Annual Report 2018

Sentencing Trends and Practices

New South Wales
Sentencing Council

NSW GOVERNMENT

NSW Sentencing Council

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Executive summary

0.1 The purpose of this report is to detail the projects the NSW Sentencing Council undertook in the 2018 calendar year, as well as provide an overview of notable sentencing research, case law and trends during the same period. This report fulfils the Council's statutory obligation to "monitor, and to report annually to the Minister on, sentencing trends and practices" (*Crimes (Sentencing Procedure) Act 1999* (NSW) s 100J(1)(c)).

The Council's projects (Chapter 1)

0.2 We worked on four projects in 2018:

- **Victims' involvement in sentencing:** reference received 24 May 2017; report transmitted to the Attorney General on 1 March 2018. The report was partially implemented by schedules 3 and 4 of the *Crimes Legislation Amendment (Victims) Act 2018* (NSW) which received assent on 28 November 2018.
- **Repeat traffic offenders:** reference received 18 April 2018; consultation paper released 4 December 2018.
- **Fire offences:** reference received 12 November 2018; submissions invited 26 November 2018.
- **Homicide:** reference received 23 November 2018; preliminary submissions invited 7 December 2018.

Sentencing related research (Chapter 2)

0.3 This year, the NSW Bureau of Crime Statistics and Research (BOCSAR) produced all of the sentencing related research that we chose to summarise for this review:

- Early indicators of the impacts of the NSW driver licence disqualification reforms – *Bureau Brief No 135* (August 2018).
- The effect of the Violent Offender Treatment Program (VOTP) on offender outcomes – *Crime and Justice Bulletin No 216* (August 2018).
- The effect of parole officers on reoffending – *Crime and Justice Bulletin No 214* (July 2018).
- Evaluation of the EQUIPS Domestic Abuse Program – *Crime and Justice Bulletin No 211* (March 2018).

Cases of interest (Chapter 3)

0.4 In 2018, the Supreme Court and appellate courts delivered judgments of interest on the following sentencing topics:

- Vulnerability as an aggravating circumstance – *Katsis v R* [2018] NSWCCA 9.
- Deprived upbringing of an offender – *Katsis v R* [2018] NSWCCA 9; *Egan v R* [2018] NSWCCA 235.
- Identifying objective seriousness for an SNPP offence – *Lin v R* [2018] NSWCCA 13.
- When a judge misstates the maximum penalty – *Campbell v R* [2018] NSWCCA 17.
- Non-parole period ratio – *Brennan v R* [2018] NSWCCA 22; *Banks v R* [2018] NSWCCA 41.
- Objective seriousness: engaging in acts of child prostitution – *R v Toma* [2018] NSWCCA 45; excessive self defence manslaughter – *Anderson v R* [2018] NSWCCA 49.
- Credit for participating in residential rehabilitation programs – *Kelly v R* [2018] NSWCCA 44; *Reddy v R* [2018] NSWCCA 212; *Small v R* [2018] NSWCCA 290.
- Expressions relating to the standard of proof at sentencing – *Erector Group Pty Ltd v Burwood Council* [2018] NSWCCA 56.
- Change in circumstances: totality considerations and the quashing of a conviction – *Little v R* [2018] NSWCCA 63.
- Backdating where an offender was on remand for unrelated discontinued offences – *Refaieh v R* [2018] NSWCCA 72.
- Future assistance to authorities: removal of unearned discount – *R v OE* [2018] NSWCCA 83.
- Domestic violence – *Patsan v R* [2018] NSWCCA 129; *Suksa-Ngacharoen v R* [2018] NSWCCA 142.
- Relevance of addiction in child abuse material offences – *Gold v R* [2018] NSWCCA 135.
- Sentencing discount for facilitating the administration of justice – *R v Nikolovski* [2018] NSWSC 1156.
- When the remaining charge on the indictment could have been dealt with summarily – *R v Parker (No 3)* [2018] NSWSC 1132.

- Limits on District Court resentencing on appeal from Local Court – *Firth v R* [2018] NSWCCA 144.
- Viewing a sample of child pornography or child abuse material – *R v Hutchinson* [2018] NSWCCA 152.
- Fatal driving offences: Assessing moral culpability – *R v Shashati* [2018] NSWCCA 167.
- Ongoing supply of drugs offence: unfulfilled agreement to supply drugs – *R v Younan* [2018] NSWCCA 180.
- Measuring a sentence in days – *Kristensen v R* [2018] NSWCCA 189 21.
- Giving reasons when applying a discount for assistance to law enforcement authorities – *Greentree v R* [2018] NSWCCA 227.
- Dangerous driving causing grievous bodily harm – *Mansweto v R* [2018] NSWCCA 232.
- Child sexual intercourse – *Beavis v R* [2018] NSWCCA 248.
- Failure to mention the guilty plea discount expressly – *Wong v R* [2018] NSWCCA 263.
- Failure to stop and assist – *R v Pulle*n [2018] NSWCCA 264.

Operation of the new penalties (Chapter 4)

0.5 In September 2018, a new penalty regime was introduced in NSW, including the new options of intensive correction order (ICO), community correction order (CCO), and conditional release order (CRO). These replaced the previous options of home detention, intensive correction order, suspended sentence, community service order, good behaviour bond, and conditional discharge bond or order.

0.6 We have examined the use of the new penalties for the final quarter of 2018, for all offences and for select categories of offences, including drug offences, traffic and vehicle regulatory offences, acts intended to cause injury, and offences against justice procedures, government security and government operations. We particularly examined the proportion of each penalty imposed for four distinct groups of offenders: Indigenous men, non-Indigenous men, Indigenous women, and non-Indigenous women.

0.7 We found that the most commonly used penalty for all groups for all offences is the fine.

0.8 Indigenous men are imprisoned at a substantially greater rate than non-Indigenous men (24.6% compared with 11.4%) and Indigenous women are imprisoned at a substantially greater rate than non-Indigenous women (12.1% compared with 4.4%).

0.9 Conversely, non-Indigenous men have “no conviction” recorded at a greater rate than Indigenous men (15.8% compared to 4.8%) and non-Indigenous women have “no conviction” recorded at a greater rate than non-Indigenous women (24.2% compared with 9.7%).

0.10 The other sentencing options do not show such significant contrasts.

0.11 The trends were broadly similar for most of the offence categories that we examined, except that a greater proportion of non-Indigenous men were imprisoned for drug offences than Indigenous men (10% compared with 8.6%).

0.12 We also examined the proportion of each penalty imposed by region. The regions are identified using the accessibility/remoteness index which measures a place’s accessibility to goods, services and opportunities for social interaction.

0.13 The data shows a greater reliance on fines in less remote areas and a greater reliance on ICOs and CCOs in more remote areas.

0.14 Finally, we examined the penalties imposed for offences which are ineligible for ICOs to test concerns that the abolition of suspended sentences could potentially lead to more people being sentenced to imprisonment.

0.15 We looked at ICO exempt offences for the four quarters before the introduction of the new sentencing regime, for the quarter in which the new regime was introduced and for the quarter after it was introduced. In the final quarter, there is a clear increase in the percentage of sentences of imprisonment and little change in the percentage of other non-custodial options.

Functions and membership of the Council (Chapter 5)

0.16 The Council continues to carry out its statutory functions. Council meetings are scheduled on a monthly basis with business being conducted at these meetings and out of session.

0.17 There are 16 members of the Council representing a range of experience and expertise. In November 2018 Detective Superintendent Christopher Craner was appointed to the Council as the member with expertise or experience in law enforcement, replacing Assistant Commissioner Mark Jenkins APM who resigned in July 2018.

0.18 We have maintained close working relationships with the Bureau of Crime Statistics and Research, and other parts of the NSW Department of Justice.

0.19 The staff of the Law Reform and Sentencing Council Secretariat (a division of the Strategy and Policy Branch of the Department of Justice) support the Council’s work.

1. The Council's projects

In Brief

We worked on four projects in 2018: Victims' involvement in sentencing; repeat traffic offenders; fire offences; and homicide. We produced a report on victims' involvement in sentencing, and a consultation paper on repeat traffic offenders. We invited submissions on fire offences and homicide.

1.1 In 2018 we completed one project, and had three ongoing projects:

- victims' invovlement in sentencing (completed)
- repeat traffic offenders (ongoing)

- fire offences (ongoing), and
- homicide (ongoing).

Victims' involvement in sentencing

Terms of reference

1.2 We received terms of reference from the Attorney General on 24 May 2017:

> I ... request that the Council conduct a review of victims' involvement in the sentencing process under the Crimes (Sentencing Procedures) Act 1999 (NSW) and consider:
>
> 1. The principles courts apply when receiving and addressing victim impact statements.
> 2. Who can make a victim impact statement.
> 3. Procedural issues with the making and reception in court of a victim impact statement, including the content of a victim impact statement, the evidential admissibility applied to a victim impact statement, and objections to the content of victim impact statements.
> 4. The level of support and assistance available to victims.
>
> In undertaking this review, the Council should have regard to:
>
> - the obligations arising under section 107 of the Crimes (Sentencing Procedure) Act 1999 (NSW)
> - the effect of the current framework on victims
> - developments in other jurisdictions both in Australia and overseas
> - minimising victim distress in the sentencing process.

Report

1.3 We transmitted our report to the Attorney General on 1 March 2018.

1.4 The report reviewed victims' involvement in the sentencing process under the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the Act").

1.5 Our focus was on the victim impact statement ("VIS"), which is one part of a broad framework designed to meet victims' needs, including the Charter of Victims Rights, the Victims Support Scheme, victim registers and restorative justice practices.

1.6 Statutory provisions for VISs first commenced in NSW in 1996 and have been amended on many occasions since. Subject to these provisions, a VIS is available at sentencing in all NSW courts. The availability and use of a VIS in the Local Court presents particular challenges both now, and in light of our recommendations.

1.7 Our recommendations are aimed at improving the system surrounding a VIS so that victims' voices can be heard whenever possible. This includes:

- minimising the trauma or harm that victims may experience when engaging with the VIS process, and
- ensuring that the process is not procedurally or substantively unfair to offenders.

Who can make a victim impact statement

1.8 The process of determining who is entitled to make a VIS should be simplified, by making the "personal harm" a person suffers as the direct result of an offence the factor that chiefly determines their entitlement to make a VIS. (**Recommendation 2.1**)

1.9 The personal harm that a person must suffer is currently limited to physical bodily harm, and psychological or psychiatric harm. Personal harm should also include emotional suffering or distress, harm to interpersonal or social relationships, economic loss or harm arising from the other forms of personal harm, and any such harms to the victim's immediate family. (**Recommendation 2.2**)

1.10 Anyone who suffers a relevant harm will therefore be entitled to make a VIS, including some who are currently excluded.

1.11 Our recommendations are framed to ensure that the expanded eligibility does not inadvertently exclude the existing entitlement of family victims to make a VIS where a victim has died.

1.12 We have also recommended extending the definition of "immediate family" to include previously excluded groups such as:

- step-grandparents, step-grandchildren, aunts and uncles, nephews and nieces
- close family members or kin of an Aboriginal person or Torres Strait Islander according to their culture, and
- anyone whom the prosecutor is satisfied is a member of the victim's extended family or culturally recognised family with whom they were close or with whom the victim had a close relationship analogous to family, or whom the victim considered to be family. (**Recommendation 2.3**)

1.13 We recommended that it should be possible to make a VIS in relation to matters listed on a Form 1 (that is, offences that are not tried but for which the offender admits guilt

and which the court takes into account when sentencing the offender for a principal offence). (**Recommendation 2.4**)

1.14 The provisions for making a VIS should also be extended to apply in cases where the defendant has been found guilty on limited evidence after a special hearing or has been found not guilty by reason of mental illness. (**Recommendation 2.5**)

Making, delivering and receiving victim impact statements

1.15 We recommended providing all victims with more options around, and flexibility in, making and delivering a VIS. This should encourage victims to exercise their rights to have their voices heard.

1.16 We recommended an express limit of one VIS for each victim, but consider there should be no limit on the number of victims who may make a VIS in any one case. (**Recommendation 3.1**)

1.17 Other recommendations to improve procedures for victims include:

- allowing victims to adopt a VIS other than by signing, including by electronic submission to the prosecutor (**Recommendation 3.2**)
- allowing a victim's carer or other important person in their life, to make a VIS on the victim's behalf if they are incapable of doing so themselves (**Recommendation 3.3**), and
- making special arrangements for reading a VIS in court, including: making available to all victims reading a VIS the arrangements that are available for victims of prescribed sexual assault offences; allowing a support person to be present; allowing victims to read a written VIS by pre-recorded media; and giving victims an opportunity, where practicable, to familiarise themselves with the courtroom. (**Recommendation 3.7**)

1.18 We also made a number of recommendations designed to reduce the possibility of last minute objections to a VIS that may prove distressing or traumatising to victims:

- providing that only the prosecution may tender a VIS (**Recommendation 3.4**), and
- allowing the prosecution to provide copies of a VIS to the defence, subject to prohibitions on retaining, copying or disseminating any such copies. (**Recommendations 3.5 and 3.6**)

Content, admission and use of victim impact statements

1.19 We recommended that a VIS should be able to address any personal harm arising from an offence. The expanded definition of "personal harm" in Recommendation 2.2 should apply. We expect that the courts will continue to take a flexible approach to permitted

content and not construe the terms of the definition too narrowly. (**Recommendation 4.1**)

1.20 In recommending an express provision that sets out what a VIS must not include, we noted the support in submissions for continuing to prohibit material that is offensive, threatening, intimidating or harassing. We also concluded that there should be a clear statement that a VIS should not give the victim's views about the sentence to be imposed or the matters that the sentencing judge should take into account. This additional express provision should assist with managing victims' expectations about what a VIS can achieve. (**Recommendation 4.2**)

1.21 There are circumstances in which it will be almost impossible for a victim to explain the impact of a crime without alluding to uncharged acts, for example, in circumstances of ongoing domestic violence. In such cases, we recommended that the court receive the VIS but not have regard to any content that goes beyond the charges for which the offender is being sentenced. (**Recommendation 4.3**)

1.22 The existing law provides that, in the case of a VIS relating to a primary victim, the court may receive and consider the VIS. However, in the case of a VIS from a family victim, the court must receive and acknowledge the VIS and may make any comment on it that the court considers appropriate. We recommended this distinction be removed and that a court be required to receive, acknowledge and consider a VIS, in appropriate form, in all cases. This would better ensure that every victim is given a voice and that those victims who prepare a VIS are not re-traumatised by a court refusing it. Requiring courts to acknowledge a VIS helps ensure that they recognise victims in the sentencing process. (**Recommendation 4.4**)

1.23 We considered there is no need to amend existing provisions about how a court may use a VIS, in particular in cases where a victim has died as a result of the offence. The current application of the provision appropriately depends on the facts and circumstances of each case.

1.24 A particular problem arises where a VIS is used as evidence of aggravating circumstances in sentencing, usually that the "injury, emotional harm, loss or damage caused by the offence was substantial". We recommended that the prosecution be encouraged, wherever possible, to adduce evidence of aggravating circumstances outside of the VIS process. This might be done by way of expert report, witness statement or evidence already adduced at trial. Our recommendation is intended to encourage practices that ensure that a VIS can effectively provide victims with a voice in court without the VIS becoming a contested element of the sentencing process. (**Recommendation 4.5**)

1.25 Currently, the Act provides that "absence of a victim impact statement does not give rise to an inference that an offence had little or no impact on a victim". We recommended strengthening the current provision by changing its language to provide that the Court is

prohibited from drawing “any inference” from the absence of a VIS. This wording seeks to eliminate any pressure on victims to make a statement. (**Recommendation 4.6**)

1.26 The prosecution and courts should adopt non-mandatory guidelines, setting out best practice for making, presenting and receiving a VIS. Our proposed timeline, that provides guidance where there are at least 10 days’ notice of a sentencing hearing, aims to ensure that parties have sufficient time to review and consult on a VIS so that it is in admissible form before the sentencing hearing. Ensuring that objections to a VIS are dealt with before the sentencing hearing should help minimise trauma for the victim. (**Recommendation 4.7**)

1.27 We recommended that there should be limits on when the defence can cross-examine a victim on their VIS during a sentencing hearing. (**Recommendation 4.8**)

1.28 We saw two alternative ways to achieve this:

- by providing that the defence may cross-examine a victim about the content of their VIS *only* if the court considers it appropriate, in the interests of justice, or
- by providing that the defence may cross examine a victim about the content of their VIS *only* if the prosecution intends to rely upon a VIS to establish circumstances of aggravation *and* if the court considers it appropriate, in the interests of justice.

1.29 The first option recognises that cross-examination may be appropriate in some circumstances, but may not be appropriate in cases where, for example, the victim is particularly vulnerable or the court does not intend to rely on the VIS to make findings adverse to the offender. The second option sets out an additional requirement, so that cross-examination is only possible where the prosecution intends to rely on a VIS to establish circumstances of aggravation.

1.30 If a court allows cross-examination, we propose that the court should make such orders about the conduct of proceedings as are necessary in the interests of the victim, including allowing special arrangements for giving evidence. In order to protect victims from potential distress, we also propose that, where the offender is unrepresented, the court must be made aware of the nature of the cross-examination proposed before it grants leave for cross-examination to occur. (**Recommendation 4.9**)

Improving a victim’s experience of a VIS and the sentencing process

1.31 We received submissions that existing information about VISs and services that assist with the preparation of a VIS may be inadequate and not always accessible to victims. We also received submissions that information and services given to victims about the VIS process are not adequately trauma-informed. To cater for victims who may be experiencing trauma we consider that all information and services should be trauma-informed.

1.32 We recommended improving information available to victims about VISs and the sentencing process, and providing for more assistance to victims. We consider that Victims Services is the best-placed agency to consult with relevant agencies to ensure that information about a VIS is standardised, centralised and routinely reviewed, is as brief as possible and targeted, and includes relevant information about VIS procedures and the role of a VIS in sentencing. (**Recommendation 5.1**)

1.33 We recommended that there should be more support for victims from people trained in trauma-informed care and practice and trained in preparing a VIS. Translator services should also be made available. (**Recommendation 5.2**)

1.34 We also recommended improving training and education for the judiciary and legal profession about issues relevant to VISs and victims. In particular, bench books should set out how courts should deal with, and acknowledge victims when they present a VIS. (**Recommendation 5.3**)

Implementation

1.35 The *Crimes Legislation Amendment (Victims) Act 2018* (NSW) was passed by parliament and received assent on 28 November 2018. Schedules 3 and 4 implemented a range of our recommendations.

Repeat traffic offenders

Terms of reference

1.36 We received terms of reference from the Attorney General on 18 April 2018:

> The Sentencing Council is to review the sentencing of recidivist traffic offenders who may pose an ongoing risk to the community and make recommendations for reform to promote road safety. In conducting the review, the Council should:
>
> 1. Provide sentencing statistics on such offenders and analyse them in terms of relevant offender characteristics;
>
> 2. Consider the principles the courts should apply when sentencing such offenders;
>
> 3. Have regard to the availability of, and relevant findings on, driver intervention programs and other initiatives in NSW and other comparable jurisdictions;
>
> 4. Consult with road safety and other experts, and consider international best practice, on how best to deter recidivist traffic offenders from reoffending and encourage safe driving practices; and

5. Have regard to any other matter the Council considers relevant.

Preliminary submissions

1.37 We invited preliminary submissions on the project on 24 April 2018 and received 19 preliminary submissions from members of the public and other interested community and legal organisations.

Consultation paper

1.38 We released a consultation paper on 4 December 2018, with a deadline for submissions of 22 March 2019.

1.39 The consultation paper covered questions about:

- driving offences that involve harm or a high risk of harm
- relevant sentencing principles
- issues arising from the system of imposing and enforcing fines and penalty notices
- issues surrounding licence suspension and disqualification and unauthorised driving
- special penalties and interventions for driving offences, including ignition interlock programs, vehicle forfeiture and other vehicle sanctions, intelligent speed adaptation systems, specialist traffic courts or lists, prevention courses, stricter penalties and intensive supervision programs, and
- communities requiring special attention, including remote and regional communities, young people, and Aboriginal people and Torres Strait Islanders.

Fire offences

Terms of reference

1.40 We received terms of reference from the Attorney General on 12 November 2018:

> The Sentencing Council is to review the standard non-parole period for the bushfire offence under section 203E of the Crimes Act 1900 (NSW) to determine whether it should be increased upon passage of the Community Protection Legislation Amendment Bill in the NSW Parliament to increase to the maximum penalty for the offence from 14 years' imprisonment to 21 years' imprisonment. The Sentencing Council is further to review whether the maximum penalties for the arson offences in Part 4AD Division 2 of the Crimes Act 1900 (NSW) should be increased.
>
> - In undertaking this review, the Sentencing Council should consider:

- The number of convictions that have been made, and the corresponding average length of any custodial sentences imposed, in respect of the bushfire and arson offences since ... 2009 ...;
- Environmental conditions, including current drought conditions across the state, that may exacerbate the potential harm caused by bushfires and other forms of fires;
- The principles that courts apply when sentencing for these offences; and
- Community expectations.

Call for submissions

1.41 On 26 November 2018 we invited submissions on the following questions:

> In light of the increase in the maximum penalty for lighting bushfires from 14 to 21 years' imprisonment:
>
> 1. What should the SNPP for the offence be, and why?
> 2. What should the maximum penalties for the offences of destroying or damaging property by fire be, and why?

1.42 The deadline for submissions was 23 February 2019.

Homicide

Terms of reference

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

> The Sentencing Council is to review the sentencing for the offences of murder and manslaughter under sections 19A, 19B and 24 of the Crimes Act 1900 (NSW), in particular:
>
> - the standard non-parole periods for murder and whether they should be increased; and
> - the sentences imposed for domestic and family violence related homicides.
>
> In undertaking this review, the Sentencing Council should consider:
>
> - Sentences imposed for homicides and how these sentencing decisions compare with sentencing decisions in other Australian states and territories;

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

Call for preliminary submissions

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

2. Sentencing related research

In Brief

In 2018, the NSW Bureau of Crime Statistics and Research produced all of the notable sentencing related research.

2.1 This chapter summarises notable sentencing related research conducted in 2018. This year, the NSW Bureau of Crime Statistics and Research (BOCSAR) produced all of the sentencing research that we chose to include.

Early indicators of the impacts of the NSW driver licence disqualification reforms

NSW Bureau of Crime Statistics and Research, Bureau Brief, No 135 (August 2018)

Suzanne Poynton and Felix Leung

2.2 This study examined the impact of the 2017 driver licence disqualification reforms on sentencing outcomes for unauthorised driving offences, focusing particularly on custodial penalties and licence disqualifications. The study defined unauthorised driving offences as:

- driving while licence disqualified, cancelled or suspended
- driving while licence cancelled, or suspended, due to fine default, and
- drive while never having been licensed.

2.3 Key components of the reform package included:

- modifying the statutory penalty for unauthorised driving offences

- replacing mandatory licence disqualifications with automatic and minimum licence disqualifications
- abolishing statutory penalties of imprisonment for first offenders convicted of driving whilst suspended after fine default, and
- reducing penalties of imprisonment for other unauthorised driving offences.

2.4 The study analysed monthly time series data for custodial penalties and licence disqualifications imposed in NSW courts for unauthorised driving offences from January 2015 to June 2018. This method determined if there was an abrupt change at the time the reforms commenced.

2.5 The study observed a post-reform decrease and a structural break when the reforms began for:

- average duration of licence disqualifications for unauthorised driving offences from just below 18 months pre-reform to around 8 months post-reform (56% decrease), and
- average duration of prison sentences for driving while licence disqualified or suspended from around 10.5 months pre-reform to below 8 months post-reform (24% decrease).

2.6 The number of people in custody where an unauthorised driving offence is their most serious offence decreased from around 260 pre-reform to around 210 post-reform (19% decrease). The structural break occurred one month after the reforms commenced.

2.7 The study also analysed the monthly count of total crashes involving injury or death from November 2012 to January 2018. The study observed an overall downward trend in the time series for both authorised drivers and unauthorised drivers. There was no structural break in the post-reform period. This suggests there was no significant change in crashes involving injury or death after the reforms commenced and no evidence that the reforms had a negative impact on road safety. The authors noted that three months was a relatively short period to collect post-reform data about crashes and that analysis should be repeated as more follow-up data becomes available.

2.8 The authors stated that, when a sufficient number of offenders have served the reduced disqualification periods, future studies will consider the impact of reforms on longer term outcomes such as reducing:

- the high volume of unauthorised driving offences finalised by the Local Court, and
- the likelihood of a person committing further unauthorised driving offences.

The effect of the Violent Offender Treatment Program (VOTP) on offender outcomes

NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin, No 216 (August 2018)

Sara Rahman, Suzanne Poynton and Wai-Yin Wan

2.9 This study sought to identify the impact of the Violent Offender Treatment Program ("VOTP") on reoffending and return to custody outcomes within 24 months of release from prison.

2.10 The VOTP is a residential therapy program delivered by Corrective Services NSW for male prisoners sentenced to a non-parole period of at least 2 years for a violent offence. The treatment phase of the program is between 9 and 12 months during which an offender attends three 2-hour group sessions each week. Inmates are encouraged to work intensively on changing the thinking, attitudes and feelings that led to their offending behaviour, and to understand the factors surrounding it. Inmates who complete the VOTP may be referred to a post-treatment program when transitioning into the community.

2.11 The researchers analysed data from the Offender Integrated Management System and BOCSAR's Reoffending Database to identify and extract information on the 587 offenders referred to the VOTP between 2007 and 2014 and released from prison. The study considered the impact of starting and completing the VOTP on general reoffending, violent reoffending and returns to custody.

2.12 Out of the 587 offenders:

- 321 were referred to, but did not start, the program,
- 50 offenders started, but did not complete, the program, and
- 216 offenders started and completed the program.

The study used linear probability models to estimate the differences between those who started the program and those who did not.

2.13 The statistical analysis methods controlled for any differences in observable risk factors such as criminal offence history. They also addressed the potential effects of unobservable bias such as an offender's motivation to change.

2.14 The study concluded that starting the VOTP was associated, at 24 months after release, with:

- lowered probability of general reoffending by 9 percentage points, and

- lowered probability of general reoffending or returning to custody by 7 percentage points.

Similar differences were found in relation to completing the VOTP.

2.15 The authors noted that they could not say whether the VOTP caused the results, in part because of the small sample size. Other limitations of the analysis were:

- the relatively short follow-up period for measuring re-offending (24 months), and
- the inability to measure the number of VOTP maintenance sessions a participant attended as part of the post-treatment program.

2.16 The authors concluded that overall, "the evidence suggests that VOTP may be effective at reducing general re-offending and returns to custody".

The effect of parole officers on reoffending

NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin, No 214 (July 2018)

Hamish Thorburn

2.17 This study aimed to determine the effect that parole officers and offices have on the reoffending of parolees.

2.18 The researchers obtained data from Corrective Services NSW on all adults released on parole in NSW between 2009 and 2012, including information on parole officer name, gender, age, years of experience, and their parole office. They matched this database to information from BOCSAR's Reoffending Database. This resulted in a sample of 15,093 offenders, supervised by 922 different parole officers across 68 different parole offices.

2.19 The first stage of the study looked at the effect of parole officer and office on reoffending of the parolee within three years of their release from custody, accounting for characteristics of parolees that affect the risk of reoffending.

2.20 The second stage of the study examined whether differences in the effect of parole officers could be explained by officer characteristics including gender, age and years of experience.

2.21 In the majority of cases, differences in parole officer accounted for less than 1 percentage point in the probability of reoffending.

2.22 When looking at the greatest effect that a parole officer could have on reoffending, the effect of a parole officer on increasing reoffending is less than 5 percentage points in all

cases and the effect of a parole officer on decreasing reoffending is 6 to 11 percentage points. The authors note that these results appear to be due to two outlying points, rather than showing a long tail in the data.

2.23 In all cases differences in parole office accounted for less than 2 percentage points in the probability of reoffending. The authors noted that this small effect is interesting because the method accounted for remoteness and socio-economic status of the parolee's postcode. This suggests that there is an effect from the office over-and-above location related effects but the study could not investigate this issue.

2.24 The study concluded that any difference in parole officer and office effects on reoffending were very small in the majority of cases. There was no evidence suggesting that parole officer age, gender or years of experience were associated with parole officer effects on reoffending.

Evaluation of the EQUIPS Domestic Abuse Program

NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin, No 211 (March 2018)

Sara Rahman and Suzanne Poynton

2.25 This study sought to estimate the unbiased effect of commencing the EQUIPS Domestic Abuse Program ("DVEQUIPS") on general reoffending and domestic violence ("DV") related reoffending.

2.26 EQUIPS stands for Explore, Question, Understand, Investigate and Practise, Plan, Succeed. DVEQUIPS is a behavioural change program offered to medium to high-risk DV offenders who are serving custodial or community-based sanctions and have a recorded current intimate partner violence offence or a history of such offences. The program involves 20 two-hour sessions delivered on a weekly or biweekly basis by trained facilitators approved by Corrective Services NSW ("CSNSW"). The program involves a range of modules including sexual respect and relationship skills, identifying abuse, offence mapping, and managing emotions, beliefs and attitudes.

2.27 The researchers obtained data from the CSNSW Offender Information Management System and the BOCSAR Reoffending Database. The study extracted details for all offenders referred to the community-based DVEQUIPS program in 2015. Offenders who started the program 12 months after the date of referral were excluded because of the significant period when an offender could reoffend before starting the program. This left a final sample of 1,273 offenders:

- 487 (38.3%) who started the program within 12 months of referral, and
- 872 (61.7%) offenders who were referred but did not start.

The follow-up period to measure reoffending was at least 12 months after the offender was referred to DVEQUIPS.

2.28 The statistical analysis methods controlled for any differences in observable risk factors such as prior criminal history. They also addressed the potential effects of unobservable bias such as an offender's motivation to change.

2.29 The study noted significant differences in characteristics of offenders who started the program and those who did not. Those who started DVEQUIPS had fewer concurrent offences than those who did not. More DVEQUIPS starters had received community service orders than non-starters. Offenders who started the program also tended to have more time remaining on their supervised orders when they were referred than non-starters.

2.30 There were also notable differences in the prior offending history of those who started DVEQUIPS and those who did not. Those who started DVEQUIPS were less likely to have a prison sentence, theft, drug, property and breach of community order offences proven in the 5 years before their index appearance. DVEQUIPS starters also had fewer prior court appearances with at least one proven offence compared to their counterparts who do not start.

2.31 Without taking into account observed or unobserved risk factors for reoffending, the reoffending rate among those who started DVEQUIPS was approximately 6 percentage points lower than those who did not start. The study found no significant difference between rates of DV reoffending for offenders who started DVEQUIPS and those who did not.

2.32 Once observable and unobservable risk factors for reoffending were included in the analysis, the study concluded that there is no evidence of a treatment effect for offenders who start DVEQUIPS within 12 months of referral when compared with offenders who were referred but did not start. There is no evidence of a significant treatment effect for both general reoffending and reoffending with a DV offence. Restricting the comparison to offenders who started the program within 6 months of referral did not alter the results.

2.33 The authors discussed several limitations to the study including:

- They could not take into account the results of suitability assessments used when referring offenders to DVEQUIPS, meaning that some offenders in the sample may have been deemed unsuitable in the pre-program suitability interview but still counted as non-starters.
- They measured reoffending from the referral date and offenders referred to the DVEQUIPS program appeared to experience significant delays in commencing the program, meaning reoffending could have been measured before offenders started the program.

3. Cases of interest

In Brief

This Chapter summarises the cases of interest delivered by the NSW Court of Criminal Appeal and the Supreme Court that relate to sentencing.

3.1 This chapter summarises judgments of interest delivered by the Supreme Court and appellate courts in 2018.

3.2 Our review of case law includes monitoring the operation of the guideline judgments.[1] Guideline judgments were handed down in 1998–2002 in relation to dangerous driving,[2] armed robbery;[3] break, enter and commit an offence;[4] guilty pleas;[5] taking further offences into account;[6] and driving with a high range prescribed concentration of alcohol.[7] We have not identified any 2018 cases of significance that engage with these guideline judgments.

Vulnerability as an aggravating circumstance

Katsis v R [2018] NSWCCA 9

3.3 The offender was convicted of murder and sexual assault, in 1988, of a 66-year-old woman living in social isolation. His sentence in the Supreme Court was 21.5 years imprisonment with a non-parole period of 16.25 years.

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1. See NSW Sentencing Council, *Sentencing Trends and Practices: Annual Report 2017* (2018) ch 3.
2. *R v Whyte* [2002] NSWCCA 343, 55 NSWLR 252 reformulating *R v Jurisic* (1998) 45 NSWLR 209.
3. *R v Henry* [1999] NSWCCA 111, 46 NSWLR 346.
4. *R v Ponfield* [1999] NSWCCA 435, 48 NSWLR 327.
5. *R v Thomson* [2000] NSWCCA 309, 49 NSWLR 383.
6. *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 1 of 2002)* [2002] NSWCCA 518, 56 NSWLR 146.
7. *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 3 of 2002)* [2004] NSWCCA 303, 61 NSWLR 305.

3.4 One ground of appeal was that the sentencing judge erred in taking into account the aggravating factor in the *Crimes (Sentencing Procedure) Act 1999* (NSW) that "the victim was vulnerable, for example, because the victim was very young or very old or had a disability, because of the geographical isolation of the victim".[8]

3.5 The offender argued that the victim was not very old, did not have a disability and did not otherwise fit the particular class of victim envisaged by the provision.

3.6 The NSW Court of Criminal Appeal (CCA) confirmed that the examples were illustrative, not exhaustive. The provision required the court to identify "a particular class of person with a particular vulnerability deriving from the person's membership of that class" rather than focus on the particular circumstances of a particular victim.

3.7 The Court noted, with regret, that the victim came within a class of people who were elderly, lived alone, did not associate with others, had no community support and did not look after themselves. Such people, because of their social isolation were often frail and undernourished and could properly be regarded as members of a vulnerable class.[9]

3.8 The Court rejected the ground of appeal and dismissed the appeal.

Deprived upbringing of an offender

3.9 Following are two cases where one of the grounds of appeal was that the sentencing judge did not allow a sufficient discount for the offender's childhood disadvantage in accordance with the High Court's decision in *Bugmy*.[10]

Katsis v R [2018] NSWCCA 9

3.10 In this case already discussed above, the offender was convicted of murder and sexual assault of a 66-year-old woman living in social isolation.[11] The offender claimed that the judge had accepted that he was raised in circumstances of abuse and deprivation and that mental, sexual and physical abuse at home was the cause of substance abuse and feelings of depression at the time of the offences.

3.11 The CCA noted his father's cruel and uncaring treatment (consisting of ridicule, corporal punishment for little or no cause and denying food at home) and two occasions of sexual abuse from an uncle. However, this did not amount to deprivation of the sort envisaged by *Bugmy* and related cases,[12] which involved the offenders being raised in

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8. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(l).
9. *Katsis v R* [2018] NSWCCA 9 [61]–[62].
10. *Bugmy v R* [2013] HCA 37, 249 CLR 571.
11. [3.3].
12. *Munda v Western Australia* [2013] HCA 38, 249 CLR 600; *Ingrey v R* [2016] NSWCCA 31.

circumstances of extreme physical and mental violence surrounded by alcohol and drug abuse. The offender also could not show a link between his offending and the "unfortunate events" in his upbringing.

3.12 The Court concluded that even if the offender's "difficulties at home were taken at their highest, it is difficult to see why his moral culpability for beating, raping and strangling the deceased into unconsciousness and then leaving her to die after setting fire to her unit, should be reduced by anything arising from his childhood nor could his upbringing excuse this behaviour".[13]

3.13 The Court also observed that the offender's one prior conviction for stealing showed that "his moral compass was not so compromised by the difficulties in his upbringing" so as to reduce his moral culpability for the offences.[14]

3.14 The Court rejected the ground of appeal and dismissed the appeal.

Egan v R [2018] NSWCCA 235

3.15 The offender was sentenced to an aggregate sentence of 6 years imprisonment with a non-parole period of 3 years for two offences of supplying greater than an indictable quantity of a prohibited drug and one offence of dealing with the proceeds of crime.

3.16 The offender migrated to Australia at a young age with his mother from a dangerous part of the Philippines, following the death of his father. He left school after obtaining a School Certificate and found employment. The offender began using drugs as a teenager. At the age of 18, his mother was sentenced to 6 months imprisonment for embezzlement following a gambling problem, causing him to leave the family's NSW Housing apartment. His mother died from a stroke when he was 22. He took up dealing drugs after he lost employment.

3.17 The CCA, in dismissing the appeal, found that "as much as the applicant's background may excite sympathy, the sentencing judge was correct to say it was not a mitigating factor". The CCA found that the circumstances which led the offender into drug dealing arose in adulthood and had nothing at all to do with any childhood deprivation. The CCA acknowledged that he was raised in straitened financial circumstances which doubtless involved "difficulties and a degree of social disadvantage". The Court, however, concluded that such deprivation does not make engaging in such offending more understandable in order to reduce moral culpability or diminish the relevance of general or specific deterrence.

3.18 The CCA observed that this was:

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13. *Katsis v R* [2018] NSWCCA 9 [108].
14. *Katsis v R* [2018] NSWCCA 9 [109].

> not a case ... of a person raised from childhood in circumstances characterised by the abuse of alcohol and alcohol fuelled violence. Nor is it the case that the [offender] was raised in an environment where illicit substance abuse was funded by engaging in the supply, for profit, of such drugs was endemic; if such a circumstance was present profound childhood deprivation may have been relevant to the [offender's] sentence.[15]

Identifying objective seriousness for an standard non-parole period offence

Lin v R [2018] NSWCCA 13

3.19 The offender, who was knowingly involved in the supply of 15kg of ephedrine to an undercover police officer, was sentenced to imprisonment for 8 years with a non-parole period of 5.5 years. The offence is subject to a standard non-parole period ("SNPP"). The SNPP represents the non-parole period for an offence that, "taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness".[16]

3.20 One ground of appeal was that the sentencing judge failed to make a determination as to the objective seriousness of the offence, in particular by failing to assess the objective criminality of the offence by reference to the "middle of the range of seriousness".

3.21 The CCA noted that referring to the "middle of the range of seriousness" is customary and in many cases usefully explains the sentence. However, it held there is no requirement that a sentencing judge necessarily express their assessment of objective criminality by such a reference. The sentencing judge had otherwise clearly stated the offender's objective criminality.[17]

3.22 The appeal was allowed on other grounds.

When a judge misstates the maximum penalty

Campbell v R [2018] NSWCCA 17

3.23 The offender was sentenced to an aggregate term of 5.5 years imprisonment with a non-parole period of 2.75 years for 5 offences, including driving a stolen vehicle contrary to s 154(A(1)(b) of the *Crimes Act 1900* (NSW). The transcript of the sentencing judge's reasons recorded the judge as stating that the maximum penalty for

15. *Egan v R* [2018] NSWCCA 235 [48].
16. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A(2).
17. *Lin v R* [2018] NSWCCA 13 [23]–[25].

the offence was 15 years when in fact it was 5 years. There was no dispute about the accuracy of the transcript.

3.24 The CCA was satisfied that the sentencing judge erred by acting on the wrong maximum penalty. In light of the prevalence of appeals on the ground of misstated maximum penalties, the Court provided some guidance as to correct practice, stating that it is the duty of practitioners to correct a judge who misstates the maximum penalty, "even by interrupting the judge", immediately, or as soon as can be done before the proceedings end and sentence is passed:

> A judge could only be grateful to have the matter drawn to his or her attention then and there so that an unnecessary appeal may be avoided.[18]

3.25 The Court also confirmed that, where there is an argument that the judge's reasons have been mis-transcribed, the party claiming that there is an error, should file and serve affidavits so that the issue can be dealt with in a regular way.[19]

Non-parole period ratio

3.26 The *Crimes (Sentencing Procedure) Act 1999* (NSW) effectively provides that a non-parole period must not be less than 75% of the head sentence, unless there are special circumstances for it to be less.[20]

Opportunity to address a non-parole period that is substantially more than 75% of the head sentence

Brennan v R [2018] NSWCCA 22

3.27 The offender was sentenced for 12 property offences, resulting in an aggregate sentence of 3.5 years imprisonment with a non-parole period of 3 years. The aggregate non-parole period was almost 86% of the aggregate head sentence.

3.28 One ground of appeal was that the judge did not accord the offender procedural fairness by allowing his solicitor the opportunity to be heard by the court on the upward departure from the statutory ratio.

3.29 The CCA noted its previous support for providing reasons for imposing a non-parole period greater than 75% of the head sentence. This was out of an abundance of caution "largely so it can be clear that that was indeed intended, and not the result of a slip, mathematical oversight ... and so forth". It also noted research that suggested that

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18. *Campbell v R* [2018] NSWCCA 17 [34]. See also *Kandemir v R* [2018] NSWCCA 154 [71].
19. *Campbell v R* [2018] NSWCCA 17 [35].
20. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(2), s 44(2B).

findings of special circumstances justifying a ratio of less than 75% were "very common".

3.30 The Court found that there was a practical injustice done to the offender because his lawyer was not made aware of the possibility of an exceptional and adverse outcome. The Court emphasised that it was not proposing an inflexible rule that sentencing courts must, in every case, raise the possibility of a ratio greater than 75% before they can impose such a sentence.[21] It, however, noted the particular circumstances of the case:

- the prosecution's silence on the question
- the possibility the non-parole period could be either greater or less than 75% of the head sentence
- the defence lawyer's reference to circumstances justifying a finding of special circumstances, and
- the fact that judgment was reserved which allowed for the possibility of further submissions, at least in written form.[22]

3.31 In resentencing the offender, the Court did not see any call for an aggregate non-parole period that was greater than 75% of the aggregate head sentence and so imposed an aggregate sentence of imprisonment for 3.5 years with a non-parole period of 2 years 7 months and 15 days.[23]

Special circumstances where the offender is already serving a lengthy custodial sentence

Banks v R [2018] NSWCCA 41

3.32 The offender was sentenced to 4.5 years imprisonment with a non-parole period of 3.25 years for an offence of reckless wounding in company committed in a correctional centre where he was serving another sentence. The 4.5 year sentence was due to commence at the end of the 10 year non-parole period for the existing sentence.

3.33 One of the grounds of appeal was that the sentencing judge erred in not finding special circumstances that justified a non-parole period of less than 75% of the head sentence.

3.34 In allowing this ground, the CCA observed that the effect of the sentence was that the offender would be subject to only 15 months parole supervision at most, after serving at least 14.5 years in custody. The Court considered it was not apparent that the

21. *Brennan v R* [2018] NSWCCA 22 [97]–[98].
22. *Brennan v R* [2018] NSWCCA 22 [98].
23. *Brennan v R* [2018] NSWCCA 22 [105], [106].

sentencing judge had regard to the practical reality of this arrangement. The Court found that a longer period of supervision would be in the interests of both the community and the offender. The short period of parole eligibility would be almost negligible if the offender were not released on parole when his eligibility first arose.[24]

3.35 The Court resentenced the offender to imprisonment for 3 years and 9 months, with a non-parole period of 2 years and 9 months. This sentence was to be wholly concurrent with the existing overall sentence, but effectively extended the existing effective non-parole period by 1 year. This would leave a period of parole eligibility of 3 years which the Court considered acceptable.[25]

Objective seriousness

Engaging in acts of child prostitution

R v Toma [2018] NSWCCA 45

3.36 The offender was convicted of two counts of participating as a client in an act of child prostitution and was sentenced to imprisonment for 1 year and 8 months to be served by way of an intensive correction order. The Crown appealed the sentence. One of the grounds was that the sentencing judge erred in assessing the objective seriousness of the offending leading to a manifestly inadequate sentence.

3.37 In particular the Crown challenged the sentencing judge's finding that the offences fell towards the bottom of the range of objective seriousness for such offending because there was only one victim and the offender perceived her to be a willing participant.

3.38 The CCA held that the fact that there was only one victim said nothing about the seriousness of the offences against that victim.[26] The Court also held that it was not a mitigating factor that a child prostitute appeared to be willing to provide sexual services, observing that the offence was directed against child prostitution. The Court also noted that the fact that a child prostitute appeared to be unwilling would be an element of aggravation.[27]

3.39 Taking these and other matters into account, the Court concluded that the sentence was manifestly inadequate and that a sentence of full-time imprisonment was warranted.[28] However, taking into account the offender's period on remand, trial delays, the onerous conditions of a lengthy period on bail and potential interruption to

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24. *Banks v R* [2018] NSWCCA 41 [33]–[34].
25. *Banks v R* [2018] NSWCCA 41 [41]
26. *R v Toma* [2018] NSWCCA 45 [17].
27. *R v Toma* [2018] NSWCCA 45 [18].
28. *R v Toma* [2018] NSWCCA 45 [42].

rehabilitation, the Court decided it was not necessary to resentence the offender in order to provide an appropriate guideline to sentencing courts in future.[29]

Excessive self defence manslaughter

Anderson v R [2018] NSWCCA 49

3.40 The offender pleaded guilty to manslaughter of his pregnant partner on the basis of excessive self defence and was sentenced to 12.75 years imprisonment with a non-parole period of 9.5 years. The CCA allowed an appeal on the ground that the sentencing judge wrongly assessed the objective seriousness of the offence by failing to give effect to the agreed facts.

3.41 In resentencing the offender, the Court considered it important to an assessment of objective seriousness that it was the offender's conduct in arriving at the victim's unit uninvited and forcefully remaining despite being told in no uncertain terms to leave, that brought about the circumstances that led to the victim's death. His display of violence and strength made it clear to the occupants of the unit that there was little they could do against him and it was in this context that the deceased moved towards the offender. Arming herself with a knife was the victim's only way both to protect herself and her friends. Even allowing for the fact that the deceased made things worse by approaching the offender with the knife raised above her head, the offender remained in control of the situation and could and should have left the unit. There was no evidence that she would have pursued him. It was the offender's decision to remain in the unit and grapple with the victim. In such a highly charged situation there was always a risk of serious injury being caused to the victim.

3.42 The Court observed that this scenario was consistent with the plea of guilty and the agreed facts, and it was, therefore appropriate to characterise the offence as an objectively serious example of manslaughter. The offender was sentenced to imprisonment for 12 years with a non-parole period of 9 years.

Credit for participating in residential rehabilitation programs

3.43 The CCA has long recognised the option of reducing or backdating a sentence to take account of an offender's participation in pre-sentence residential rehabilitation programs, as a form of quasi-custody.[30] Three cases have elaborated some relevant principles when considering such matters.

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29. *R v Toma* [2018] NSWCCA 45 [48].
30. *Reddy v R* [2018] NSWCCA 212 [31]; *R v Cartwright* (1989) 17 NSWLR 243, 259; *R v Eastway* (unreported, NSWCCA, 19 May 1992).

Attendance as part of bail conditions

Kelly v R [2018] NSWCCA 44

3.44 The offender was sentenced to 3 years imprisonment with a non parole period of 1 year and 8 months for supplying methylamphetamine. In resentencing the offender following a successful appeal, the CCA dealt with the question of whether the offender's participation in a residential rehabilitation program amounted to quasi-custody sufficient to justify backdating the sentence.

3.45 Two judges noted that the offender's bail conditions required that he reside at the Centre and that the Centre was required to report if the offender "self-exited" or was ejected from the program, which would have put the offender in breach of his bail conditions.[31] The new sentence, which was no less than the original sentence, was backdated to account for the 21 days spent on the program.

Voluntary participation

Reddy v R [2018] NSWCCA 212

3.46 The offender was sentenced to imprisonment for 3 years and 5 months with a non-parole period of 2 years for aggravated dangerous driving causing grievous bodily harm. One ground of appeal was that the sentencing judge failed to backdate the sentence to allow for a period of quasi-custody in residential rehabilitation programs. The offender had self-admitted into two such programs for his alcohol abuse.

3.47 The question of backdating had not been put to the sentencing judge, but was considered on appeal in accordance with authority that a judge should take quasi-custody into account when there is evidence for it, even though the judge has not been specifically asked.[32] The CCA considered a previous case where voluntary participation in a residential program was not considered a reason to reduce a sentence. The Court concluded that legal compulsion should not be regarded as a condition of taking quasi-custody into account. The Court noted that invariably a grant of bail to allow a person to attend a residential program is made at the offender's request.[33]

3.48 The Court concluded that the conditions of the residential programs amounted to quasi-custody since there was limited opportunity for participants to leave the facilities and the programs involved restrictions on activities, supervision, discipline and compulsory participation in designated activities.[34] The Court observed "what matters more is not

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31. *Kelly v R* [2018] NSWCCA 44 [3], [52].
32. *Bonett v R* [2013] NSWCCA 234 [50]–[51].
33. *Reddy v R* [2018] NSWCCA 212 [33].
34. *Reddy v R* [2018] NSWCCA 212 [42]–[45].

whether the [offender's] participation was voluntary or under legal compulsion, but rather whether the [offender] did in fact subject himself to the restrictions of the course".[35]

3.49 The Court did not impose a lesser sentence, but backdated the sentence by 4 months to account for time spent in the residential programs.

Sentencing judge's discretion in taking periods of quasi-custody into account

Small v R [2018] NSWCCA 290

3.50 The offender was sentenced to 4 years imprisonment with a non-parole period of 2 years for supplying a prohibited drug. The single ground of appeal was that the judge failed properly to give credit and backdate the sentence to reflect time spent in quasi-custody.

3.51 The CCA found that, even though the sentencing judge did not backdate the sentence or otherwise quantify a discount, he clearly had regard to the period of quasi-custody and took it into account when formulating the sentence.[36]

3.52 The Court stated that the question of how quasi-custody should be taken into account is at the discretion of the sentencing judge and is a question of fact and degree. The Court particularly noted that there is no mandatory requirement to backdate a sentence, nor to provide reasons for not doing so, even if backdating appears to be preferable.[37] The Court also noted that there is no authority requiring a sentencing judge to quantify any discount when having regard to quasi-custody.[38]

Expressions relating to the standard of proof at sentencing

Erector Group Pty Ltd v Burwood Council [2018] NSWCCA 56

3.53 The offenders were sentenced in the Land and Environment Court for carrying out a development without appointing a principal certifying authority or obtaining a construction certificate.

3.54 The development involved excavation work which resulted in the collapse of an adjoining building and damage to others. For the damage to the adjoining buildings to be taken into account as an aggravating factor[39] the sentencing judge needed to be

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35. *Reddy v R* [2018] NSWCCA 212 [45].
36. *Small v R* [2018] NSWCCA 290 [44].
37. *Small v R* [2018] NSWCCA 290 [39].
38. *Small v R* [2018] NSWCCA 290 [42].
39. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(g).

satisfied that there was a causal connection beyond reasonable doubt. The judge concluded that, if the steps required for carrying out the development had been taken, then the damage would "in all probability" not have occurred.

3.55 One ground for the appeal against fines of $40,000 for each charge, was that the sentencing judge erred in finding that the damage was caused by the excavation work.

3.56 The CCA was prepared to accept that the judge applied the correct standard of proof, despite the words raising some doubt that the judge had applied the civil standard of proof (on the balance of probabilities). The Court considered that the judge used "in all probability" as a substitute for "beyond reasonable doubt" without intending in any way to lessen the standard of proof required. The Court, however, cautioned that it was not desirable for a sentencing judge to use such an expression.[40]

3.57 The Court, however, found that the necessary causal connection had in fact not been established beyond reasonable doubt. It reduced the fines by 50%.

Change in circumstances: totality considerations and the quashing of a conviction

Little v R [2018] NSWCCA 63

3.58 The offender was sentenced in the District Court for taking/detaining a person in company with the intent to obtain an advantage. In imposing a sentence of 7.5 years imprisonment with a non-parole period of 5 years, the sentencing judge noted that the offender was already serving a sentence of 10 months imposed by the Local Court for traffic offences and set a commencement date for the new sentence "having regard to totality". The convictions for the driving offences were later overturned on appeal to the District Court. The offender, therefore, appealed the 7.5 year sentence to the CCA.

3.59 It was observed that this was an unusual case "where the sentencing Judge had regard to the totality principle by reference to a sentence of the Local Court which was thereafter quashed following the acquittal of the applicant on appeal to the District Court".[41] The court considered that the closest analogy to these circumstances was to be found in cases where "a matter has been raised in sentence proceedings but the full facts were not known or understood at the time of the sentence proceedings but have subsequently become known". The quashing of the driving convictions amounted to a change of circumstances that justified the CCA in intervening.[42]

3.60 The Court, therefore, further backdated the sentence by 2 months.

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40. *Erector Group Pty Ltd v Burwood Council* [2018] NSWCCA 56 [93]–[94].
41. *Little v R* [2018] NSWCCA 63 [52].
42. *Little v R* [2018] NSWCCA 63 [45].

Backdating where an offender was on remand for unrelated discontinued offences

Refaieh v R [2018] NSWCCA 72

3.61 The offender was sentenced to 6 years imprisonment with a non-parole period of 4 years for knowingly taking part in the supply of a large commercial quantity of cocaine. Before sentencing, the offender was in custody for:

- 63 days when he was on remand for the trafficking charge, before he was released on bail
- 366 days covering the remand period from his arrest on a murder charge until he pleaded guilty to the trafficking charge, and
- 268 days covering the remand period from his guilty plea until sentencing for the trafficking charge.

3.62 Subject to one minor mathematical error, the judge backdated the sentence to take into account the first and third period on remand, but not the second period on remand since that related only to the murder charge. The murder charge was subsequently dropped.

3.63 The *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that a sentencing count "must take into account any time for which the offender has been held in custody in relation to the offence".[43] The issue on appeal was whether the sentencing judge erred by failing to back-date the trafficking sentence to take into account pre-sentence custody served on remand in relation to an unrelated offence.

3.64 After reviewing relevant decisions, the CCA was not satisfied that any decision supported the offender's argument that the words "in relation to" should be construed so broadly as to include time when the offender was on bail for the trafficking offence but was not eligible for release because of the murder charge.[44]

3.65 The Court also observed that, under the general discretion to backdate a sentence,[45] it would have been open to the sentencing judge to backdate some or all of the period that related solely to the murder charge. However, the fact that he did not exercise this discretion did not amount to error.[46] The Court acknowledged that the later dropping of the murder charge meant that the offender spent time in custody in relation to an

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43. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 47(3).
44. *Refaieh v R* [2018] NSWCCA 72 [56].
45. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 47(2).
46. *Refaieh v R* [2018] NSWCCA 72 [82].

offence for which he was not convicted, but pointed out that this was not the situation that presented itself to the sentencing judge at the time.[47]

Future assistance to authorities: removal of unearned discount

R v OE [2018] NSWCCA 83

3.66 The offender was sentenced for offences arising from the supply of a large commercial quantity of pseudoephedrine. The respondent received a 15% discount for future assistance to the authorities namely that he would give evidence in any proceedings against a co-offender and to give "active cooperation" in relation to certain matters. The offender effectively failed to fulfil these undertakings and the DPP accordingly appealed under s 5DA of the *Criminal Appeal Act 1912* (NSW) for the court to vary the sentence accordingly.

3.67 The CCA summarised the proper approach to reversing or adjusting a sentence to take account of the failure to adhere to an undertaking of assistance:

- remove all the discounts to find the starting point of the head sentence at first instance
- apply the discount for guilty plea and any remaining discount for assistance actually given (or so much of the future assistance that is not to be reversed) to calculate the discounted head sentence, and
- apply the same ratio of non-parole period to head sentence as fixed by the sentencing judge at first instance.[48]

Domestic violence

Recognising patterns of behaviour

Patsan v R [2018] NSWCCA 129

3.68 The offender pleaded guilty to recklessly causing grievous bodily harm to the victim with whom he had commenced an intimate relationship. A further charge of assault causing actual bodily harm was taken into account on a Form 1.

3.69 The District Court imposed a sentence of 2 years and 3 months imprisonment with a non-parole period of 1 year and 4 months.

3.70 The offender sought leave to appeal against sentence in the CCA.

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47. *Refaieh v R* [2018] NSWCCA 72 [79].
48. *R v OE* [2018] NSWCCA 83 [55].

3.71 Justice Adamson (with whom Chief Justice Bathurst and Justice Leeming agreed) refused leave to appeal the sentence. In doing so, she rejected the submission that the sentencing judge had, in effect, used the applicant as a scapegoat for the prevalence of domestic violence offences:

> While every sentence imposed must have regard to all the circumstances particular to the specific case, individualised justice does not require sentencing judges to ignore patterns of behaviour which are repeated all too frequently before them. The experience of this Court and the statistics relied upon by the Crown indicate that domestic violence offences not infrequently conform to the following pattern, to which the applicant's conduct in the present case conformed: a male attacks (or kills) a woman with whom he is, or has been, in an intimate relationship when she expresses a wish to leave that relationship. Typically, the male is physically stronger than the female. The male is thus generally in a position to inflict considerable harm to the female and there is no real prospect of spontaneous physical retaliation because of the disparity between their respective strengths.[49]

3.72 Justice Adamson observed that the CCA has frequently applied the approach sanctioned by the High Court that recognises the role of the criminal law in the context of domestic violence (arising from a change in societal attitudes to domestic violence) and that authorises sentencing courts to give significant weight to specific and general deterrence, denunciation and community protection.

Separate punishment for breach of an apprehended domestic violence order

Suksa-Ngacharoen v R [2018] NSWCCA 142

3.73 The offender was sentenced for offences arising from one course of conduct committed against his former partner – causing grievous bodily harm by explosion and contravening an apprehended domestic violence order ("ADVO"). The sentencing court also dealt with call-ups relating to the breach of bonds previously imposed for common assault and contravening a domestic violence order. The total effective sentence was 19 years imprisonment with an effective non-parole period of 14.25 years.

3.74 One ground of appeal was that the sentencing judge erred by partly accumulating the substantive offence on the related ADVO offence, since the offences arose from the same event. In rejecting this ground, the CCA observed that each offence involved quite separate and distinct criminality. The criminality of breaching an ADVO rested "in the complete disregard for an order of a court, conduct which has the practical effect of undermining the authority of the courts, and preventing the courts from extending

49. *Patsan v R* [2018] NSWCCA 129 [39].

effective protection to persons at risk of harm from another".[50] The Court observed that "Conduct which involves deliberate disobedience of a court order must be treated as serious, and should ordinarily be separately punished from any offence that occurs at the same time, always having regard to the requirements of the totality principle".[51]

3.75 The Court, however, allowed the appeal on the grounds that the sentence for the substantive offence (18 years imprisonment with a non-parole period of 13.25 years) was manifestly excessive. On resentencing, the Court imposed a sentence of 16 years imprisonment for the substantive offence with a non-parole period of 11 years. The total effective sentence was 17 years imprisonment with a non-parole period of 12 years.

Relevance of addiction in child abuse material offences

Gold v R [2018] NSWCCA 135

3.76 The offender pleaded guilty to a number of offences involving the sexual exploitation of children, including possessing and disseminating child abuse material and grooming a child for unlawful sexual activity.

3.77 The offender received an aggregate sentence of 6 years and 6 months imprisonment with a non-parole period of 4 years.

3.78 In appealing the sentence to the CCA, the offender alleged that the sentencing judge failed adequately to take into account the offender's mental condition at the time of the offences.

3.79 The offender relied on evidence at sentencing from medical and psychiatric experts about the offender's anxiety disorder, obsessive compulsive personality disorder and process addiction.

3.80 In rejecting the appeal, Justice Button observed:

> [It] has been confirmed for almost twenty years that the criminal law of New South Wales is that even dependence on a highly addictive drug such as heroin or crystal methylamphetamine (ice) is not, except in unusual circumstances, a mitigating feature on sentence ... If that be the case, it is very difficult to see how an addiction to child pornography could play such a role.[52]

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50. *Suksa-Ngacharoen v R* [2018] NSWCCA 142 [132].
51. *Suksa-Ngacharoen v R* [2018] NSWCCA 142 [132].
52. *Gold v R* [2018] NSWCCA 135 [83].

Sentencing discount for facilitating the administration of justice

R v Nikolovski [2018] NSWSC 1156

3.81 The offender was charged with murder and with robbery while armed with a dangerous weapon. In the trial before the Supreme Court, the jury was directed to acquit the offender at the close of the prosecution case. He subsequently pleaded guilty to the robbery charge.

3.82 In the sentencing hearing, the offender submitted that he should have a reduced sentence because his trial was conducted in an economical way. The *Crimes (Sentencing Procedure) Act 1999* (NSW) gives a court the power to impose a lesser penalty on an offender who is tried on indictment "having regard to the degree to which the administration of justice has been facilitated by the defence (whether by disclosures made pre-trial or during the trial or otherwise)".

3.83 The sentencing judge did not allow a specific reduction for the offender's willingness to facilitate justice. While he accepted that the trial was conducted in a "practical and sensible fashion without needless forays into aspects of evidence that were of limited significance", he did not think that this was what parliament intended by providing for such a discount. The judge observed that, while counsel may have conducted the trial sensibly, the prosecution was still put to proof on all elements of the offence, and the offender advanced a positive defence.[53]

When the remaining charge on the indictment could have been dealt with summarily

R v Parker (No 3) [2018] NSWSC 1132

3.84 The offender was charged with manslaughter after injecting the deceased with heroin. He was also charged on the indictment with supply of a prohibited drug. He pleaded guilty to the supply offence. He was acquitted of manslaughter after a jury trial in the Supreme Court.

3.85 The Supreme Court, therefore, sentenced the offender for the supply offence which was the only offence left on the indictment. It was conceded that the amount of drug supplied was less than 1 gram. The sentencing judge noted that maximum penalty was 15 years imprisonment.[54] However, in the circumstances, the judge noted that, though strictly applicable, the maximum had relatively limited relevance because the offence would otherwise have been dealt with summarily in the Local Court. In the judge's view, the

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53. *R v Nikolovski* [2018] NSWSC 1156 [86].
54. *Drug Misuse and the Trafficking Act 1985* (NSW) s 25(1).

offender should not be prejudiced because the jury found him not guilty of manslaughter which led the supply offence being dealt with on indictment.

3.86 In sentencing the offender, the judge attributed significance to the principle that the protection of the community could not justify a sentence which is out of proportion to the seriousness of the offence committed. He observed that imposing a bond might protect the community and advance the offender's prospects of rehabilitation. However, in the context of the time the offender had already spent on remand, it would constitute an additional penalty which would be disproportionate to the seriousness of the supply offence. The judge regarded the objective seriousness of the offence as being relatively low and accordingly convicted the offender without imposing any other penalty.[55]

Limits on District Court resentencing on appeal from Local Court

Firth v R [2018] NSWCCA 144

3.87 The District Court sentenced the offender for a number of property offences including an offence of aggravated break, enter and commit a serious indictable offence. An aggregate sentence of 8 years imprisonment with a non-parole period of 5 years was imposed. At the same time, the judge determined a severity appeal by the offender against sentences imposed by the Local Court. She set aside the sentences and resentenced the offender by including each of the Local Court offences in the overall aggregate sentence. The indicative sentences for the Local Court offences were imprisonment for 15 months, 12 months and 4 months.

3.88 In a severity appeal against the aggregate sentence, the CCA identified a problem with the sentencing judge's approach of including the sentences for the Local Court offences in the aggregate sentence of 8 years. The District Court may determine an appeal against sentence from the Local Court by setting the sentence aside, varying it, or dismissing the appeal. The District Court, in determining the appeal, may exercise any power that the Local Court could have exercised.[56] The Local Court may impose an aggregate sentence, but cannot impose one that exceeds 5 years imprisonment.[57] The CCA, therefore, concluded that in purporting to re-sentence the offender for the Local Court appeal matters, by an aggregate sentence that exceeded 5 years, the sentencing judge acted without power.[58] The Local Court appeal matters were therefore remitted to the District Court to be dealt with according to law.

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55. Under *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10A.
56. *Crimes (Appeal and Review) Act 2001* (NSW) s 11(1), s 20(2), s 28(2).
57. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 53A, s 53B.
58. *Firth v R* [2018] NSWCCA 144 [83].

Viewing a sample of child pornography or child abuse material

R v Hutchinson [2018] NSWCCA 152

3.89 The offender received an overall sentence of 17 months imprisonment with a minimum period to serve of 8 months for a number of state and Commonwealth offences relating to child abuse material. One of the grounds, in an appeal alleging that the sentences were inadequate, was that the sentencing judge erred in assessing the objective seriousness of the offences. In dealing with this ground the CCA considered whether it was necessary for the sentencing judge to view the child abuse material in order obtain a full appreciation of its nature as a significant factor in assessing the objective seriousness of the offences.

3.90 During the appeal, the prosecution handed up a booklet containing samples of the child abuse material. The Court received the booklet and indicated that it would consider later whether it was necessary to view it. The Court observed that there was no binding authority requiring the court to view a sample of such material in every case and concluded that in the majority of cases an adequate written description of the material supplied by the prosecution would suffice. The Court also doubted that victims would receive any comfort from the knowledge that judges and lawyers were also examining the material.[59]

3.91 The appeal was dismissed on the grounds that, while lenient, the sentences were not manifestly inadequate.

Fatal driving offences: Assessing moral culpability

R v Shashati [2018] NSWCCA 167

3.92 The offender was sentenced to 4.5 years imprisonment with a non-parole period of 2.25 years for aggravated dangerous driving causing death. The offender had been driving a 4-wheel drive vehicle containing his teenage son and three nephews at 80km/h with one wheel on the grass verge of a road in order to overtake slow moving vehicles in the single lane going in his direction. The vehicle hit a drainage ditch and stopped suddenly. One of the boys died from injuries received. There was evidence that the offender had used methylamphetamine earlier that day.

3.93 The DPP appealed on the ground that the sentence was manifestly inadequate.

3.94 The sentencing judge (who had not heard the evidence at trial, the trial judge having died), declined to take into account evidence of the offenders erratic driving in the hours before the accident. In considering whether this behaviour could be taken into account

59. *R v Hutchinson* [2018] NSWCCA 152 [49], [90].

at sentencing, the CCA observed that evidence relevant to the moral culpability of the offender is not to be narrowly confined. The Court stated:

> Thus, where a driver is suffering from some disability, whether due to lack of sleep, intoxication or the consumption of drugs, the history of earlier conduct, together with possible inferences as to the driver's appreciation of the circumstances in which he or she had placed himself or herself will be relevant to moral culpability in most cases.[60]

3.95 The Court concluded that "the whole of the offender's conduct from the time he decided to take methylamphetamine before setting out with his three nephews and son ... was not only relevant to the sentencing exercise, but involved matters which, once understood to be admissible, could not reasonably have been ignored".[61] The failure of the sentencing judge to take these matters into account meant that his assessment of the offender's moral culpability was inherently flawed.[62] In deciding whether to resentence the offender the Court noted that the inadequate sentence resulted from a misapplication of principle in assessing the objective seriousness of the offending which was a matter of importance to the regular administration of justice.[63] The court further observed that continuing discrepancies in sentencing in relation to fatal driving accidents, warranted intervention "to give guidance in order to achieve a higher level of consistency".[64]

3.96 The offender was resentenced to 6 years imprisonment with a non-parole period of 3.25 years.

Ongoing supply of drugs offence: unfulfilled agreement to supply drugs

R v Younan [2018] NSWCCA 180

3.97 The offender received an aggregate sentence of 4 years and 4 months imprisonment with a non-parole period of 2 years and 10 months for 5 offences relating to the supply of drugs, the supply of an unregistered prohibited firearm and dealing with suspected proceeds of crime. The DPP appealed against the sentence, asserting that it was inadequate.

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60. *R v Shashati* [2018] NSWCCA 167 [24].
61. *R v Shashati* [2018] NSWCCA 167 [26].
62. *R v Shashati* [2018] NSWCCA 167 [27].
63. *R v Shashati* [2018] NSWCCA 167 [59].
64. *R v Shashati* [2018] NSWCCA 167 [60].

3.98 One of the grounds in the appeal was that the sentencing judge erred in characterising the two offences of ongoing supply of methylamphetamine as "mid-range or just below mid-range". In addressing this ground, it was noted that quite a number of events described in the agreed facts were agreements to supply without confirmation that the supply occurred. Counsel for the offender argued that there is lesser criminality involved in a supply offence that consists of an agreement to supply rather than actual supply because no profit is derived and no drugs are disseminated into the community. The CCA noted that this claim was debatable. The Court concluded that an agreement to supply without evidence of completed or actual supply does little to lessen the gravity of the offending especially in light of the following factors that would apply in most cases of agreements to supply:

- the agreements were not isolated instances but occurred in the context of an ongoing supply of drugs
- the offender was motivated by commercial gain or greed, even if partly to fund their own drug use
- it was not asserted that the offender never intended to fulfil the agreement to supply
- the offender had a demonstrated capacity to supply, and
- there was nothing to suggest that an agreement not being fulfilled had anything to do with a decision of the offender.[65]

3.99 In allowing the appeal, the Court observed that the aggregate sentence fell well short of the mark in sending a strong message of deterrence to those contemplating large-scale, repetitive and lucrative drug dealing and/or illicit trading in readily concealable handguns.[66] The Court imposed an aggregate sentence of 7 years imprisonment with a non-parole period of 4.5 years.

Measuring a sentence in days

Kristensen v R [2018] NSWCCA 189

3.100 In sentencing an offender for a Commonwealth offence of using a carriage service to send indecent material to a person under 16, the District Court imposed a sentence of 1 year 3 months and 23 days. While not subject to a complaint on appeal, one CCA judge commented that the sentencing judge had not explained why such an unusual and unrounded term was chosen. The judge confirmed previous comments of the Court discouraging the imposition of such terms, noting that it may add an unnecessary

65. *R v Younan* [2018] NSWCCA 180 [50].
66. *R v Younan* [2018] NSWCCA 180 [95].

complication in some cases and may also suggest that there is some absolute arithmetical precision involved in the assessment of sentences.[67]

Giving reasons when applying a discount for assistance to law enforcement authorities

Greentree v R [2018] NSWCCA 227

3.101 The offender was sentenced to an aggregate sentence of 10 years imprisonment with a non-parole period of 7 years for drug and firearm offences.

3.102 The sentencing judge received two confidential exhibits said to contain material that fell within the provision that allows a court to discount a penalty it imposes having regard to the offender's assistance to law enforcement authorities.[68] The provision also provides a detailed list of factors that the court must consider in applying such a discount.[69] The judge allowed a combined discount of 30% which included the discount for the offender's guilty plea.

3.103 One of the grounds of appeal was that the sentencing judge failed to consider properly the list of factors. The offender's submission was that the sentencing judge did not address any of the factors. The CCA identified this as a case where there was an obvious tension between achieving the objects of the discount for assistance to law enforcement authorities and the sentencing judge's obligation to give reasons. The Court observed that in some cases disclosing the details of the assistance may put the offender or their family at risk and may undermine or even destroy the benefits the authorities may get from the assistance. A detailed discussion of the factors might, therefore, defeat the very purpose of the discount.

3.104 The Court observed that the sentencing judge was satisfied of the significance and usefulness of one of the forms of assistance, but not of another and concluded that there was no breach of the judge's obligation to give reasons in this case. The Court observed that, generally, where such confidential material is in evidence, very careful consideration must be given before it can be concluded that a sentencing judge either failed to address the factors listed or failed to give proper reasons.[70]

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67. *Kristensen v R* [2018] NSWCCA 189 [42].
68. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23(1).
69. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23(2).
70. *Greentree v R* [2018] NSWCCA 227 [55]–[57].

Dangerous driving causing grievous bodily harm

Mansweto v R [2018] NSWCCA 232

3.105 The offender received an aggregate sentence of 4.5 years with a non-parole period of 2.75 years for two counts of dangerous driving causing grievous bodily harm (including the loss of an unborn child). Other offences included furious driving causing bodily harm (dealt with on Form 1) and failure to register and failure to insure (dealt with on a s 166 certificate). All arose in relation to an incident in which the offender's car crashed into a house after the brakes failed and the steering wheel detached from the column. The offender had been restoring the vehicle over a period of months, the brakes had only previously been tested a low speeds and the offender had failed to secure the steering wheel's retaining nut.

3.106 On appeal, the CCA found that the sentence was manifestly excessive. The Court observed that where the offender pleaded guilty, was genuinely remorseful and was unlikely to reoffend, the fundamental considerations were:

- the gravity of the failure to take care when using the vehicle, and
- the seriousness of the injuries.

3.107 The Court observed that the failure to take care involved a relatively low degree of moral culpability and the injuries were relatively severe but by no means a worst case. The Court found that the indicative sentences for the two counts would be appropriate to a case involving "significantly more culpable mishandling of a motor vehicle".[71]

3.108 In assessing the gravity of the failure to take care, the Court noted that the failure to secure the steering wheel was a "matter of omission and forgetfulness". It was markedly lower in moral culpability than continuing to drive when overtired and/or affected by drugs or alcohol – where the risk arises from continuing reckless conduct.[72]

3.109 The Court did not consider that the failure to register or insure the vehicle were relevant to the offences' objective seriousness, since they were regulatory infringements which did not cause the accident or the injuries.[73]

3.110 The Court instead imposed an aggregate sentence of 2 years and 4 months imprisonment with a non-parole period of 1 year and 4 months.

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71. *Mansweto v R* [2018] NSWCCA 232 [82].
72. *Mansweto v R* [2018] NSWCCA 232 [77].
73. *Mansweto v R* [2018] NSWCCA 232 [79].

Child sexual intercourse

Beavis v R [2018] NSWCCA 248

3.111 The offender received an aggregate sentence of 8 years imprisonment with a non-parole period of 4 years and 10 months for two counts of aggravated indecent assault and three counts of sexual intercourse with a child under his authority aged 10–14 years. The offences were committed when the victim was on a sleep-over at the offender's house.

3.112 A number of grounds of appeal were raised and some were upheld. Two of the grounds are dealt with below. The CCA re-sentenced the offender to 7 years imprisonment with a non-parole period of 4 years and 2 months.

The need to maintain a distinction between breach of trust and breach of authority

3.113 One of the grounds of appeal against sentence was that the sentencing judge erred in finding that the sexual intercourse offences involved a significant breach of trust when being "under the authority" of the offender was an element of those offences.

3.114 The CCA upheld this ground of appeal. The Court stated that the matters said to show that the victim was under the offender's authority (as an element of the sexual intercourse offences) were the same as the matters said to constitute the aggravating factor of breach of trust, namely that the victim was staying in the offender's house and he was therefore responsible for her safety and security. The Court noted that the sentencing judge did not refer to or maintain a distinction between a breach of trust and a breach of authority.[74]

Risk of reoffending

3.115 Another ground of appeal was that the sentencing judge had failed adequately to take into account the fact that the appellant had been assessed as being at a low risk of reoffending. The offender further submitted that the fact that the offences were committed at a sleep-over where school aged children were involved and the offender no longer had school aged children meant that the possibility of further offences was "remote to non-existent". This was said to justify a discount on sentence.

3.116 The CCA rejected this submission, noting:

> It is impossible to conclude that this alone would mean that there could never be further opportunity for the appellant to engage in offending conduct of the

74. *Beavis v R* [2018] NSWCCA 248 [255].

> kind of which he was convicted and it would be mere speculation so to conclude in the absence of any evidence on this issue.[75]

3.117 In rejecting the ground of appeal, the Court said it was sufficient to note the offender was assessed as being at low risk of re-offending and that the judge knew this when sentencing him.[76]

Failure to mention a guilty plea discount expressly

Wong v R [2018] NSWCCA 263

3.118 The offender was sentenced to 6.75 years imprisonment with a non-parole period of 3.75 years for importing a commercial quantity of methamphetamine. One of the grounds of appeal was that the sentencing judge's remarks did not refer to the early guilty plea or to any mitigation of sentence as a result.

3.119 The CCA rejected this ground of appeal, concluding there was no doubt that the sentencing judge allowed a discount of 25% to reflect the guilty plea. The Court observed that failing to mention expressly the plea and any discount does not mean that the sentencing judge failed to take it into account. Each case must be evaluated on its own facts. The Court noted that in this case:

- The sentencing remarks were delivered immediately after the sentencing proceedings to accommodate family of the offender who had travelled from Hong Kong for the proceedings.
- The plea and its effect had been mentioned on more than one occasion in the proceedings and it could not be assumed that the judge, who was an experienced judge, would have failed to have regard to the plea.
- The length and structure of the sentence itself suggested that the judge had allowed a discount in the order of 25% on a sentence of 9 years imprisonment.

3.120 The Court said that it was always preferable for a judge to refer specifically to an early plea and to identify the discount applied. However, the Court also said that it was aware of the pressures on District Court judges when delivering a sentence and that it is easy not to state a fact that everybody knows needs to be taken into account.[77]

3.121 The Court dismissed the appeal.

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75. *Beavis v R* [2018] NSWCCA 248 [275].
76. *Beavis v R* [2018] NSWCCA 248 [275].
77. *Wong v R* [2018] NSWCCA 263 [38]-[45].

Failure to stop and assist

R v Pullen [2018] NSWCCA 264

3.122 The offender received an aggregate sentence of 15 months imprisonment to be served by way of an intensive correction order (ICO) for one count of dangerous driving causing grievous bodily harm and one count of failing to stop and assist after an impact causing grievous bodily harm.

3.123 The offender, having consumed cannabis and alcohol, lost control of his car while speeding in a road works zone, and collided with a stationary semi-trailer. His passenger was trapped in the wreckage for over an hour with significant damage to his leg. After the accident, the offender escaped through the driver's side window and attempted to flee the scene. Road workers restrained him until police arrived, when he again attempted to flee before being caught by police.

3.124 The Crown appealed against the aggregate sentence on the grounds that it was manifestly inadequate.

3.125 In allowing the appeal, the CCA found that the indicative sentence of 3 months for failing to stop and assist did not reflect the distinct criminality involved and did not give sufficient weight to general deterrence and denunciation.[78] The sentencing judge had found that the offending was "well below the mid-range".

3.126 The Court noted that Parliament's intention that these offences should invite "significant punishment" is reflected in the maximum penalty of 7 years imprisonment where the impact causes grievous bodily harm and 10 years where the impact causes death.[79]

3.127 The Court stated the purposes of an offence of failing to stop and assist after an accident[80] were:

- It emphasises the need for drivers involved in serious accidents to stop and provide assistance to anyone who is injured by at least contacting emergency services.
- It seeks to deter people from impeding a police investigation into an accident. If a driver in a serious motor vehicle accident flees, it may hinder police in their ability to collect the necessary evidence to discover the cause of the accident and to

78. *R v Pullen* [2018] NSWCCA 264 [52].
79. *R v Pullen* [2018] NSWCCA 264 [51].
80. *Crimes Act 1900* (NSW) s 52AB.

determine who is at fault as well as, if necessary, to lay charges against the driver or to issue a fine.[81]

3.128 The Court also said that for such offences, the need for general deterrence and denunciation is of considerable importance:

> This is because failing to stop and assist in the event of a serious collision may result in unnecessary loss of life or the prolonging of suffering in circumstances where treatment for any injuries sustained may be readily available. In these circumstances, severe punishments are warranted to deter drivers from fleeing in the event of a serious collision.[82]

3.129 The Court also found that the sentencing judge had erred in assessing the objective seriousness of the offence by failing to take into account a material consideration, namely whether the offender had actual or constructive knowledge of his passenger's injuries. The Court stated that the seriousness of the offending will "of course be greater in circumstances where a person knows that the victim has suffered grievous bodily harm or death".[83] The Court was satisfied from the circumstances of the accident that the offender had such knowledge.

3.130 The Court found that, in all the circumstances, the objective seriousness of the offence was just below mid-range. The Court accordingly recorded an indicative sentence of imprisonment for 1.5 years.

3.131 In re-sentencing the offender to an ICO for 3 years, the Court acknowledged that imposing an ICO represented some degree of leniency. However, it was satisfied that imposing a number of conditions in addition to the mandatory conditions meant that the ICO still incorporated a "substantial degree of punishment", having regard as well to the significant increase in the length of the ICO.[84] The ICO's conditions included 650 hours of community service, a requirement to participate in a rehabilitation program or receive treatment, a requirement to abstain from consuming alcohol and drugs, and a requirement to complete the Sober Driver Program if assessed as suitable.

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81. *R v Pullen* [2018] NSWCCA 264 [49].
82. *R v Pullen* [2018] NSWCCA 264 [51].
83. *R v Pullen* [2018] NSWCCA 264 [47].
84. *R v Pullen* [2018] NSWCCA 264 [93].

4. Operation of the new penalties

In brief

In September 2018, a new penalty regime was introduced in NSW. We have examined the use of the new penalties for the final quarter of 2018, for all offences and for select categories of offences according to gender and Indigenous status. We also examined the proportion of each penalty imposed by region. Finally, we examined the penalties imposed for offences which are ineligible for an ICO to test concerns that the abolition of suspended sentences could potentially lead to more people being sentenced to imprisonment.

4.1 Our annual reviews since 2011 have looked at the operation of intensive correction orders (ICOs) which were introduced as a sentencing option in 2010, at the same time as periodic detention was abolished.[1] At the time, the Attorney General asked us to report annually on the operation of ICOs in the lead up to a 5 year statutory review which we conducted in 2016.[2]

1. *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010* (NSW).
2. NSW, *Parliamentary Debates*, Legislative Council, 22 June 2010, 24426; NSW Sentencing Council, *Intensive Correction Orders: Statutory Review*, Report (2016).

4.2 The ICO that was introduced in 2010 was effectively abolished when a new sentencing regime was introduced in NSW, with changes taking effect on 24 September 2018. The ICO under this new regime bears some similarities to the ICO under the previous regime. However, the new ICO has a broader application, replacing as it does several sentencing options under the old regime and involving fewer inflexible mandatory components.

4.3 In order to examine how the new ICO operates, this chapter looks at the first quarter of operation of the new sentencing regime for all of the generally available penalty options. This is consistent with the Council's statutory obligation to "monitor, and to report annually to the Minister on, sentencing trends and practices".[3]

4.4 Unlike past analyses of ICOs, given the limited timeframe being examined, we are unable to provide meaningful data on some matters such as discharges of orders or breaches.

The new sentencing regime

4.5 The new sentencing regime arose from recommendations made by the NSW Law Reform Commission (LRC) in 2013.[4]

3. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100J(1)(c).
4. NSW Law Reform Commission, *Sentencing,* Report 139 (2013).

4.7 Existing sentences were converted as follows:

Old regime	New regime
Imprisonment	Imprisonment (no change)
Home detention	Intensive correction order (new)
Intensive correction order (old)	
Suspended sentence	Abolished. (Transitional provisions ensure the continued operation of existing suspended sentences.)
Fine	Fine (no change)
Community service order	Community correction order
Good behaviour (s 9) bond	
Conviction with no other penalty (s 10A) order	Conviction with no other penalty (s 10A) order (no change)
Conditional discharge bond or order (s 10 bond)	Conditional release order

The new sentencing options

4.8 Three new sentencing options were introduced:

- the new intensive correction order ("ICO")
- the community correction order ("CCO"), and
- the conditional release order ("CRO").

4.9 The LRC recommended these new orders as part of its aim to reduce the complexity of sentencing law and deliver transparency and consistency in approach.

4.10 The previous community-based orders were seen as overlapping and unnecessarily rigid and complicated. The new orders were intended to rationalise the options available to courts, increase their flexibility and use, and promote prevention and reduction of reoffending.

Intensive correction order

4.11 The new ICO is intended to replace the old ICO and home detention.

4.12 If a court decides to sentence an offender to up to 2 years imprisonment for a single offence or to an aggregate or effective sentence of up to 3 years for multiple offences, it

may instead order that the offender serve the sentence in the community by way of an ICO. An ICO is not available for certain serious offences.[5]

4.13 All ICOs have two standard conditions requiring an offender:

- not to commit any offence, and
- to submit to supervision by a community corrections officer.

4.14 ICOs also must, unless there are good reasons not to, include at least one of the following conditions:

- home detention
- electronic monitoring
- a curfew
- community service work of no more than 750 hours
- a requirement to participate in a rehabilitation program or receive treatment
- a requirement to abstain from alcohol or drugs or both
- a requirement not to associate with particular people, or
- a requirement not to go to a particular place or area.

4.15 The court may also impose further conditions provided they are not inconsistent with any other applicable condition. The State Parole Authority ("SPA") may also impose, vary or revoke conditions that are not standard conditions.

4.16 If an offender fails to comply with any obligation under an ICO, SPA may take a number of actions, including recording the breach, giving a formal warning, imposing conditions, varying or revoking conditions (that are not standard conditions) or revoking the ICO. If SPA revokes the ICO, the offender must serve the balance of the sentence by full-time imprisonment.[6]

Community correction order

4.17 The CCO is intended to replace the community service order and good behaviour (s 9) bond.

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5. See [4.66].
6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7, pt 5; *Crimes (Administration of Sentences) Act 1999* (NSW) pt 3, pt 7 div 1.

4.18 A court may impose a CCO instead of a sentence of imprisonment. The maximum term of a CCO is 3 years.

4.19 All CCOs have two standard conditions requiring an offender:

- not to commit any offence, and
- to appear before the court if called on to do so at any time during the CCO's term.

4.20 The court may, at the time of sentencing or at any time on the application of a community corrections officer, impose one or more of the following conditions:

- a requirement to submit to supervision by a community corrections officer
- a curfew (not exceeding 12 hours a day)
- community service work of no more than 500 hours
- a requirement to participate in a rehabilitation program or receive treatment
- a requirement to abstain from alcohol or drugs or both
- a requirement not to associate with particular people, or
- a requirement not to go to a particular place or area.

4.21 The court may also impose further conditions provided they are not inconsistent with any other applicable condition and are not home detention, electronic monitoring or a curfew exceeding 12 hours a day. The court may, at any time after sentencing, impose, vary or revoke conditions that are not standard conditions.

4.22 If an offender fails to comply with any condition under a CCO, the court may call on the offender to appear before it.

4.23 The court may take a number of actions, including taking no action, imposing conditions, varying or revoking conditions (that are not standard conditions) or revoking the CCO. If the court revokes the CCO, the court may re-sentence the offender.[7]

Conditional release order

4.24 The CRO is intended to replace the conditional discharge bond or order (s 10 bond).

4.25 A court, when it records a conviction for an offence, may impose a CRO instead of a sentence of imprisonment or a fine (or both). A court may also impose a CRO when it

7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8, pt 7; *Crimes (Administration of Sentences) Act 1999* (NSW) pt 4B.

finds a person guilty of an offence but does not record a conviction. The maximum term of a CRO is 2 years.

4.26 All CROs have two standard conditions requiring an offender:

- not to commit any offence, and
- to appear before the court if called on to do so at any time during the CRO's term.

4.27 The court may, at the time of sentencing or at any time on the application of a community corrections officer, impose one or more of the following conditions:

- a requirement to submit to supervision by a community corrections officer
- a requirement to participate in a rehabilitation program or receive treatment
- a requirement to abstain from alcohol or drugs or both
- a requirement not to associate with particular people, or
- a requirement not to go to a particular place or area.

4.28 The court may also impose further conditions provided they are not inconsistent with any other applicable condition and are not home detention, electronic monitoring, a curfew, or community service work. The court may, at any time after sentencing, impose, vary or revoke conditions that are not standard conditions.

4.29 If an offender fails to comply with any condition under a CRO, the court may call on the offender to appear before it.

4.30 The court may take a number of actions, including taking no action, imposing conditions, varying or revoking conditions (that are not standard conditions) or revoking the CRO. If the court revokes the CRO, the court may re-sentence the offender.[8]

Sentencing statistics

4.31 The first full quarter of operation of the new sentencing regime was the final quarter of 2018 (October to December).

4.32 The following figures set out the percentage of each sentencing option imposed in the final quarter of 2018 in relation to particular categories of offender, based on gender, Indigenous status and region.

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8. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9, pt 8; *Crimes (Administration of Sentences) Act 1999* (NSW) pt 4C.

4.33 However, in comparing the groups of offenders, we have not been able to control for factors that are known to influence sentencing outcomes. It is possible that apparent differences in sentence outcome are the result of unmeasured differences between offenders, such as age and prior offences. The data relating to selected broad offence categories cannot reflect the range of facts, circumstances and levels of culpability for individual offences. The data has also not been tested for significance. It remains unknown whether the data shows meaningful difference rather than what might be achieved by chance or natural variation.

4.34 The observations in this chapter, therefore, can only point to trends and patterns that may require further investigation and more sophisticated analysis.

Gender and Indigenous status

4.35 This data only relates to those offenders whose gender and Indigenous status are recorded. We have excluded the 4042 (of 28,793) individual offenders whose gender and/or Indigenous status is not recorded.

All offences

4.36 Figure 4.1 shows the percentage of penalties imposed by NSW higher courts and the Local Court for all offences, by gender and Indigenous status.

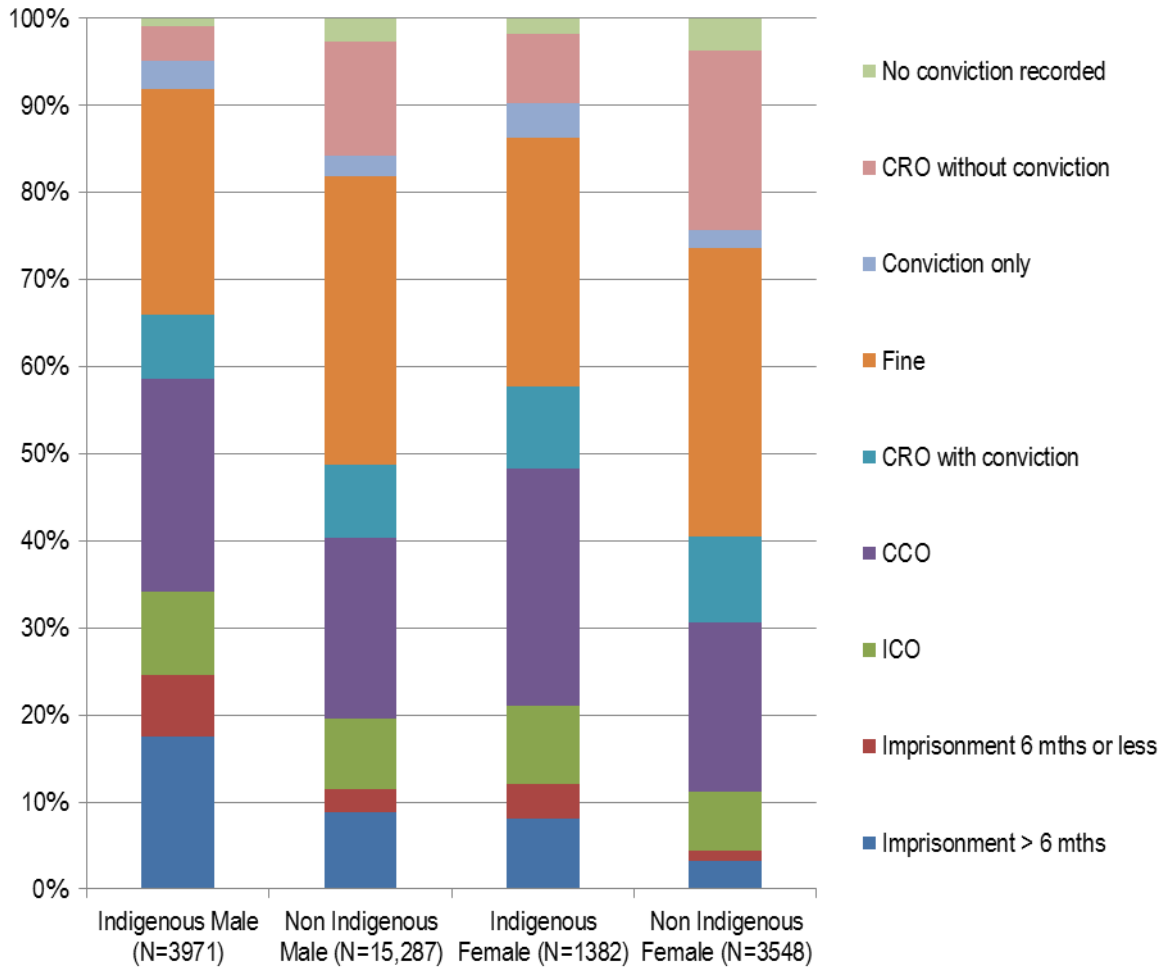
4.37 The most commonly used penalty for all offences is the fine, ranging from 25.5% for Indigenous men to 33.2% for non-Indigenous men.

4.38 Indigenous men are imprisoned at a substantially greater rate than non-Indigenous men (24.6% compared with 11.4%) and Indigenous women are imprisoned at a substantially greater rate than non-Indigenous women (12.1% compared with 4.4%).

4.39 Conversely, non-Indigenous men have “no conviction” recorded at a greater rate than Indigenous men (15.8% compared with 4.8%) and non-Indigenous women have “no conviction” recorded at a greater rate than non-Indigenous women (24.2% compared with 9.7%).

4.40 The other sentencing options do not show such significant contrasts. For example, an ICO was imposed on 9.6% of Indigenous men, compared with 8.1% of non-Indigenous men, 9.0% of Indigenous women and 6.8% of non-Indigenous women.

Figure 4.1: NSW Higher and Local Criminal Courts, sentences imposed, October-December 2018



Source: NSW Bureau of Crime Statistics and Research, reference 19-17374.

Drug offences

4.41 Figure 4.2 shows the breakdown by Indigenous status and gender for drug offences. Drug offences include:

- import or export illicit drugs
- deal or traffic in illicit drugs
- manufacture or cultivate illicit drugs, and
- possess or use illicit drugs.

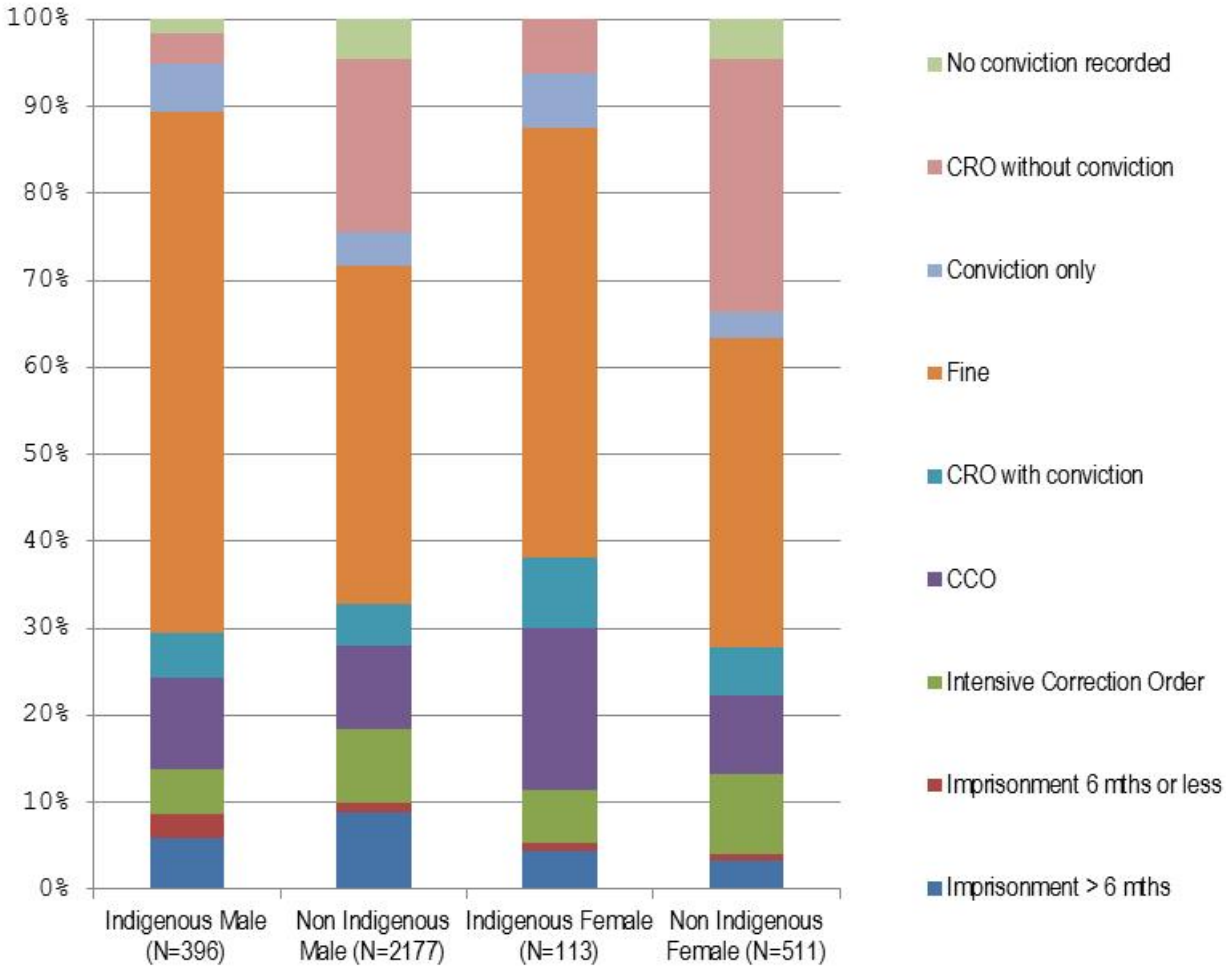
4.42 The most commonly used penalty for drug offences is the fine. Fines were imposed on 59.8% of Indigenous men, compared with 49.6% of Indigenous women, 38.9% of non-Indigenous men and 35.6% of non-Indigenous women.

4.43 Indigenous men are imprisoned at a slightly lesser rate than non-Indigenous men (8.6% compared with 10%) and Indigenous women are imprisoned at a slightly greater rate than non-Indigenous women (5.3% compared with 4.1%). This is substantially different from the rate for all offences (above).

4.44 However, non-Indigenous men have no conviction recorded at a substantially greater rate than Indigenous men (24.2% compared with 5.1%) and non-Indigenous women have no conviction recorded at a substantially greater rate than non-Indigenous women (33.7% compared with 6.2%).

4.45 An ICO is imposed in 5.3% of cases for Indigenous men, compared with 6.2% for Indigenous women, 8.4% for non-Indigenous men and 9.2% for non-Indigenous women.

Figure 4.2: NSW Higher and Local Criminal Courts, sentences imposed for drug offences, October-December 2018



Source: NSW Bureau of Crime Statistics and Research, reference 19-17374.

Traffic offences

4.46 Figure 4.3 shows the breakdown by Indigenous status and gender for traffic and vehicle regulatory offences. Traffic and vehicle regulatory offences include a wide variety of

regulatory offences including drive while licence disqualified or suspended, drive without a licence, registration offences, roadworthiness offences, exceeding the prescribed content of alcohol, and exceeding the prescribed content of illicit drugs.

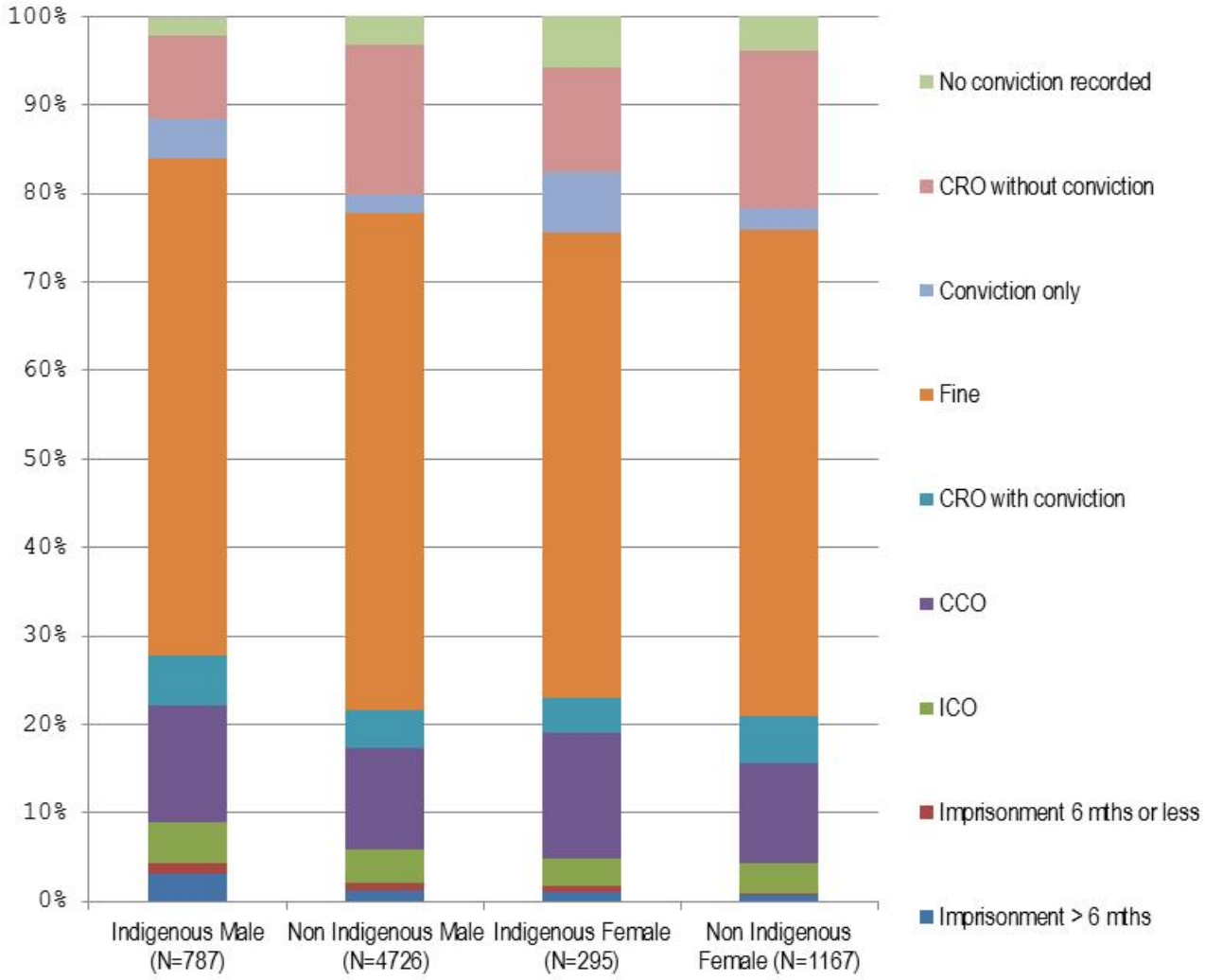
4.47 The most commonly used penalty for traffic and vehicle regulatory offences is the fine, being imposed in more than 50% of all cases across all categories. Another frequent penalty is the CCO, which was imposed on Indigenous offenders in 11.4% of cases (for men) and 11.2% of cases (for women) and on non-Indigenous offenders in 13.3% of cases (for men) and 14.2% (for women).

4.48 Imprisonment is little used as a sentencing option for traffic and vehicle regulatory offences, however, there is a disparity between Indigenous and non-Indigenous offenders. For men, 1.3% of non-Indigenous offenders were sentenced to a term of imprisonment compared with 3.0% of Indigenous offenders. For women, 0.9% of non-Indigenous offenders were sentenced to a term of imprisonment compared with 1.7% of Indigenous offenders.

4.49 “No conviction” is a more frequently used sentencing option for traffic and vehicle regulatory offences and there is also a disparity between Indigenous and non-Indigenous offenders. For men, 11.6% of Indigenous offenders did not have a conviction recorded compared with 20.1% of non-Indigenous offenders. For women 17.6% of Indigenous offenders did not have a conviction recorded compared with 21.7% of non-Indigenous offenders.

4.50 ICO use is more evenly spread with 3.1% of Indigenous women receiving ICOs compared with 3.5% of non-Indigenous women. 4.6% of Indigenous men received ICOs compared with 3.7% of non-Indigenous men.

Figure 4.3: NSW Higher and Local Criminal Courts, sentences imposed for traffic offences, October-December 2018



Source: NSW Bureau of Crime Statistics and Research, reference 19-17374.

Acts intended to cause injury

4.51 Figure 4.4 shows the breakdown by Indigenous status and gender for acts intended to cause injury. Acts intended to cause injury include serious assault resulting in injury, serious assault not resulting in injury, common assault and intimidation/stalking.

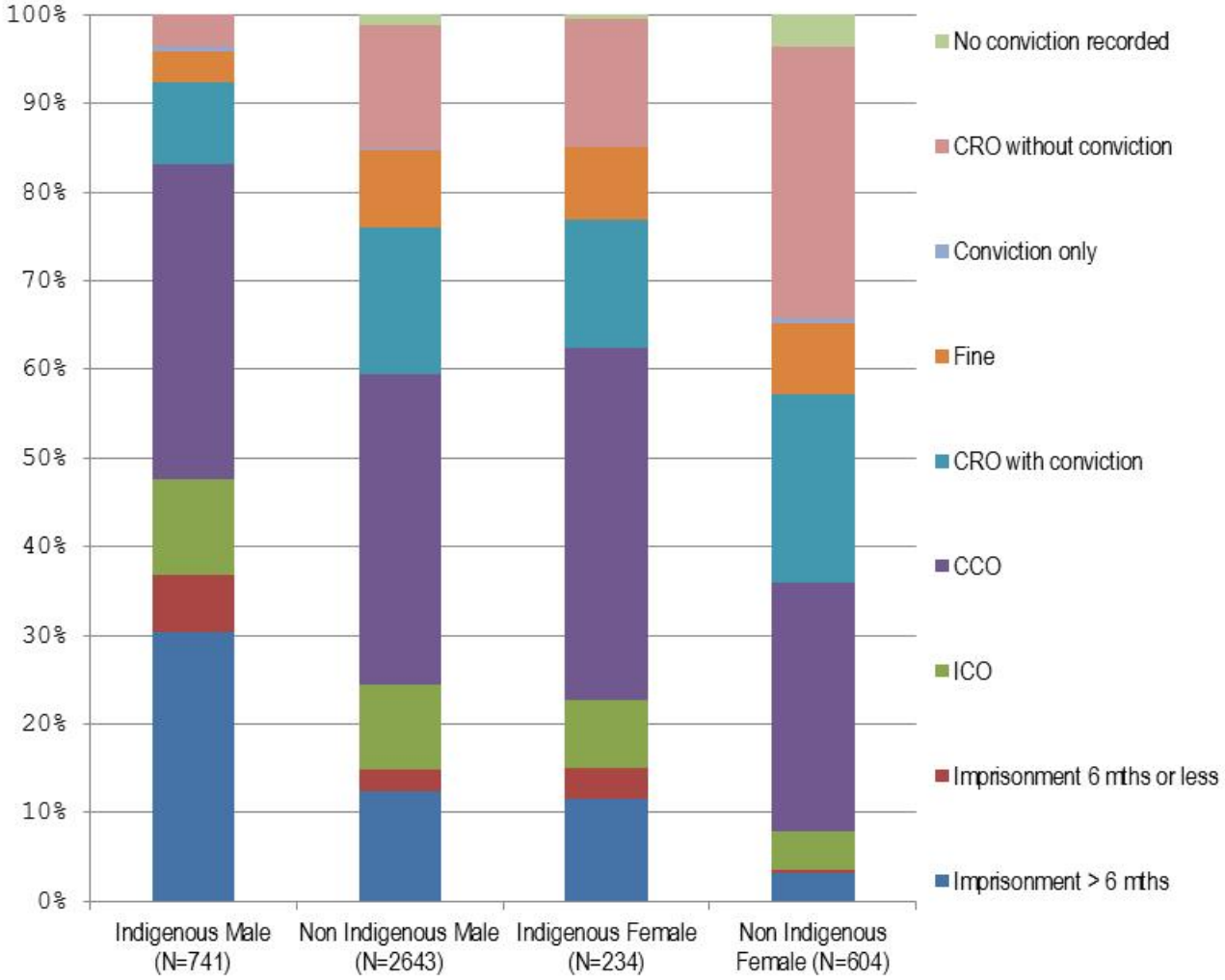
4.52 For Indigenous men, the most common penalty for an act intended to cause injury is imprisonment, with 36.8% of Indigenous men receiving that penalty. This compares with 14.9% for non-Indigenous men, 15% for Indigenous women and 3.5% for non-Indigenous women.

4.53 Conversely, the most common outcome for non-Indigenous women is to have no conviction recorded, with 34.3% receiving “no conviction”. This compares with 15% for Indigenous women, 15% for non-Indigenous men and 3.6% for Indigenous men.

4.54 Across the board, the most common penalty was the CCO with 35.5% of Indigenous men receiving one. This compares with 35% of non-Indigenous men, 39.7% of Indigenous women and 28% of non-Indigenous women.

4.55 An ICO was also imposed quite frequently with 10.8% of Indigenous men receiving one, compared with 9.5% of non-Indigenous men, 7.7% of Indigenous women and 4.5% of non-Indigenous women.

Figure 4.4: NSW Higher and Local Criminal Courts, sentences imposed for acts intended to cause injury, October-December 2018



Source: NSW Bureau of Crime Statistics and Research, reference 19-17374.

Offences against justice procedures, government security and government operations

4.56 Figure 4.5 shows the breakdown by Indigenous status and gender for offences against justice procedures, government security and government operations. Offences against justice procedures, government security and government operations include breach of custodial order offences, breach of community-based orders, breach of apprehended

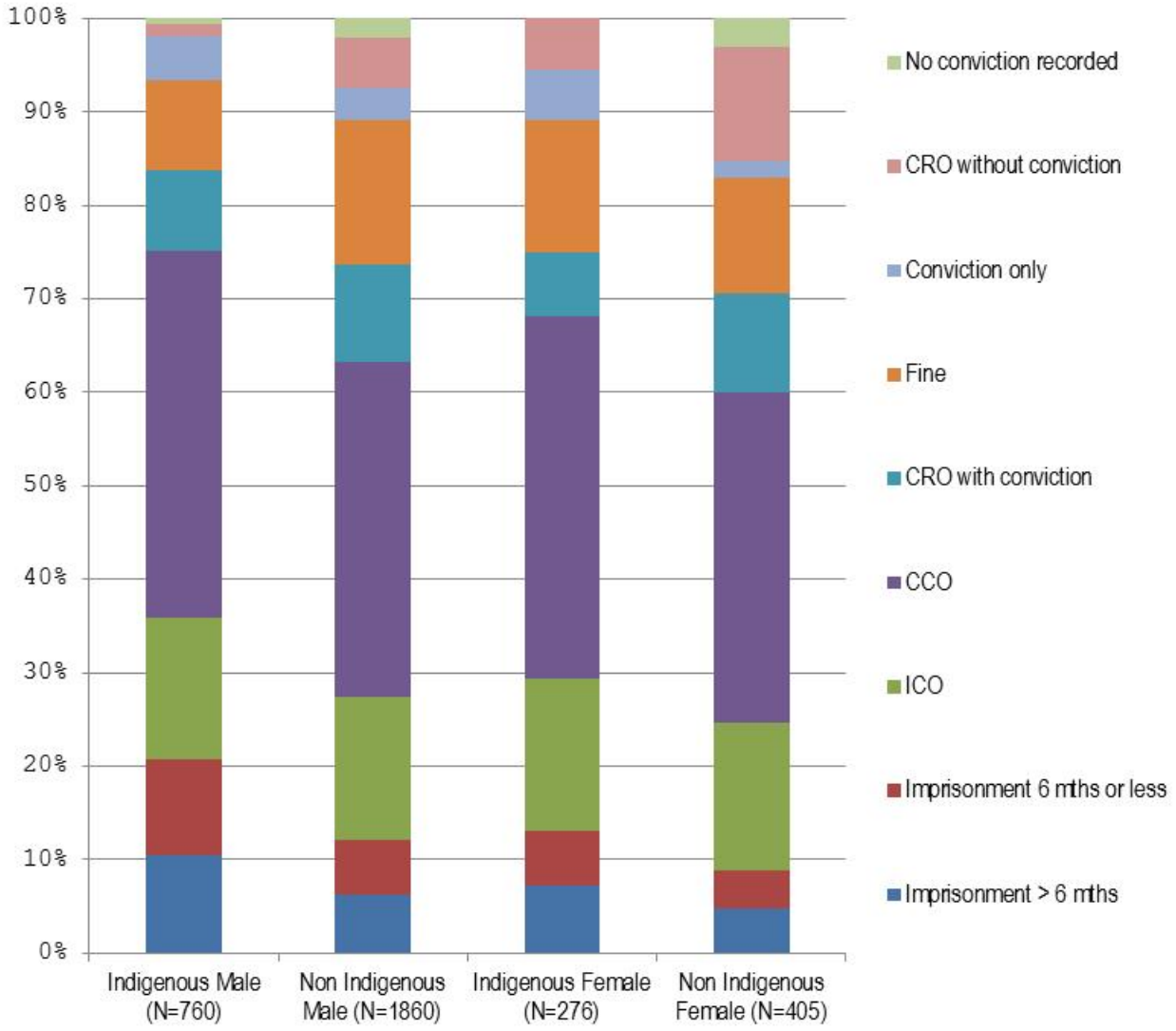
violence orders, and offences against justice procedures such as subverting the course of justice, resisting or hindering a police officer or justice official, and prison regulation offences.

4.57 The most common penalty for all groups is a CCO, with slightly over a third of each group receiving one. As with many of the other categories of offence, there is a significant disparity between the groups for imprisonment and “no conviction”.

4.58 In the case of imprisonment, 20.8% of Indigenous men were sentenced to that penalty, compared to 12.8% of non-Indigenous men, 13% of Indigenous women and 8.9% of non-Indigenous women. On the other hand, no conviction was recorded for 2% of Indigenous men, compared to 7.4% of non-Indigenous men, 5.4% of Indigenous women and 15.3% of non-Indigenous women.

4.59 The percentage of ICOs imposed was relatively consistent across all groups at around 15–16% each.

Figure 4.5: NSW Higher and Local Criminal Courts, sentences imposed for offences against justice procedures, government security and government operations, October-December 2018



Source: NSW Bureau of Crime Statistics and Research, reference 19-17374.

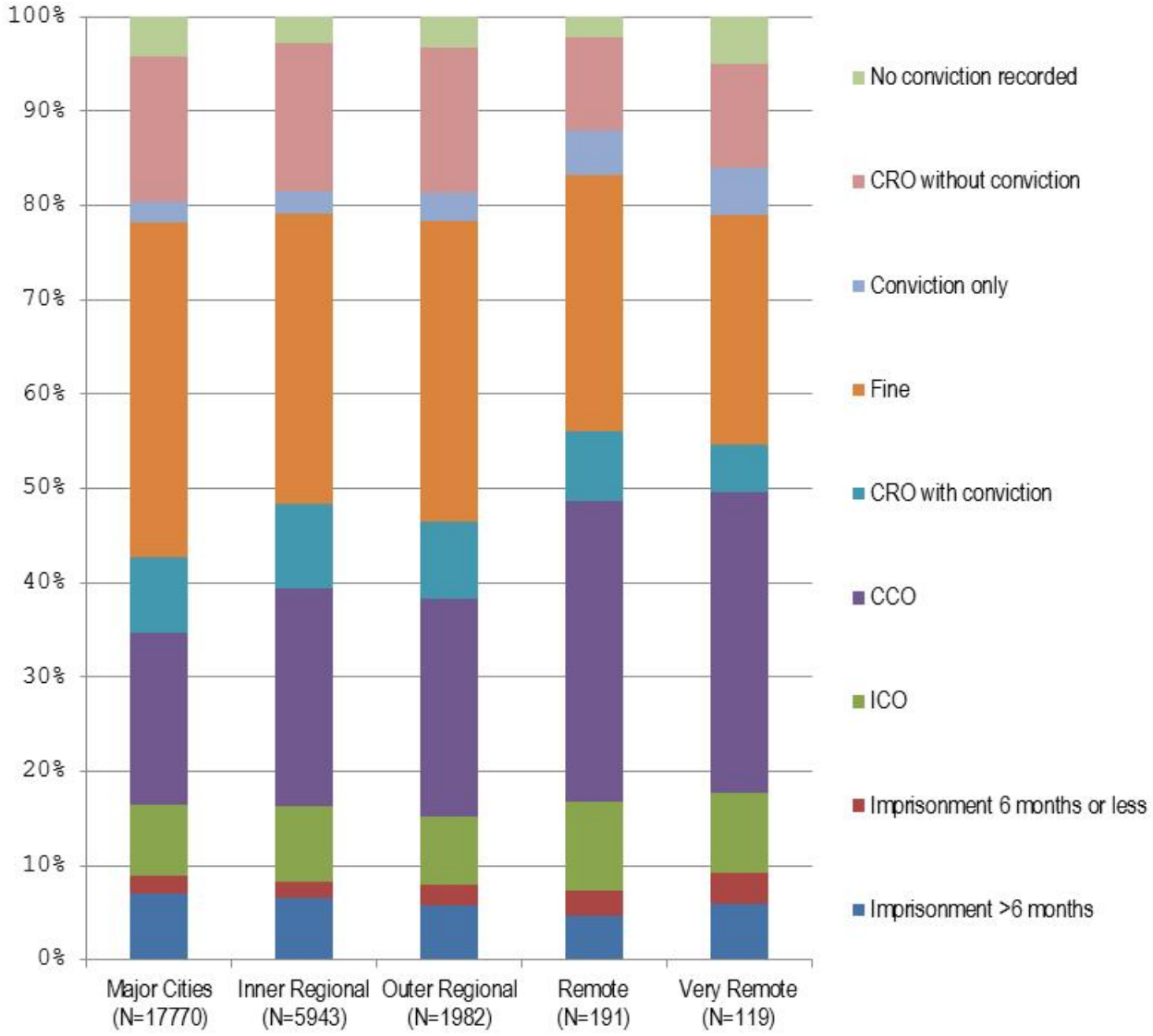
Regional use of sentencing options

4.60 Figure 4.6 shows the breakdown of penalties imposed by region for all offences. The regions are identified using the accessibility/remoteness index which measures a place's accessibility to goods, services and opportunities for social interaction:

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

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

Figure 4.6: NSW higher and local criminal courts, sentences imposed by region, October-December 2018



Source: NSW Bureau of Crime Statistics and Research, reference 19-17374.

4.61 The data shows a greater reliance on fines in less remote areas and a greater reliance on ICOs and CCOs in more remote areas. The precise percentages are set out in Table 4.1.

Table 4.1: Percentages of ICOs, CCOs and fines by region, October–December 2019

Type of principal penalty	Major Cities (N=17770)	Inner Regional (N=5943)	Outer Regional (N=1982)	Remote (N=191)	Very Remote (N=119)
Fine	35.5%	30.7%	32.0%	27.2%	24.4%
ICO	7.5%	8.0%	7.3%	9.4%	8.4%
CCO	18.4%	23.1%	23.0%	31.9%	31.9%

Source: NSW Bureau of Crime Statistics and Research, reference 19-17374.

4.62 The percentage of ICOs and CCOs in remote and very remote areas is particularly interesting since one of the problems identified about ICOs and community service orders in the LRC review in 2013 was that the community service requirement was difficult to fulfil in regional and remote areas of NSW.[9]

4.63 Our past reviews of ICOs also noted that offenders in more remote regions generally were less likely to receive an ICO than offenders in less remote regions, although the percentages were starting to move closer together by 2017.[10]

4.64 The new ICOs and CCOs do not have a mandatory community service requirement and courts may impose other conditions that can be met in regional and remote areas.

Offences that are ineligible for intensive correction orders

4.65 Concerns have been expressed that the abolition of suspended sentences could potentially lead to more people being sentenced to imprisonment.[11] To test these concerns, we looked at the sentencing patterns before and after the introduction of the new sentencing regime for offences for which ICOs are currently excluded.

4.66 The Act currently provides:

> (1) An intensive correction order must not be made in respect of a sentence of imprisonment for any of the following offences—
>
> (a) murder or manslaughter,

9. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [9.24], [11.47], [12.64]. See also L Snowball, *Does a Lack of Alternatives to Custody Increase the Risk of a Prison Sentence?* Crime and Justice Bulletin No 111 (NSW Bureau of Crime Statistics and Research, 2008)
10. NSW Sentencing Council, *Sentencing Trends and Practices*, Annual Report (2017) [5.13].
11. See submissions cited in NSW Sentencing Council, *Intensive Correction Orders: Statutory Review*, Report (2016) [3.44]. See also NSW Law Reform Commission, *Sentencing,* Report 139 (2013) [10.37].

(b) a prescribed sexual offence,

(c) a terrorism offence within the meaning of the Crimes Act 1914 of the Commonwealth or an offence under section 310J of the Crimes Act 1900,

(d) an offence relating to a contravention of a serious crime prevention order under section 8 of the Crimes (Serious Crime Prevention Orders) Act 2016,

(e) an offence relating to a contravention of a public safety order under section 87ZA of the Law Enforcement (Powers and Responsibilities) Act 2002,

(f) an offence involving the discharge of a firearm,

(g) an offence that includes the commission of, or an intention to commit, an offence referred to in paragraphs (a)–(f),

(h) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in paragraphs (a)–(g).[12]

4.67 This expanded the ineligible offences for the old ICO which were only prescribed sexual offences.[13] We are applying all of the currently exempt offences to the period before the new regime was introduced.

4.68 Figure 4.7 shows the breakdown of sentences for ICO exempt offences for the four quarters before the introduction of the new sentencing regime, for the quarter in which the new regime was introduced and for the quarter after it was introduced. There is a clear increase in the percentage of sentences of imprisonment and little change in the percentage of other non-custodial options.

4.69 We will continue to monitor the sentencing for ICO exempt offences in future annual reviews.

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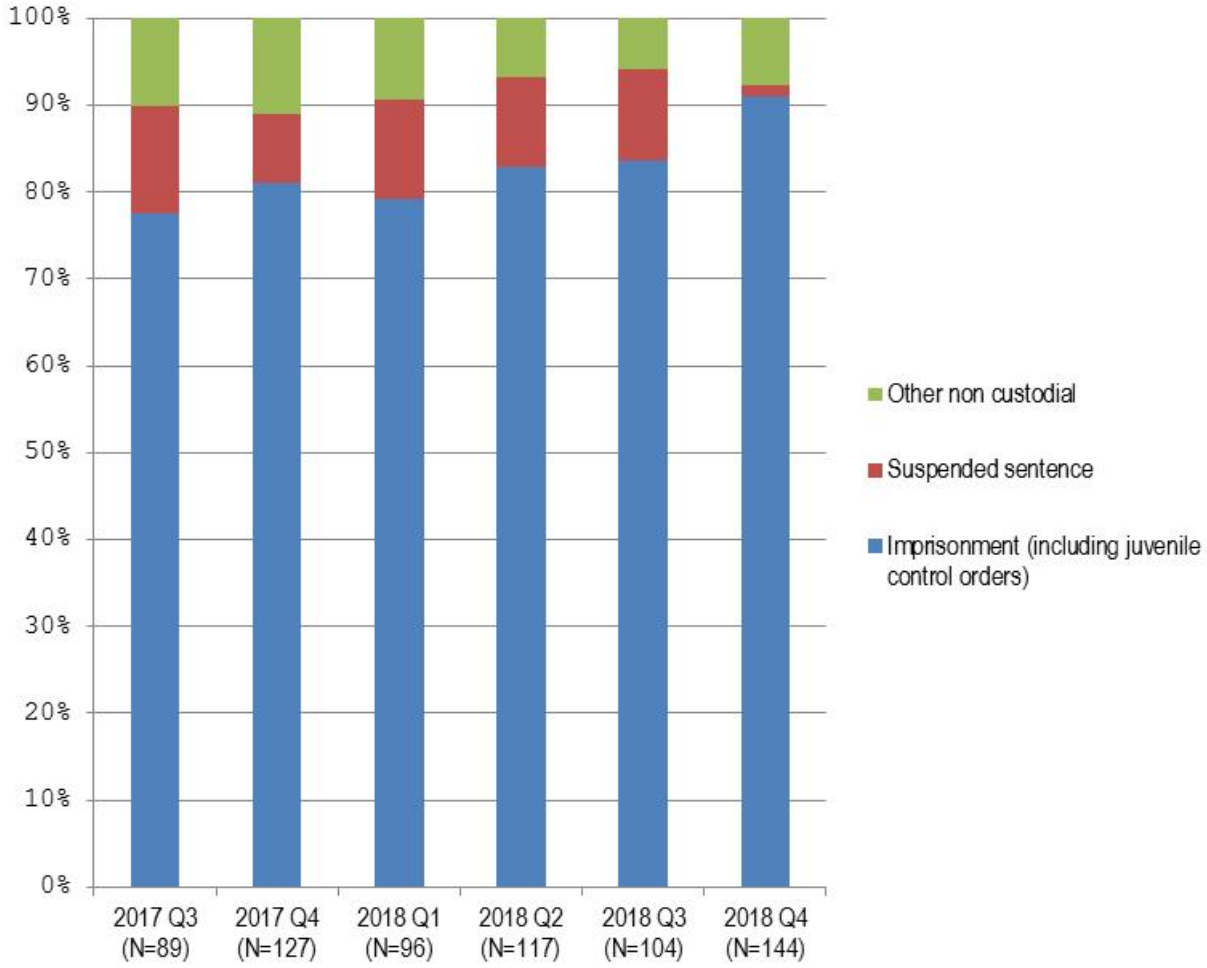
12. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67.

13. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 66 (substituted by *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) sch 1 [29].)

Figure 4.7: NSW Higher, Local and Children's Criminal Courts, sentences imposed for ICO ineligible offences, July 2017–December 2018



Source: NSW Bureau of Crime Statistics and Research, reference 19-17336.

5. Functions and membership of the Council

In brief

We continue to carry out our statutory functions and Council meetings are scheduled on a monthly basis. Council members contribute a wide range of experience and expertise in relevant fields. Staff of the Law Reform and Sentencing Council Secretariat (a division of the Strategy and Policy Branch of the Department of Justice) support our work.

Functions of the Council

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

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

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

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

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

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

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

(e) to educate the public about sentencing matters.

Council members

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

5.3 The Council's members (and their qualifications) at the end of 2018 are set out below.

Chairperson

The Hon James Wood AO QC	Retired judicial officer

Members

His Honour Acting Judge Paul Cloran	Retired magistrate
Mr Christopher Craner	Member with expertise or experience in law enforcement
Mr Lloyd Babb SC	Member with expertise or experience in criminal law or sentencing – prosecution
Mr Mark Ierace 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
Professor Megan Davis	Member with expertise or experience in Aboriginal justice matters
Mr Howard Brown OAM	Community member - experience in matters associated with victims of crime
Ms Thea Deakin-Greenwood	Community member - experience in matters associated with victims of crime
Associate Professor Tracey Booth	Community member
Ms Moira Magrath	Community member
Mr Peter Severin	Member with expertise or experience in corrective services
Mr Wayne Gleeson	Member with expertise or experience in juvenile justice
Mr Paul McKnight	Representative of the Department of Justice
Professor David Tait	Member with relevant academic or research expertise or experience

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

5.4 In July 2018, Assistant Commissioner Mark Jenkins APM, the member with expertise or experience in law enforcement resigned. In November 2018, Detective Superintendent Christopher Craner was appointed in his place.

5.5 In August 2018, the Attorney General reappointed the Hon James Wood AO QC as a member and chairperson of the Sentencing Council for the period 26 November 2018 to 25 November 2021.

Council business

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

5.7 During 2018 we received presentations from:

- Nayomi Senanayake, a policy officer with the Law Reform and Sentencing Council Secretariat, who presented her findings on the Harlem Parole Re-entry Court which she investigated under the John Hennessy Legal Scholarship. (21 March 2018)
- Brooke O'Donnell, General Manager, Education and Communications, Road Safety Education who spoke about the RYDA Program which is delivered to Year 10 and Year 11 students at 80 venues around the state. (17 October 2018)
- Officers from the Centre for Road Safety (Julie Thompson – Associate Director, Road Safety Policy; Justina Diaconu – Principal Policy Officer; and Gavin Crouch – Manager Sanctions, Transport Policy, Freight, Strategy and Planning) discussed various topics of relevance to our project on repeat traffic offenders. (17 October 2018)

5.8 We have maintained close working relationships with the Bureau of Crime Statistics and Research, and other parts of the NSW Department of Justice.

Staffing

5.9 Staff of the Law Reform and Sentencing Council Secretariat (a division of the Strategy and Policy Branch of the Department of Justice) support the Council's work.