also been a decrease in the proportion of breaches for which the courts have imposed a CCO (from 27.4% to 12.5%).

Figure 1.21: Outcomes (proportion) of breach of each conditional release order with a conviction, 2019 – 2021



Source: NSW Bureau of Crime Statistics and Research, reference kf23-22440.
The data tables for this figure are in Appendix A.

Community correction orders

1.69 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.[22]

1.70 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.[23]

22. *Crimes (Administration of Sentences) Act 1999* (NSW) s 107C(1).
23. *Crimes (Administration of Sentences) Act 1999* (NSW) s 107C(5).

1.71 If the court revokes a CCO, it may re-sentence the offender for the offence to which the revoked order relates.[24]

Number of CCOs where breach established by the courts

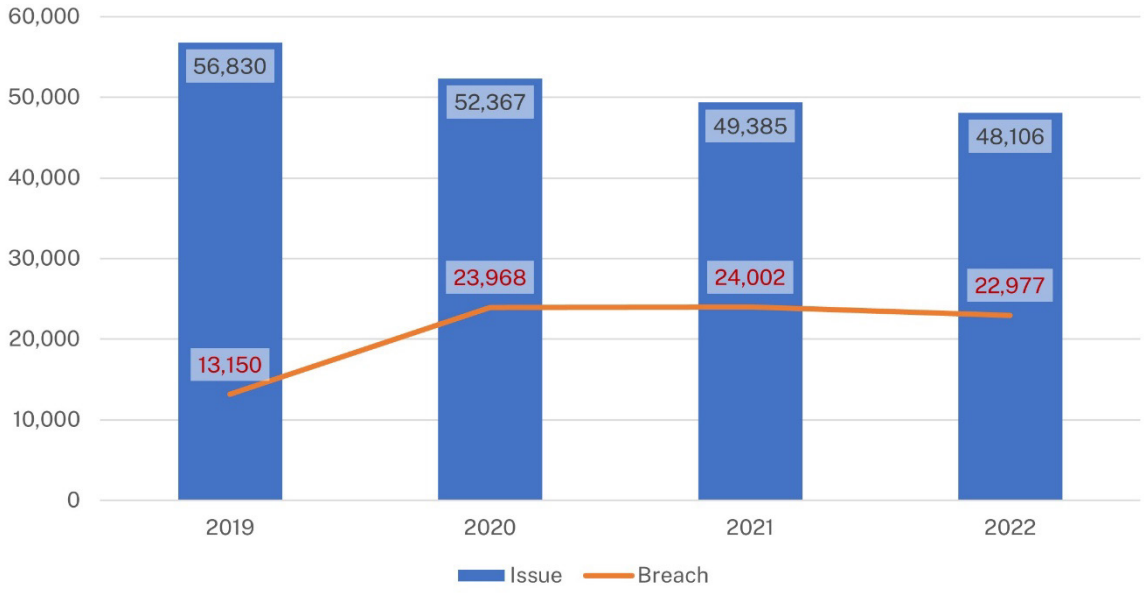
1.72 Figure 1.22 shows the number of instances where a court found that an offender breached the conditions of a CCO in 2019-2022 (indicated by the orange line).

1.73 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 2022, offenders breached one or more CCOs on 10,177 appearances. Of these, 4752 (46.7%) involved breach of one order. The remainder (53.3%) involved breaches of two or more orders.[25]

1.74 In 2022, 22,977 CCOs were found to have been breached. By way of comparison, in 2022, courts issued 48,106 CCOs.

1.75 The increase in numbers between 2019 and 2020 (13,150 to 23,968 CCOs breached) is to be expected as more CCOs enter the system. The numbers appear to have levelled out in 2021.

Figure 1.22: Number of community correction orders breached, compared with number issued, 2019 – 2022



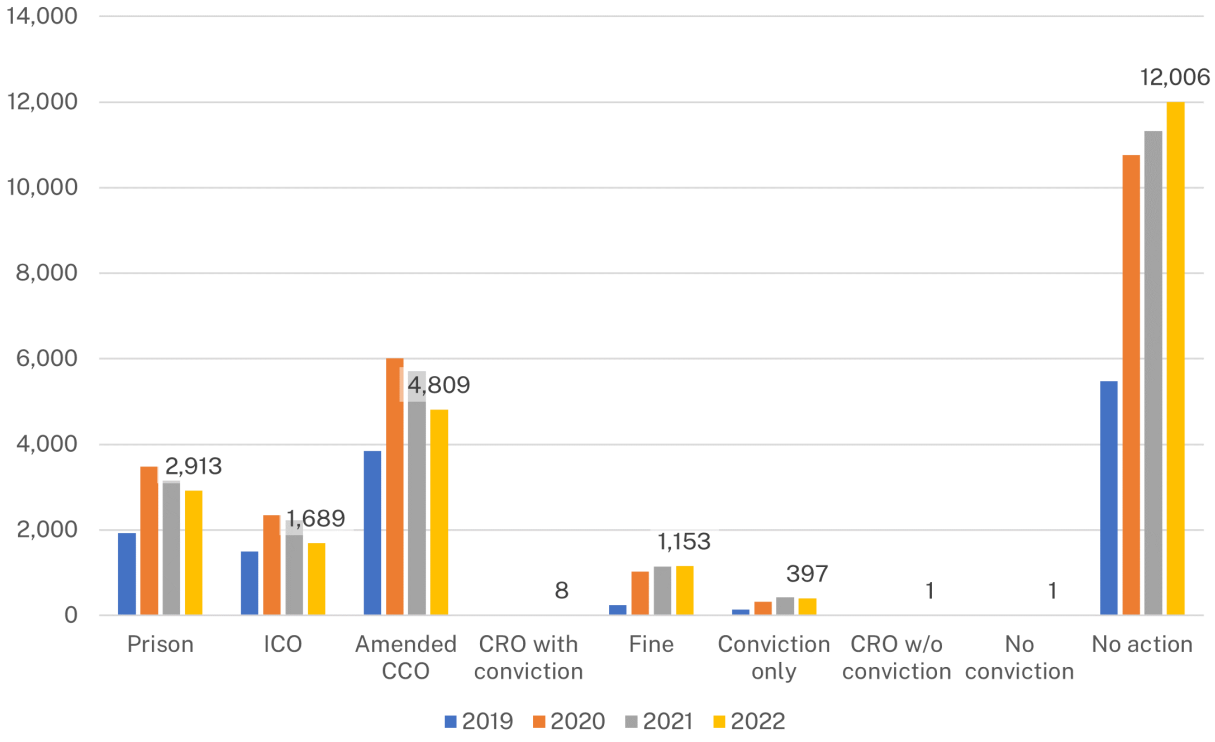
Source: NSW Bureau of Crime Statistics and Research, reference kf23-22440.
The data tables for this figure are in Appendix A.

24. *Crimes (Administration of Sentences) Act 1999* (NSW) s 107D.
25. NSW Bureau of Crime Statistics and Research, reference 23-22443.

Outcomes of breaches that were referred to the courts

1.76 Figure 1.23 shows the number of outcomes for each breached CCO in 2019 – 2022.

Figure 1.23: Outcomes (number) of breach of each community correction order, 2019 – 2022

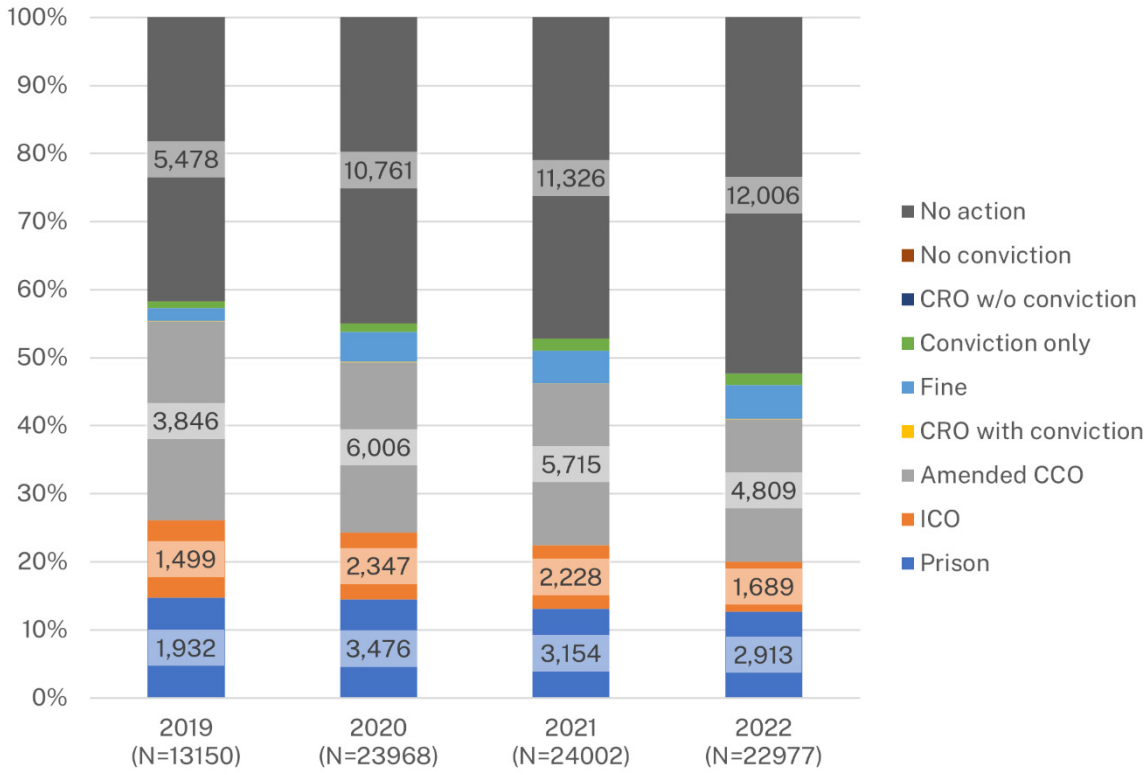


Source: NSW Bureau of Crime Statistics and Research, reference kf23-22440.
The data tables for this figure are in Appendix A.

1.77 Figure 1.24 shows the proportion of outcomes for each breached CCO. In 2022, the courts decided to take no action on the breach for 52.3% of breached orders. The court amended one or more conditions of the CCO for 20.9% of breached CCOs. In a further 20.0%, the court imposed a harsher penalty – either an ICO or imprisonment.

1.78 An increasing proportion of the responses are for the court to take no action (from 41.6% in 2019 to 52.3% in 2022). A decreasing proportion of the responses are to impose an ICO (from 11.4% in 2019 to 7.4% in 2022) or an amended CCO (from 29.2% in 2019 to 20.9% in 2022).

Figure 1.24: Outcomes (percentage) of breach of each community correction order, 2019 – 2022



Source: NSW Bureau of Crime Statistics and Research, reference kf23-22440.
The data tables for this figure are in Appendix A.

Intensive correction orders

1.79 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.

1.80 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.[26]

1.81 Additional conditions that a court impose, include:

- a home detention condition

26. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 73(2).

- 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.[27]

1.82 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).[28]

Breached conditions

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

1.84 The two most commonly breached conditions in 2022 were the standard conditions that apply to all ICOs:

- the offender must not commit any offence – found at 1191 hearings, and
- the offender must submit to supervision by a community corrections officer – found at 713 hearings.

1.85 Figure 1.25 shows the number of breaches of conditions that led to the revocation of an ICO in 2019 – 2022.

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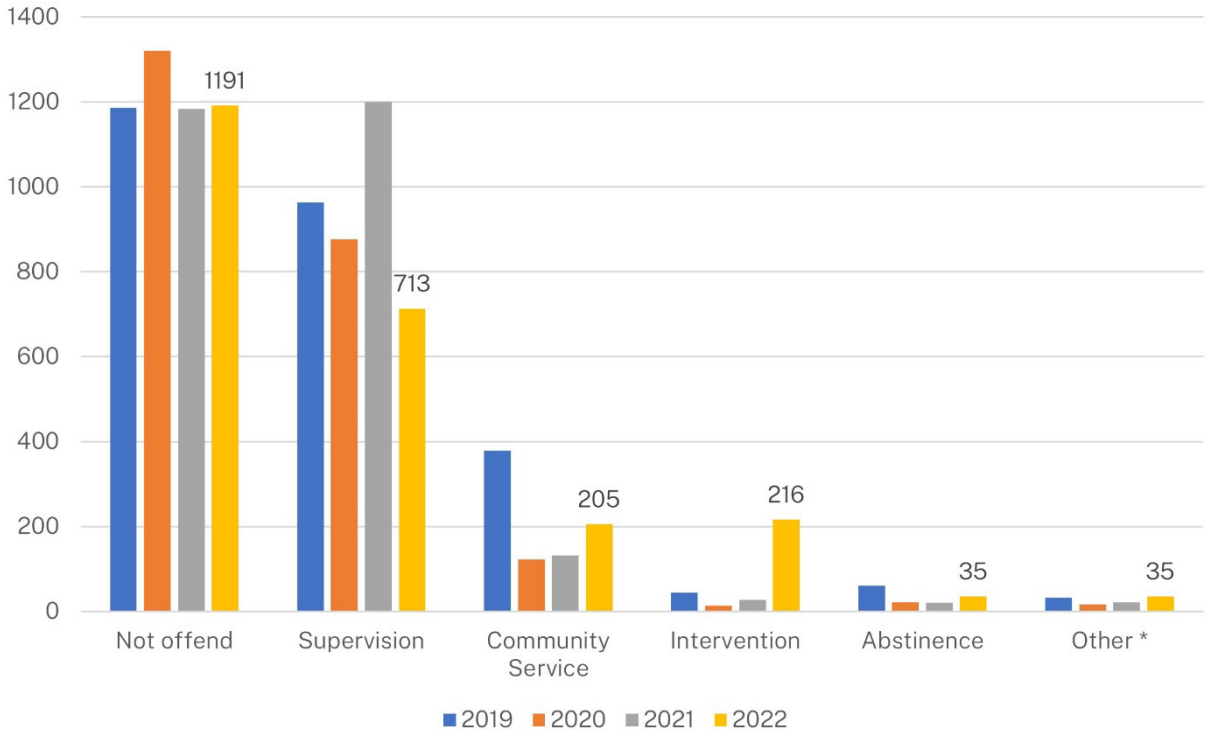
27. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 73A(2)
28. *Crimes (Administration of Sentences) Act 1999* (NSW) s 164(2).

Figure 1.25: Conditions breached resulting in revocation of an ICO in 2019 – 2022



Source: Corrections Research Evaluation and Statistics.
* Other: Home detention, Electronic monitoring, Non association, Curfew, Place restriction.
The data tables for this figure are in Appendix A.

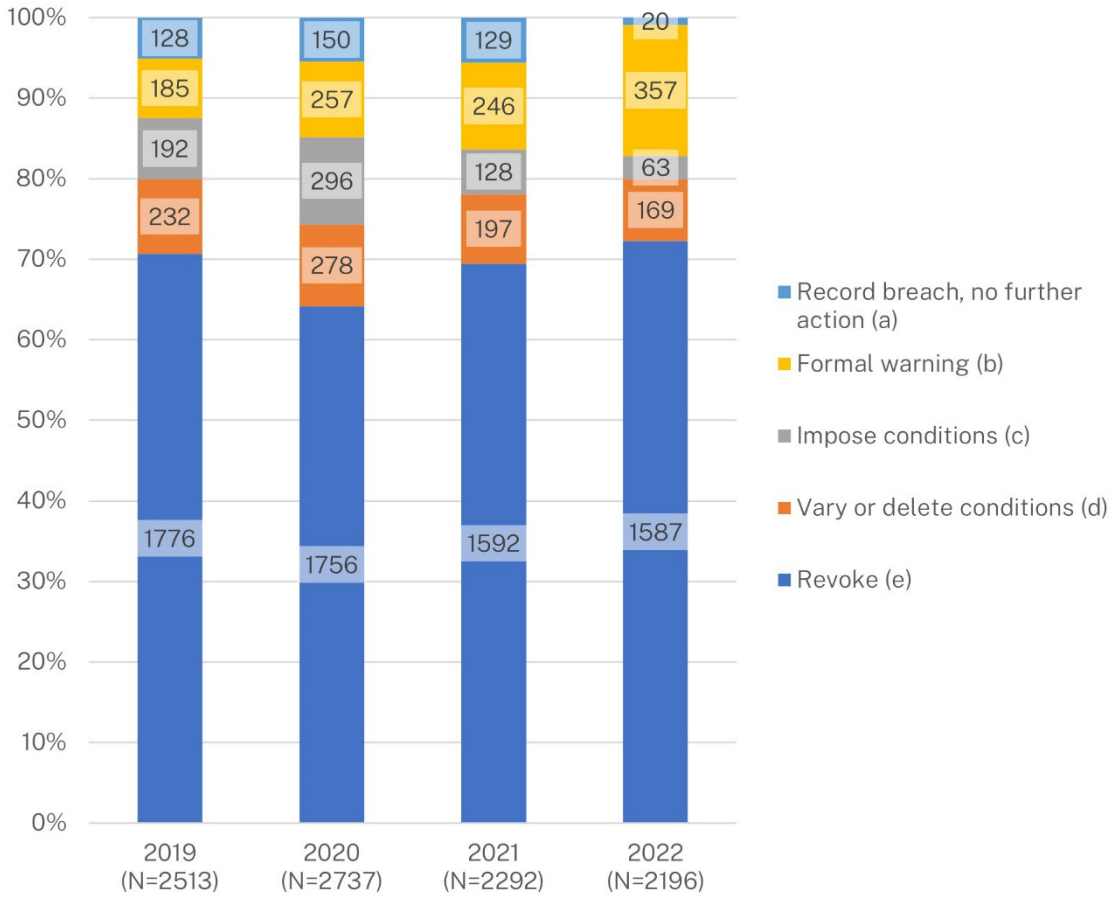
Outcomes of breaches that were referred to the Parole Authority

1.86 In 2022, there were 2,196 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 1587 hearings (72.3%)
- issuing a formal warning – at 357 hearings (16.3%), and
- varying or deleting conditions – at 169 hearings (7.7%).

1.87 Figure 1.26 shows the outcomes of hearings where SPA was satisfied that a breach of an ICO condition had occurred in 2019–2022. It shows a substantial reduction in the proportion of times SPA recorded the breach but took no further action (from 5.6% to 0.9%) and a substantial increase in the proportion of times SPA issued a formal warning (from 10.7% to 16.3%). We understand that these figures may show the results of more potential breaches being dealt with by Community Corrections administratively and not brought before SPA during the COVID-19 pandemic.

Figure 1.26: Outcomes where Parole Authority was satisfied a breach occurred, 2019 - 2022



Source: Corrections Research Evaluation and Statistics.
The data tables for this figure are in Appendix A.

Reinstatement after revocation

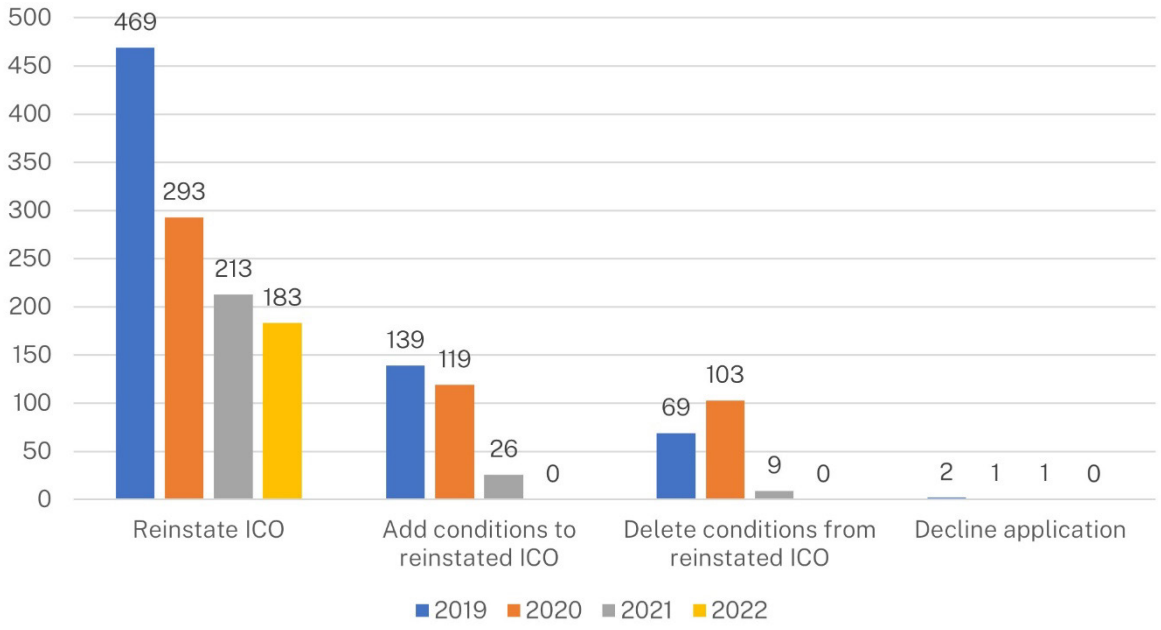
1.88 After an ICO has been revoked and an offender has served at least one month in full-time custody, SPA may, on an offender's application, reinstate the ICO.[29] The application must state "what the offender has done, or is doing, to ensure that the offender will not fail to comply with the offender's obligations under the intensive correction order in the event that it is reinstated".[30]

1.89 Figure 1.27 shows the outcomes of reinstatement applications for ICOs in 2019–2022. In 2022, SPA reinstated ICOs on 183 occasions. SPA did not add or delete any conditions upon reinstatement. These numbers show a substantial drop from previous years' figures (from 469 occasions in 2019). This may, again, reflect the move to Community Corrections dealing with some potential breaches

29. *Crimes (Administration of Sentences) Act 1999* (NSW) s 165.
30. *Crimes (Administration of Sentences) Act 1999* (NSW) s 165(2)(b).

administratively, thereby reducing the need for reinstatement and, in particular, reinstatement with conditions added or deleted.

Figure 1.27: Outcomes of reinstatement applications for intensive correction orders, 2019–2021



Source: Corrections Research Evaluation and Statistics.
The data tables for this figure are in Appendix A.

2. Sentencing-related research

2.1 This chapter summarises notable research relating to the operation of sentencing in NSW that was conducted in 2022. The research was undertaken or sponsored by a variety of bodies, including the NSW Bureau of Crime Statistics and Research (BOCSAR) and the Judicial Commission of NSW (Judicial Commission).

The impact of the NSW Youth Koori Court on sentencing and reoffending outcomes

2.2 This report, published by BOCSAR,[1] examined the impact of the NSW Youth Koori Court on outcomes for young Aboriginal people. In particular, the report considered the impact of the Youth Koori Court on the probability of offenders being sentenced to a juvenile control order (a sentence comprising a custodial term of up to two years at a youth detention centre) and recidivism rates.

2.3 The Youth Koori Court was established in February 2015 to address the over-representation of young Aboriginal people in custody. The Court provides an alternative case management process for young Aboriginal people appearing before the NSW Children's Court, which is designed to increase compliance with

1. 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).

court orders, reduce risk factors related to reoffending, and increase young Aboriginal and Torres Strait Islander peoples' confidence in the criminal justice system. The Youth Koori Court develops an action and support plan which is then implemented and monitored at intervals. At the successful conclusion of the plan, or termination for other reasons, including non-compliance, the Children's Court must sentence the young person.[2]

2.4 The report compared outcomes for 151 young Aboriginal people who were referred to the Youth Koori Court with outcomes for 2883 young Aboriginal people who had their matters finalised in the NSW Children's Court. The report used two estimation strategies. The first, a linear probability regression model, included control variables such as demographics, offence types, and offending history. The second, a difference-in-differences model, measured changes in outcomes for young Aboriginal people at Parramatta Children's Court after the establishment of the Youth Koori Court.

2.5 The regression model analysis indicated that young Aboriginal people who were referred to the Youth Koori Court were 40% less likely to receive a juvenile control order at the index court finalisation than young Aboriginal people whose matter proceeded through the Children's Court. This finding was supported by the difference-in-differences model analysis, which found that offenders referred to the Youth Koori Court were 8.1 percentage points less likely to be sentenced to a juvenile control order.

2.6 The regression model also indicated that, among young Aboriginal people not sentenced to a juvenile control order, Youth Koori Court participants were 84% less likely to be sentenced to a juvenile control order at reconviction within one year of index court finalisation.

2.7 A subgroup analysis of the regression model results revealed that the Youth Koori Court was also less likely to impose juvenile control orders at index court finalisation on young Aboriginal people who had no prior custodial episodes (7.7 percentage points), or who had been charged with a violent or property offence (7.7 and 5.5 percentage points respectively). These results were reflected in the difference-in-differences analysis. The subgroup analysis of the regression results also indicated that property offenders were 13.7 percentage points less likely to reoffend within one year of finalisation, and 12 percentage points less likely to receive a juvenile control order at reconviction.

2.8 Overall, the study revealed an association between referral to the Youth Koori Court and the diversion of young Aboriginal people from custody. The study observed no adverse impact on recidivism rates, and, in the case of property offenders, there was a decrease in recidivism rates.

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2. Children's Court of NSW, *Practice Note 11: Youth Koori Court* (revised 17 Mar 2023).

2.9 The report's limitations include that:

- Only a small number of young Aboriginal people have been referred to the Youth Koori Court since its establishment.
- The design of the study could not entirely rule out selection bias. For example, young people referred to the Youth Koori Court are willing participants and may therefore be more motivated to comply with process requirements than members of the comparison group. The study's estimates should therefore be interpreted as associative, rather than causal.
- Neither failure to appear nor breach of bail conditions could be included as outcomes in the study.

Sentencing for domestic violence in the Local Court

2.10 This study, published by the Judicial Commission,[3] examined the impact of s 4A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) on Local Court sentences for domestic violence offences. The provision mandates that sentencing for a domestic violence offence must be either full-time detention or a supervised order, unless the court is satisfied that another penalty is more appropriate in the circumstances of the case.

2.11 The study compared the penalties received for domestic violence offences with those received for non-domestic violence offences and found that the former received more severe penalties. The study period was from 24 September 2018, when the provision came into effect, to 23 September 2020.

2.12 A "domestic violence offence" is defined in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) and primarily includes personal violence offences which are committed in the context of a "domestic relationship".[4]

2.13 Seven offences were included in the analysis. These offences were:

- contravene an apprehended violence order (AVO)[5]
- common assault[6]
- stalk or intimidate with intent to cause fear of physical or mental harm[7]

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3. M Zaki, B Baylock and P Poletti, *Sentencing for Domestic Violence in the Local Court*, Sentencing Trends and Issues No 48 (Judicial Commission of NSW, 2022)
4. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 4, s 5(1) definition of "domestic relationship", s 11(1) definition of "domestic violence offence".
5. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14(1).
6. *Crimes Act 1900* (NSW) s 61.
7. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13(1).

- destroy or damage property[8]
- assault occasioning actual bodily harm[9]
- intentionally choke, suffocate or strangle a person without consent,[10] and
- intentionally choke, suffocate or strangle a person with recklessness.[11]

2.14 The first five offences were the five most common domestic violence offences during the study period. The last two offences were relevant because at least 75% of cases involving those offences were related to domestic violence.

2.15 The study found that the courts imposed more severe penalties for domestic violence offences:

- 18.0% received full-time imprisonment compared with 12.6% of non-domestic violence offences
- 9.8% received intensive correction orders (ICOs) compared with 8.1% of non-domestic violence offences
- 39.0% received community correction orders (CCOs) compared with 35.3% of non-domestic violence offences, and
- 8.1% received conditional release orders (CROs) with conviction compared with 7.8% of non-domestic violence offences.

2.16 The study also found that courts imposed more supervision orders for domestic violence offenders. Of the domestic violence offenders that received an ICO, CCO, or CRO, 54.8% received supervision orders, compared with 41.6% of non-domestic violence offenders. The most common supervision order for domestic violence offenders was rehabilitation or treatment (32.0%), which applied to a range of conditions such as mental health, substance abuse, and anger management. Community service was imposed on 14.9% of domestic violence offenders who were sentenced to an ICO or a CCO and abstention from drugs and/or alcohol was imposed for 10.8% of offenders. All other conditions, such as complying with AVOs, curfews, and non-association, were imposed for less than 10% of domestic violence offenders.

2.17 The study analysed the results of appeals heard in the District Court relating to domestic violence offences. In the study period, 8.4% of domestic violence offences were appealed in the District Court, with 7.9% being severity appeals and 0.8% being appeals against conviction. The court allowed 38.9% of conviction appeals and 63.7% of severity appeals. Of the severity appeals, 72.3% related to

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8. *Crimes Act 1900* (NSW) s 195(1).
9. *Crimes Act 1900* (NSW) s 59(1).
10. *Crimes Act 1900* (NSW) s 37(1A).
11. *Crimes Act 1900* (NSW) s 37(1).

fulltime imprisonment. There was one appeal against the inadequacy of a sentence which was dismissed.

2.18 The study concluded that overall, penalties were more severe for domestic violence offences, with a higher rate of imprisonment and supervision orders being imposed. The study suggested that this reflected the new sentencing principles contained in s 4A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and, given the small proportion of successful severity appeals, concluded that the Local Court had been consistent with the intent of the legislation.

Have the 2018 sentencing reforms reduced the risk of reoffending?

2.19 This study, published by BOCSAR,[12] examined whether the reforms introduced by the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) reduced reoffending and further episodes of imprisonment.

2.20 The reforms aimed to increase the proportion of adult offenders sentenced to supervised community-based orders, reduce the proportion of those serving short prison sentences, and reduce reoffending by extending supervision and therapeutic interventions to high-risk offenders and managing them more effectively in the community.

2.21 The study used BOCSAR's Re-offending Database to examine all matters involving adults finalised in the 13 weeks before and 13 weeks after the commencement of the sentencing reforms on 24 September 2018. It measured reoffending up to 29 February 2020.

2.22 The sample was restricted to offenders whose index principal offence had a statutory maximum penalty of imprisonment. It excluded those for whom an ICO could not be imposed and those in custody for a prior offence. The time restrictions ensured that all offenders had at least 12 months against which reoffending could be measured and avoided measuring outcomes during the COVID-19 pandemic. The resulting sample included 36,941 finalisations, 7820 involving domestic violence and 4901 where the offenders were sentenced to short-term prison or a community custodial sentence.

2.23 The study compared custody and reoffending outcomes for the group sentenced before the reforms and the group sentenced after the reforms, controlling for other factors (covariates) that may influence reoffending.

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12. N Donnelly, M-T Kim, S Rahman and S Poynton, *Have the 2018 NSW Sentencing Reforms Reduced the Risk of Re-Offending?* Crime and Justice Bulletin No 246 (NSW Bureau of Crime Statistics and Research, 2022).

2.24 The data showed expected differences between the two groups in relation to the principal penalty received. For the post-reform group, there was:

- a smaller proportion of offenders who received prison (6.7% compared with 8.1%)
- a smaller proportion who received an unsupervised community order (31.8% compared with 37.2%), and
- a higher proportion who received a supervised community order (26.2% compared with 18.2%), including an increase in supervised custodial orders (from 5.3% to 7.2%) and in supervised non-custodial orders (from 12.9% to 19.1%).

2.25 The study found reoffending rates tended to be slightly lower for the post reform group in terms of:

- any reoffending (28.9% compared with 31.1%)
- domestic violence offending (27% compared with 29.9%), and
- offenders sentenced to short prison sentences or community custodial sentences (41.4% compared with 43.0%).

2.26 Offenders also reoffended slightly more slowly. For example, it took 111 free days for 15% of post reform offenders to reoffend compared with 103 free days for the pre-reform group.

2.27 While unadjusted regression estimates showed that reoffending within one year was significantly lower in the post reform group, the estimates adjusted for covariates showed no statistical difference between the two groups.

2.28 Similarly, in relation to the time to next offence, unadjusted regression estimates suggested a 6% reduction in the risk of reoffending at any time. However, the estimates adjusted for covariates suggested a 2% reduction which was no longer statistically relevant.

2.29 Similar patterns were observed for domestic violence offenders, as well as those convicted of serious violence, property and drug reoffending. There was also no significant reduction in those sentenced to short-term prison or a community custodial sentence.

2.30 The study also compared the proportion in the pre-reform and post-reform groups that received a new sentence of imprisonment within one year and found no significant difference between them.

2.31 A supplementary analysis examined the impact of the reforms on those most likely to have received a supervised community-based order because of the reforms. This was to address the possibility that the result from a simple comparison were influenced by a large number of offenders who were unlikely to be affected by the reforms.

2.32 The first stage of the analysis estimated that post-reform offenders were approximately 8 percentage points more likely to receive a supervised community-based order (26.2% compared with 18.2%). However, the second stage did not estimate any meaningful impact on reoffending for those that received a supervised community-based order after the reforms or any change in new terms of imprisonment. Again, no meaningful differences were found in relation to domestic violence offences, serious violence, property and drug offences, or among those sentenced to a short prison sentence or a community custodial sentence.

2.33 While the reforms increased the proportion of offenders receiving a supervised community sentence, compared with short-term imprisonment and unsupervised community sentences, there was no evidence to suggest that the reforms significantly reduced reoffending. Earlier offender studies showed significantly lower rates of recidivism among offenders supervised by probation and parole authorities. Explanations for the difference in results include:

- the follow-up period was limited to 12 months to avoid the impact of the COVID-19 pandemic
- the actual rate of supervision was likely to be smaller because Corrective Services only provides community supervision to those assessed as being at medium to high risk of reoffending, and
- the reforms resulted in supervised community orders being given both to some more risky offenders, who would otherwise have received short prison terms, and to some less risky offenders, who would otherwise have received unsupervised community orders, and there may have been opposite effects on reoffending for these groups (for example, more supervision may have resulted in lower risk offenders being detected committing minor offences).

2.34 The study noted that there was no evidence of any adverse impact of the reforms on the prison population. Despite more offenders being placed on supervised orders, there were no additional breaches of supervised orders. Further research was suggested to find whether there had been any savings because of the reduction of short-term sentences of imprisonment (offset against the increased costs of supervising more offenders in the community).

2.35 The authors also suggested that, given the “abundance of evidence” supporting the effectiveness of community supervision in reducing recidivism, there should be further research into the extent and quality of supervision following the reforms. They noted the possibility that the quality of supervision may have been compromised by the greater volume of offenders being subject to supervision. The further research should assess not only the frequency and type of contacts with community corrections officers but also the level of access to behavioural change, education and employment programs.

Jurisdictional differences in sentencing practice

2.36 The findings outlined below, published by the Judicial Commission,[13] arose from the National Jury Sentencing Study. The aim of the study was to examine juror attitudes to sentencing for sex offences and other offences. The study's comparison of legal and lay assessments of relevant sentencing factors for sex offences[14] was summarised in our 2021 Annual Review.[15] Although it was not its aim, the study revealed differences between Australian jurisdictions in relation to sentencing procedures or practice. We summarise the two differences which are of interest to NSW.

Time between verdict and sentence

2.37 The study observed that, in some jurisdictions, the sentencing hearing was sometimes held on the day of the verdict, but in others after a considerable delay. NSW had the longest delay with an average number of 126 days between verdict and sentence for the 20 NSW trials surveyed. The next longest was South Australia, with an average of 88 days for the 11 trials surveyed. The median in NSW was 112 days because in one case there was a delay of 447 days. The study observed that this disparity:

> suggests that a more in-depth Study could shed light on an appropriate balance between expedition, on the one hand, and fair and considered outcomes for offenders, on the other. That it takes 20 times as long to finalise a case post-verdict in NSW as in Qld is startling and clearly has implications in terms of both offenders and victims attaining closure.[16]

Length of sentencing remarks

2.38 NSW also had the longest sentencing remarks with an average of 5488 words. The sentencing remarks in NSW, Victoria and the Australian Capital Territory were considerably longer (with averages of over 4000 words) than Queensland, Tasmania, South Australia and the Northern Territory (with averages of 1818–2654 words). However, the study found no difference in jurors' assessment of clarity and persuasiveness of sentencing remarks based on length.

2.39 The study observed that the disparity in the length of remarks:

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13. K Warner, L Bartels and K Gelb, "Jurisdictional Differences in Sentencing Practice: Insights from the National Jury Sentencing Study" (2022) 34 *Judicial Officers' Bulletin* 27.
14. K Warner and others, "Comparing Legal and Lay Assessments of Relevant Sentencing Factors for Sex Offences in Australia (2021) 45 *Criminal Law Journal* 57.
15. NSW Sentencing Council, *Sentencing Trends and Practices*, Annual Report 2021 (2022) [2.44]–[2.59].
16. K Warner, L Bartels and K Gelb, "Jurisdictional Differences in Sentencing Practice: Insights from the National Jury Sentencing Study" (2022) 34 *Judicial Officers' Bulletin* 27, 29.

> suggests that at least consideration could be given to making reasons more concise, without sacrificing transparency and persuasiveness. There would likely also be significant cost savings attendant on the delivery of shorter sentencing remarks.[17]

2.40 Finally, the study acknowledged that a range of factors may influence the length of remarks, including the complexity of sentencing legislation. It concluded there should be further research, including on:

> how the length of sentencing remarks is perceived by legal practitioners, other judicial officers, offenders, victims and other members of the public.[18]

Trends in the Aboriginal female adult custodial population

2.41 This study, published by BOCSAR,[19] found that the number of Aboriginal women in custody (both under sentence and in remand) had increased between March 2013 and February 2021.

2.42 The study analysed data from Corrective Services NSW's Offender Information Management System (OIMS), NSW Police Force's Computerised Operational Policing System (COPS) and the Court Data Warehouse (CDW).

2.43 The number of Aboriginal women in custody increased by 28%, from a monthly average of 224 women to 287, mostly in the four years from March 2013 to February 2017. The numbers stabilised in 2017 before declining sharply after February 2020, coinciding with the start of the COVID-19 pandemic.

2.44 From the 12 months to February 2014 to the 12 months to February 2020, the average number of Aboriginal women in remand increased by 45 women (52.3%). In the same period, the average number of Aboriginal women in sentenced custody increased by 56 women (40.6%).

2.45 A factor contributing to this increase was that more Aboriginal women were taken to court by police (an increase of 61.9% over the seven years to February 2020), resulting in more Aboriginal women being sentenced to imprisonment. The remand population also increased as more Aboriginal women were refused bail following the show cause amendments to the *Bail Act 2013* (NSW).

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17. K Warner, L Bartels and K Gelb, "Jurisdictional Differences in Sentencing Practice: Insights from the National Jury Sentencing Study" (2022) 34 *Judicial Officers' Bulletin* 27, 30.
18. K Warner, L Bartels and K Gelb, "Jurisdictional Differences in Sentencing Practice: Insights from the National Jury Sentencing Study" (2022) 34 *Judicial Officers' Bulletin* 27, 30.
19. A Pisani, K Sinclair and S Rahman, *Trends in the Aboriginal Female Adult Custodial Population in NSW, March 2013 to February 2021*, Bureau Brief No 161 (NSW Bureau of Crime Statistics and Research, 2022).

2.46 The study found that the imprisonment rate for Aboriginal women had not changed significantly, which it considered surprising given other findings that the 2018 sentencing reforms[20] reduced the likelihood of receiving a sentence of imprisonment. Regression analysis suggested that the unadjusted rate of imprisonment remains stable because sentenced Aboriginal women have more serious offences and more prior offences. This suggests that repeat offending is a persistent issue.

2.47 The study concluded that addressing rates of contact with the criminal justice system is important for reducing imprisonment of Aboriginal women.

The effectiveness of alcohol interlocks in reducing repeat drink driving and improving road safety

2.48 The aim of this study, published by BOCSAR,[21] was to evaluate the impact of the first phase of the mandatory alcohol interlock program introduced in NSW in February 2015. An alcohol interlock device, attached to a motor car, allows a person to drive only if they return a negative breath sample.

2.49 The program, which applies to specified drink driving offenders, imposes a minimum disqualification period, and an automatic interlock period or a further period of disqualification that differs depending on whether the offender was exempted or did not take up the interlock option. The disqualification and interlock periods differ in length depending on the type of offence and whether the offender installs an interlock device. The study, therefore, looked at outcomes within 36 months of the index court finalisation and within 60 months. The 60–month period covers the entire automatic disqualification period for offenders who do not install an interlock.

2.50 Under phase one, the following offenders were eligible for the program:

- first-time high-range drink driving offenders
- drink driving offenders with at least one drink driving conviction within the last five years, and
- any offender who refused a breath test when requested by police.

2.51 The overall uptake of the program was under 60% for all groups, despite their eligibility.

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20. See [1.3], [2.20].
21. S Rahman, *The Effectiveness of Alcohol Interlocks in Reducing Repeat Drink Driving and Improving Road Safety*, Crime and Justice Bulletin No 251 (NSW Bureau of Crime Statistics and Research, 2022).

2.53 The study looked at the impact of stage one of the program on:

- repeat drink driving
- driving while disqualified
- traffic infringements (that did not proceed to court)
- alcohol-related crashes, and
- crashes involving an injury or fatality.

2.54 The study used a dataset extracted from the Re-offending Database of 98,501 proven drink driving offences (those involving a prescribed concentration of alcohol (PCA) or refusal to provide a breath sample) finalised in periods before and after introduction of the program in February 2015 (that is, between 1 June 2012 and 30 April 2018). This included records for 24,598 offenders convicted of an eligible interlock offence (12,245 committed before the scheme was introduced and 12,353 after the scheme was introduced).

2.55 The study used two approaches to determine the impact of the scheme. The first approach (a regression discontinuity design) compared outcomes for:

- first-time mid-range drink drivers who recorded blood alcohol concentration (BAC) readings of between 0.12 BAC and the 0.15 BAC threshold (who were ineligible for the program), and
- first-time high-range drink drivers who recorded readings between the 0.15 BAC threshold and 0.18 BAC (and were, therefore, eligible for the program).

2.56 The reason for this was that offenders who recorded a reading just below or just above the high-range threshold were arguably much more similar on observed and unobserved factors that influenced the likelihood of reoffending. A further refinement of this approach compared only those in the high-range group who took up the interlock option.

2.57 The second approach (a difference in differences analysis) estimated the overall impact of the introduction of the program by comparing outcomes for all eligible drink drivers with non-eligible drink drivers before and after the program commenced. This was because the results from the first approach could not necessarily be generalised to drivers who recorded a BAC outside the narrow bandwidth specified and might not be applicable to repeat offenders or those who refuse breath tests.

Comparing offenders around the high-range offender threshold

2.58 The regression discontinuity estimates for all first-time offenders at the threshold of 0.15 BAC showed:

- a small, statistically significant reduction in PCA reoffending within 12 months of index finalisation (the initial disqualification period)

- a statistically significant reduction of 6.4 percentage points in PCA reoffending during the interlock period
- a small reduction of 1.8 percentage points in PCA reoffending following the interlock period
- a small reduction of 0.29 infringements in the average number of traffic infringements committed in the 24 months following finalisation, and
- no difference in the probability of an alcohol-related crash or any crash with an injury or death.

2.59 The study calculated fuzzy regression discontinuity estimates only for first-time offenders who took up an interlock. These estimates were more representative of the impact of the program on those who actually took part in it.

2.60 The study observed statistically significant reductions in reoffending among the first-time high range offenders who took up an interlock device:

- a negligible 2 percentage point reduction during the initial disqualification period
- a large, statistically significant 11 percentage point reduction during the interlock period (amounting to an 86% reduction)
- a small, statistically significant, 3.1 percentage point reduction in the 24 months following the interlock period, and
- a small but significant reduction of 0.35 in average traffic infringements in the 36 months after finalisation.

2.61 These estimates also found no difference in the likelihood of an alcohol related crash or crash involving injury or fatality. The study noted the relatively small probabilities, indicating the low rate of these types of crashes in the sample. This reduced the ability to detect small differences in these infrequent events.

Comparing interlock eligible drink driving offences with ineligible ones

2.62 The second approach, which estimated the overall impact of the program, compared offenders who committed interlock eligible drink driving offences (regardless of whether they took up the interlock device) with ineligible offenders.

2.63 The estimates from the difference-in-differences analyses, which represented the overall impact of the program on all eligible offenders (regardless of whether they took up the interlock device), found significant reductions in PCA offending of:

- 3.4 percentage points within 36 months of finalisation (43%), and
- 6.0 percentage points within 60 months of finalisation (43%).

2.64 Reductions in PCA offending were particularly large for offenders convicted of repeat high-range drink driving and repeat refuse to provide breath sample

offences, those living in disadvantaged areas and, to a lesser extent, those living outside major cities.

2.65 At least some of the additional reduction in PCA offending observed within 60 months compared with 36 months of finalisation was caused by longer interlock periods for repeat high-range and refuse breath test offenders.

2.66 There were no significant differences in the likelihood of driving while disqualified within 36 or 60 months of finalisation. There were also no significant differences in the number of traffic infringements, on the probability of involvement in an alcohol-related crash or on crashes resulting in injury or death.

Conclusions

2.67 The comparison between offenders on either side of the high-range threshold found large statistically significant reductions in the probability of drink driving offending among first time high-range offenders who took up alcohol interlock devices. These reductions were also seen in the comparison between those who were eligible for the program and those who were not.

2.68 The authors observed that the results showing no significant effect on crashes suggested that the program allowed offenders to return to lawful driving sooner without any adverse impact on road safety.

2.69 Unlike most other studies, this study found small reductions in offending after the end of the interlock period. One possible explanation for this result was that, unlike other programs, the NSW program required several points of contact with medical practitioners which may have had an effect on some offenders' behaviour. Qualitative research might provide further insight into the rehabilitative benefit of this element of the program.

2.70 The authors also noted substantial room for improvement given that nearly 40% of eligible first-time offenders did not commence the program. The findings were also promising for those who had historically been found to be disadvantaged by penalties for driving offences, particularly for those living in more disadvantaged areas and those living in regional NSW.

Evaluating Youth on Track

2.71 This study, published by BOCSAR,[22] examined the results of the NSW Government's Youth on Track early intervention program. The program identifies young people who are at risk of remaining in the criminal justice system and, for three to twelve

22. I Klauzner and others, *Evaluating Youth on Track: A Randomised Controlled Trial of an Early Intervention Program for Young People who Offend*, Crime and Justice Bulletin No 249 (NSW Bureau of Crime Statistics and Research, 2022).

months, provides them with a caseworker and individual and family interventions. This study evaluated Youth on Track's effectiveness in reducing reoffending in young people. It compared Youth on Track's results to Fast Track, which provided case management for six weeks but did not provide any interventions. The study evaluated the young people at 12 and 24 months after program entry and used the data of 725 young people who were involved in the program between August 2017 and June 2020.

2.72 The study found that Youth on Track participants were less likely to have committed another offence or have entered custody. However, the study determined that the differences were statistically insignificant due to the limited sample size.

2.73 It also found that at the program's end:

- Youth on Track participants were 6.2 percentage points more likely to be employed than Fast Track participants. On average, Youth on Track participants also worked one hour more each week.
- Youth on Track participants were 1.5 percentage points less likely to be in out-of-home care than Fast Track participants.
- There were no significant differences in school attendance, community involvement and stable accommodation.

2.74 The study concluded that the Youth on Track program had marginal benefits over Fast Track. It noted that several factors may have limited its effectiveness:

- Facilitators were the same across both programs, which may have caused some aspects of the Youth on Track program to be present in the Fast Track program.
- Much of the casework and therapies applied were based on evidence that may not have been well-suited to the Youth on Track context, such as evidence of interventions studied in a clinical context or conducted outside Australia.
- A short, intensive program such as Fast Track may be sufficient to achieve Youth on Track's goal.

2.75 The study noted that further research was being completed with the NSW Human Services Data Set, which will compare the outcomes for Youth on Track participants with similar young people who did not receive an intervention. Due to the marginal benefits of Youth on Track over Fast Track, the study concluded that there should be more comprehensive research to make any conclusions about Youth on Track's effectiveness.

Disability support and reincarceration after a first adult prison episode for people with intellectual disability

2.76 This study, published in the *Journal of Criminology,*[23] examined the relationship between accessing disability support and subsequent reincarceration rates for adults with an intellectual disability. Previous research by the authors found that adults with an intellectual disability were overrepresented in prison in NSW, with 4.3% of the prison population having an intellectual disability, compared with 1.3% of the general population.

2.77 This study identified 1129 prisoners in NSW with an intellectual disability who were released from their first time in custody as adults between 2005 and 2015. On average, the study followed the participants for 4.8 years.

2.78 During the study period, 72% of the participants were reincarcerated. It is estimated that 37% of participants returned to custody within 6 months of release and 50% within the first 12 months. This is contrasted with the general Australian reincarceration rates, where almost 50% of individuals return to custody within two years of release.

2.79 The study found that accessing disability support after being released from custody lowered the risk of reincarceration by 22%. Additionally, those who received disability support and were reincarcerated spent longer in the community before returning to custody, with a median of 911 days. Those who did not receive post-release support spent a median of 286 days in the community before reincarceration.

2.80 The study examined an additional subsample – those who were released from custody and accessed disability support. In the 2014–2015 financial year, there were 104 such individuals. This dataset identified whether the individuals accessed specialist support for intellectual disabilities or general disability support. The study found that 38% of those who received specialist support were reincarcerated during the study period, compared with 65.3% who received general support. The study concluded that receiving specialist support lowered the risk of reincarceration by 50%. There was no difference in the time spent out of custody before reincarceration.

2.81 The study noted two key limitations to the findings. First, the data was aggregated from multiple datasets, meaning that for the majority of datapoints, the study could not identify the time and duration of accessing support and whether the support

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23. J Trofimovs and others, "Disability Support and Reincarceration after a First Adult Prison Custody Episode for People with Intellectual Disability in New South Wales, Australia" (2022) 55(2) *Journal of Criminology* 239.

was specialist or generalist. Secondly, the 2014–2015 data subset had a very limited sample size. Overall, it concluded that key factors in reducing recidivism among adults with intellectual disability were:

- identifying individuals with intellectual disability
- creating a comprehensive definition of "intellectual disability"
- implementing more effective data practices, and
- providing better connections to post-release disability support services.

Mental health service use and reoffending

2.82 The study, published in the *Australian and New Zealand Journal of Psychiatry*,[24] looked at a group of offenders diagnosed with psychosis who did not receive a custodial sentence and the association between their use of mental health services (specifically clinical contact with community mental health services) and reoffending.

2.83 The study used data from a population-based study which linked health and offending records, identifying people with a diagnosis of psychosis who received a non-custodial sentence (or court outcome with no penalty) between 1 July 2001 and 31 December 2012.

2.84 The study identified 7393 offenders with psychosis who received a relevant sentence or court outcome. They grouped offenders into three categories of psychosis:

(i) any diagnosis of schizophrenia and related psychoses (regardless of other types of psychoses) (67%)

(ii) any diagnosis of affective psychoses (in absence of a diagnosis in (i)) (11%), and

(iii) any substance-related psychoses (in absence of a diagnosis in (i) and/or (ii)) (22%).

2.85 In 98% of cases, the mental health service contacts occurred at community mental health services rather than emergency rooms or hospital admissions.

2.86 In 70% of cases, offenders had at least one mental health service contact during the study period and 49% reoffended.

2.87 The study found that reoffending among those who had contact with mental health services (clinical contact group) was "significantly lower" than those with no clinical contact. The incidence of reoffending in the clinical contact group was 7.8 per 100 person–years compared with 19.1 for those with no clinical contact. The study also found that reoffending decreased as the number of clinical contacts increased and

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24. A Adily and others, "Mental Health Service Utilisation and Reoffending in Offenders with a Diagnosis of Psychosis Receiving Non-Custodial Sentences: A 14-Year Follow-Up Study" (2023) 57 *Australian and New Zealand Journal of Psychiatry* 411.

that there was a more than fivefold risk of reoffending for those with no clinical contact compared with those with more than 200 clinical contacts. Offenders with substance-related psychosis and non-violent offenders had fewer clinical contacts and higher rates of reoffending when compared with controls.

2.88 The study also examined the time to reoffending in those who had clinical contact and those who did not. There was a longer "median survival time" between the index and second offence for those in the clinical contact group (13.56 years) than for those who had no clinical contact (1.69 years). Of those who reoffended, the median time to reoffending was over 12 times longer for those who had clinical contact than those who did not. More particularly:

- for violent offenders, the time to reoffending was longer for those with clinical contact (median survival time: 12.07 years) than for those with no clinical contact (median survival time: 2.59 years), and
- for non-violent offenders, the time to reoffending was longer for those with clinical contact (median survival time: 10.94 years) than for those with no clinical contact (median survival time: 1.41 years).

2.89 The study concluded that "increased contact with mental health services has a positive association with reduced reoffending" but that this did not demonstrate a causal relationship. In particular, it noted that the association between less clinical contact and higher reoffending risk was "likely to be confounded by other risk".[25]

2.90 The authors considered that future work could examine the relevance of the nature of the treatment received and compare the cost-effectiveness of clinical treatment over punitive sanctions in reducing reoffending by those with psychosis.

2.91 They recommended better access to ongoing treatment for some at-risk groups, observing that non-violent offenders and those with substance-related psychosis "appear to have reduced contact with community mental health services suggesting they ought to be a target of treatment efforts".[26] They also observed that Aboriginal offenders were at higher risk of reoffending, suggesting a need for them to have access to "culturally appropriate mental health and other community support services".[27]

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25. A Adily and others, "Mental Health Service Utilisation and Reoffending in Offenders with a Diagnosis of Psychosis Receiving Non-Custodial Sentences: A 14-Year Follow-Up Study" (2023) 57 *Australian and New Zealand Journal of Psychiatry* 411, 420.
26. A Adily and others, "Mental Health Service Utilisation and Reoffending in Offenders with a Diagnosis of Psychosis Receiving Non-Custodial Sentences: A 14-Year Follow-Up Study" (2023) 57 *Australian and New Zealand Journal of Psychiatry* 411, 421.
27. A Adily and others, "Mental Health Service Utilisation and Reoffending in Offenders with a Diagnosis of Psychosis Receiving Non-Custodial Sentences: A 14-Year Follow-Up Study" (2023) 57 *Australian and New Zealand Journal of Psychiatry* 411, 421.

Can electronic monitoring reduce reoffending?

2.92 This article, published in the *Review of Economics and Statistics*,[28] evaluated the impact of electronic monitoring as a sentencing option on reoffending rates.

2.93 Electronic monitoring is an alternative to imprisonment which permits offenders to serve their sentence in the community while under various restrictions and supervision from community corrections officers. Electronic monitoring, imposed in the form of a home detention order, was available for non-violent offenders facing a sentence of 18 months or less.[29] Home detention is now available as a condition of an intensive correction order,[30] since reforms came into operation in 2018.

2.94 The authors noted that, while prison sentences are commonly associated with a higher potential for specific deterrence for individuals, factors including detachment from the community and proximity to criminal peers suggest that prison sentences may cause an increased risk of reoffending. The authors suggested that electronic monitoring may therefore have the potential to deliver better outcomes for some offenders.

2.95 Using the BOCSAR's Re-offending Database and information on referrals of offenders to NSW Community Corrections for assessment of suitability for electronic monitoring, the authors identified those eligible for home detention who were sentenced to either home detention or prison. Some groups of offenders were excluded from the sample including:

- Aboriginal offenders
- those whose primary offence was not eligible for electronic monitoring, and
- offenders living outside Sydney at the time of offending (as, at the time, electronic monitoring was not generally available outside Sydney).

Cases were also limited to those presided over by judges who had presided over 10 or more electronic monitoring eligible cases between 2000 and 2007. Courts in which only one judge presided each calendar year were also excluded.

2.96 This resulted in a sample of 16,475 cases (the full sample). In this sample, there were 8826 index cases – that is, cases in which an offender in the full sample was before the court for an electronic monitoring eligible offence. This number was further reduced to exclude those whose time spent in the community after the

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28. J Williams and D Weatherburn, "Can Electronic Monitoring Reduce Reoffending?" (2022) 104 *Review of Economics and Statistics* 232.
29. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 74–83, repealed by *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) sch 1 cl 6.
30. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 73A(2)(a)–(b).

offence lasted less than two years, either due to death or incarceration for a prior offence, to create a final "estimation sample" of 7366.

2.97 Reoffending rates were measured within a two-year period which began, in the case of prison offenders, at the date of release from prison, or in the case of electronic monitoring offenders, at the date of the finalisation of the index offence. The article found that sentences using electronic monitoring reduced reoffending within two years by 28% compared to prison sentences. The impact of electronic monitoring on recidivism was even more pronounced for individuals aged below 30 at the time of their offending. Reoffending within two years for this group was reduced by 67% relative to prison offenders.

2.98 The authors found that, even when the two-year period was set to begin at the end of electronic monitoring offenders' sentence (rather than at index finalisation) the probability of reoffending was further reduced, from -0.16 to -0.19.

2.99 The authors found that the reduction in rates of reoffending measured were sustained: serving an electronic monitoring sentence rather than a jail sentence reduced reoffending by 15% after five years. For offenders under the age of 30 at the time of their index offence, this reduction was 35% and remained at 31% after eight years.

2.100 The authors also found that receiving an electronic monitoring sentence reduced the number of subsequent court appearances by 50%.

2.101 Finally, the authors also estimated that on average, diversion from a prison sentence to an electronic monitoring sentence represented a cost saving of $29,252 per offender. The figure assumes the average sentence length represented in the data (6 months).

3. Cases of interest

3.1 The chapter summarises sentencing cases of interest arising in the NSW Court of Criminal Appeal and NSW Supreme Court in 2022. Of particular interest are the cases relating to sentencing for serious road crime, sentencing for child sexual offences (including maintaining a sexual relationship with a child) and sentencing for cases where the offending took place some considerable time before the sentencing hearing.

Sentencing principles

Totality

3.2 The principle of totality is that when a court sentences an offender for multiple or further offences, the overall sentence must be "just and appropriate" to the totality of the offending behaviour.[1] The Court must also have regard to the effect of the total length of the sentences for all of the offences, and in doing so, avoid a "crushing" sentence that would not accord with an offender's record and prospects of rehabilitation.[2]

3.3 Totality is most commonly taken into account when a court is sentencing an offender for more than one offence, as shown in some cases in this chapter.[3]

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1. *Mill v R* (1988) 166 CLR 59, 63 citing D A Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2nd ed, 1979) 56–57.
2. *Postiglione v R* (1997) 189 CLR 295, 304 (Dawson and Gaudron JJ) citing D A Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2nd ed, 1979) 57–58; *Cahyadi v R* [2007] NSWCCA 1 [27]; *Smale v R* [2007] NSWCCA 328 [130]–[133].
3. See [3.4]-[3.11]; [3.97]-[3.99].

However, it can also be taken into account in certain circumstances where the offender has already been sentenced for other offences and is either still serving that sentence or has completed it. Two of the cases below deal with circumstances where the offender was sentenced for offences having been previously sentenced for similar offences committed at the same time.[4]

When reasons for imposing a wholly accumulated sentence should be articulated

Robson-Bolan v R [2022] NSWCCA 1

3.4 The offender pleaded guilty to two Commonwealth and State drug offences[5], with two further offences taken into account. He was sentenced to 2 years 6 months' imprisonment for the Commonwealth offence and 1 year's imprisonment for the State offence, with the sentences to be served consecutively (resulting in an effective sentence of 3 years 6 months' imprisonment).

3.5 One of the grounds of appeal was that the sentencing judge, in requiring the sentences be served consecutively, erred in applying the totality principle.

3.6 The CCA found that while a sentencing judge is not required to explain how they have applied the totality principle, it is "preferable" that they do so.[6] In the circumstances of the case, including the issues raised in the sentencing proceedings below, the CCA found that the single reference to the sentence being "intended to reflect the principle of totality" was not sufficient to expose the judge's reasoning, and that some explanation was needed for why the sentences were to be served consecutively.[7] The CCA identified several features of the case which indicated that some concurrency in sentencing would be appropriate. These included the factually similar nature of the offending, that the offences were "part of a single episode of criminality" and that they shared the "same combination of motivation" that informed the offending.[8]

3.7 The CCA allowed this ground and re-sentenced the offender to 2 years 3 months' imprisonment for the Commonwealth offence and 9 months' imprisonment for the State offence, with the offences to be served partially concurrently, resulting in an effective sentence of 2 years 9 months' imprisonment.

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4. See [3.12]-[3.20].
5. *Criminal Code* (Cth) s 11.1(1), s 307.2(1); *Drug Misuse and Trafficking Act 1985* (NSW) s 25(1).
6. *Robson-Bolan v R* [2022] NSWCCA 1 [34]–[35].
7. *Robson-Bolan v R* [2022] NSWCCA 1 [34]–[35].
8. *Robson-Bolan v R* [2022] NSWCCA 1 [36].

Avoiding a crushing sentence is no reason to avoid a "just and appropriate" sentence

Hraichie v R [2022] NSWCCA 155

3.8 The offender pleaded guilty to four offences: sending a letter threatening to kill the Commissioner of Corrective Services,[9] wounding a fellow prisoner with intent to murder,[10] causing grievous bodily harm to the same prisoner with intent to cause grievous bodily harm,[11] and committing acts in preparation for terrorist acts.[12] He received a total effective sentence of 34 years with a non-parole period of 29 years.

3.9 One of the grounds of appeal was that the sentencing judge had, by excessive accumulation of sentences for each offence, erred in applying the totality principle. The offender submitted that the resulting sentence did not reflect totality, but was "crushing". The CCA, in rejecting this ground, observed that the principle of totality, including any need to avoid a "crushing" sentence, should not be used to avoid a sentence that is "just and appropriate". That a sentence may be crushing is just one of the matters a court takes into account in determining whether a sentence is beyond the range of properly available sentences.[13]

3.10 The CCA observed that the sentencing judge had considered all of the factors that might make the sentence crushing, in particular the offender's youth and the extremely long period of custody under difficult conditions. However the CCA emphasised that the offences were "extremely grave" and the offender's subjective case was "extremely poor".[14]

3.11 The CCA allowed the appeal on other grounds related to totality and resentenced the offender to a lesser term.

Where an offender who serves a sentence for multiple offences is subsequently prosecuted for an additional offence

R v Obbens [2022] NSWCCA 109

3.12 The offender, a teacher, pleaded guilty to an offence, committed in 1989, of indecent assault on a child under 16 who was under his authority.[15] A further offence against the same victim was included on a Form 1. The offender was sentenced to an 18-month community corrections order (CCO) with standard

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9. *Crimes Act 1900* (NSW) s 31(1).
10. *Crimes Act 1900* (NSW) s 27.
11. *Crimes Act 1900* (NSW) s 33(1)(b).
12. *Criminal Code* (Cth) s 101.6(1).
13. *Hraichie v R* [2022] NSWCCA 155 [73].
14. *Hraichie v R* [2022] NSWCCA 155 [74].
15. *Crimes Act 1900* (NSW) s 61E(1A) repealed by *Crimes (Amendment) Act 1989* (NSW) sch 1 (2).

conditions. The offender had already received an aggregate sentence of 3 years' imprisonment in 2016 for similar offences against three other 13 year old victims in 1987–1989.

3.13 One of the grounds of appeal was that the sentence was manifestly inadequate.

3.14 The CCA dismissed the appeal, noting that the case gave rise to "an important aspect of the totality principle which applies when there is a delay in the prosecution of multiple offences and a fragmentation of the sentencing proceedings".[16]

3.15 Normally, in sexual offences delay will not automatically operate as a mitigating factor because the offender has enjoyed the benefit of a place in the community. However, the situation is different in cases where additional offending has been found after the offender has already served a sentence for such offending. The CCA observed that in such cases, the delay between the original sentence and the second prosecution is "unlikely to be a period in which the offender went about life free from opprobrium".[17] The CCA also observed that the second prosecution, with the potential for a return to custody "is an additional stress and disruption that would not have been suffered had all offending been dealt with together". The result was "a return to prison to serve a separate term of imprisonment is likely to involve a significantly greater punishment than would be the case had the first term of imprisonment been longer as a result of all the offences having been dealt with together".[18] The CCA considered that the sentencing judge had applied an important principle of fairness to the case.

3.16 The CCA conceded that a CCO was particularly lenient in this case, but given the punishment already imposed and the offender's experience in prison and personal circumstances, it was a case where such an order "is in the best interests of all concerned".[19]

Interaction between totality and the historical offences reforms

Haak v R [2022] NSWCCA 28

3.17 The offender was found guilty by a jury of two sexual offences committed on a child[20] in 2007. He received an aggregate sentence of 10 years' imprisonment with a non-parole period of 7 years 6 months.

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16. *R v Obbens* [2022] NSWCCA 109 [20].
17. *R v Obbens* [2022] NSWCCA 109 [20].
18. *R v Obbens* [2022] NSWCCA 109 [20].
19. *R v Obbens* [2022] NSWCCA 109 [25].
20. *Crimes Act 1900* (NSW) s 61M(2), s 66A.

3.18 One of the grounds of appeal was that the sentencing judge failed to consider totality in relation to other similar offences committed in 2010 and sentenced in 2012. The sentences for these offences had already been completed. This ground of appeal raised a complicating factor related to historical offences sentencing reforms[21] which commenced on 31 August 2018. These reforms require the sentencing for a child sexual offence to apply "sentencing patterns and practices at the time of sentencing" and not at the time of the offence.[22] The CCA accepted the offender's submission that the reforms did not in fact give rise to any discrepancy since there was "little, if any, difference between the 'sentencing patterns and practices' for such offences then and now".[23]

3.19 However, the CCA observed that it remained to be determined exactly how the reforms (expressed in s 25AA of the *Crimes (Sentencing Procedure) Act 1999* (NSW)) are to be applied when the discrepancy is starker. The CCA stated that "on its face", the question of what would likely have been the effective sentence if the offender had been sentenced at the one time for all of the offences is to be answered by reference to s 25AA, adding "the greater discrepancy between the sentencing practice applied when the offender was previously sentenced and the present the lesser utility in this exercise".[24]

3.20 The CCA rejected the ground for other reasons, including that the 2007 offences were "entirely separate" to the 2010 offence.[25]

Parity: use of sentencing judge's assessment of objective seriousness

Smith (a pseudonym) v R [2022] NSWCCA 123

3.21 The offender pleaded guilty to four drug-related offences and was sentenced to 12 years 4 months' imprisonment with a non-parole period of 8 years 2 months. A co-offender had been sentenced by another judge to 4 years 6 months' imprisonment with a non-parole period of 3 years.

3.22 The offender's sole ground of appeal was that there was an unjustifiable disparity between his sentence and the co-offender's sentence. The offender relied on the similarity of expressions used by the judges in their assessments of "objective seriousness" for both the offender and co-offender.

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21. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25AA.
22. See [4.4].
23. *Haak v R* [2022] NSWCCA 28 [21].
24. *Haak v R* [2022] NSWCCA 28 [21].
25. *Haak v R* [2022] NSWCCA 28 [25].

3.23 In the case of the offender, the judge assessed his offending to be at the "low end of the mid-range of objective seriousness". In the case of the co-offender, the other judge assessed his offending to be "something less than in the mid-range".[26]

3.24 The CCA dismissed the appeal and in doing so commented that limited weight can be given to the comparison of words used by different judges in assessing objective seriousness. A better comparison of criminality and moral culpability can be drawn from the specific findings made about the nature of offending in each case.

Deterrence: Consideration of local deterrence

Patel v R [2022] NSWCCA 93

3.25 The offender pleaded guilty to drug possession and trafficking offences. The trafficking offences involved the importation of a marketable quantity of MDMA by post. He received an aggregate sentence of 4 years 6 months' imprisonment with a non-parole period of 2 years 8 months.

3.26 One of the grounds of appeal was that the judge considered there was a particular need for general deterrence in the Northern Rivers area without "a sound and transparent reason for doing so". The judge had referred to the offender's evidence that consumption of such drugs was regarded as "normative, everyday behaviour" in his social group and observed that this accorded with his experience as a prosecutor and judge in the Northern Rivers.

3.27 The CCA found that there was a sufficient basis to conclude that there was "a prevalent attitude to drug use in the region which required deterrence". In rejecting this ground of appeal, the CCA observed that, although the judge did no more than use his local experience to confirm the effect of the offender's evidence:

> there is no reason why a magistrate or judge who sits regularly in a particular locality or region cannot draw on general observations derived from that experience to inform decision-making in this way.[27]

3.28 The CCA allowed one of the other grounds of appeal and resentenced the offender in accordance with Commonwealth sentencing law.

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26. *Smith (a pseudonym) v R* [2022] NSWCCA 123 [51].
27. *Patel v R* [2022] NSWCCA 93 [33].

Discounts

3.29 The *Crimes (Sentencing Procedure) Act 1999* (NSW) gives a sentencing court power to reduce a sentence by way of "discount" for pleas of guilty,[28] assistance to law enforcement authorities[29] and pre-trial and trial assistance.[30]

3.30 Early guilty plea reforms were introduced in 2018 for indictable offences. These reforms prescribe fixed discounts of 5%, 10% or 15% for guilty pleas entered at various defined stages before trial. Two of the cases below deal with interpretation of these provisions.

Assistance to the authorities: voluntary disclosure of guilt

McKinley v R [2022] NSWCCA 14

3.31 The offender pleaded guilty to five indictable offences including: aggravated break, enter and steal, take and drive conveyance without consent of owner, break, enter and steal, armed robbery, and larceny. He admitted to these offences voluntarily after being arrested for unrelated offences, giving rise to a discount for assistance to law enforcement authorities[31] which amounted to no more than 15% for each offence. He received an aggregate sentence of 7 years' imprisonment with a non-parole period of 5 years 3 months.

3.32 The grounds of appeal included that the judge erred in failing to:

- give reasons for limiting the discount for voluntary disclosure of guilt to 15% or less, and
- consider the impact of voluntary disclosure of unknown guilt in the weight given to general and specific deterrence.

3.33 The CCA noted that the offender was entitled to a "significant added element of leniency" because he voluntarily disclosed involvement in serious crimes of which the police had no knowledge.[32] It also noted that the public policy of encouraging people to confess to otherwise unknown crimes was a "matter of great significance in the administration of justice".

3.34 On the deterrence point, the CCA noted that such a confession "reduces materially the appropriateness of general deterrence as a significant factor" since, in such a case, general deterrence would be "directed to an extremely small class of

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28. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22; *R v Thomson* [2000] NSWCCA 309, 49 NSWLR 383 [160].
29. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23.
30. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22A.
31. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23.
32. *McKinley v R* [2022] NSWCCA 14 [37].

individuals minded to commit crimes and then admit to them".[33] Specific deterrence was also significantly diminished since such a confession "discloses significant remorse and leads to a conclusion that the prospects of rehabilitation are significantly improved".[34]

3.35 The CCA noted that the discount intended to encourage voluntary confession of guilt is limited by the requirement that the resulting sentence is not "unreasonably disproportionate to the nature and circumstances of the offence".[35]

3.36 The CCA concluded that insufficient discount had been provided in the particular circumstances of the assistance provided. It allowed the appeal, applied a 55% discount for assistance and resentenced the offender to 5 years 3 months' imprisonment with a non-parole period of 3 years 11 months.

Early guilty plea where alternative charges

Black v R [2022] NSWCCA 17

3.37 The offender had been charged with murder and, in the alternative, manslaughter. He offered to plead guilty to manslaughter (based on excessive self-defence) but the prosecution rejected this offer. At arraignment the offender entered a plea of not guilty to murder and a plea of guilty to manslaughter, which the prosecution again declined to accept. A trial date was set and the offender sought and was granted leave to withdraw the plea of guilty to manslaughter. The offender was then arraigned before a jury and entered pleas of not guilty to both charges, however the trial was adjourned because of the failure of a prosecution witness to attend. Further negotiations then took place resulting in the prosecution accepting a plea of guilty to manslaughter.

3.38 At sentencing, the judge reasoned that the offender was entitled to a 10% discount on sentence in accordance with s 25D(2)(b)(ii) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), because manslaughter was expressly identified in the case conference certificate and was therefore "the subject of the proceedings when the offer was made".

3.39 The offender's sole ground of appeal was that the sentencing judge erred by categorising his case in this way and rather, should have applied the 25% discount available where an offer to plead guilty to a different offence at committal is later accepted by the prosecution in accordance with s 25E(2) and s 25E(3)(a).

3.40 The key question was whether manslaughter was a "different offence", that is, "to the offence the subject of the proceeding when the offer was made".

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33. *McKinley v R* [2022] NSWCCA 14 [43].
34. *McKinley v R* [2022] NSWCCA 14 [44].
35. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23(3).

3.41 Drawing on the reasoning of an earlier Supreme Court case in which a similar issue was raised,[36] the CCA concluded that the legislature intended that only one offence – the principal offence (in this case, murder) – could be "the offence the subject of the proceedings". This was said to be "consistent with the reality of how trials of alternative offences are in practice conducted". It also produces a fair result in that it ensures that an offender whose offer to plead guilty to an alternative offence has been rejected by the prosecution will not be denied the benefit of a reduction in sentence that would have reflected the utilitarian value of the plea had it been accepted.[37]

3.42 The alternative position adopted by the sentencing judge would mean that the prosecution's decision merely to include an alternative charge on the charge certificate or case conference certificate could deprive an offender, who offers a realistic plea of guilty, of a substantial reduction. This would undermine the intended purpose of the discounts set out in s 25E(3) to "operate as an incentive to offenders to offer realistic pleas of guilty". It would also be potentially unfair.[38]

3.43 The CCA allowed the appeal and, since the error was entirely discrete from all discretionary aspects of sentencing, simply applied the 25% discount prescribed by s 25E(3)(a). This resulted in a sentence of 5 years 7 months 14 days' imprisonment with a non-parole period of 3 years 7 months 10 days.

When 10% discount is available for an early guilty plea

Gurin v R [2022] NSWCCA 193

3.44 The offender was charged with two offences of robbery in company.[39] The offences were committed in company with two others. One co-offender pleaded guilty at committal and received a discount of 25%, the other maintained a plea of not guilty and was sentenced after trial.

3.45 The offender in this case also pleaded not guilty and was committed for trial and, on arraignment, maintained pleas of not guilty. The offender was granted bail pending trials. The original date for the trial of the offender and the remaining co-accused was vacated because of the COVID-19 pandemic. The offender pleaded not guilty on the indictment for the rescheduled trial, but pending the resolution of some procedural issues, failed to appear on the first day of the trial. The trial was aborted before a jury was empanelled. The co-accused was then convicted at a separate trial. The offender was eventually arrested under a bench warrant and

36. *R v Holmes (No 7)* [2021] NSWSC 570.
37. *Black v R* [2022] NSWCCA 17 [37]–[38].
38. *Black v R* [2022] NSWCCA 17 [40]–[41].
39. *Crimes Act 1900* (NSW) s 97(1).

brought before the District Court where he entered pleas of guilty to each of the charges.

3.46 At sentencing, the offender's lawyer pressed for a 10% discount for the guilty plea because it had been entered at least 14 days before the trial had been listed to commence. The sentencing judge instead allowed a 5% discount for the guilty plea in accordance with s 25D(2)(c) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) on the basis that he did not enter a plea at least 14 days before the first day of the trial at which he failed to appear. He received a sentence of 5 years 6 months' imprisonment with a non-parole period of 3 years 2 months.

3.47 The offender's sole ground of appeal was that the guilty plea warranted a 10% reduction because it had been entered at least 14 days before the first day of the offender's trial.[40]

3.48 Section 25C(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) defines "first day of the trial of an offender" as "the first day fixed for the trial of the offender or, if that day is vacated, the next day fixed for the trial that is not vacated". The CCA concluded that, in the context, "vacated" meant "adjourned before the commencement of the trial".[41] The CCA observed:

> Where the first day of trial is vacated in the sense of being adjourned before the trial commences by presentation of the indictment and arraignment, the clock is reset, and the provision provides an offender with another opportunity to enter a plea of guilty 14 days before the next day fixed for trial. Once a trial commences, however, the opportunity to obtain a 10% reduction is lost. A plea of guilty entered after the commencement of a trial attracts the reduction of 5%... And this is so whether the trial is aborted before empanelment, the jury is discharged after empanelment, or a new trial is necessary because the jury are unable to reach a verdict. This is so even if after a successful conviction appeal to the Court of Criminal Appeal, a guilty verdict is set aside, and a new trial directed.[42]

3.49 In dismissing the appeal, the CCA also observed:

> It would be to afford s 25D a wholly unreasonable, if not absurd, meaning if in circumstances where the [District Court trial] had been aborted because of his absconding, the remaining co-accused had to be tried separately for the same reason, and law enforcement resources had to be further expended to re-arrest him and bring him back before the court, the [offender] then had a further opportunity to avail himself of the 10% reduction in sentence by treating the aborting of the [District Court trial] after it had commenced as if the first day fixed for that trial had been vacated.[43]

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40. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25D(2)(b)(i).
41. *Gurin v R* [2022] NSWCCA 193 [32].
42. *Gurin v R* [2022] NSWCCA 193 [29].
43. *Gurin v R* [2022] NSWCCA 193 [31].

Other factors taken into account at sentencing

Good character as a mitigating factor for child sexual offences

Fenner v R [2022] NSWCCA 48

3.50 The offender pleaded guilty to sexual intercourse with a young person under his special care and who was aged 17. He was sentenced to 3 years 9 months' imprisonment with a non-parole period of 2 years 3 months.

3.51 The offender demonstrated good character in the course of his employment for 10 years, good character outside of work and provided 25 references in support. The offender submitted that his absence of a criminal record and his good character should be considered as mitigating factors under s 21A(3) of the *Crimes (Sentencing Procedure) Act 1999 (NSW)*. However, the trial judge rejected this argument on the basis that the offender's good character and absence of a criminal record facilitated his offending.

3.52 One of the grounds of appeal was that the sentencing judge erred by failing to consider the offender's prior good character as a mitigating factor.

3.53 The CCA allowed the appeal, noting that:

> This was not a case involving an offender who deliberately set out to use the benefits of his apparent good character to obtain a trusted position with the specific purpose of committing the offences in mind. For the period he had been a schoolteacher he had demonstrated his actual good character in the course of his employment, as well as in other areas of his life outside of his employment.[44]

3.54 The CCA noted that some weight must be given to the good character evidence in these circumstances and resentenced the offender to 3 years with a non-parole period of 1 year and 10 months.

Effect of domestic violence on a fraud offender

Totaan v R [2022] NSWCCA 75

3.55 The offender pleaded guilty to two offences of obtaining financial advantage by deception from the Commonwealth,[45] by obtaining Parenting Payment Single benefits amounting to $112,999.96. She received an aggregate sentence of 4 years' imprisonment with a non-parole period of 2 years.

3.56 The appeal raised issues around "exceptional hardship" to family and other dependants when sentencing federal offenders.[46] The CCA allowed the appeal,

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44. *Fenner v R* [2022] NSWCCA 48 [50].
45. *Criminal Code* (Cth) s 134.2(1).
46. *Crimes Act 1914* (Cth) s 16A(2)(p).

resentenced the offender to an effective sentence of 3 years' imprisonment and ordered that she be released immediately on recognizance to be of good behaviour for 1 year 11 months (the remainder of the sentence). In resentencing the offender, the CCA considered the evidence of the offender's domestic violence context.

3.57 The offender had given evidence in the sentencing hearing about her personal circumstances that included a history of domestic violence from her former partner and father of her two children. The former partner was violent, abusive, displayed controlling behaviours and regularly withdrew money from shared bank accounts to fund a gambling habit. The benefit was used to pay bills and buy necessities for herself and her children.

3.58 The sentencing judge found that, while the offender suffered violent domestic abuse, she was not satisfied that it was "the sole reason for her offending". The judge also observed that, as the offender "now knows, there are ways in which to resolve abusive relationships, even if it took her former partner's incarceration for that to happen".[47]

3.59 The CCA observed that this did not "give adequate weight" to the offender's evidence which "indicated that she was trapped in a violent and controlling relationship, which she felt unable to leave".

3.60 In considering the question of general deterrence, the CCA observed that it was important to "condemn and deter" the offending which, "if replicated on wide scale, threatens the integrity of the social security system upon which many vulnerable people rely". However, the CCA observed that the need for general deterrence "must always be assessed by reference to the personal circumstances of the offending", noting that "[h]ere there was domestic abuse, no doubt contributed to by the gambling addiction of the [offender's] partner".[48]

Lack of criminal history in domestic violence matters

Wornes v R [2022] NSWCCA 184

3.61 The offender, a woman with a personality disorder and no criminal history, committed a series of domestic violence offences on her partner. She pleaded guilty to one offence of wounding with intent to cause grievous bodily harm. She was also being sentenced for two summary offences for contravening an apprehended domestic violence order and admitted to two offences of common assault, which were taken into account on a Form 1.

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47. *Totaan v R* [2022] NSWCCA 75, 108 NSWLR 17 [25].
48. *Totaan v R* [2022] NSWCCA 75, 108 NSWLR 17 [130].

3.62 The offender received a sentence of 8 years' imprisonment with a non-parole period of 5 years for the wounding offence. Convictions with no further penalties were recorded for the apprehended domestic violence order offences.

3.63 One ground of appeal was that the sentencing judge erred in concluding that the offender's lack of prior convictions took on less significance in the context of domestic violence offending. The CCA allowed this ground, finding that the offender's lack of previous convictions was a mitigating factor, even though there was a history of her perpetrating domestic violence on her partner.

Personality disorder in mitigation

Wornes v R [2022] NSWCCA 184

3.64 The offender, a woman with a personality disorder, whose case is described above,[49] received a sentence of 8 years' imprisonment with a non-parole period of 5 years.

3.65 One of the grounds of appeal was that the sentencing judge erred in determining that, as a matter of law, the offender's personality disorder ought to be seen as falling outside of the scope of the sentencing principles relating to mental health conditions.[50] The CCA allowed this ground, finding that a personality disorder can be taken into account on sentence as a factor that reduces moral culpability in the same way as any other mental health condition.

3.66 Another ground of appeal was also allowed, and the sentence was reduced to 6 years' imprisonment with a non-parole period of 4 years.

Breach of ADVO

R v Lloyd [2022] NSWSC 906

3.67 The offender pleaded guilty to murdering a woman with whom he was in a relationship. The offence was committed in breach of an apprehended domestic violence order.

3.68 The Supreme Court, in sentencing the offender to 25 years 6 months' imprisonment with a non-parole period of 19 years 1 month, treated the breach of the ADVO as an aggravating factor, observing previous judicial comments on the fact that domestic violence is "a profoundly serious problem in our community".[51] The Court stated that the ADVO had been made for the specific purpose of ensuring the victim's safety:

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49. See [3.61]–[3.63].
50. *DPP (Cth) v De La Rosa* [2010] NSWCCA 194, 79 NSWLR 1.
51. *R v Lloyd* [2022] NSWSC 906 [20]; *R v Goodbun* [2018] NSWSC 1025 [202]–[203].

> It was not to be regarded as some empty rhetorical flourish, pronounced by a functionary in the performance of some rote administrative procedure. The pervasion of domestic violence in our community in recent years is such that the point has been reached where one thing needs to be made clear: any person who is subject to an ADVO is not at liberty to treat it as a piece of paper, containing an insignificant and inconvenient form of words, which can be ignored when it suits them, or worse still, when they wish to set about committing some nefarious and violent act against the person for whose protection the order has been made. A person who acts in breach of an order of the kind made against the offender should expect that any such breach will be treated seriously by the Courts. In the context of the present case, the offender's breach of the ADVO which was put in place for [the victim's] protection is to be given full weight as a circumstance of aggravation.[52]

The offence took place in the victim's home

R v Lloyd [2022] NSWSC 906

3.69 The offender pleaded guilty to murdering a woman with whom he was in a relationship, as described above. The offence was also committed at the front door of the victim's premises.

3.70 In sentencing the offender, the Supreme Court considered the aggravating factor that "the offence was committed in the home of the victim".[53] The offender submitted that because the offence took place on common property, albeit immediately outside the victim's front door, the aggravating factor did not apply.

3.71 The Court referred to authorities supporting the extension of the concept of "home" beyond the physical residence and noted that "where an offence occurs outside, as opposed to inside, the physical residence, it remains a matter for a sentencing judge to determine whether, on ordinary sentencing principles, that aggravates the offending". The Court considered that the victim had a "legitimate expectation that having arrived home, she would be able to walk to the front door an enter her premises safely". The Court was, therefore, satisfied that the offending was aggravated by being committed at the victim's home, although "the degree of aggravation is less than would have been the case if the offender had found his way inside premises and committed the offence".[54]

Lack of sophistication in a criminal enterprise is not mitigating

Patel v R [2022] NSWCCA 93

3.72 The offender pleaded guilty to drug possession and trafficking offences. The trafficking offence involved the importation of a marketable quantity of MDMA by

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52. *R v Lloyd* [2022] NSWSC 906 [21].
53. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(eb).
54. *R v Lloyd* [2022] NSWSC 906 [33].

post. He received an aggregate sentence of 4 years 6 months' imprisonment with a non-parole period of 2 years 8 months.

3.73 One of the grounds of appeal was that the sentencing court "did not take into account the lack of sophistication involved in the offences as a factor reducing the objective seriousness of the offending".

3.74 The CCA rejected this ground. It observed that sophistication in a criminal enterprise may sometimes operate as an aggravating factor essentially because it demonstrates premeditation and deception. However, it did not follow that a lack of sophistication is a mitigating factor, since it was "no more than the absence of a feature that would otherwise be aggravating". The CCA also observed that the offending was premeditated (and repeated) and involved deception since the offender used names other than his own.[55]

3.75 The CCA allowed one of the other grounds of appeal and resentenced the offender in accordance with Commonwealth sentencing law.

Context of offender's drug dependency

Patel v R [2022] NSWCCA 93

3.76 The offender pleaded guilty to drug possession and trafficking offences, as outlined above.[56]

3.77 One of the grounds of appeal was that the sentencing judge's finding that the offender's MDMA use was a choice "for nothing more complex than the lifestyle that he enjoyed", was not available in light of psychological material.

3.78 The offender submitted that the sentencing judge had overlooked a "ten year history of significant drug abuse", a severe substance abuse disorder and some psychological issues.

3.79 The CCA observed that, contrary to the offender's submission that his addiction should be regarded as a mitigating factor, the sentencing judge's point was that "his drug use was an adult lifestyle choice, and not the result of a childhood addiction". This did not deny that the drug use had become a dependency, but "it does detract from the mitigating effect that an addiction acquired in an underprivileged childhood might have had".[57] The CCA considered that the evidence supported the conclusion that the offender's drug use was "associated with going

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55. *Patel v R* [2022] NSWCCA 93 [28].
56. See [3.25]–[3.28].
57. *Patel v R* [2022] NSWCCA 93 [38].

to parties and other social gatherings, was influenced by what was socially acceptable and popular, and was essentially a lifestyle choice made as an adult".[58]

3.80 The CCA allowed one of the other grounds of appeal and resentenced the offender in accordance with Commonwealth sentencing law.

Adverse publicity

R v Dawson [2022] NSWSC 1632

3.81 The offender was found guilty, after a judge-only trial, of the murder of his wife in 1982.

3.82 In imposing a sentence of 24 years' imprisonment with a non-parole period of 18 years, the Supreme Court considered a submission that the publicity surrounding his arrest and conviction "has been so persistent and so unremitting that he has been unfairly subjected to punishment extending beyond that to which he might ordinarily have been expected to endure". Particular attention was drawn to the findings of other Supreme Court judges in stay proceedings that the publicity generated by a podcast was the worst example of prejudicial publicity that they had experienced.

3.83 The judge agreed that the publicity around the crime had been intense. However, he noted that the offender had now been convicted of the crime that attracted the publicity. The references in the stay proceedings were in the context of an application on the basis that the offender could not receive a fair trial because the publicity improperly made assumptions about guilt when he was entitled to the presumption of innocence. The judge concluded that to allow the proposition that the offender should now be granted some concession for the "avalanche of publicity" would not in his view be consistent with the offender's conviction.[59]

Gun violence

R v Keleklio [2022] NSWSC 62

3.84 The offender was found guilty by a jury of murder on the principles of joint criminal enterprise. The co-offender, who pleaded guilty to murder, shot the victim three times as he sat outside a cafe in the central shopping district of Bankstown.

3.85 The sentencing judge considered that some aspects of the offender's intellectual capacity and mental condition, while not being relevant to mitigation, lessened the influences of general deterrence, retribution and denunciation on the assessment

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58. *Patel v R* [2022] NSWCCA 93 [39].
59. *R v Dawson* [2022] NSWSC 1632 [27].

of sentence. However, the judge also noted that there was a particular need to retain emphasis on general deterrence in this case:

> in part to reflect the affront that crimes involving violence committed in public represent to the peace and good order of the community. Gun violence carried out in public with lethal intention and effect is abhorrent in our community, and courts must send a clear and consistent message of deterrence in their sentencing responses.[60]

3.86 The offender received a sentence of 30 years with a non-parole period of 22 years 6 months.

Presence of a child: Child cannot be the victim

Arvinthan v R [2022] NSWCCA 44

3.87 The offender pleaded guilty to two offences: entering a dwelling with intent to commit a serious indictable offence, and aggravated break and enter and commit a serious indictable offence.[61] In the case of the second offence, the serious indictable offence was sexual touching.[62] The victim of this offence was 17.

3.88 The offender received an aggregate sentence of 4 years 6 months' imprisonment with a non-parole period of 2 years 9 months.

3.89 One of the grounds of appeal was that the sentencing judge had erred in finding the second offence was more serious because it was committed in the presence of a child under 18.[63] The prosecution conceded this error.

3.90 The CCA confirmed that the aggravating factor refers to a case where a child is present but is not the victim. The CCA observed that the fact that the victim is a child, in cases where the victim being a child is not an element of the offence, may be a factor that increases an offender's moral culpability and, accordingly, the objective seriousness of the offence. The age of the victim does not activate the aggravating factor that the offence was committed in the presence of a child.[64]

3.91 The CCA allowed the appeal and resentenced the offender to an aggregate sentence of 3 years 10 months' imprisonment with a non-parole period of 2 years 4 months.

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60. *R v Keleklio* [2022] NSWSC 62 [83].
61. *Crimes Act 1900* (NSW) s 111(1), s 112(2).
62. *Crimes Act 1900* (NSW) s 61KC.
63. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(ea).
64. *Arvinthan v R* [2022] NSWCCA 44 [5]–[6], [39].

Sentencing for serious road crime

3.92 The following cases, that relate to serious road crime, are of interested given that the NSW Law Reform Commission is reviewing serious road crime offences.[65]

3.93 The two manslaughter cases show the willingness of courts to review sentences on the grounds of totality where there are multiple victims for a single course of action.

Motor vehicle manslaughter and use of comparable cases

Moananu v R [2022] NSWCCA 85

3.94 The offender pleaded guilty to two counts of manslaughter and one count of aggravated dangerous driving causing grievous bodily harm, and admitted to three driving offences that were included on a Form 1 to be taken into account in sentencing. He received an aggregate sentence of 15 years' imprisonment with a non-parole period of 10 years.

3.95 One of the grounds of the appeal was that the aggregate sentence was manifestly excessive. The majority of the CCA allowed this ground.

3.96 Justice Leeming noted that similar conduct, with similarly tragic consequences, had resulted in substantially shorter sentences, while identical sentences had only been imposed for cases that were significantly worse. Justice Hamill similarly found that the degree of notional accumulation was unusually high for a driving case involving a single course of criminal conduct causing death or grievous injury to more than one victim.

3.97 By contrast Justice Price, dissenting, noted that indicative sentences in past cases may be a guide to whether error is established. His Honour considered that none of the indicative sentences was manifestly excessive when measured against the yardstick of past indicative sentencing, and that the extent of the notional accumulation was appropriate given the totality of the criminality.

3.98 The CCA reduced the sentence to 12 years 6 months' imprisonment and a non-parole period of 8 years 4 months.

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65. NSW Law Reform Commission, "Review of serious road crime offences" <*www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Serious_road_crime/project_page.aspx*> (accessed 7 August 2023).

Motor vehicle manslaughter and the totality principle

Davidson v R [2022] NSWCCA 153

3.99 The offender spent the day drinking alcohol and consuming cocaine and MDMA, then drove his motor vehicle and hit seven children. He pleaded guilty to seven offences related to driving a motor vehicle, including four of manslaughter, one of aggravated dangerous driving occasioning grievous bodily harm, and two of cause bodily harm by misconduct in charge of a motor vehicle. The offender, who was 29 years old at the time of the offence, received an aggregate sentence of 28 years' imprisonment with a non-parole period of 21 years.

3.100 One of the grounds of appeal was that the aggregate sentence was manifestly excessive. The majority of the CCA noted that that there was a single course of criminally negligent conduct. It found that the proper application of the totality principle means that an offender will spend less time in custody for each additional victim, compared to if there had only been one victim or one charge. It noted that to impose on someone with good prospects of rehabilitation a sentence that would not allow the prospect of release until after they were 50 years old was crushing, and not proportionate to the totality of the criminality.

3.101 The CCA allowed the appeal and resentenced the offender to 20 years' imprisonment with a non-parole period of 15 years.

Dangerous driving causing multiple deaths and injury

R v Russell [2022] NSWCCA 294

3.102 The offender was towing an overloaded caravan when he lost control of the vehicle causing a collision that killed his wife and stepson, and grievously injured his stepson's partner. The offender was found guilty by a jury of two counts of dangerous driving causing death and one count of dangerous driving causing grievous bodily harm.[66] He received an aggregate sentence of 4 years' imprisonment with a non-parole period of 2 years. The sentencing judge recorded indicative sentences of 2 years 6 months for each of the counts of dangerous driving occasioning death, and 1 year 9 months for the count of dangerous driving occasioning grievous bodily harm.

3.103 One of the grounds of appeal was that the sentence imposed was manifestly inadequate. The prosecution argued that the indicative sentences were too short, and the aggregate sentence did not recognise the totality of the criminality (the loss of two lives and the grievous harm to a third victim).

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66. *Crimes Act 1900* (NSW) s 52A(1)(c), s 52A(3)(c).

3.104 The CCA allowed this ground, noting that few of the "typical" factors from the *Whyte* guideline judgment on dangerous driving applied in this case.[67] *Whyte* established that in a case of high moral culpability "a full-time custodial head sentence of less than 3 years (in the case of death) and 2 years (in the case of grievous bodily harm) would not generally be appropriate".[68] In *Whyte* the offender was young and otherwise of good character, whereas in this case the offender was an experienced truck driver who knew the importance of weight limits, and was not a person of good character. As a result, it should have been clear that the indicative sentences the sentencing judge proposed – which were markedly below the numerical guidelines in *Whyte* – were significantly too lenient. The notional accumulation was also not sufficient to recognise the death of two people and the grievous bodily harm of a third.

3.105 The CCA allowed the appeal and resentenced the offender to 6 years 6 months' imprisonment with a non-parole period of 4 years.

Sentencing for child sexual offences

Abuse of authority and abuse of trust

PC v R [2022] NSWCCA 107, 108 NSWLR 181

3.106 The offender pleaded guilty to two counts of sexual intercourse with a child under 10,[69] four counts of sexual intercourse with a child between 10 and 14 in circumstances of aggravation,[70] and one count of indecent assault of a person under 16.[71] Seven other offences were included on a Form 1. The circumstance of aggravation was that the victim was under the offender's authority, the victim being his daughter.[72] He received an aggregate sentence of 16 years' imprisonment with a non-parole period of 9 years.

3.107 One of the grounds of appeal was that the sentencing judge erred in deciding that the "under authority" offences were aggravated by a factor (that the offender abused a position of trust or authority)[73] that was an element of the offence. The offender argued that double counting had occurred because the offender's breach of trust had derived from his position of authority.

3.108 In dismissing this ground of appeal, the CCA observed that

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67. *R v Russell* [2022] NSWCCA 294 [87]–[92]; *R v Whyte* [2002] NSWCCA 343.
68. *R v Whyte* [2002] NSWCCA 343 [229].
69. *Crimes Act 1900* (NSW) s 66A(1).
70. *Crimes Act 1900* (NSW) s 66C(2).
71. *Crimes Act 1900* (NSW) s 61M(2).
72. *Crimes Act 1900* (NSW) s 66C(5)(d).
73. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(k).

> The degree of trust between a father and child may vary in any given case and may depend, for example, on the age and particular circumstances or character of the father and/or the child. It could not be said that "abuse of trust" is an element of the offence …
>
> In the present case, the judge placed express emphasis on breach of trust and the particular circumstances of the daughter's age and innocence that aggravated the offending which was committed by a person (the father) in a position of authority. Her Honour's identification of these circumstances clearly explained the finding of aggravation about which the [offender] complains and went beyond an abuse of authority.[74]

Historical sentencing and retrospective application of SNPPs

GL v R [2022] NSWCCA 202

3.109 The offender pleaded guilty to eight sexual offences against the same child over four years either in NSW or overseas. Those that were committed overseas were covered by provisions of the *Crimes Act 1914* (Cth) and those committed in NSW by the *Crimes Act 1900* (NSW). The sentencing judge imposed a total effective sentence for all offences of 9 years' imprisonment with a non-parole period of 5 years.

3.110 One of the grounds of appeal was that the sentencing judge erred in relation to two offences by taking into account a standard non-parole period that did not apply. The offences were indecent assault of child under 10.[75] The offences were committed in 2007 when the standard non-parole period was 5 years. From 1 January 2008, the SNPP was increased to 8 years with retrospective operation.

3.111 By the time of the sentencing in 2019, amendments had been introduced requiring courts to sentence for child sexual offences according to sentencing patterns and practices at the time of sentencing, not at the time of the offence (the historical offences amendments).[76] These amendments, however, also provided that the SNPP for a child sexual offence is the SNPP (if any) that applied at the time of the offence, not at the time of the sentencing.[77] A clause in the transitional provisions stated that the SNPP table as in force before the historical offences amendments, continued to apply in respect of an offence.[78]

3.112 Justice Hamill decided that the relevant SNPP was 5 years by applying the "clear words" of the main historical offences amendments rather than the clause in the transitional provisions. This approach applied the plain language of the main provision while "giving voice to the principle that, in the absence of clear statutory

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74. *PC v R* [2022] NSWCCA 107, 108 NSWLR 181 [77], [81].
75. *Crimes Act 1900* (NSW) s 61M(2).
76. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25AA(1). See [4.4].
77. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25AA(2).
78. *Crimes (Sentencing Procedure) Act 1999* (NSW) sch 2 cl 91.

language, the construction of penal statutes should favour the liberty of the subject". Justice Hamill also concluded the historical offences amendments should prevail because they were later in time than SNPP amendments.[79]

3.113 Justice Hamill upheld this ground of appeal since applying an SNPP of 8 years was a material error that could affect the sentencing outcome.[80] Justice Garling agreed with this conclusion.[81]

3.114 In resentencing the offender, Justice Hamill decided that this conclusion made little difference to the sentencing outcome and dismissed the appeal since no different, less severe sentence was warranted. Justice Garling agreed.[82]

3.115 Justice Brereton was inclined to think that Parliament did not intend the historical offences amendments to repeal the retrospective application of the 8-year SNPP, in accordance with the transitional provisions. However, he did not need to resolve the issue since he agreed that no lesser sentence was warranted.[83]

Brevity of offending does not reduce objective seriousness

R v Lau [2022] NSWCCA 131

3.116 The offender pleaded guilty to multiple counts of sexual and related offences against children between the ages of seven and 15. He received an aggregate sentence of 10 years' imprisonment with a non-parole period of 6 years 6 months.

3.117 The Director of Public Prosecutions appealed on the ground that the sentence was manifestly inadequate.

3.118 In considering the sentencing judge's reasons, one of the conclusions the CCA reached was that the judge had treated "what she regarded as the brevity of the offending as a factor which reduced its objective seriousness". The CCA observed:

> Although the time over which the individual instances of offending took place may not have been an entirely irrelevant consideration, it was of limited significance. It has been observed by this Court on numerous occasions that offending of this nature is capable of having profound, long-term, and generally deleterious effects upon victims, both physically and psychologically. The victim impact statements tendered in this case provide a ready example of those effects.[84]

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79. *GL v R* [2022] NSWCCA 202 [109].
80. *GL v R* [2022] NSWCCA 202 [111].
81. *GL v R* [2022] NSWCCA 202 [4].
82. *GL v R* [2022] NSWCCA 202 [8].
83. *GL v R* [2022] NSWCCA 202 [1].
84. *R v Lau* [2022] NSWCCA 131 [82].

3.119 The CCA allowed the appeal and resentenced the offender to an aggregate term of 15 years' imprisonment with a non-parole period of 11 years 3 months.

Absence of some features does not reduce seriousness of offending

SB v R [2022] NSWCCA 164

3.120 The offender was found guilty by a jury of aggravated indecent assault and multiple counts of sexual intercourse with a child under 10.[85] The victims were the two children of the offender's de facto partner, aged, at the time, from three to six. He received an aggregate sentence of 17 years with a non-parole period of 11 years.

3.121 The offender appealed on one ground, that the sentence was manifestly excessive. One argument was that the sentence was excessive because the sexual intercourse offences did not have some of the features referred to in another CCA judgment as indicating a high level of seriousness.[86] The offender relied on the following features in support of this argument: there was no pattern of systemic abuse; each offence was short in duration; the degree of penetration was limited; there were no threats or violence; there was no physical injury; the offending was not planned and did not occur in front of other children; there was no grooming; and the offender was not the children's natural father.

3.122 The CCA rejected this argument and concluded:

> In short, the absence of the features the [offender] referred to ... does not serve to lessen the gravity of the offending acts. Gravity falls to be assessed by the features that were present, and not by reference to those that were not.[87]

3.123 The CCA dismissed the appeal, noting that the sentence was "stern but within the available range".[88]

Breaching reporting requirements

Bisiker v R [2022] NSWCCA 110

3.124 The offender pleaded guilty to three offences relating to the transmission and possession of child pornography and one offence of failing to comply with reporting conditions under the *Child Protection (Offenders Registration) Act 2000* (NSW). The offender received a total effective sentence of 6 years 11 months with a non-parole period of 4 years 11 months. This included a sentence of 3 years 3 months for the breach of reporting conditions.

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85. *Crimes Act 1900* (NSW) s 66A, s 61M(2).
86. *TO v R* [2017] NSWCCA 12 [252].
87. *SB v R* [2022] NSWCCA 164 [70].
88. *SB v R* [2022] NSWCCA 164 [75].

3.125 The grounds of appeal included that the sentencing judge erred in applying the totality principle, leading to a manifestly excessive total effective head sentence and non-parole period. In considering this ground, the CCA observed that the breach of reporting requirements involved "quite distinct criminality". The CCA identified the purposes of the scheme as "providing intelligence to police relating to child sex offenders, assisting in the management of such offenders in the community, and providing victims and their families with an increased sense of security" and observed that achieving these purposes would be undermined if any failure to comply was:

> subsumed within any subsequent offences which occurred in connection with something which should have been reported. In order for the protective regime to be effective it is important that there be deterrence for the very fact of failing to comply with the requirements of the Act.[89]

3.126 The CCA also observed that:

> seeking to deter reoffending was one of the purposes of the regime does not mean that there is no separate significance, for punishment purposes, of breach of the regime where such reoffending has occurred.[90]

3.127 The CCA dismissed the appeal on all grounds.

Sentencing for maintaining a sexual relationship with a child

3.128 The following cases display different attitudes to the offence of maintaining an unlawful sexual relationship with a child under s 66EA of the *Crimes Act 1900* (NSW). An unlawful sexual relationship is "a relationship in which an adult engages in two or more unlawful sexual acts with or towards a child over any period".[91] The maximum penalty is imprisonment for life.

Questioning use where facts must be found at sentence

R v RB [2022] NSWCCA 142

3.129 The offender was found guilty by a jury of one offence of maintaining sexual relationship with a child,[92] and one offence of indecent assault of a child.[93] For the offence of maintaining a sexual relationship with a child he received a sentence of 10 years' imprisonment with a non-parole period of 7 years. One of the grounds of

89. *Bisiker v R* [2022] NSWCCA 110 [25].
90. *Bisiker v R* [2022] NSWCCA 110 [25].
91. *Crimes Act 1900* (NSW) s 66EA(2).
92. *Crimes Act 1900* (NSW) s 66EA.
93. *Crimes Act 1900* (NSW) s 61M(2).

appeal by the prosecution was that the sentencing judge erred by determining that she was obliged to sentence on the facts most favourable to the offender.

3.130 This ground raised the question of how a sentencing judge can determine facts relevant to the objective gravity of a s 66EA offence after a jury has made a finding of guilt. This is because the offence provision does not require the jury to agree on what sexual acts towards a child constitute the unlawful sexual relationship.[94] In light of this, the CCA noted that the sentencing judge's adoption of any particulars at all, as if they represented the least serious findings inherent in a guilty verdict, would in fact involve sentencing the offender on a basis that exceeded anything the jury had agreed. This was consistent with the aims of the offence "to enable the prosecution to secure convictions where a complainant's evidence is thought to be insufficiently clear and cogent to support findings beyond reasonable doubt regarding specific instances of misconduct".[95]

3.131 The CCA, therefore, observed:

> The present concern is not whether findings by the judge would be of greater seriousness than the two least significant matters. The concern is that, for a sentence to be passed, there have to be evidence-based findings of a tribunal of fact concerning the extent and seriousness of the offending. At present there are none. There are none by the jury as a collective body because they were not required to reach unanimity on any particular act or acts and there are none by the judge because the two least grave particulars were just adopted conventionally. Evidence-based findings are essential to this Court's consideration of whether the sentence imposed at first instance is inadequate. Public confidence in the ultimate sentencing outcome depends upon the facts of the misconduct having been determined by a lawful and credible process.[96]

3.132 The CCA allowed the prosecution's appeal, quashed the sentence for the relationship offence and remitted the matter to the District Court for rehearing. The task of the sentencing judge was to determine the facts of the offending and, in doing so, to apply the criminal standard of proof beyond reasonable doubt.

3.133 In dealing with this matter, the CCA commented on s 66EA, noting that:

> A patently contradictory and unsatisfactory situation arises as a direct consequence of s 66EA having been drafted with the object of enabling an accused to be convicted on the indistinct basis that he or she maintained a sexual relationship, the content and physical acts of which do not have to be resolved at the point of the jury determining guilt. After a guilty verdict the section reposes in the trial judge the heavy responsibility of fixing a penalty that may be as great as imprisonment for life, the maximum possible punishment under the law of this State, without the benefit of implicit unanimous jury findings upon any specific acts that comprised the relationship and in reliance upon evidence that the

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94. *Crimes Act 1900* (NSW) s 66EA(5)(b)–(c).
95. *R v RB* [2022] NSWCCA 142 [64].
96. *R v RB* [2022] NSWCCA 142 [69].

> prosecution has implicitly deemed insufficient to prove any such acts, to the criminal standard, if charged separately.[97]

3.134 The CCA further noted:

> This case does not demonstrate any practical utility in the laying of a charge under s 66EA. It illustrates how the section has worked a less than transparent shift of decision-making, on very significant questions of criminal culpability, from jury to judge.
>
> The effect of a Crown election to lay a charge under s 66EA is to deny the accused trial by jury on specific allegations of sexual acts; to have the accused tried by jury on a threshold, generalised issue of whether a sexual relationship was maintained; then to have specific allegations of what he is to be punished for litigated for the first time in a post-conviction hearing by a sentencing judge alone.[98]

Desirability of using the offence

TS v R [2022] NSWCCA 222

3.135 The offender pleaded guilty, amongst other offences, to 99 counts of sexual abuse of his stepdaughter over almost 5 years. He was also found guilty, after trial, of 31 other counts including administering an intoxicating substance with the intent to assault his stepdaughter. He received an aggregate sentence of 32 years with a non-parole period of 24 years.

3.136 The offender appealed against sentence. This was upheld on the ground that a standard non-parole period was taken into account for 32 offences which did not apply at the time the offences were committed. The resentencing involved indicating a sentence for each count as required by the *Crimes (Sentencing Procedure) Act 1999* (NSW).[99] Despite undertaking this process, the CCA concluded that no lesser sentence than that imposed by the sentencing judge was warranted.

3.137 In approaching the resentencing, the CCA noted that the offender had complained that the sentencing exercise had been made "overly complex" by "overloading of the indictment". The CCA observed that the offence of persistent sexual abuse of a child[100] was available:

> Had that offence been charged and found proved, the sentencing exercise may have been less complex, at least in the sense that it would have overcome the need to indicate sentences for something in the order of 100 sexual offences … That, however, is not to the point. As the trial judge appreciated and as observed above, the prosecutor having elected to frame the indictment as presented, the only appropriate sentence was an aggregate sentence, obliging the Court to

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97. *R v RB* [2022] NSWCCA 142 [72].
98. *R v RB* [2022] NSWCCA 142 [75]–[76].
99. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 53A(2)(b).
100. *Crimes Act 1900* (NSW) s 66EA.

> make a written record of the sentence which would have imposed for each offence had separate sentences been imposed.[101]

Assessing seriousness

Towse v R [2022] NSWCCA 252

3.138 The offender pleaded guilty to one count of persistent sexual abuse of a child with the nine year old daughter of his de facto partner.[102] The conduct, which amounted to the offences of sexual intercourse, sexual touching, and sexual act,[103] took place over seven days. Some of them took place in Queensland. He was sentenced to 8 years' imprisonment with a non-parole period of 5 years. The sentence was subject to a 35% discount for the early guilty plea and voluntary disclosure of some of the conduct.

3.139 The CCA noted that there was no doubt as to the individual offences, nor when they occurred. The offence had been adopted by both prosecution and defence because the offence could cover conduct in Queensland and this would relieve the offender of the possibility of further charges in Queensland.[104]

3.140 One of the grounds of appeal was that the sentence was manifestly excessive. The CCA reviewed a number of cases involving similar sentences that involved substantially more serious offending over longer periods and allowed the appeal. The majority observed:

> The seriousness of the offending undoubtedly warranted the imposition of a sentence of imprisonment. However, the actual conduct, whilst involving a relatively minor form of sexual intercourse, occurred within such a brief period that it could not bear comparison with the extended period of offending in [a comparable case], with an even younger victim.[105]

3.141 The CCA resentenced the offender to 5 years 3 months' imprisonment with a non-parole period of 3 years 3 months.

3.142 Justice McNaughton dissented, noting in particular that the penalty for the offence had been increased from 25 years' imprisonment to imprisonment for life and one of the five unlawful sexual acts amounted to sexual intercourse with a child under 10,[106] which also carried a maximum penalty of life imprisonment.

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101. *TS v R* [2022] NSWCCA 222 [242].
102. *Crimes Act 1900* (NSW) s 66EA(1).
103. *Crimes Act 1900* (NSW) s 66A, s 66DA, s 66DC.
104. *Towse v R* [2022] NSWCCA 252 [18].
105. *Towse v R* [2022] NSWCCA 252 [52].
106. *Crimes Act 1900* (NSW) s 66A(1).

Sentencing for other offences

Fraud

O'Brien v R [2022] NSWCCA 234

3.143 The offender pleaded guilty to three counts of dishonestly obtaining financial advantage by deception.[107] Four other such offences were taken into account in two Form 1 documents. He received an aggregate sentence of 5 years 6 months' imprisonment with a non-parole period of 3 years 6 months.

3.144 The offender had wrongly presented himself on the internet as a qualified tradesman and completed defective repairs and renovations. He received close to $800,000 from customers. There were seven victims, most of whom were elderly and vulnerable. One victim lost her home because of the financial consequences of the offence.

3.145 One ground of appeal was that the sentence was manifestly excessive. The CCA resolved this ground "without deep analysis":

> In light of the multiple victims; the substantial sums involved in two of the counts; the very substantial sum involved as a whole; the severe consequences of the offending to some of the victims; the heartlessness of the criminal enterprise generally; and the significant criminal antecedents of the [offender], it is impossible to be satisfied that any attribute of the aggregate sentence is manifestly excessive.[108]

Sexual assault: age difference

Baker v R [2022] NSWCCA 195

3.146 The offender was convicted, by a jury, of three counts of aggravated indecent assault (victim with a cognitive impairment),[109] and five counts of counts of aggravated sexual intercourse without consent (victim with cognitive impairment).[110] He received an aggregate sentence of 19 years' imprisonment with a non-parole period of 13 years 4 months.

3.147 The victim was 17 years 7 months old and the offences were committed in one course of conduct after the offender (then aged 31) convinced the victim to accept a ride when she was running away from her stepmother's house.

3.148 One of the grounds of appeal was that the sentencing judge erred in finding that the victim's age was an aggravating factor.

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107. *Crimes Act 1900* (NSW) s 192E(1)(b).
108. *O'Brien v R* [2022] NSWCCA 234 [39].
109. *Crimes Act 1900* (NSW) s 61M(1).
110. *Crimes Act 1900* (NSW) s 61J(1).

3.149 The CCA rejected this ground concluding that, while age differential is usually not relevant in cases of non-consensual intercourse between adults, the judge did not err in taking the discrepancy into account as relevant to objective gravity:

> What her Honour saw as relevant was the age discrepancy, observing that "here the victim was still a very young woman. The accused was a mature man". The relative age of the victim to the [offender] was relevant to objective seriousness, because the differential increased the victim's vulnerability, which was exploited by the [offender].[111]

3.150 The CCA also, by majority, rejected all other grounds of appeal.

Sexual touching as part of a course of conduct

Morrison v R [2022] NSWCCA 158

3.151 The offender was found guilty of two counts of aggravated sexual assault,[112] and three counts of sexual touching of a child over 10 and under 16.[113] He received an aggregate sentence of 13 years imprisonment with a non-parole period of 8 years 8 months.

3.152 The offender was a 52 year old man who committed the offences against the 13 year old victim after he took her home. The sexual touching offences involved kissing (indicative sentence: 3 years with a non-parole period of 2 years); a hickey to the neck (indicative sentence: 3 years with a non-parole period of 2 years); and a hickey to the chest (indicative sentence: 3 years 9 months with a non-parole period of 2 years 6 months).

3.153 One of the grounds of appeal was that the indicative sentences were manifestly excessive. The other ground of appeal was that the aggregate sentence itself was manifestly excessive.

3.154 The CCA observed that:

> On any view of the matter, a sentence of imprisonment for 3 years, with a non-parole period of 2 years, for a non-consensual mouth to mouth kiss involving the tongue, forcibly imposed by a 52 year old man upon a 13 year old girl, would be manifestly excessive.[114]

3.155 In relation to the hickeys to the neck and chest, the CCA observed:

> However, repulsive as the conduct of a much older man was, invading the bodily space of a 13 year old vulnerable child, he should not be sentenced to 3, or 3½ years imprisonment for doing so.[115]

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111. *Baker v R* [2022] NSWCCA 195 [24].
112. *Crimes Act 1900* (NSW) s 61J(1).
113. *Crimes Act 1900* (NSW) s 66DB(a).
114. *Morrison v R* [2022] NSWCCA 158 [60].
115. *Morrison v R* [2022] NSWCCA 158 [61].

3.156 The CCA further noted that "the much more serious offending, and much more substantial harm" was caused by the offences of aggravated sexual intercourse.[116]

3.157 The CCA concluded that, in this case, the offending, all of which occurred in the early hours of one morning, "demanded a very high degree of notional concurrency" which was not achieved by the aggregate sentence:

> Viewed that way, this is not so much a ground of manifest excess, but an impermissible exercise of the discretion to accumulate notional sentences when imposing an aggregate sentence. However the error be characterised, it warrants allowing the appeal against sentence ...[117]

3.158 The CCA resentenced the offender, imposing an aggregate sentence of 10 years 6 months' imprisonment with a non-parole period of 7 years. Indicative sentences for the sexual touching offences ranged from 18 months to 2 years.

Terrorism: rejection of comparison to attempted murder

Khan v R [2022] NSWCCA 47

3.159 The offender was convicted by a jury of engaging in a terrorist act.[118] The terrorist act involved the offender stabbing the victim multiple times with a knife with the intention of killing him. The offender targeted the victim because he believed him to be an American and supporter of conduct the offender considered to be war crimes in the Middle East.

3.160 The maximum penalty for such an offence is life imprisonment. The offender received a sentence of 36 years' imprisonment with a non-parole period of 27 years.

3.161 One of the grounds of appeal was that the sentence was manifestly excessive. The offender argued that the sentence was manifestly excessive because, if the offender had been charged with attempted murder, the maximum penalty in NSW would have been 25 years' imprisonment.[119]

3.162 In considering this point, the CCA observed:

> Most interestingly, ordinarily, an attempt to commit an offence carries a maximum penalty equal to the maximum penalty fixed for the completed offence.
>
> Thus, an attempted robbery carries the same maximum sentence as a robbery. In the case of attempted murder, the legislature has differentiated the penalty for attempt and the penalty for the completed offence. Of itself, this may create anomalies.
>
> For example, assume a murder that would otherwise carry the maximum sentence and assume that the murder is unsuccessful, but as a consequence the

116. *Morrison v R* [2022] NSWCCA 158 [62].
117. *Morrison v R* [2022] NSWCCA 158 [74].
118. *Criminal Code* (Cth) s 101.1(1).
119. *Crimes Act 1900* (NSW) s 27.

> victim is left alive, but with severe brain damage preventing any and all executive functioning and without use of any bodily function below the neck. The crime would be attempted murder.
>
> Many would suggest that the damage is at least as great, and possibly greater, than if the attempt at murder had been successful. This would be particularly so if, apart from the disabilities to which I have referred, the victim was in constant pain.
>
> Yet, the maximum sentence for murder is life imprisonment and the maximum sentence for attempted murder is 25 years' imprisonment.[120]

3.163 The CCA then observed that the offender's argument "loses sight of the offence" and agreed with the sentencing judge in rejecting the analogy:

> Terrorism, while ultimately concerned with the risk to human life, is fundamentally concerned with the threat to civil society by those persons advancing a political, religious, or ideological agenda who intend to intimidate governments or the public. The comparison with attempted murder, in those circumstances, where the terrorist act, which sought to kill, was unsuccessful, is misplaced.[121]

3.164 The CCA dismissed the appeal on all grounds.

Offences against police officers

Courtney v R [2022] NSWCCA 223

3.165 The offender pleaded guilty to using an offensive weapon with intent to prevent lawful apprehension.[122] A further offence of taking and driving a conveyance without the owner's consent was included on a Form 1. The offender was also dealt with for driving while disqualified.[123] He received an aggregate sentence of 5 years 3 months' imprisonment with a non-parole period of 3 years 5 months. The offender, who came to the attention of a police patrol while driving, evaded apprehension by colliding with the police car on three separate occasions.

3.166 One of the grounds of appeal was that the sentencing judge erred by double counting the fact that prevent lawful apprehension offence was committed against police officers in accordance with s 21A.[124] One of the arguments put in support of this proposition was that, while there may be cases where preventing lawful apprehension could be aggravated by the fact that the victim was a police officer, the "better view" was that "it was open to take that factor into account only if there was something particular or unusual about the circumstances of the offending".[125]

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120. *Khan v R* [2022] NSWCCA 47 [100]–[104].
121. *Khan v R* [2022] NSWCCA 47 [109].
122. *Crimes Act 1900* (NSW) s 33B(1)(a).
123. *Road Transport Act 2013* (NSW) s 54(1)(a).
124. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(a).
125. *Courtney v R* [2022] NSWCCA 223 [38].

3.167 The CCA rejected this argument noting that it was not supported by the authorities relied on by the offender. The authorities[126] rather established that "a factor which is an inherent characteristic of the offence for which an offender is being sentenced cannot be taken into account as an aggravating factor under s 21A(2) … unless its nature or extent in the particular case is unusual". The CCA reiterated that the fact that the offending involved a police officer was not an inherent characteristic of the offence which related to any person effecting the lawful apprehension or detention of an offender.[127]

3.168 The CCA allowed the appeal on other grounds, but on resentencing the offender, found that no other sentence was warranted.

Murder: domestic violence context

R v Darcy (No 9) [2022] NSWSC 135

3.169 The offender was found guilty by a jury of the murder of her partner. She sedated the victim and killed him with helium gas, attempting to make the murder look like a suicide. The murder was committed after the offender had convinced the victim to change his will to make her the sole beneficiary of his farming property. Internet search records indicated she had planned the murder for some months. She also promoted the idea that the offender was at risk of suicide, before and after the murder.

3.170 In sentencing the offender, the Supreme Court judge observed:

> This murder was committed in the context of a domestic relationship, and so it attracts particular considerations of general deterrence, denunciation and community protection and must recognise the dignity of the domestic violence victim.[128]

3.171 The judge characterised it as a murder of "high objective seriousness",[129] pointing to the internet searches about ways to kill, as well as initial emotional abuse and "sneaky physical attacks" that led up to the murder. The judge observed that the offender was "callous, relentless, and heartless" in getting rid of the victim who stood between her and the property.[130]

3.172 However, the judge was not persuaded that "the level of culpability is so extreme that the community interest in retribution, punishment, community protection and

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126. *R v Yildiz* [2006] NSWCCA 97 [37]; *Mansour v R* [2011] NSWCCA 28 [46]; *Trejos v R* [2017] NSWCCA 122 [55].
127. *Courtney v R* [2022] NSWCCA 223 [57].
128. *R v Darcy (No. 9)* [2022] NSWSC 135 [98].
129. *R v Darcy (No. 9)* [2022] NSWSC 135 [103].
130. *R v Darcy (No. 9)* [2022] NSWSC 135 [104].

deterrence can only be met through imposition of a life sentence". She considered that:

> Issues of community protection and specific deterrence can be met through the imposition of a very lengthy fixed sentence, with that sentence still reflecting those factors as well as the community's interest in retribution, punishment and general deterrence.[131]

3.173 The judge took into account aggravating factors, including that the offender had drugged the victim, committed the offence in the victim's home, was on parole at the time of the offence, committed the murder for financial gain, and engaged in a high degree of planning. She had previously pleaded guilty to charges that she had hit her previous husband on the head with a hammer while he slept, poisoned him with prescription medication and left him sleeping in a room which she had doused with petrol and set on fire in order to claim insurance money.

3.174 The offender received a sentence of 40 years' imprisonment with a non-parole period of 30 years.

Contempt of court – suspended sentence

Council of the NSW Bar Association v Rollinson [2022] NSWSC 407

3.175 The offender, a former barrister, had ceased to hold a practising certificate yet continued to practice and in doing so breached undertakings to the Bar Association and the Supreme Court and also breached injunctions issued by the Court. The offender pleaded guilty to three instances of criminal contempt of court.

3.176 The *Crimes (Sentencing Procedure) Act 1999* (NSW) does not apply in proceedings that seek to punish criminal contempt. The forms of punishment that may be imposed for criminal contempt are set out in the *Supreme Court Rules 1970* (NSW). These include a fine and/or committal to a correctional centre which may be imposed on terms, including a suspension of punishment.[132] The judge noted that the principle of imprisonment as a penalty of last resort, the principle of totality and the principles relating to the sentencing of mentally ill offenders were all applicable to punishment for contempt.

3.177 In sentencing the offender, the judge considered the offender's conduct was so grave as to require a sentence of imprisonment. The judge imposed a total effective sentence of 9 months (consisting of sentences for each contempt of 2 months, 4 months and 6 months).

3.178 However, the judge decided to suspend the sentence, in light of a number of matters including the offender's cognitive decline and the fact that the offender's

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131. *R v Darcy (No. 9)* [2022] NSWSC 135 [106].
132. *Supreme Court Rules 1970* (NSW) pt 55 r 13.

"personality disorder, age and build would render him vulnerable to intimidation" in custody.

3.179 The judge acknowledged that the sentence was rendered "appreciably more lenient". However, the judge also noted that the suspension would give the offender a "significant incentive" to comply with the Court's injunction "in circumstances where he has been unable to so to date". The judge concluded that:

> The authority of the Court is not so fragile that it can only be vindicated by committing a vulnerable person to jail without him being afforded one last opportunity to comply with the orders made against him.[133]

Heavy Vehicle National Law

Transport for NSW v De Paoli Transport Pty Ltd [2022] NSWSC 1678

3.180 The offenders, a line-haul trucking company and two schedulers (the company owner and an employee) pleaded guilty to offences under the *Heavy Vehicle National Law.* The offences involved failure to ensure the safety of transport activities.[134] In the case of the company, the offending involved the failure to provide and maintain adequate safety systems and the failure to provide adequate training to drivers. Those failures exposed drivers and the public to a risk of death or serious injury (a category 2 offence). The two schedulers' offending involved a failure to ensure that the drivers' trips were safe (category 3 offences).

3.181 After allowing a 25% discount for the guilty pleas, the magistrate imposed fines of $15,000 on the company, $6,000 on the company owner and $3,000 on the employee.

3.182 Transport for NSW appealed the to the Supreme Court on questions of law. The judge concluded that the magistrate's approach was erroneous on numerous grounds:

> His Honour's emphasis on the absence of any accidents rather than the assessment of risk caused by the offending conduct was erroneous. His failure to have any proper regard to deterrence was erroneous. His Honour failed to consider the nature and extent of the failures of the primary duty. Further, the sentences were manifestly inadequate. The level of penalty was affected by both his Honour's own views as to the risks associated with heavy vehicles and whether reasonably practicable steps could have been taken to eliminate or reduce the risks.[135]

3.183 The judge set out factors that a court would normally consider when sentencing for a breach of duty under the *Heavy Vehicle National Law*:

(1) The category of offence. For example, Category 1 involves both exposure of an individual to a risk of death or serious injury or illness and recklessness as to the

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133. *Council of the NSW Bar Association v Rollinson* [2022] NSWSC 407 [104].

134. *Heavy Vehicle National Law* (NSW) s 26C, s 26G, s 26H.

135. *Transport for NSW v De Paoli Transport Pty Ltd* [2022] NSWSC 1678 [68].

risk. Category 2 requires the contravention exposed an individual to a risk of death or serious injury or illness.

(2) The nature and extent of the contravention; for example, the failure to comply with the duty over an extended period involving multiple vehicles and different types of transgressions might be considered more serious than non-compliance over a limited period in limited ways.

(3) The offender's conduct in failing to comply. Conduct involving "deliberate deceit or fabrication of records or falsifying documents or encouragement of drivers to not comply with fatigue management or speed rules will obviously be more serious than failures that arise through sloppiness, inadvertence or being unaware (not that any of that is any excuse)".

(4) The particulars of the failures when considered as a whole. For example, there may be both systemic failures (the absence of any proper system) and training failures. Two failures will be more serious than one.

(5) The period over which the failures took place and the number of vehicles involved as these combined must necessarily increase the risk to drivers and other road users.

(6) Whether the offender acted "quickly and thoroughly" to remedy the non-compliance, although the weight of such a factor is "very much affected by the extent and nature of the offending in the first place".

(7) Whether the contraventions had or had not caused any injury or death may be taken into account. However, the weight given to the absence of incidents would be small because the offences are "risk-based rather than dependent upon persons actually being injured or killed".

(8) Both specific and general deterrence are important. The legislative scheme was introduced to improve heavy vehicle safety. Penalties which would "operate only as a minor blip on the operation of a transport company" do not reflect the importance of deterrence.[136]

3.184 The judge resentenced the offenders, imposing fines of $180,000 on the company, $15,000 on the company owner and $15,000 on the employee.

Breach of an extended supervision order

Monteiro v R [2022] NSWCCA 37

3.185 The offender pleaded guilty to 10 counts of failing to comply with an extended supervision order (ESO) and an interim supervision order. The breaches involved a variety of conduct, including using false names and unregistered devices, sending and receiving messages and accessing the internet, and maintaining a variety of email addresses, alternate names and social media accounts. The sentencing judge assessed the breaches as below mid-range or just below mid-range. He received an aggregate sentence of 2 years 8 months' imprisonment with a non-parole period of 2 years.

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136. *Transport for NSW v De Paoli Transport Pty Ltd* [2022] NSWSC 1678 [47].

3.186 The offender appealed the severity of his sentence.

3.187 In considering the appeal, the CCA observed that there was a "fine but important distinction" between breaches that "point to planning for, or the commission of, serious sexual or violence offences" and those that do not. The CCA also noted that the full range of sentencing options was available for breaching an ESO and that some breaches will be highly technical and not warrant a custodial sentence.[137]

3.188 The breaches in this case were of conditions that facilitate supervision. The CCA observed that compliance with these conditions was important, but that it should be uncommon for such a breach to be assessed as mid-range where it is known that it is not related to the preparation or commission of serious offences or it does not increase the risk of such offences.[138]

3.189 The CCA took the view that the offending, while not at the lowest level, was well below mid-range[139] and concluded that the sentence itself was manifestly excessive.[140] In considering the appropriate penalty, the CCA observed that, since the offender was already under an ESO, the imposition of a CCO or intensive correction order (ICO) might "not result in any punishment whatsoever" and that a fine might be far more effective.[141] However, it also considered that because the breaches went to "the heart of the supervision process", and, whatever the motive, significantly impeded the full implementation of the supervision process, they warranted a sentence of imprisonment.[142]

3.190 Bearing in mind, among other things, that parole conditions would be less restrictive than the conditions of the ESO, the CCA imposed a fixed sentence of 18 months' imprisonment with no parole period.[143]

Particular penalties and related orders

Determining an appropriate licence disqualification period

Pearce v R [2022] NSWCCA 68

3.191 The offender pleaded guilty to a single count of aggravated dangerous driving causing grievous bodily harm, with the circumstance of aggravation being driving

137. *Monteiro v R* [2022] NSWCCA 37 [36]–[37].
138. *Monteiro v R* [2022] NSWCCA 37 [39]–[40].
139. *Monteiro v R* [2022] NSWCCA 37 [41].
140. *Monteiro v R* [2022] NSWCCA 37 [45].
141. *Monteiro v R* [2022] NSWCCA 37 [43].
142. *Monteiro v R* [2022] NSWCCA 37 [44].
143. *Monteiro v R* [2022] NSWCCA 37 [50].

more than 45 km/h above the speed limit.[144] He was sentenced to 6 years' imprisonment with a non-parole period of 3 years 9 months. The offender was subject to an automatic driver licence disqualification for 5 years from when he was released on parole, unless the sentencing judge exercised a discretion to alter the disqualification period.[145] The sentencing judge did not alter the automatic period.

3.192 One of the grounds of appeal was that the sentence imposed, in particular the period of licence disqualification, was manifestly excessive.

3.193 The CCA found that the sentence itself was at the high end of the range but not manifestly excessive. However, the sentencing judge did not consider whether to exercise the discretion to alter the licence disqualification period. The majority considered that this conclusion required a re-exercise of the entire sentencing discretion. The CCA considered that reducing the period of disqualification would promote rehabilitation because it would make it easier for the offender to gain employment and reintegrate into the community.

3.194 The CCA allowed the appeal on this ground and reduced the disqualification period to 1 year 4 months. It did not consider that a lesser sentence was otherwise warranted.

Commencement of an intensive correction order

Shavali v R [2022] NSWCCA 178

3.195 The offender was sentenced for three weapons offences to an aggregate sentence of 3 years to be served by ICO. The offender had spent 438 days in custody on remand before the sentencing.

3.196 One of the grounds of appeal was that the sentencing court had not taken into account the pre-sentence custody when imposing the aggregate sentence. The prosecution conceded this ground and the CCA allowed the appeal. The CCA was, therefore, required to resentence the offender.

3.197 By the time of the hearing of the appeal, the offender had served part of the existing ICO and supervision had been withdrawn. The majority of the CCA determined that the appropriate sentence was 1 year 1 month, taking into account the time served in custody and subject to the existing ICO, and that this could be served by an ICO. However, one of the standard conditions of an ICO is that the offender must submit to supervision by a community corrections officer.[146] Imposing the sentence would therefore require the offender to submit to

144. *Crimes Act 1900* (NSW) s 52A(4).

145. *Road Transport Act 2013* (NSW) s 205(3)(d).

146. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 73(2)(b).

supervision, when supervision had already been withdrawn because his risk of reoffending was assessed as low. The majority observed:

> Arguably, by imposing a lesser sentence upon the [offender], the Court would place him in a less advantageous position than he now is.[147]

3.198 The majority therefore concluded that in all the offender's circumstances, no other sentence was warranted in law and dismissed the appeal. The CCA observed that imposing a meaningful (albeit less severe) sentence which met the purposes of sentencing would involve imposing restrictions on the offender's liberty that he did not presently face.

3.199 Justice Brereton, in dissent, stated that it was "unjust and unpalatable" that the offender should be left to serve the full remaining term. He concluded that:

> having regard to the pre-sentence custody, and to the burden of the ICO which he has already served, and the expiry of which ought to have been imminent, no further penalty might be imposed and a conviction without (further) penalty under s 10A of the *Crimes (Sentencing Procedure) Act* substituted. While such a sentence would ordinarily be entirely inadequate for the offences here in question, the difference here is that while the case is not one in which no penalty is appropriate, it is one in which the appropriate penalty has now already been practically entirely paid.[148]

Relevance of a publication order in determining the quantum of a fine in water prosecutions

Budvalt Pty Ltd v Grant Barnes, Chief Regulatory Officer, Natural Resources Access Regulator [2022] NSWCCA 9

3.200 The offender Budvalt Pty Ltd, was fined $250,000 for an offence under the *Water Management Act 2000* (NSW).[149] The judge also made an order for the publication of the court orders.[150]

3.201 One of the grounds of appeal was that the sentencing judge erred:

- by finding that the making of publication orders, and the offending company's lack of opposition to them was irrelevant to determining the amount of any fine, and
- in proceeding to determine the amount of the fine without regard to those matters.

147. *Shavali v R* [2022] NSWCCA 178 [75].
148. *Shavali v R* [2022] NSWCCA 178 [7], [13].
149. *Water Management Act 2000* (NSW) s 91B(1).
150. *Water Management Act 2000* (NSW) s 353G(1)(a).

3.202 The offending company argued that the amount of a fine should be reduced because the deterrent effect of a publication order means there is less need for deterrence through a fine.

3.203 The CCA reaffirmed that the deterrent effect of publication orders is well recognised.[151] However, it found that, in construing the provisions in the *Water Management Act*, the judge was not obliged when determining the appropriate penalty to take into account the making of a publication order.[152] The discretion to impose a penalty and the discretion to make a publication order are to be exercised separately.[153]

Procedural and other issues

Fact finding at sentencing: Wounding with intent to cause grievous bodily harm

Maybury v R [2022] NSWCCA 233

3.204 The offender was found guilty after trial by jury of two charges. One of them was wounding with intent to cause grievous bodily harm.[154] He received an aggregate sentence of 6 years' imprisonment with a non-parole period of 3 years 6 months. The indicative sentence for the wounding was 5 years' imprisonment with a non-parole period of 3 years.

3.205 The offender had one ground of appeal: that the judge erred by sentencing on the basis that the injuries amounted to grievous bodily harm, where the offence was wounding with intent to cause grievous bodily harm.

3.206 After reviewing the authorities, the CCA identified the correct approach when sentencing for wounding with intent to cause grievous bodily harm:

- identify and take into account the wounds for which the offender is being sentenced as well as "those injuries that are so related to, or closely connected with, the actions causing those wounds that they properly inform a determination of the nature and extent of those wounds and their consequences", and

151. *Budvalt Pty Ltd v Grant Barnes, Chief Regulatory Officer, Natural Resources Access Regulator* [2022] NSWCCA 9 [58].
152. *Budvalt Pty Ltd v Grant Barnes, Chief Regulatory Officer, Natural Resources Access Regulator* [2022] NSWCCA 9 [68].
153. *Budvalt Pty Ltd v Grant Barnes, Chief Regulatory Officer, Natural Resources Access Regulator* [2022] NSWCCA 9 [68].
154. *Crimes Act 1900* (NSW) s 33(1)(a).

- consider the extent, if any, of the grievous bodily harm that was inflicted at the time of the wounding in order to make a "proper evaluation" of the intention element of the offence.[155]

3.207 The CCA dismissed the appeal, concluding:

> provided the relevant injuries are correctly identified in relation to an offence of wounding with intent to cause grievous bodily harm, it is not an error to consider whether and where those injuries fit on the spectrum of grievous bodily harm when assessing the objective seriousness of such an offence in a particular case.[156]

3.208 The CCA also rejected the offender's submission that there is a "principle that it is for a jury to determine whether any injuries amount to grievous bodily harm and not a judge on sentence". The CCA noted that it is the jury's task to determine whether injuries amount to grievous bodily harm, where infliction of grievous bodily harm is an element of the offence. Otherwise the jury's verdict will be silent on the issue and the judge may be required to determine various matters including the seriousness of the injuries inflicted:

> When such an assessment is required, it is permissible, where the injuries are really serious, for the sentencing judge to describe the injuries as amounting to grievous bodily harm.[157]

Whether retroactive revocation of parole makes an offender on conditional liberty

Ahmad v R [2022] NSWCCA 144

3.209 The offender pleaded guilty to three counts of property crimes and was sentenced to 2 years 3 months' imprisonment with a non-parole period of 1 year.

3.210 One of the grounds of appeal was that the sentencing judge erred by finding that the offender was on conditional liberty at the time of the offences and in treating it as an aggravating factor.

3.211 The offender had been on parole at the time of the offences. The State Parole Authority subsequently revoked the offender's parole with effect from a date before the offences took place. The retrospective application was permitted by s 171(4) of the *Crimes (Administration of Sentences) Act 1999* (NSW). The offender argued that this retrospectively altered his status at the time of the offences so that, rather than being on conditional liberty, he was unlawfully at large.

3.212 The CCA rejected this ground, on the basis that s 171(4) extended "the term of an offender's sentence, prospectively, by reference to the number of days for which

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155. *Maybury v R* [2022] NSWCCA 233 [115].
156. *Maybury v R* [2022] NSWCCA 233 [116].
157. *Maybury v R* [2022] NSWCCA 233 [135].

the offender was at large after the revocation order takes effect" and did not alter retrospectively the offender's status as being on conditional liberty.[158]

Duty of legal practitioners to assist sentencing judges

Moye v R [2022] NSWCCA 96

3.213 The offender received an aggregate sentence of 6 years' imprisonment with a non-parole period of 3 years 9 months. The offender appealed on two grounds, both of which were conceded by the prosecution, namely that the sentencing judge acted on the wrong maximum penalty for three offences and also failed to take into account a period of pre-sentence custody. The CCA resentenced the offender.

3.214 Justice Adams, in separate brief remarks, observed that it was "regrettable" that the lawyers at the sentencing hearing did not correct the two errors that were identifiable at the time:

> It is the duty of legal practitioners appearing on sentence to correct errors of this type. It is to be accepted that one may be nervous to interrupt a judge but at the very least it should be done after the reasons have been given and before the sentence is passed. Sentencing judges in busy lists require the assistance of legal practitioners on matters such as these.[159]

Whether offender was "a convicted inmate of a correctional centre"

Hraichie v R [2022] NSWCCA 155

3.215 The offender, a prisoner, pleaded guilty to one charge of detaining a person without consent with intent to obtain an advantage[160] and one charge of assault.[161] He received an aggregate sentence of 10 years' imprisonment with a non-parole period of 5 years.

3.216 At the time of this offence, the offender was subject to an unexpired parole period relating to a number of offences that had previously been sentenced in the Local Court. However, he was in prison on remand in relation to other offences with which he had been charged while in custody.

3.217 The sentencing judge found that s 56 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) was engaged, which establishes a default position that sentences for offences involving assault by convicted inmates should be served consecutively on any other sentences. The judge concluded that the aggregate sentence should be wholly cumulated on other periods of imprisonment already imposed by a variety of

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158. *Ahmad v R* [2022] NSWCCA 144 [30], [31].
159. *Moye v R* [2022] NSWCCA 96 [29].
160. *Crimes Act 1900* (NSW) s 86(1)(b).
161. *Crimes Act 1900* (NSW) s 61.

courts for a variety of offences. This required that the offender was, at the date of the offence, a "convicted inmate of a correctional centre".[162]

3.218 One of the grounds of appeal was that the judge erred in applying s 56. The question, therefore, became whether the offender was a "convicted inmate of a correctional centre", having become entitled to release on parole, but continuing to be held in custody on remand in relation to other charges.

3.219 The definition of convicted inmate turned on the use of the expression "other than person who is on release on parole".[163] The CCA found that the Local Court's parole order operated as a direction to release the offender on parole at the expiry of the non-parole period and nothing had qualified the offender's eligibility for release. Therefore, from the expiry of the non-parole period, the offender was only in custody because he had been refused bail.[164] Section 56, thus, did not apply.[165]

3.220 The CCA upheld this ground of appeal. However, the CCA observed that for the purposes of resentencing it was "appropriate to note the important policy underlying s 56 and the potential application of that policy even in cases to which the section does not apply".[166] This included the importance of maintaining prison discipline, protecting inmates from assaults by fellow inmates and maintaining public confidence in the administration of justice by not allowing it to appear that offenders had escaped effective punishment.

3.221 The CCA resentenced the offender to an aggregate sentence of 8 years 3 months' imprisonment with a non-parole period of 3 years 3 months. The commencement date for the revised aggregate sentence was fixed to allow some 12 months concurrency with the effective sentence in relation to the other offences.

3.222 The Sentencing Council's 2021 report on assaults on emergency services workers has recommended extending s 56 to offences committed by inmates on remand.[167] As we note in chapter 4, this recommendation has not yet been adopted.[168]

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162. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 56(1)(a).
163. *Crimes (Administration of Sentences) Act 1999* (NSW) s 4(1)(a).
164. *Hraichie v R* [2022] NSWCCA 155 [145].
165. *Hraichie v R* [2022] NSWCCA 155 [146].
166. *Hraichie v R* [2022] NSWCCA 155 [148].
167. NSW Sentencing Council, *Assaults on Emergency Services Workers,* Report (2021) [8.44][8.49], rec 8.1.
168. [4.13].

Opportunities lost by long delay in prosecuting a young offender

Young (a pseudonym) v R [2022] NSWCCA 111

3.223 The offender pleaded guilty to two offences of sexual intercourse with a child between 10 and 16,[169] and one offence of attempted sexual intercourse with a child between 10 and 16.[170] The offences took place in 2003–2004 when the offender was aged 14–16 and the victim (a niece) was aged 9–11 in a household where physical and sexual violence was common. The victim disclosed the offences to a family member in 2008 but it was not until 2018 that the victim reported the offences to the police, while also reporting offences committed by her grandfather. The offender was charged in 2020 and sentenced in 2021, when he was 34. He received an aggregate sentence of 3 years' imprisonment with a non-parole period of 18 months.

3.224 The sole ground of appeal was that the aggregate sentence was manifestly excessive.

3.225 While the sentencing judge considered the delay in dealing with the offences among the relevant factors, the CCA considered that it was not only the fact of the delay that was relevant, but also its extent. The CCA noted that if the offender had been charged soon after the offences, he would have been dealt with in the Children's Court since none of the offences were serious children's indictable offences. This lost opportunity was accepted as ameliorating. Other factors flowing from the delay included:

- being dealt with in the District Court meant that the available sentencing options were limited and rehabilitation was no longer the primary sentencing principle
- the loss of the possibility of addressing the cycle of abuse that both the offender and victim were in (noting in particular that the offender's history of trauma has led to a cycle of crime and gaol)
- the offender, although having a criminal history at the time of sentencing, had lost the opportunity of coming before the Children's Court as a person of good character
- had the complaint been made before 31 August 2018, the offender would have had the benefit of being sentenced on the basis of sentencing principles at the time of the offence and not at the time of sentencing, and
- after 24 September 2018, suspended sentences were no longer an alternative and an ICO was no longer available for sexual offenders, meaning that these

169. *Crimes Act 1900* (NSW) s 66C(1).

170. *Crimes Act 1900* (NSW) s 66D.

options were not available to the judge on finding that the custodial threshold had been crossed.[171]

3.226 The CCA noted that, while the sentencing judge had been "sensitive to the complexities involved and showed compassion in his treatment of the competing factors", the sentence did not reflect "the exceptional accumulation of subjective factors". The CCA found that one of the factors that contributed to the sentence being unreasonable and plainly unjust was the "numerous ways" in which delay had resulted in lost opportunities for the offender.[172]

3.227 In dealing with the issue of delay, the CCA observed that it is common for there to be delay in complaints by victims of child sexual abuse, often because the offender has threatened the child. The CCA noted that there was no evidence that the offender had made such threats and that the situation would be different for an offender whose threats had prevented a victim coming forward.[173]

3.228 In response to the submission that the sentencing judge had erred in finding the custodial threshold had been crossed, the CCA observed that this was not a mitigating factor that had been overlooked, and that it had been accepted that it was difficult to find that the custodial threshold had not been crossed, especially since "that left a community corrections order as the only sentencing option".[174]

3.229 The CCA found that a lesser sentence was warranted in the "highly unusual circumstances of the case". However, the exercise was complicated by the fact that there had been delay in listing the appeal and the fact that the offender had spent most of his sentence in custody already.[175] The CCA resentenced the offender to an aggregate sentence of 2 years' imprisonment with a non-parole period of 16 months.

Sentencing proceedings without prosecutor a "travesty"

Director of Public Prosecutions (NSW) v Peckham [2022] NSWSC 713

3.230 The offender was sentenced in the Local Court for the offence of breaching an apprehended domestic violence order. The magistrate recorded a conviction but imposed no further penalty.

3.231 The sentencing proceedings, which the appeal judgment described as "a travesty", were conducted in the absence of the prosecution and, initially, the offender. It is

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171. *Young (a pseudonym) v R* [2022] NSWCCA 111 [36]–[49].
172. *Young (a pseudonym) v R* [2022] NSWCCA 111 [66].
173. *Young (a pseudonym) v R* [2022] NSWCCA 111 [50].
174. *Young (a pseudonym) v R* [2022] NSWCCA 111 [55].
175. *Young (a pseudonym) v R* [2022] NSWCCA 111 [67], [68].

not apparent that the offender entered a plea, and the magistrate gave no reasons for the sentence.

3.232 The Director of Public Prosecutions appealed the sentence to a single judge of the Supreme Court under s 56(1)(a) of the *Crimes (Appeal and Review) Act 2001* (NSW) and, alternatively, sought judicial review of the decision under s 69 of the *Supreme Court Act 1970* (NSW).

3.233 One ground of appeal was that the prosecutor was denied procedural fairness. The judge upheld this ground, stating:

> A fundamental requirement of procedural fairness is that the parties to litigation are given the opportunity to be heard. No authorities need be cited for this proposition. The requirement of procedural fairness applies to criminal proceedings and applies equally to all parties to such proceedings.[176]

3.234 Another ground of appeal was that the magistrate failed to give reasons. The judge upheld this ground, making it unnecessary to rule on another ground relating to the adequacy of the reasons. The judge observed:

> This is not a case where there was any debate about the contents of the reasons or whether they were adequate. There are many cases resolved in the conduce of busy Local Court lists where brief, even scanty, reasons may suffice. The parties agree that this is not the occasion to attempt to define the scope and extent of the duty to give reasons in sentence matters disposed of summarily. The adequacy of such reasons will vary from case to case. It would be wrong to attempt to be prescriptive. The sometimes absurd workload of the magistracy must be acknowledged.[177]

3.235 In disposing of the matter, the judge concluded that it was better to quash the conviction and remit the matter to the Local Court under s 69 of the *Supreme Court Act 1970* (NSW). The course was to be preferred over setting aside the sentence and imposing a different sentence under the *Crimes (Appeal and Review) Act 2001* (NSW). Reasons for this approach included that:

- the fundamentally flawed nature of the proceedings required that there be a record of quashing and the matter being dealt with according to law
- remittal is often the preferred remedy when the CCA finds a denial of procedural fairness
- the Local Court is the more appropriate forum for the resolution of factual disputes
- the offender's appeal rights to the District Court would be preserved and would be by rehearing, which is broader than any appeal rights from a Supreme Court decision under the *Crimes (Appeal and Review) Act 2001* (NSW), and

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176. *DPP (NSW) v Peckham* [2022] NSWSC 713 [20].
177. *DPP (NSW) v Peckham* [2022] NSWSC 713 [23].

- it was not apparent that the offender had in fact pleaded guilty.[178]

3.236 Two practical reasons were also given for remitting the matter:

- the offender had at least one outstanding matter before the court as well as a breach proceeding and it was appropriate that the same judicial officer deal with all outstanding matters to ensure the proper application of the principles of totality and proportionality, and
- the offender was not then in attendance at the Supreme Court hearing and arrangements would need to be made for his presence.[179]

178. *DPP (NSW) v Peckham* [2022] NSWSC 713 [30]–[33].

179. *DPP (NSW) v Peckham* [2022] NSWSC 713 [34].

4. Legislative developments

4.1 This chapter summarised three Acts that commenced operation in 2022 and that are of relevance to sentencing practice and procedure. They were in relation to:

- sentencing for historical offences: *Crimes (Sentencing Procedure) Amendment Act 2022* (NSW)
- assaults against law enforcement officers and frontline emergency and health workers: *Crimes Legislation Amendment (Assaults on Frontline Emergency and Health Workers) Act 2022* (NSW), and
- victim impact statements where the offence involves the loss of a foetus: *Crimes Legislation Amendment (Loss of Foetus) Act 2021* (NSW).

Sentencing for historical offences

4.2 The *Crimes (Sentencing Procedure) Amendment Act 2022* (NSW) amended the *Crimes (Sentencing Procedure) Act 1999* (NSW) in relation to sentencing for offenders whose offending occurred long before the sentencing date (sometimes referred to as "historical offences"). The amendments were to:

- require a court, when sentencing for such offences, to do so in accordance with the sentencing patterns and practices at the time of sentencing; and
- clarify that an intensive correction order (ICO) is not available for certain historical sexual offences.

4.3 The amendments commenced on 18 October 2022 and apply to proceedings commenced on and after this date.

Sentencing patterns and practices at time of sentencing

4.4 The amendments relating to sentencing patterns and practices expand on amendments passed in 2018[1] that required courts, when sentencing for child sexual

1. *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 3, inserting *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25AA, later amended by *Crimes (Sentencing Procedure) Amendment Act 2022* (NSW) sch 1.

offences, to do so in accordance with the sentencing patterns and practices at the time of sentencing.[2] The 2018 amendments were a response to a recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse.[3] They changed the position at common law, that courts, when sentencing for offences, must do so in accordance with the sentencing patterns and practices at the time of the offence. Some cases dealing with issues related to these amendments are summarised in chapter 3.[4]

4.5 The amendments now require a court, when sentencing for any offence, to do so in accordance with the sentencing patterns and practices at the time of sentencing, unless the offence is not a child sexual offence and the offender establishes there are exceptional circumstances.[5]

ICO excluded offences

4.6 The amendments also clarified that the provisions that make offenders ineligible for an ICO where they have committed certain sexual offences extend to historical sexual offences.

4.7 This was because the relevant provision previously referred to a prescribed sexual offence as including an offence that was an "offence under Part 3 Division 10 or 10A of the *Crimes Act 1900* (NSW) at the time the offence was committed".[6] The heading for Divisions 10 and 10A did not exist in the *Crimes Act 1900* (NSW) before 2000. The relevant provision now makes clear that a prescribed sexual offence includes "an offence under a previous enactment that is substantially similar to" an offence under Division 10 or 10A.[7]

Assaults against law enforcement officers and frontline emergency and health workers

4.8 The *Crimes Legislation Amendment (Assaults on Frontline Emergency and Health Workers) Act 2022* (NSW) commenced on 18 October 2022. It partially implemented the Council's recommendations in our report on assaults on emergency services workers.[8]

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2. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25AA.
3. Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017) rec 76.
4. [3.17]–[3.20]; [3.109]–[3.115]; [3.223]-[3.229].
5. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21B, inserted by *Crimes (Sentencing Procedure) Amendment Act 2022* (NSW) sch 1.
6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(2) definition of "prescribed sexual offence" (a).
7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(2) definition of "prescribed sexual offence" (h), inserted by *Crimes (Sentencing Procedure) Amendment Act 2022* (NSW) sch 1.
8. NSW Sentencing Council, *Assaults on Emergency Services Workers,* Report (2021).

4.9 Amendments implementing or partially implementing our recommendations included those repealing:

- the offences of obstruction of and violence against ambulance officers in s 67J of the *Health Services Act 1997* (NSW)[9]
- the offence of resisting or hindering a police officer in s 546C of the *Crimes Act 1900* (NSW),[10] and
- the offence of assaulting, resisting or wilfully obstructing any officer in s 58 of the *Crimes Act 1900* (NSW).[11]

4.10 New offences were enacted with penalties that were in accordance with our recommendations:

- assaults and other action against frontline health workers[12]
- resisting or hindering a police officer,[13] and
- aggravated offences for assaults against law enforcement officers during public disorders (including in correctional centres and detention centres).[14]

4.11 The definition of "law enforcement officer" was also expanded to include those employed or otherwise engaged to provide services to detainees in a correctional centre or detention centre for the purposes of education, health or rehabilitation.[15]

4.12 New offences of assault or other action against frontline emergency workers, that we decided not to recommend, were also enacted.[16]

4.13 One recommendation for legislative reform has not yet been adopted:

Recommendation 8.1: Extend sections 56 and 58(3)(a)(ii) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) to offences committed by inmates on remand

Sections 56 and 58(3)(a)(ii) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should not be limited to offences committed by offenders while a "convicted

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9. NSW Sentencing Council, *Assaults on Emergency Services Workers,* Report (2021) rec 7.1(2).
10. NSW Sentencing Council, *Assaults on Emergency Services Workers,* Report (2021) rec 7.5(2).
11. NSW Sentencing Council, *Assaults on Emergency Services Workers,* Report (2021) rec 7.5(2).
12. NSW Sentencing Council, *Assaults on Emergency Services Workers,* Report (2021) rec 7.1–7.3; *Crimes Act 1900* (NSW) s 60AE.
13. NSW Sentencing Council, *Assaults on Emergency Services Workers,* Report (2021) rec 7.5(1). *Crimes Act 1900* (NSW) s 60(1AA).
14. NSW Sentencing Council, *Assaults on Emergency Services Workers,* Report (2021) rec 7.7; *Crimes Act 1900* (NSW) s 4(1) definition of "public disorder", s 60A(1A), s 60A(2A), s 60A(3A).
15. NSW Sentencing Council, *Assaults on Emergency Services Workers,* Report (2021) rec 7.6; *Crimes Act 1900* (NSW) s 60AA definition of "law enforcement officer".
16. *Crimes Act 1900* (NSW) s 60AD. See NSW Sentencing Council, *Assaults on Emergency Services Workers,* Report (2021) [7.48]–[7.54].

inmate" or "while a person subject to control". These sections should also apply to all relevant offences committed by inmates on remand.

Victim impact statements where the offence involves the loss of a foetus

4.14 The *Crimes Legislation Amendment (Loss of Foetus) Act 2021* (NSW) commenced on 29 March 2022. It extended the victim impact statement (VIS) provisions in the *Crimes (Sentencing Procedure) Act 1999* (NSW) to allow VISs to deal with situations where an offence has resulted in the loss of a foetus carried by a primary victim of the offence.

4.15 In such cases, the amendments:

- extend the definition of "family victim" to include a member of the primary victim's immediate family, whether or not the primary victim died,[17] and
- provide that the family victim's VIS may contain particulars of the impact of the loss of the foetus on the family victim and other members of the primary victim's immediate family (but not the primary victim).[18]

4.16 The second reading speech observed:

> These reforms recognise that the harm caused by such offending can cause widespread harm for the immediate family of a pregnant woman, especially including her spouse or partner who would have been the other parent.[19]

17. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definition of "family victim" (b).
18. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(2)(b).
19. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 10 November 2021, 6740.

5. The Council's work

5.1 This chapter outlines the Council's work in 2022.

Functions and membership

Functions of the Council

5.2 The Sentencing Council has the following functions under s 100J of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (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

5.3 Section 100I(2) of the CSPA provides that the Sentencing Council is to consist of 16 members with various qualifications.

5.4 The Sentencing Council's membership, as at 31 December 2022, is set out below.

Chairperson

The Hon Peter McClellan AM, KC	Retired judicial officer

Members

Acting Magistrate Timothy Keady	Retired magistrate
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 Kerrie Thompson	Community member - experience in matters associated with victims of crime
Ms Thea Deakin-Greenwood	Community member - experience in matters associated with victims of crime
Mr Craig Hughes-Cashmore	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

5.5 The terms of Ms Moira Magrath and Professor Tracey Booth, both community members, ended on 23 May 2022. The Council thanks them both for their significant contribution to the work of the Council, and in particular notes the importance of the perspective that the community members bring to the Council's work.

5.6 Ms Karly Warner's term as the member with expertise or experience in Aboriginal justice matters ended on 31 October 2022. The Council thanks Karly for her considered input to the Council's work during her term.

5.7 The following appointments and reappointments were made in 2022:

Member	Date of (re)appointment	Term
Wayne Gleeson	15 August 2022	Three years
Craig Hughes-Cashmore	15 August 2022	Three years
Kerrie Thompson	15 August 2022	Three years
Belinda Rigg SC	14 October 2022	Two years
Peter Severin	14 October 2022	Two years
Christina Choi	14 October 2022	Three years
Thea Deakin-Greenwood	14 October 2022	Three years
Felicity Graham	14 October 2022	Three years
Assistant Commissioner Scott Cook APM	1 November 2022	Two years
The Hon Peter McClellan AM, KC	1 November 2022	Three years

5.8 There were two vacancies at the end of 2022.

Projects

5.9 In 2022, we had two ongoing reviews: one on the sentencing of fraud offences, and another on the sentencing of firearms, knives and other weapons offences. We also released a podcast, "Sentencing Explained", as part of our community education function.

Fraud

Terms of reference

5.10 The former Attorney General issued the following terms of reference 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)

Submissions and consultations

5.11 We invited preliminary submissions on 25 October 2021. The deadline for submissions was 31 January 2022. We received eight preliminary submissions from a range of legal and justice stakeholders, as well as members of the public.

5.12 We conducted preliminary consultations with various people and organisations with experience of fraud offending and fraud offenders, including defence and prosecution agencies, government agencies and academics.

5.13 We released a consultation paper in September 2022.[1] It set out the law and data relating to fraud offences in NSW, including sentencing outcomes. It also examined the needs of victims of fraud, the motivations of fraud offenders, and the sentencing principles and factors that courts take into account when sentencing for fraud.

5.14 The consultation paper asked whether the existing arrangements for sentencing fraud offences were adequate, and whether sentences for fraud are appropriate. It also sought responses to options for reform, including in relation to the maximum penalties, indictable only and summary only offences, limits on the use of imprisonment, aggravating factors, and decriminalisation and diversion.

5.15 We received 14 submissions in response to the consultation paper from a range of legal and justice stakeholders, members of the public, academics and non-government agencies.

5.16 The consultation paper, and most submissions made to the review, can be viewed on our website.

Report

5.17 The report was released in 2023. Details will be included in the 2023 Annual Report.

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1. NSW Sentencing Council, *Fraud*, Consultation Paper (2022).

Firearms, knives and other weapons

Terms of reference

5.18 The former Attorney General issued the following terms of reference on 4 November 2022:

> The Sentencing Council is asked to conduct a review of sentencing for firearms, knives and other weapons offences (focusing on but not limited to offences involving the use or carrying of firearms, knives and other weapons), and make any recommendations for reform that it considers appropriate.
>
> In undertaking this review, the Sentencing Council should:
>
> 1. provide sentencing statistics for convictions and penalty notices (where relevant) over a five year period;
> 2. provide information on the characteristics of offenders, sentence type and length;
> 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);
> 4. consider whether the standard non parole periods where identified remain appropriate;
> 5. consider whether offences for which penalty notices are available remain appropriate;
> 6. consider whether the maximum penalties for the offences are appropriate with reference to other jurisdictions;
> 7. consider whether any existing summary offences should be made indictable offences;
> 8. consider any other matter the Council considers relevant.

Submissions and consultations

5.19 We called for preliminary submissions on the terms of reference on 5 December 2022. We received 13 preliminary submissions from members of the public and from legal and justice agencies. Most submissions are available on our website.

5.20 Consultations were undertaken in 2023. We will summarise this stage of the project in our 2023 Annual Report.

"Sentencing Explained" Podcast

5.21 In July 2021, we commenced work on a podcast called "Sentencing Explained", as part of our community education function.

5.22 Each episode features the Chair of the NSW Sentencing Council, the Hon Peter McClellan AM KC, in conversation with expert guests including judicial officers, police, public interest lawyers, prosecutors, victims' advocates, and Sentencing Council members. The episodes provide a window into the NSW justice system for Legal Studies students, law students, lawyers, and anyone interested in criminal law.

5.23 The primary target audience is secondary school students taking Legal Studies in years 11 and 12. Study guides are available with every episode to help students strengthen their understanding of the content.

5.24 The Department of Communities and Justice provided funding towards the project for technical production and editing costs and provided in-kind support through its media and communications team.

5.25 In 2022, we released eight episodes of the podcast:

1 "Insights into sentencing reform" with the Hon Bob Debus AM, released on 24 October 2022
2 "Perspectives on the Sentencing Council" with Howard Brown OAM and Moira McGrath, released on 19 October 2022
3 "The role and duty of a prosecutor" with Director of Public Prosecutions Sally Dowling SC, released on 14 November 2022
4 "The role and duty of defence counsel" with Senior Public Defender Belinda Rigg SC, released on 7 November 2022
5 "Stepping through sentencing with Supreme Court Judges" with Justice Adamson and Justice Hulme, released on 21 November 2022
6 "Determining a sentence in the District Court" with Judge Woodburne, released on 28 November 2022
7 "A look at Legal Aid and sentencing" with Robert Hoyles, released on 5 December 2022
8 "Police, sentencing and alternative pathways" with Assistant Commissioner Scott Cook, released on 12 December 2022

5.26 At the beginning of December 2022, the trailer and these episodes of the podcast had been downloaded 2696 times. However, the actual number of listeners may have been higher, as we heard that teachers have downloaded episodes to play in their HSC Legal Studies classes.

5.27 The podcast also received some media coverage:

- Law Society of NSW, *Monday Briefs* (24 October 2022)

- "New podcast provides window into the NSW justice system", *Law Society Journal* (26 October 2022)
- "Podcasting ex-judge has sentencing in spotlight", *Sydney Morning Herald* (24 October 2022)
- ABC Sydney Radio (8 November 2022)
- "What's in a sentence? Big wigs explain", *Northern Daily Leader* (Tamworth) (14 November 2022)
- “From brickie’s labourer to Supreme Court judge: Peter McClellan’s extraordinary career”, *Sydney Morning Herald* (23 December 2022)

5.28 A further ten episodes were released in 2023. These will be detailed in the 2023 Annual Report.

Other Council business

Meetings

5.29 The Council meets monthly, with business being completed at these meetings and out of session.

5.30 Following the COVID-19 pandemic, all meetings were held by remote connection in 2022.

People

5.31 The Law Reform Commission and Sentencing Council Secretariat (the Secretariat) supports the Council’s work. The Secretariat is part of the Policy, Reform and Legislation Branch, within the Law Reform and Legal Services Division of the Department of Communities and Justice.

5.32 The following people worked with the Secretariat for at least part of 2022:

- Dr Jackie Hartley, Policy Manager
- Ms Alexandra Sprouster, Policy Manager
- Ms Sophie Sauerman, Senior Policy Officer
- Ms Laura Schultz, Senior Policy Officer
- Mr Joseph Waugh PSM, Senior Policy Officer
- Mr Oliver Cumming, Policy Officer
- Ms Uma Ossatjyz, Policy Officer
- Ms Aelish White, Policy Officer, and
- Ms Anna Williams, Research Support and Librarian.

5.33 Our paid winter internship program takes place during the university vacation. Student interns make significant contributions to research and writing on a range of projects. The following people worked with the Secretariat, and contributed to the Sentencing Council's work, as part of the 2022 winter internship program:

- Mr Tom Jilek, University of Melbourne, and
- Ms Angelique Donoghue, University of Newcastle.

Communications and engagement

5.34 The Sentencing Council's new website was launched in November 2022. The new website provides a modern and accessible way for the public to engage with our work and resources.

5.35 The Sentencing Council's branding was also refreshed in 2022 to reflect the Sentencing Council's status as an independent agency, in accordance with the NSW Government Branding Framework.

5.36 Each year, the Sentencing Council uploads the HSC Legal Studies exam questions and answers that are relevant to sentencing law to our website. The 2021 HSC Legal Studies exam papers were made available in 2022.

Collaboration

5.37 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.

Appendix A: Data tables

Figure 1.1: NSW higher and local criminal courts, penalties imposed, 2022

Penalty	No	%
Prison > 6mths	7,555	6.4
Prison < 6mths	3,185	2.7
ICO	5,807	4.9
CCO	22,077	18.7
CRO with conviction	4,674	4.0
Fine	49,236	41.7
Conviction only	4,049	3.4
CRO w/o conviction	16,053	13.6
No conviction	5,322	4.5
Total	117,958	100.0

Source: NSW Bureau of Crime Statistics and Research, reference 23-22438.

Figure 1.2: NSW higher and local criminal courts, penalties imposed for each year, 2019 – 2022

	2019		2020		2021		2022	
	No	%	No	%	No	%	No	%
Prison > 6mths	8,727	7.7	7,978	7.7	7,277	6.8	7,555	6.4
Prison < 6mths	2,927	2.6	3,083	3.0	3,257	3.0	3,185	2.7
ICO	7,482	6.6	6,344	6.1	6,268	5.9	5,807	4.9
CCO	23,205	20.5	21,730	21.0	21,383	20.0	22,077	18.7
CRO with conviction	5,219	4.6	3,772	3.6	3,931	3.7	4,674	4.0
Fine	41,116	36.4	40,664	39.2	44,159	41.2	49,236	41.7
Conviction only	3,321	2.9	3,631	3.5	3,382	3.2	4,049	3.4
CRO w/o conviction	16,476	14.6	12,579	12.1	13,313	12.4	16,053	13.6
No conviction	4,509	4.0	3,877	3.7	4,104	3.8	5,322	4.5
Total	112,982	100.0	103,658	100.0	107,074	100.0	117,958	100.0

Source: NSW Bureau of Crime Statistics and Research, reference 23-22438.

Figure 1.3: NSW higher and local criminal courts, proportion of penalties imposed on Aboriginal and other male offenders, 2022

	Aboriginal	Non-Aboriginal/ unknown
Prison > 6 mths	13.6%	5.9%
Prison < 6 mths	7.0%	1.9%
ICO	7.0%	4.8%
CCO	22.8%	18.5%
CRO with conviction	3.5%	3.9%
Fine	35.1%	42.1%
Conviction only	5.0%	2.9%
CRO w/o conviction	4.6%	15.2%
No conviction	1.3%	4.8%
Total	100.0%	100.0%

Source: NSW Bureau of Crime Statistics and Research, reference 23-22438.

Figure 1.4: NSW higher and local criminal courts, proportion of each penalty imposed on Aboriginal and other male offenders, 2022

	Aboriginal		Non-Aboriginal/ unknown	
	No	%	No	%
Prison > 6 mths	2,919	41.9	4,053	58.1
Prison < 6 mths	1,500	53.5	1,304	46.5
ICO	1,497	31.5	3,261	68.5
CCO	4,896	27.9	12,663	72.1
CRO with conviction	743	21.9	2,653	78.1
Fine	7,535	20.8	28,773	79.2
Conviction only	1,078	35.4	1,963	64.6
CRO w/o conviction	993	8.8	10,348	91.2
No conviction	289	8.1	3,279	91.9
Total	21,450	23.9	68,297	76.1

Source: NSW Bureau of Crime Statistics and Research, reference 23-22438.

Figure 1.5: NSW higher and local criminal courts, percentage of penalties imposed on Aboriginal and other female offenders, 2021

	Aboriginal	Non-Aboriginal/ unknown
Prison > 6 mths	3.6%	1.7%
Prison < 6 mths	3.4%	0.7%
ICO	5.8%	3.4%
CCO	23.3%	15.5%
CRO with conviction	6.2%	4.5%
Fine	41.4%	40.9%
Conviction only	5.3%	3.0%
CRO w/o conviction	9.2%	22.3%
No conviction	1.8%	8.0%
Total	100.0%	100.0%

Source: NSW Bureau of Crime Statistics and Research, reference 23-22438.

Figure 1.6: NSW higher and local criminal courts, percentage of each penalty imposed on Aboriginal and other female offenders, 2022

	Aboriginal		Non-Aboriginal/unknown	
	No	%	No	%
Prison > 6 mths	274	47.0	309	53.0
Prison < 6 mths	259	68.0	122	32.0
ICO	439	41.9	609	58.1
CCO	1,748	38.7	2,769	61.3
CRO with conviction	463	36.3	811	63.7
Fine	3,106	29.9	7,292	70.1
Conviction only	395	42.4	536	57.6
CRO w/o conviction	692	14.8	3,975	85.2
No conviction	135	8.7	1,424	91.3
Total	7,511	29.6	17,847	70.4

Source: NSW Bureau of Crime Statistics and Research, reference 23-22438.

Figure 1.7: Number and proportion of Aboriginal female offenders receiving sentences of imprisonment of 6 months or less, 2019 – 2022

	2019	2020	2021	2022
Proportion	60.4%	62.0%	64.5%	68.0%
Number	220	228	225	259

Source: NSW Bureau of Crime Statistics and Research, reference 23-22438

Figure 1.8: Number and proportion of Aboriginal female offenders receiving sentences of imprisonment of more than 6 months, 2019 – 2022

	2019	2020	2021	2022
Proportion	49.4%	48.7%	47.3%	47.0%
Number	407	318	293	274

Source: NSW Bureau of Crime Statistics and Research, reference 23-22438

Figure 1.9: Number and proportion of Aboriginal male offenders receiving sentences of imprisonment of 6 months or less, 2019 – 2022

	2019	2020	2021	2022
Proportion	48.2%	49.3%	51.1%	53.5%
Number	1236	1339	1485	1500

Source: NSW Bureau of Crime Statistics and Research, reference 23-22438

Figure 1.10: Number and proportion of Aboriginal male offenders receiving sentences of imprisonment of more than 6 months, 2019 – 2022

	2019	2020	2021	2022
Proportion	40.0%	41.1%	40.4%	41.9%
Number	3161	3008	2692	2919

Source: NSW Bureau of Crime Statistics and Research, reference 23-22438

Figure 1.11: NSW higher and local criminal courts, number of offenders sentenced in each region, 2019 – 2022

Region	2019	2020	2021	2022
Major cities	70,102	63,043	65,510	73,666
Inner regional	23,185	22,644	22,788	24,238
Outer regional	7,283	7,340	7,828	7,884
Remote/very remote	1,210	1,181	1,206	1,181
Unknown	11,229	9,472	9,777	11,007

Source: NSW Bureau of Crime Statistics and Research, reference 23-22438.

Figure 1.12: NSW higher and local criminal courts, proportion of penalties imposed in each region, 2022

Penalty	Major cities		Inner regional		Outer regional		Remote/ very remote		Unknown	
	No	%	No	%	No	%	No	%	No	%
Prison > 6 mths	3,684	5.0	1,333	5.5	389	4.9	54	4.6	2,095	19.0
Prison < 6 mths	1,357	1.8	476	2.0	191	2.4	32	2.7	1,129	10.3
ICO	3,609	4.9	1,487	6.1	450	5.7	40	3.4	221	2.0
CCO	13,909	18.9	5,251	21.7	1,659	21.0	279	23.6	979	8.9
CRO with conviction	3,068	4.2	1,063	4.4	364	4.6	62	5.2	117	1.1
Fine	30,812	41.8	9,685	40.0	3,330	42.2	447	37.8	4,962	45.1
Conviction only	2,404	3.3	761	3.1	256	3.2	61	5.2	567	5.2
CRO w/o conviction	10,996	14.9	3,321	13.7	996	12.6	178	15.1	562	5.1
No conviction	3,827	5.2	846	3.5	246	3.1	28	2.4	375	3.4
Total	73,666	100.0	24,238	100.0	7,884	100.0	1,181	100.0	11,007	100.0

Source: NSW Bureau of Crime Statistics and Research, reference 23-22438.

Figure 1.13: Discharge of intensive correction orders, 2019 – 2022

Outcome	2019		2020		2021		2022	
	No	%	No	%	No	%	No	%
Completed	9217	61.8	16660	71.9	17842	72.6	16859	72.9
Revoked	4938	33.1	5564	24	5314	21.6	5175	22.4
Other*	755	5.1	962	4.1	1419	5.8	1100	4.8
Total	14910	100	23186	100	24575	100	23134	100

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

Figure 1.14: Discharge of community correction orders, 2019 – 2022

	2019		2020		2021		2022	
	No	%	No	%	No	%	No	%
Completed	12936	63.7	20584	75.6	20482	73.6	20827	77.6
Revoked	5188	25.6	4670	17.2	3748	13.5	3011	11.2
Other *	2170	10.7	1965	7.2	3612	13	2995	11.2
Total	20294	100	27219	100	27842	100	26833	100

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

Figure 1.15: Discharge of conditional release orders, 2019 – 2022

	2019		2020		2021		2022	
	No	%	No	%	No	%	No	%
Completed	1495	67.9	2986	83.8	2636	82.7	2327	83.2
Revoked	441	20	356	10	222	7	216	7.7
Other *	266	12.1	223	6.3	330	10.4	253	9
Total	2202	100	3565	100	3188	100	2796	100

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

Figure 1.16: Number of conditional release orders without a conviction breached, compared with number issued, 2019 – 2022

	2019	2020	2021	2022
Issue	21,284	16,949	17,994	21,394
Breach	1,193	2,195	2,281	2,477

Source: NSW Bureau of Crime Statistics and Research, reference kf23-22440.

Figure 1.17: Number of conditional release orders with a conviction breached, compared with number issued, 2019 – 2021

	2019	2020	2021	2022
Issue	8,966	6,553	6,563	7,703
Breach	2,478	2,326	1,928	1,952

Source: NSW Bureau of Crime Statistics and Research, reference kf23-22440.

Figure 1.18: Outcomes (number) of breach of each conditional release order without a conviction, 2019 – 2022

Penalty	2019	2020	2021	2022
Prison	5	13	19	8
ICO	13	11	12	13
CCO	166	268	227	194
CRO with conviction	86	123	117	123
Fine	311	567	622	669
Conviction only	58	132	162	150
Amended CRO w/o conviction	50	119	112	116
No conviction	6	3	3	0
No action	498	959	1,005	1,202

Source: NSW Bureau of Crime Statistics and Research, reference kf23-22440.

Figure 1.19: Outcomes (proportion) of breach of each conditional release order without a conviction, 2019 – 2022

Penalty	2019		2020		2021		2022	
	No	%	No	%	No	%	No	%
Prison	5	0.4	13	0.6	19	0.8	8	0.3
ICO	13	1.1	11	0.5	12	0.5	13	0.5
CCO	166	13.9	268	12.2	227	10	194	7.8
CRO with conviction	86	7.2	123	5.6	117	5.1	123	5
Fine	311	26.1	567	25.8	622	27.3	669	27
Conviction only	58	4.9	132	6	162	7.1	150	6.1
Amended CRO w/o conviction	50	4.2	119	5.4	112	4.9	116	4.7
No conviction	6	0.5	3	0.1	3	0.1	0	0
No action	498	41.7	959	43.7	1005	44.1	1202	48.6
Total	1193	100	2195	100	2279	100	2475	100

Source: NSW Bureau of Crime Statistics and Research, reference kf23-22440.

Figure 1.20: Outcomes (number) of breach of each conditional release order with a conviction, 2019 – 2022

Penalty	2019	2020	2021	2022
Prison	157	120	68	76
ICO	86	66	42	30
CCO	679	482	347	243
Amended CRO with conviction	257	195	154	180
Fine	253	359	329	296
Conviction only	55	66	57	77
CRO w/o conviction	5	9	13	4
No conviction recorded	6	0	0	0
No action	978	1,029	918	1,045

Source: NSW Bureau of Crime Statistics and Research, reference kf23-22440.

Figure 1.21: Outcomes (proportion) of breach of each conditional release order with a conviction, 2019 – 2021

Penalty	2019		2020		2021		2022	
	No	%	No	%	No	%	No	%
Prison	157	6.3	120	5.2	68	3.5	76	3.9
ICO	86	3.5	66	2.8	42	2.2	30	1.5
CCO	679	27.4	482	20.7	347	18	243	12.5
Amended CRO with conviction	257	10.4	195	8.4	154	8	180	9.2
Fine	253	10.2	359	15.4	329	17.1	296	15.2
Conviction only	55	2.2	66	2.8	57	3	77	3.9
CRO w/o conviction	5	0.2	9	0.4	13	0.7	4	0.2
No conviction recorded	6	0.2	0	0	0	0	0	0
No action	978	39.5	1,029	44.2	918	47.6	1,045	53.6
Total	2,476	100	2,326	100	1,928	100	1,951	100

Source: NSW Bureau of Crime Statistics and Research, reference kf23-22440.

Figure 1.22: Number of community correction orders breached, compared with number issued, 2019 – 2022

	2019	2020	2021	2022
Issue	56,830	52,367	49,385	48,106
Breach	13,150	23,968	24,002	22,977

Source: NSW Bureau of Crime Statistics and Research, reference kf23-22440.

Figure 1.23: Outcomes (number) of breach of each community correction order, 2019 – 2022

	2019	2020	2021	2022
Prison	1,932	3,476	3,154	2,913
ICO	1,499	2,347	2,228	1,689
Amended CCO	3,846	6,006	5,715	4,809
CRO with conviction	14	21	4	8
Fine	241	1,030	1,147	1,153
Conviction only	137	320	425	397
CRO w/o conviction	2	1	2	1
No conviction	1	6	1	1
No action	5,478	10,761	11,326	12,006

Source: NSW Bureau of Crime Statistics and Research, reference kf23-22440.

Figure 1.24: Outcomes (percentage) of breach of each community correction order, 2019 – 2022

	2019		2020		2021		2022	
	No	%	No	%	No	%	No	%
Prison	1,932	14.7	3,476	14.5	3,154	13.1	2,913	12.7
ICO	1,499	11.4	2,347	9.8	2,228	9.3	1,689	7.4
Amended CCO	3,846	29.2	6,006	25.1	5,715	23.8	4,809	20.9
CRO with conviction	14	0.1	21	0.1	4	0	8	0
Fine	241	1.8	1,030	4.3	1,147	4.8	1,153	5
Conviction only	137	1	320	1.3	425	1.8	397	1.7
CRO w/o conviction	2	0	1	0	2	0	1	0
No conviction	1	0	6	0	1	0	1	0
No action	5,478	41.7	10,761	44.9	11,326	47.2	12,006	52.3
Total	13,150	100	23,968	100	24,002	100	22,977	100

Source: NSW Bureau of Crime Statistics and Research, reference kf23-22440.

Figure 1.25: Conditions breached resulting in revocation of an ICO in 2019 – 2022

	2019	2020	2021	2022
Not offend	1186	1320	1184	1191
Supervision	963	876	1199	713
Community Service	378	122	132	205
Intervention	44	14	27	216
Abstinence	61	22	21	35
Other *	33	17	22	35

Source: Corrections Research Evaluation and Statistics.

* Other: Home detention, Electronic monitoring, Non association, Curfew, Place restriction

Figure 1.26: Outcomes where Parole Authority was satisfied a breach occurred, 2019 – 2022

	2019		2020		2021		2022	
	No	%	No	%	No	%	No	%
Revoke (e)	1776	70.7	1756	64.2	1592	69.5	1587	72.3
Vary or delete conditions (d)	232	9.2	278	10.2	197	8.6	169	7.7
Impose conditions (c)	192	7.6	296	10.8	128	5.6	63	2.9
Formal warning (b)	185	7.4	257	9.4	246	10.7	357	16.3
Record breach, no further action (a)	128	5.1	150	5.5	129	5.6	20	0.9
Total	2513	100	2737	100	2292	100	2196	100

Source: Corrections Research Evaluation and Statistics.

Figure 1.27: Outcomes of reinstatement applications for intensive correction orders, 2019–2021

	2019	2020	2021	2022
Reinstate ICO	469	293	213	183
Add conditions to reinstated ICO	139	119	26	0
Delete conditions from reinstated ICO	69	103	9	0
Decline application	2	1	1	0

Source: Corrections Research Evaluation and Statistics.