

Annual
Report
2019

Sentencing Trends and Practices

New South Wales
Sentencing Council



NSW Sentencing Council

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Executive summary

- 0.1 This report details the projects the NSW Sentencing Council undertook in the 2019 calendar year, and provides 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".

The Council's projects (Chapter 1)

- 0.2 We worked on three projects in 2019:
- **Repeat traffic offenders:** reference received 18 April 2018; consultation paper released 4 December 2018; submissions received; report scheduled for completion in 2020.
 - **Fire offences:** reference received 12 November 2018; submissions invited 26 November 2018; report transmitted to the Attorney General on 11 June 2019. The report was implemented by schedule 1.8[1] of the *Justice Legislation Amendment Act 2019* (NSW) which received assent on 26 September 2019.
 - **Homicide:** reference received 23 November 2018; preliminary submissions invited 7 December 2018; consultation paper released 31 October 2019; report scheduled for completion in 2020.

Sentencing related research (Chapter 2)

- 0.3 This year, the NSW Bureau of Crime Statistics and Research (BOCSAR) produced all the sentencing related research that we chose to summarise for this review:
- Evaluating the impact of the Intensive Drug and Alcohol Treatment Program (IDATP) on prisoner misconduct - *Crime and Justice Bulletin No 222* (March 2019).
 - Offenders sentenced to time already served in custody - *Bureau Brief No 140* (May 2019).
 - Youth on Track randomised controlled trial: Process evaluation - *Bureau Brief No 141* (August 2019).

Cases of interest (Chapter 3)

- 0.4 In 2019, the NSW Court of Criminal Appeal ("CCA") delivered judgments of interest on the topics set out below.

Matters taken into account at sentencing

- Reasons for possessing firearms - *Sumrein v R* [2019] NSWCCA 83

- Financial gain as an inherent characteristic of an offence - *Lee v R* [2019] NSWCCA 15
- Offender whose parole had been revoked was on “conditional liberty” - *Turnbull v R* [2019] NSWCCA 97
- Impact of an ADVO on relationships of trust and authority - *Turnbull v R* [2019] NSWCCA 97
- Sexual assault in the context of domestic violence - *SC v R* [2019] NSWCCA 25
- Use of uncharged acts of domestic violence - *Vasilevski v R* [2019] NSWCCA 277
- Manslaughter in the context of a family dispute - *R v Yardley* [2019] NSWCCA 291
- Sexual offences against the offender’s own child - *RH v R* [2019] NSWCCA 64
- Role in drug importation - *Klomfar v R* [2019] NSWCCA 61
- Extent of participation in drug syndicate - *Kay v R* [2019] NSWCCA 275
- Application of Bugmy principles - *R v Irwin* [2019] NSWCCA 133
- Offence (involving self defence) when it occurs in victim’s home - *Patel v R* [2019] NSWCCA 170
- Terrorist offences: The weight of mitigating factors - *Alou v R* [2019] NSWCCA 231
- Relevance of terrorist organisation’s ideology - *R v Lelikan* [2019] NSWCCA 316
- Parity where offender’s prospects of rehabilitation are better than co-offenders’ – *Bell v R* [2019] NSWCCA 271
- Assault by a Correctional officer - *Waterfall v R* [2019] NSWCCA 281
- Offender’s reduced life expectancy - *Lissock v R* [2019] NSWCCA 282
- Moral culpability and objective seriousness - *Wood v R* [2019] NSWCCA 309
- Belief in victim’s sexual interest irrelevant - *Cordeiro v R* [2019] NSWCCA 308
- Whether the offender was in a position of authority is an objective question – *Cordeiro v R* [2019] NSWCCA 308
- A person can abuse a position of trust even when they no longer hold the position - *Merhi v R* [2019] NSWCCA 322
- Aggravating factors for joint criminal enterprise manslaughter - *Tabbah v R* [2019] NSWCCA 324

Procedural and other issues

- Evidence of remorse and prospects of rehabilitation - *Mihelic v R* [2019] NSWCCA 2
- Adjournment of sentencing appeals due to insufficient funds - *Weldon v R* [2019] NSWCCA 205
- Opportunity to address special circumstances - *Kha v R* [2019] NSWCCA 215
- Assessing the basis for expert evidence - *Gibson v R* [2019] NSWCCA 221
- Totality where an aggregate sentence is not used - *Thomas v R* [2019] NSWCCA 265
- Use of “wicked” in sentencing remarks - *Adams v R* [2019] NSWCCA 295
- Steps in sentencing historic child sex offences - *R v Cattell* [2019] NSWCCA 297
- Providing comparable cases to the sentencing judge - *Ebrahami v R* [2019] NSWCCA 273

Manifestly inadequate sentences

- Possession of firearms - *R v Campbell* [2019] NSWCCA 1
- Work health and safety offences - *Attorney General (NSW) v Ceerose Pty Ltd* [2019] NSWCCA 35
- Supply of methylamphetamine: large commercial quantity - *R v Qi* [2019] NSWCCA 73
- Child sexual assault - *R v JJ* [2019] NSWCCA 148
- Protection of biodiversity - *R v Kennedy* [2019] NSWCCA 242
- Attempted murder (multiple victims) - *R v Amati* [2019] NSWCCA 193
- Armed robbery - *R v Chandler* [2019] NSWCCA 250

Intensive correction orders and the community safety consideration (Chapter 4)

- 0.5 In September 2018, a new penalty regime was introduced in NSW, including the new intensive correction order (ICO) that replaced a range of penalties including the old ICO and home detention.
- 0.6 The new ICO is available where a court decides to sentence an offender to up to 2 years’ imprisonment for a single offence, or an aggregate sentence of three years for multiple offences. The court may impose an ICO as an alternative to imprisonment, which enables the offender to serve the sentence in the community under strict conditions.

- 0.7 Section 66 of the *Crimes (Sentencing Procedure) Act* provides that the “paramount consideration” in determining whether to impose an ICO is community safety. When considering community safety, the sentencing court must assess whether an ICO or fulltime imprisonment is more likely to address the offender's risk of reoffending.
- 0.8 Section 66(3) provides that, when deciding whether to impose an ICO, the sentencing court must also consider the purposes of sentencing set out in s 3A of the *Crimes (Sentencing Procedure) Act* and any relevant common law sentencing principles, and may consider any other matters that the court thinks relevant.
- 0.9 Since the new ICO commenced on 24 September 2018, there have been several CCA cases that deal with community safety and the other considerations in s 66.
- 0.10 The CCA has reached different conclusions about how to address “community safety” in s 66. In *R v Fangaloka* [2019] NSWCCA 173, the Court adopted a restrictive interpretation, such that an ICO should not be imposed unless it is more likely to address the offender’s risk of reoffending than fulltime imprisonment. However, other CCA decisions have questioned this interpretation.
- 0.11 The CCA has also reached different conclusions about whether the community safety consideration is paramount. In *R v Pullen* [2018] NSWCCA 264, the Court held that the other considerations in s 66 are necessarily subordinate to it. However, other CCA decisions have rejected this approach.
- 0.12 These different interpretations of s 66 may create uncertainty for sentencing courts in determining whether to impose an ICO in a particular case.

Sentencing trends (Chapter 5)

Use of penalties

- 0.13 2019 was the first full year of operation of the new sentencing regime, which commenced in September 2018.
- 0.14 In 2019, 117,695 adult offenders were sentenced to one of the current penalties available in NSW.
- 0.15 The most common penalty is the fine (34.1%), followed by a community correction order (22%) and a conditional release order without a conviction (14%). A term of imprisonment is imposed in 10.3% of cases.
- 0.16 We particularly examined the proportion of each penalty imposed by gender and Aboriginal status.
- 0.17 We identified 18,189 Aboriginal men who received a relevant sentence in 2019, compared with 74,673 male offenders who were not Aboriginal or whose Aboriginal status was unknown.

- 0.18 Aboriginal men represent 3.5% of the male resident population in NSW. Yet male offenders who are recorded as Aboriginal represent:
- 19.6% of all male offenders
 - 36.5% of male offenders sentenced to imprisonment for more than 6 months
 - 43.9% of male offenders sentenced to imprisonment for 6 months or less
 - only 6.5% of male offenders who did not have a conviction recorded, and
 - only 6% of male offenders who received conditional release orders without a conviction.
- 0.19 Compared with other male offenders, a significantly greater proportion of Aboriginal men received sentences of imprisonment (22.9% compared with 8.9%) and a significantly smaller proportion of Aboriginal men received a sentence that did not involve a conviction (4.9% compared with 18.5%).
- 0.20 We identified 6121 Aboriginal women who received a relevant sentence in 2019, compared with 19,247 women who were not Aboriginal or whose Aboriginal status was unknown.
- 0.21 Aboriginal women represent 3.4% of the resident female population in NSW. Yet, female offenders who are recorded as Aboriginal represent:
- 24.1% of all female offenders
 - 46% of female offenders sentenced to imprisonment for more than 6 months
 - 53.8% of female offenders sentenced to imprisonment for 6 months or less
 - only 10.2% of female offenders who received conditional release orders without a conviction, and
 - only 10% of female offenders who did not have a conviction recorded.
- 0.22 Compared with other offenders, a significantly greater proportion of Aboriginal women received sentences of imprisonment (10.2% compared with 3.4%) and a significantly smaller proportion of Aboriginal women received a sentence that did not involve a conviction (10.1% compared with 28.4%).
- 0.23 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. The data shows that offenders who live outside major cities are more likely to receive a CCO and less likely to receive a fine than those who live in major cities.

Aboriginal women offenders

- 0.24 We examined Aboriginal women offenders in further detail comparing them with female offenders who were not Aboriginal or whose Aboriginal status was not known.
- 0.25 In 2019, only 43.4% of Aboriginal female offenders lived in major cities, compared with 67.6% of other female offenders. A greater proportion of Aboriginal women lived in regional and remote areas compared with other female offenders. These figures accord with general population statistics for the regions.
- 0.26 In 2019, a greater proportion of Aboriginal women lived in more disadvantaged areas compared with other female offenders (65.9% compared with 52.3%). Conversely, a greater proportion of other female offenders lived in less disadvantaged areas compared with Aboriginal women (42.6% compared with 27.3%).
- 0.27 In relation to categories of offences committed, a greater proportion of Aboriginal women commit offences against justice procedures, government security and government operations, and theft and related offences, whereas a much greater proportion of other female offenders commit traffic and vehicle regulatory offences.
- 0.28 Given that Aboriginal women make up 24.1% of female offenders, the data for each offence committed by female offenders shows that Aboriginal women are significantly over-represented for public order offences (39.4%), theft and related offences (35.9%), and offences against justice procedures, etc (35.7%) and are under-represented for traffic and vehicle regulatory offences (13.7%), and illicit drug offences (19.7%).
- 0.29 Generally, it appears that when compared with other female offenders, Aboriginal women are more likely to receive a sentence of imprisonment or a supervised community sentence and less likely to receive an unsupervised community sentence or a fine.
- 0.30 In relation to criminal history, Aboriginal women were less likely than other offenders to have had no prior convictions in the past 5 years (18.4% compared with 55.5%) and more likely to have been sentenced to a term of imprisonment in the past 5 years (23.5% compared with 5.7%). The data also shows that Aboriginal women represent only 9.5% of the female offenders with no prior proven offences in the past 5 years and that Aboriginal women represent 56.7% of the female offenders with a prison sentence in the past 5 years.
- 0.31 Across all criminal history categories, the data generally shows a greater reliance on imprisonment and supervised community sentences for Aboriginal women and a lesser reliance on unsupervised community sentences and fines, although the differences were not so marked in the case of women with no proven offences in the past 5 years. However, unlike the other categories of criminal history, Aboriginal women with at least one sentence of imprisonment in the past 5 years were slightly less likely to receive a supervised community sentence when compared with other female offenders.

- 0.32 Only 2% of Aboriginal women offenders received a dismissal (with or without a conditional release order) under s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) after being found guilty compared with 5.8% of other female offenders. This difference was found to persist across regions and criminal history.
- 0.33 When compared with other female offenders, Aboriginal women were about 3.7 times more likely to receive a head sentence of up to 6 months, and about 2.7 times more likely to receive a head sentence of more than 6 months.
- 0.34 The general sentencing patterns outlined above also applied in relation to the three most common offence groups that are committed by Aboriginal women and in relation to domestic violence offences.

Functions and membership of the Council (Chapter 6)

- 0.35 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.
- 0.36 There are 16 members of the Council representing a range of experience and expertise.
- 0.37 In July 2019 Ms Belinda Rigg SC was appointed to the Council as the member with expertise or experience in criminal law or sentencing – defence, replacing Mr Mark Ierace SC who resigned upon his appointment to the Supreme Court on 31 January 2019.
- 0.38 In November 2019, Mr Christopher Craner, the member with expertise or experience in law enforcement resigned, upon his secondment to the Federal Police
- 0.39 Nine members were reappointed after their terms expired in the second half of 2019. There were three vacancies on the Council at the end of 2019.
- 0.40 We have maintained close working relationships with the Bureau of Crime Statistics and Research, and other parts of the NSW Department of Communities and Justice.
- 0.41 Staff of the Law Reform and Sentencing Council Secretariat (a part of the Policy, Reform and Legislation Branch of the Department of Communities and Justice) support the Council's work.

1. The Council's projects

In Brief

We worked on three projects in 2019: Repeat traffic offenders; fire offences; and homicide. We produced a report on fire offences, and a consultation paper on homicide.

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1.1 In 2019, we completed one project, and had two ongoing projects:

- fire offences (completed)
- repeat traffic offenders (ongoing), and
- homicide (ongoing).

Repeat traffic offenders

Terms of reference

- 1.2 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

- 1.3 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

- 1.4 We released a consultation paper on 4 December 2018, with a deadline for submissions of 22 March 2019.
- 1.5 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.
- 1.6 We received nine submissions.
- 1.7 The report is scheduled for completion in 2020.

Fire offences

- 1.8 In 2018, the NSW government increased the maximum penalty for the bushfire offence in s 203E of the *Crimes Act 1900* (NSW) ("*Crimes Act*") from imprisonment for 14 years to imprisonment for 21 years. In light of this, the Attorney General, by terms of reference we received on 12 November 2018, asked us to review:
- the standard non-parole period ("SNPP") for the bushfire offence, and
 - the maximum penalties for the property damage by fire offences in Part 4AD Division 2 of the *Crimes Act*.

Terms of reference

- 1.9 The terms of reference state:

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

1.10 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?

1.11 The deadline for submissions was 23 February 2019. We received eight submissions.

Report

1.12 We transmitted our Report to the Attorney General on 11 June 2019. The Report was released on 21 August. It made one recommendation; namely, to increase the SNPP for the bushfire offence to fall within the range of 8–10 years' imprisonment. We summarise the contents of the Report below.

Fire offences

1.13 In the Report we review a range of fire offences under both the *Crimes Act* and the *Rural Fires Act 1997* (NSW), which have maximum penalties ranging from a fine of \$5,500, up to imprisonment for 25 years.

1.14 Other parts of Australia have a wide range of fire offences broadly similar to those in NSW. Significant variations include:

- the offences of causing death by intentionally destroying or damaging property by fire (in Victoria)
- the offence of endangering property by the likely spread of fire (in Queensland), and
- the offence of lighting a fire that is likely to injure or damage a person or property (in Western Australia).

1.15 In some parts of Australia, the maximum penalties for property damage by fire offences are similar to those in NSW. However, Queensland, South Australia and Western Australia each have a maximum penalty of life imprisonment for comparable property damage by fire offences.

Fire offenders

- 1.16 The Report also presents research about the characteristics of fire offenders. Fire offenders have a variety of characteristics and motivations for fire offending.
- 1.17 About half of the fire offenders in NSW are aged 24 years or under. Younger children generally commit fire offences accidentally, while older children have motivations for fire offending that are similar to adults.
- 1.18 Very few fire offenders have committed a known previous fire offence. A large proportion of fire offenders have a prior offending history that involves offences other than fire offences.
- 1.19 Sentencing options for young people to divert them away from the criminal justice system include cautions, warnings and a requirement to participate in a “youth justice conference”.
- 1.20 Outside of the criminal law, other ways of preventing fire offending include education, community planning, environmental design, risk analysis, pro-active policing and detection, and therapeutic interventions.
- 1.21 The fire offender literature does not clearly provide reasons for or against increasing the SNPP of the bushfire offence, or increasing maximum penalties of the property damage by fire offences.

The bushfire offence

- 1.22 The bushfire offence makes it an offence to cause a fire intentionally, and be reckless as to its spread to vegetation on any public land or on land belonging to another.
- 1.23 The maximum penalty for the offence is 21 years’ imprisonment and the SNPP is 5 years. The SNPP was not increased when the maximum penalty was increased from 14 to 21 years’ imprisonment.
- 1.24 The offence was introduced to emphasise society’s condemnation of deliberate bushfire lighting and to reflect the seriousness of the danger that bushfires pose.
- 1.25 Data about charge finalisations for the bushfire offence in various courts show that:
 - a relatively low percentage of charges result in a conviction
 - a relatively large proportion of charges are dealt with through provisions that take into account the defendant’s mental health, and
 - a relatively large proportion of matters are withdrawn by the prosecution, potentially illustrating the difficulties of proof attached to the bushfire offence.

1.26 In dealing with those convicted, NSW courts impose imprisonment in a significant proportion of cases. The sentencing data for the bushfire offence as a principal offence in 2008-2017 shows:

- in the Local Court of NSW, there were 64 offenders, and 42% of them received a sentence of imprisonment, and
- in the NSW higher courts, there were 7 offenders, and all of them received a sentence of imprisonment.

1.27 Having considered this data, we conclude in the Report that the standard non-parole period for the bushfire offence should be set somewhere in the range of 8 to 10 years. **(Recommendation 4.1)**

1.28 This recommended range is more than 37.5% of the maximum penalty for the offence, which is the starting point for setting an SNPP that we recommended in our 2013 report on SNPPs. The range reflects the seriousness with which the community views the offence, and takes into account:

- the need for special deterrence, given the prevalence of deliberately lit fires and the difficulties in detection and prosecution
- the potential for exceptional personal, economic and environmental harm, especially given the increasing risk in light of climate change, and
- the potential vulnerability of victims, particularly for those who live in isolated areas and those who live on the interface between populated urban areas and the bush.

1.29 The courts will apply the SNPP in appropriate cases. Some offenders will nevertheless be subject to relevant sentencing principles that may mitigate their sentences, for example:

- young offenders, for whom the objective of rehabilitation will be more important than usual, and
- those with mental health or cognitive impairments, where the need for deterrence may be less than usual.

Property damage by fire offences

1.30 NSW has several property damage offences with various elements. These include the offences of destroying or damaging another's property:

- intentionally or recklessly (and aggravated forms of this offence when committed in company, or during a public disorder)
- with intent to injure a person (and an aggravated form of this offence when committed during a public disorder), and

- dishonestly with a view to gain (and an aggravated form of this offence when committed during a public disorder).
- 1.31 Each of these offences has escalated penalties where the property damage is caused by fire or explosives. The maximum penalties for the various fire offences range from 10 years to 16 years imprisonment.
- 1.32 The legislative intention for introducing the original offences was to simplify the law, clearly indicate the aggravating circumstances, and rationalise the penalties. Later amendments were part of reforms to criminalise gang activity.
- 1.33 Data about charge finalisations for the offences in various courts show that:
- the proportion of charges resulting in conviction is relatively low, and
 - a relatively large proportion of defendants are dealt with through the relevant mental health provisions.
- 1.34 In dealing with those convicted, NSW courts impose imprisonment in a significant proportion of cases. The sentencing data for a relevant offence as a principal offence in 2008-2017 shows that in the:
- Local Court of NSW, there were 920 offenders, and 36% of them received a sentence of imprisonment
 - NSW Children's Court, there were 309 offenders, and 25% of them received a juvenile probation order, and
 - NSW higher courts, there were 151 offenders, and 78% received a sentence of imprisonment.

Penalties for property damage by fire

- 1.35 Our report noted that increasing the maximum penalties of the property damage by fire offences to match the new maximum penalty for the bushfire offence presents some difficulties. This is because the property damage by fire offences have very different elements to the bushfire offence.
- 1.36 We considered options for reforming the maximum penalties of the property damage by fire offences, including:
- retaining the current penalty structure
 - increasing maximum penalties generally
 - increasing maximum penalties for cases where death results, and
 - increasing maximum penalties where there was a risk of the fire spreading.

- 1.37 Simply increasing the penalties of the property damage by fire offences, without changing the elements of each offence, risked unbalancing the penalty structure for all the property damage offences.
- 1.38 Creating fire offences with new elements that reflect more serious outcomes (such as death), or serious risk of spread of fire outside a bushfire situation, would require a substantial review of the existing property damage offences. This is outside the scope of our terms of reference.
- 1.39 Therefore, our report made no recommendation for change to the current maximum penalties for the property damage by fire offences. In doing so, we noted that:
- the increase in the maximum penalty for the bushfire offence can be justified on the grounds that lighting a bushfire carries an extremely serious risk to life and property, and deterrence is important, and
 - we have no evidence that the current penalty scheme for the property damage by fire offences has resulted in inadequate sentences.

Implementation

- 1.40 In response to our single Report recommendation, the government introduced an SNPP of 9 years by the *Justice Legislation Amendment Act 2019* (NSW) which commenced on assent on 26 September 2019.¹

Homicide

Terms of reference

- 1.41 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:

1. *Justice Legislation Amendment Act 2019* (NSW) sch 1.8[1].

- 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

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

Consultation paper

- 1.43 We released a consultation paper on 31 October 2019, with a deadline for submissions of 7 February 2020.
- 1.44 The consultation paper covered questions about:
- sentencing principles that apply in cases of murder and manslaughter
 - sentencing for domestic violence related homicide
 - sentencing for child homicide, and
 - penalties for murder and manslaughter.
- 1.45 The report is scheduled for completion in 2020.

2. Sentencing related research

In Brief

In 2019, the NSW Bureau of Crime Statistics and Research produced all of the notable sentencing related research. Relevant studies related to: the impact of the Intensive Drug and Alcohol Treatment Program on prisoner misconduct; offenders sentenced to time already served in custody; and the Youth on Track randomised controlled trial.

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- 2.1 This chapter summarises notable sentencing related research conducted in 2019.

Evaluating the impact of the Intensive Drug and Alcohol Treatment Program (IDATP) on prisoner misconduct

NSW Bureau of Crime Statistics and Research, *Crime and Justice Bulletin*, No 222 (March 2019) by Evann J Ooi

- 2.2 This study examined the impact participating in the Intensive Drug and Alcohol Treatment Program (IDATP) had on male prisoner misconduct.
- 2.3 Corrective Services NSW and Justice Health and Forensic Mental Health have delivered IDATP since 2012. Prisoners volunteer to participate in the program. They are eligible to participate in the IDATP if they have a history of drug and alcohol abuse and a sufficiently high risk of recidivism, as well as other characteristics.
- 2.4 Participants in IDATP are accommodated separately from the general prison population. They follow personalised treatment plans involving therapeutic community activities and cognitive behavioural work. They also engage in prison-based employment and education. Participants take part in the program for up to 9 months, but usually for 6 to 8 months.

- 2.5 Prisoner misconduct was measured by the annual number of correctional centre offences committed by each IDATP participant during their prison sentence. These offences are listed in sch 2 the *Crimes (Administration of Sentences) Regulation 2014* (NSW).
- 2.6 The study analysed prisoner misconduct of 623 male participants. Available data for 130 female participants was not analysed due to the small sample size. Given the staggered program start dates for each participant, the study compared prisoner misconduct of participants before and after IDATP. This method avoided the selection bias of using non-participants as the control group.
- 2.7 The study also controlled for other factors including prison location, prison security classification, the increased scrutiny of IDATP participants relative to general prison population, participant behaviour changes nearing parole decisions or sentence expiry, as well as a participant's age, years in custody and offending history.
- 2.8 The study found that correctional centre offences decreased by approximately 73% in the years after participation in IDATP, for male participants.

Offenders sentenced to time already served in custody

NSW Bureau of Crime Statistics and Research, *Bureau Brief, No 140 (May 2019) by Stephanie Ramsey and Jackie Fitzgerald*

- 2.9 This study summarised recent trends in “time-served” sentences for adults. These are custodial sentences equivalent in duration to the time already spent on remand, resulting in an offender's immediate release.
- 2.10 The study measured time-served sentences as occurring where the offender was released within 7 days of receiving a custodial sentence.
- 2.11 In the five years from July 2013 to June 2018:
 - the number of time-served sentences increased by 65% (up from 472 in 2013/14 to 781 in 2017/18, or up from roughly 39 defendants per month in 2013/14 to 65 defendants per month in 2017/18)
 - the proportion of all time-served sentences increased by 1%, from 8.3% to 9.3%
 - the median length of time-served sentences increased by 47%, from 60 days to 88 days, and
 - the number of time-served sentences increased the most for sentences of 3–6 months (up 135 defendants), followed by sentences of 1–3 months (up 93 defendants), then 6–12 months (up 36 defendants).

- 2.12 The greatest annual increase in the number of time-served sentences occurred between 2014/15 and 2015/16. This coincided with a substantial increase in remand population. The increased remand population was at least partly caused by:
- an increased proportion of defendants refused bail, after commencement of amendments to the new *Bail Act 2013* (NSW) in early 2015 (which increased the probability of bail refusal by about 11%)
 - an increased volume of defendants coming to court (up from 122,945 in 2013/14 to 141,084 in 2017/18), and
 - increased court delay, particularly in the NSW District Court (where the median time between arrest and case finalisation, for defended cases involving refused bail, increased from 528 days in 2013/14 to 684 days in 2017/18).
- 2.13 The study also examined time-served sentences by jurisdiction. From 2013/14 to 2017/18:
- the vast majority of time-served sentences were handed down by the Local Court (which is expected since 87% of criminal cases are dealt with by the Local Court)
 - the number of time-served sentences in the Local Court increased by 68% (up from 401 in 2013/14 to 673 in 2017/18, or up from roughly 33 defendants per month in 2013/14 to 56 defendants per month in 2017/18)
 - the number of time-served sentences in Higher Courts increased by 52% (up from 71 in 2013/14 to 108 in 2017/18, or up from roughly 6 defendants per month in 2013/14 to 9 defendants per month in 2017/18)
 - 90.5% of time-served sentences in the Local Court had a duration of 6 months or less, and
 - 47.2% of time-served sentences in the Higher Courts had a duration of more than 1 year.
- 2.14 Though only a small proportion of the increase in time-served sentences came from the Higher Courts, court delays rose more significantly in the Higher Courts than in the Local Court. From 2013/14 to 2017/18:
- in the Higher Courts, the median time from charge to finalisation for a defendant on remand increased from 528 days to 684 days, and from 374 days to 466 days for sentence matters, and
 - in the Local Court, the median delay from charge to finalisation for a defendant on remand increased from 245 days to 254 days, and from 136 days to 147 days for sentence matters.
- 2.15 The study suggested that the number of offenders that receive time-served sentences longer than the custodial sentence they would have received (had they been released on bail and were sentenced at conviction) “is likely increasing”.

Youth on Track randomised controlled trial: Process evaluation

NSW Bureau of Crime Statistics and Research, *Bureau Brief, No 141 (August 2019) by Lily Trimboli*

- 2.16 This study examined stakeholder perceptions about whether BOCSAR is implementing the ongoing randomised controlled trial of Youth on Track as intended, and whether the trial faces any unexpected challenges or consequences.

What is Youth on Track?

- 2.17 Youth on Track is an intervention scheme that aims to reduce re-offending among young people by addressing the underlying social and psychological causes of their offending.
- 2.18 Youth on Track started in July 2013, in the NSW Police Local Area Commands (LACs) of Blacktown, the Mid-North Coast and Newcastle. The scheme was gradually expanded to 13 LACs, including in the Central West, Coffs Harbour and New England areas. Youth on Track is funded until June 2020. In 2016, the NSW Department of Communities and Justice contracted Mission Australia, Social Futures, and Centacare to deliver the scheme.
- 2.19 Participants in Youth on Track are each allocated a case worker. The case worker develops a treatment plan for the participant according to two assessments. The first assessment is the Child and Adolescent Intellectual Disability Screening Questionnaire (CAIDS-Q). It screens for cognitive disability and indicates whether the participant should be referred to an appropriate clinician for further assessment. The second assessment is the Youth Level of Service Case Management Inventory – Australian Adaptation (YLS/CMI-AA). It assesses the participants' risk of offending based on a wide variety of social and psychological factors. YLS/CMI-AA involves interviews with the participant and their family, and gathering information from various sources.
- 2.20 Treatment plans may include behavioural or family interventions delivered by the case worker, or other programs delivered by agencies to which participants are referred. The standard behavioural intervention offered is Changing Habits and Reaching Targets (CHARTS), which aims to change the thinking that underpins participants' offending behaviour. One family intervention offered is Collaborative Family Work, which is delivered by two case workers in 6–10 sessions of up to one hour each. It seeks to encourage better problem solving and collaboration in the family. Participants may be referred to a wide range of other programs, including TAFE and community colleges, accommodation services, employment assistance programs, physical and mental health services, financial and legal services, as well as recreation and cultural support programs.
- 2.21 Treatment plans last for between 3 and 12 months. The caseworker assesses the participant using YLS/CMI-AA assessment 12 and 24 weeks after the initial

assessment, and adjusts the participant's treatment plan if necessary. The caseworker also uses YLS/CMI-AA to assess the participant when they finish their treatment plan. If needed, the caseworker will then facilitate ongoing community supports for the participant.

Eligibility for Youth on Track

- 2.22 Participation in Youth on Track is voluntary and requires written consent from the participant and their family. A person is eligible to participate in the scheme if they:
- are aged 10 to 17 years
 - offend in an area where the scheme runs or attend school in such an area
 - have not previously been supervised by Youth Justice NSW
 - are deemed suitable to participate through discretionary or automatic referral, and
 - are deemed suitable to participate by a Youth on Track provider.
- 2.23 Discretionary referrals are made mainly by NSW Police Youth Liaison Officers, and sometimes by local primary and secondary schools in areas where the scheme runs. A young person is referred to the scheme if they have received at least one formal police contact (that is, a caution, a Youth Justice Conference or a charge) and they have several risk factors for re-offending.
- 2.24 Automatic referrals are made by the NSW Police Force. A young person is automatically referred if they have received at least one prior formal police contact, and they have at least a 60% chance of re-offending within 24 months. Formal police contact is measured by the NSW Police Force Computerised Operational Policing System (COPS) database. Chance of re-offending is determined by a screening tool developed by BOCSAR.
- 2.25 After a person is referred to Youth on Track, a provider of the scheme conducts a final assessment of their suitability to participate. Factors that make a person unsuitable for the scheme, at this stage of assessment, include that: they live outside the service area of the scheme; it is unsafe for the provider to work with them; and, it is not in the best interests of the young person (for example because they already have a number of agencies involved in their life).

Youth on Track randomised controlled trial

- 2.26 BOCSAR is conducting a randomised controlled trial of Youth on Track to determine whether participating in the scheme reduces re-offending among participants. The trial runs from August 2017 to 2021.
- 2.27 The trial was designed by BOCSAR and Youth Justice NSW through 18 face-to-face consultations over 4 weeks, including with Youth on Track case workers, Aboriginal community members and service providers. It is the first randomised controlled trial of a youth justice intervention in NSW.

- 2.28 The control group for the trial was created by asking prospective participants of Youth on Track if they would like to participate in a randomised controlled trial of the scheme. If they consented, they were randomly balloted to receive a shorter, less intensive intervention called Fast Track, instead of Youth on Track. The random assignment is intended to minimise group allocation bias.
- 2.29 Fast Track was developed specifically for the trial. The case workers who deliver Fast Track also deliver Youth on Track, to ensure staff involved in each scheme have relatively similar training, skills and experiences. Fast Track has a similar structure to Youth on Track. The main differences between the schemes are that Fast Track:
- runs for only 6 weeks (compared to 3–12 months), with less interventions in treatment plans
 - uses a less comprehensive criminogenic assessment tool called Youth Level of Service/Case Management Inventory: Screening Version (YLS/CMI:SV) (compared to YLS/CMI-AA), and
 - does not involve the caseworker delivering behavioural or family interventions. (Instead the caseworker provides 4–5 case management interactions, which result in referrals to programs delivered by external agencies.)
- 2.30 If a person consented to participate in Youth on Track but not to the trial, they were still randomly assigned to either Youth on Track or Fast Track, but their information was not used in the study. This avoided the potential for participants or caseworkers to manipulate the randomisation process.
- 2.31 The trial will ultimately compare re-offending and social outcomes between 350 Youth on Track participants and 350 Fast Track participants. Re-offending is measured in days between consenting to participate in the trial and the first formal contact with police (that is, a caution, a Youth Justice Conference or a charge). Social outcomes measures include accommodation status, engagement in education, employment and community activities.

Process evaluation of the randomised controlled trial of Youth on Track

- 2.32 This study examined stakeholder perceptions about whether BOCSAR is implementing the ongoing randomised controlled trial of Youth on Track as intended, and whether the trial faces any unexpected challenges or consequences.
- 2.33 The method involved semi-structured interviews with 52 stakeholders and an analysis of available administrative program data. Stakeholders included Youth on Track staff, staff associated in discretionary referral (that is, Youth Liaison Officers and school-related staff), and service providers to which participants were referred by Youth on Track staff.
- 2.34 Stakeholders agreed that Youth on Track and Fast Track were being implemented as intended. In addition, they agreed that the randomisation process had little

impact on engagement rates. This was corroborated by administrative data showing that 92% of eligible young people consented to participate in the trial.

- 2.35 Stakeholders were critical of the short timeframe of Fast Track. They said that 6 weeks is not enough time for case workers to build rapport with participants, or to deliver services that could produce change in the participant.
- 2.36 Stakeholders also raised issues concerning the referral of Fast Track participants to external services. Some said these services are limited in their area or have lengthy waiting lists, particularly in rural areas. Though this is an issue relevant to Youth on Track and Fast Track, the problem is magnified for Fast Track participants given the shorter timeframe.
- 2.37 A common concern among stakeholders was that randomly allocating participants with complex needs to Fast Track may negatively impact the participant, particularly if they have insufficient support to assist them after the scheme ends.
- 2.38 Though most stakeholders had a negative perception of Fast Track, some noted that positive outcomes had been achieved in its limited timeframe. Stakeholders acknowledged that Fast Track's limited timeframe accelerates case workers' progress through the waitlist of people referred to the scheme. Stakeholders also recognised that this enables a greater number of people to participate in the scheme, who otherwise may not have received any services.
- 2.39 Some stakeholders expressed the view that a randomised controlled trial is the best evaluation methodology to determine which of Youth on Track and Fast Track most effectively reduces re-offending among participants. They accepted it was necessary for young people to be randomly allocated to one of the two interventions rather than allocation based on individual assessment.

3. Cases of interest

In Brief

The NSW Court of Criminal Appeal has delivered a number of judgments of interest in cases relating to sentencing in 2019. These judgments consider matters that are taken into account at sentencing as well procedural and other issues. The Court also found that a number of sentences were manifestly inadequate.

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- 3.1 This chapter sets out cases of interest relating to sentencing decided by the NSW Court of Criminal Appeal (“CCA”) in 2019.

Matters taken into account at sentencing

- 3.2 The courts take into account a wide range of matters at sentencing. These can be matters that the courts consider when assessing the objective seriousness of an offence, when assessing the moral culpability of an offender, or considering aggravating or mitigating factors. There are also factors that entitle offenders to a sentencing discount. Below we summarise a selection of cases that consider the relevance of particular matters to sentencing.

Reasons for possessing firearms

Sumrein v R [2019] NSWCCA 83

- 3.3 The offender pleaded guilty to possessing a loaded firearm in a public place. He also admitted to possessing an unauthorised pistol and possessing ammunition without a licence or permit. These were taken into account on a form 1. He was sentenced to imprisonment for 3 years 9 months with a non-parole period of 2 years.
- 3.4 One of the grounds of appeal was that the judge erred in assessing the objective seriousness of the offence and/or the offender’s culpability. The offender was carrying the firearm for protection because he feared for his and his family’s safety

when his home was sprayed with bullets after the family of a woman with whom he had been having an affair found out about it.

- 3.5 The sentencing judge observed that a usual feature of such an offence – that the firearm was possessed in connection with a criminal enterprise – was absent in this case. However, the CCA found that this absence did not deserve to be characterised as “of minor consequence”.¹ The CCA also found that the judge was in error in failing to take into account as relevant to assessing the objective gravity and moral culpability, the offender’s motive for obtaining the gun – to protect himself and his family.²
- 3.6 In resentencing the offender to 3 years imprisonment with a non-parole period of 1 year 5 months, the CCA took into account the offender’s generally favourable subjective case. However, the CCA also observed:

While taking into account the fact that the applicant’s possession of the pistol was not in connection with a criminal enterprise, and accepting that he was motivated by fear for himself and his family, the fact remains that he took the law into his own hands rather than reporting his concern to the appropriate authorities, as he should have done. His behaviour was not only foolish, it was reprehensible. Clearly, it posed a real danger to the public. It may be that he carried the gun simply to scare a possible attacker, but there was a substantial risk that in a confrontation he might fire it.³

Financial gain as an inherent characteristic of an offence

Lee v R [2019] NSWCCA 15

- 3.7 The offender pleaded guilty to four counts relating to forgery, dealing in identification information for fraudulent purposes and participating in a criminal group⁴ in relation to the sale of driver’s licences and Medicare cards. In determining the appropriate sentence, the judge took into account as an aggravating factor that the offences were committed for financial gain.⁵
- 3.8 On appeal, the offender submitted the judge erred in taking into account this aggravating factor because dealing in identification information was an offence with an inherent profit making purpose, drawing an analogy with profits expected to be made through the supply of prohibited drugs. The CCA rejected such an analogy, noting that:

1. *Sumrein v R* [2019] NSWCCA 83 [45].
2. *Sumrein v R* [2019] NSWCCA 83 [46].
3. *Sumrein v R* [2019] NSWCCA 83 [49].
4. *Crimes Act 1900* (NSW) s 93T, s 192J, s 256(1).
5. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(o).

It is not uncommon for false identity documents to be created for purposes unrelated to financial gain. I am not persuaded that financial gain is an inherent characteristic of that type of offence. Whilst in the present case, the applicant's motive in producing the fraudulent identification documents was the money that he was to receive for each document; this does not lead to the conclusion that financial gain is an inherent characteristic of an offence contrary to s 192J.⁶

Offender whose parole had been revoked was on “conditional liberty”

***Turnbull v R* [2019] NSWCCA 97**

- 3.9 The offender pleaded guilty to a number of domestic violence related Commonwealth and state offences. Two aggregate sentences were imposed amounting to an overall sentence of 5 years imprisonment with a non-parole period of 3 years 6 months.
- 3.10 The sentencing judge found that the offence of break and enter with intent to intimidate was aggravated by the fact that the offender “was on conditional liberty, namely parole”. The offender had been released to parole, but his parole had been revoked before the offences were committed.
- 3.11 One of the grounds of appeal was that the sentencing judge erred in finding that offender was on conditional liberty in accordance with s 21A(2)(j) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).
- 3.12 All judges agreed to grant leave to appeal but dismissed the appeal.
- 3.13 Justice Simpson, in the majority judgment, observed that the judge was technically wrong to identify the nature of the conditional liberty as “parole”, even though “it was correct to say that the [offender] was at large on conditional liberty”. Since the list of aggravating factors in s 21A(2) was not exhaustive, the judge could have taken account of the offender's circumstances. The error also made no material difference to the outcome of the sentencing and it was at least arguable that committing an offence while at liberty following the revocation of parole is more serious than doing so while on parole.⁷
- 3.14 However, since it could not be said with confidence that the error did not affect the exercise of the sentencing discretion, the CCA was required to resentence the offender.
- 3.15 Justice Simpson held that where error has been established, “the duty of this Court to exercise an independent sentencing discretion is not discharged merely by adopting the sentence imposed at first instance and concluding that ‘no lesser

6. *Lee v R* [2019] NSWCCA 15 [61].

7. *Turnbull v R* [2019] NSWCCA 97 [22].

sentence is warranted in law”. She acknowledged that this imposes a significant burden on the CCA, “particularly where the identified error is minor, and the resultant sentence is not shown to be manifestly excessive”.⁸ Since the sentences she proposed were longer than the original sentence, it was appropriate not to disturb the original sentence.

Domestic violence

Impact of an ADVO on relationships of trust and authority

Turnbull v R [2019] NSWCCA 97

- 3.16 As noted above,⁹ the offender pleaded guilty to a number of domestic violence related Commonwealth and state offences. Another ground of appeal was that the judge erred in finding the aggravating factor that the offender abused a position of trust and authority in relation to the victim.¹⁰ The offender argued that the existence of an Apprehended Domestic Violence Order (“ADVO”) preventing him from contacting his former partner and children “dissolved the relationship of trust and authority he formerly held to them”. Justice Wilson, with whom the other judges agreed, rejected this argument:

The fact that a court has had to intervene in a domestic relationship by issuing an order to protect some of those involved in it, does not terminate the obligations of a father to his children, or the position he holds towards them. The [offender] continued to hold a position of trust to his sons, and authority over them, regardless of the ADVO that sought to regulate his behaviour.

...

Although the [offender] had separated from his former partner, and an ADVO regulated his conduct towards her, he similarly continued to have a position of trust with respect to her, albeit of a less significant nature. The [offender] had privileged access to his former partner’s life as a consequence of his previous relationship to her that a stranger, or a person with only a slight acquaintance to her, would not have had. It extended to knowing where she lived, knowing how to contact her mother, knowing that she had a second mobile phone in her home, and the like. Whilst this is a relationship involving a much lesser degree of trust than the relationship between a father and his children, it did impose a

8. *Turnbull v R* [2019] NSWCCA 97 [44]–[45].

9. [3.9].

10. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(k).

responsibility not to act to her detriment. I would not conclude that it is erroneous to treat it as such.¹¹

Sexual assault in the context of domestic violence

SC v R [2019] NSWCCA 25

- 3.17 The offender was found guilty, after trial before a jury, of a number of offences against his wife, including sexual assault in circumstances of aggravation (actual bodily harm) and two counts of assault occasioning actual bodily harm. He received an aggregate sentence of 10 years imprisonment with a non-parole period of 7 years 6 months.
- 3.18 One of the grounds of the appeal against sentence was that the sentencing judge erred in assessing the gravity of the aggravated sexual assault (which involved anal intercourse and bleeding).
- 3.19 Counsel for the offender submitted that the offending was not so serious in the circumstances of the relationship between the offender and his wife because such intercourse had occurred with consent previously and also drew attention to previous CCA decisions that could be read as implying that domestic violence was of itself not as serious as a sexual assault by a stranger.
- 3.20 The CCA did not consider it necessary to repeat the passages “since the proposition that domestic violence, of itself, is less serious than sexual assault by a stranger only has to be stated to be rejected”. The Court further noted that aggravated sexual assault¹² covers offences against victims who are in a pre-existing relationship with the offender as well as against victims who are not. In concluding that this was merely one of many factors to be taken into account in assessing the objective seriousness of the offence, the Court described two scenarios to make the point:

Offences committed in the context of a pre-existing relationship where the offender and victim live under the same roof, as in the present case, are commonly referred to as “domestic violence”. Such offences may, as in the present case, involve a substantial breach of trust. The victim may sleep in the same bed as the offender and be in a particularly vulnerable position, if assaulted in that context. The victim may lie about the conduct to children, general practitioners, friends and relatives who observe visible injuries either out of fear of the offender or hope that the conduct will not be repeated. The offending conduct may lead to the break-up of the relationship, the loss of the home and the disruption of the lives not only of the victim but also of any children who live in the household. A victim in that situation may also fear that if she (or he) tries to leave the relationship

11. *Turnbull v R* [2019] NSWCCA 97 [134], [136].

12. *Crimes Act 1900* (NSW) s 61J.

as a result of the assaults, she (or he) will be killed by the offender, this being a not uncommon scenario in murder trials heard in the Common Law Division of this Court.

Offences committed by strangers, for example, when the victim is walking home from the train station or bus stop, may lead the victim to mistrust every stranger, and become scared of going out and fearful of the world in general.¹³

- 3.21 The Court dismissed the appeal against sentence.

Use of uncharged acts of domestic violence

***Vasilevski v R* [2019] NSWCCA 277**

- 3.22 The offender was found guilty, after trial by jury, of offences against his defacto partner - one count of assault occasioning actual bodily harm and one count of influencing a witness to withhold true evidence. He was also convicted of breaching an ADVO. The offender was found not guilty of seven other offences involving assault and sexual assault. The offender received an aggregate sentence of 4 years imprisonment with a non-parole period of 3 years. The judge nominated an indicative sentence of 2 years 6 months for the assault, 3 years 6 months for the evidence offence and 14 months for breaching the ADVO.
- 3.23 The offender appealed to the CCA on the ground that the aggregate sentence was manifestly excessive because the indicative sentences were manifestly excessive. The offender submitted that the sentence for the assault was excessive because the judge took into account “uncharged acts of violence”. The Court observed that the submission assumed that the sentencing judge was prohibited from enquiring into whether the assault was an isolated act of violence, or whether it represented a wider course of “assaultive conduct” the offender inflicted on his partner. According to the Court, this assumption that other acts of violence were irrelevant for sentencing purposes was misplaced.¹⁴
- 3.24 The Court observed that evidence of other assaults had been led at trial for context to determine whether the assault was an isolated act. It was also observed that submissions had been made as to whether the evidence proved the uncharged acts of violence to the criminal standard and the judge had accepted the need for caution in using it.¹⁵ The Court found that, although the evidence of uncharged acts of violence allowed for a finding that the assault was not an isolated event, the judge made no finding that this made the assault more objectively serious, concluding that to “have used the evidence for that purpose would have constituted error”. The Court observed that the “finding of objective seriousness in the mid-range was

13. *SC v R* [2019] NSWCCA 25 [104]–[105].

14. *Vasilevski v R* [2019] NSWCCA 277 [141]–[142].

15. *Vasilevski v R* [2019] NSWCCA 277 [142]–[143].

based upon other factual findings, including that at the time of the assault the complainant was vulnerable on account of her mild intellectual disability and that she was in a graveyard late at night, isolated and alone with the [offender]”.¹⁶

- 3.25 In respect of this submission, the Court concluded that there was nothing in the sentence for the assault to suggest error that might lead to an excessive aggregate sentence. The Court dismissed the appeal.

Manslaughter in the context of a family dispute

***R v Yardley* [2019] NSWCCA 291**

- 3.26 The offender pleaded guilty to the manslaughter of his non-biological brother. The brothers had been involved in a family provision dispute following the death of their adoptive father who had left the offender out of his will. He was sentenced to 3 years 6 months imprisonment with a non-parole period of 18 months. The DPP appealed the sentence on the grounds that it was manifestly inadequate.
- 3.27 Counsel for the offender submitted that because the offending occurred in the context of a family dispute between two brothers, general deterrence had little role to play. The CCA, however, observed:

The offending was an instance of domestic violence. The fact that it was between siblings, as opposed to partners, does not change that context, nor does it mean that the recognised importance of general deterrence of violence in a domestic setting is somehow diminished.¹⁷

- 3.28 The CCA found that the sentence was manifestly inadequate. However, counsel for the offender argued that the Crown had failed to establish that the appeal had been brought to lay down principles to be followed by courts in sentencing and that, given the circumstances surrounding the respondent’s offending, the CCA should decline to intervene. The Court rejected the submission:

The protean nature of the offence of manslaughter is such that it necessarily covers a wide range of circumstances which might often be regarded, of themselves, as unique. If that were a basis on which to decline to intervene, it would follow that this Court would decline to intervene in the majority of these types of cases that come before it. That, in my view, would reflect an incorrect application of principle.¹⁸

- 3.29 The Court further observed that there is a strong need to provide guidance sentencing people who commit such offences in the context of a domestic

16. *Vasilevski v R* [2019] NSWCCA 277 [147].

17. *R v Yardley* [2019] NSWCCA 291 [67].

18. *R v Yardley* [2019] NSWCCA 291 [71].

relationship.¹⁹ In resentencing the offender, the Court emphasised the need for general deterrence in such cases²⁰ and imposed a term of 6 years 6 months imprisonment with a non-parole period of 4 years 9 months.

Sexual offences against the offender's own child

***RH v R* [2019] NSWCCA 64**

- 3.30 The offender was convicted at trial of 5 serious offences against her daughter who was then aged between 10 and 13 years. The offences were two counts of aggravated sexual assault (the victim being under 16 years); two counts of aggravated sexual intercourse with a child between 10 and 14 years; and one count of procuring a child under the age of 14 for unlawful sexual activity. She was sentenced to an aggregate term of 16 years imprisonment with a non-parole period of 11 years.
- 3.31 Two of the grounds of appeal against the sentence were that the sentencing judge erred in:
- considering the vulnerability of the victim as an aggravating feature of the conduct where that vulnerability related to the victim's age, and
 - not reducing the sentence because of the extra-curial punishment for the loss of the offender's children.
- 3.32 The CCA, in considering the first point, noted that concepts involved in the aggravating factors of abuse of a position of trust or authority and committing the offence in the victim's home, were all different. The Court observed:

When an offence is committed by a mother against her child in the home they share, these aggravating factors are all present, as is the aggravating factor that the child is vulnerable to the mother's offending. Contrary to the [offender's] case, one does not encompass the other, the home being concerned with where the offence occurred; the offender's position of trust or authority being concerned with what flows from his or her relationship with the victim, so far as the offender is concerned; and the vulnerability of a child to such offending by a mother, being concerned with what flows from the relationship, so far as the child is concerned.

Taking into account a child's vulnerability to offending by her mother, as her Honour did, thus did not result in double counting in those offences where K's age or the applicant's abuse of her position of authority or trust were elements of the offence, as was also submitted for the applicant. The concept of a child's vulnerability to offending by her mother

19. *R v Yardley* [2019] NSWCCA 291 [71].

20. *R v Yardley* [2019] NSWCCA 291 [83].

encompasses more than the child's mere chronological age and the abuse of the mother's position, which may continue even after a child ceases to be a minor.²¹

- 3.33 In relation to the second point, the Court stated that there was no authority to support the conclusion that it would amount to extra-curial punishment to remove children from an offender, as "obviously dangerous" to those children as the offender was, in order to provide for their safety and care. The Court concluded that such a conclusion "would be perverse" and stated that the removal of the offender's children from her care "was the natural consequence of her terrible offending against one of them and reflected society's concern for the safety and ongoing care of her children".²²
- 3.34 The Court dismissed the offender's appeal.

Drug offences

Role in drug importation

***Klomfar v R* [2019] NSWCCA 61**

- 3.35 The offender pleaded guilty to importing a commercial quantity of cocaine (2 kg). He was sentenced to imprisonment for 7 years 8 months, with a non-parole period of 5 years.
- 3.36 In rejecting the ground of appeal that the sentence was manifestly excessive in light of, amongst other things, the offender's assistance to the authorities, the CCA observed:

The seriousness with which the Parliament views offending of this nature is reflected in the maximum penalty of life imprisonment. The [offender] can draw no comfort from the reference by the sentencing judge to his being a "courier" whose role was "limited and lower and in the hierarchy". Characterising an offender in that way must never obscure an assessment of what the offender actually did. In the present case, the [offender] ... engaged in a planned course of conduct centred upon a venture of drug importation. He left Europe, travelled to the United States to collect a large quantity of cocaine, and then imported that drug into this country. He did so in circumstances where he had been promised a substantial monetary reward. It has been observed on numerous occasions that those who act as the applicant did in this case perform an essential role in the process of organised drug trafficking. If an organisation is starved of such recruits, it will collapse. That demonstrates the significance of the role undertaken by the applicant.

21. *RH v R* [2019] NSWCCA 64 [48]–[49].

22. *RH v R* [2019] NSWCCA 64 [56]–[57].

Moreover, there is no inevitable correlation between an offender who is said to have been in the lower echelon of a hierarchy, and the severity of the punishment that he or she can expect to, and will, receive. These observations are appropriate for any drug importation, but particularly one such as the present which involved the importation of a quantity of cocaine which was substantially in excess of the commercial quantity, and which was worth well in excess of \$1 million.²³

Extent of participation in drug syndicate

***Kay v R* [2019] NSWCCA 275**

- 3.37 The offender pleaded guilty to supplying cocaine on an ongoing basis. She received a sentence, after a discount of 25% for an early guilty plea, of 4 years imprisonment with a non-parole period of 1 year 8 months. The sentence was based in part on an assessment that the drug enterprise for which the offender worked was well-organised and systematic and its operations involved a significant level of planning and organisation and that the offender played a significant role in the organisation.
- 3.38 Two of the grounds of appeal were that the judge erred in assessing the objective seriousness of the offence and that the judge imposed a manifestly excessive sentence. In finding these grounds made out, the CCA observed that it was a mistake to conflate the sophistication of the organisation with the offender's role as a "runner":

Stripped to its bare essentials, [the offender's] role was to be told by a phone call or message received from a customer where to deliver cocaine and in what quantity and then to deliver it to the customer and collect payment. [The offender] was clearly at the very bottom of the hierarchy in every sense of the term. She did not source the cocaine. She did not contribute capital or administrative know-how to the criminal enterprise. She did not cut, weigh or package the cocaine. She did not seek out customers. She was required to use her own vehicle. She did not share in the profits of the organisation, as distinct from being paid with respect only for deliveries made by her. She did not organise or give instructions to others in the operation who were subservient to her. In a rhetorical sense, it is difficult to conceive of anyone in the organisation who could have been lower in the scale of responsibilities, influence or income. ... Without wishing unnecessarily to add to the ever expanding judicial lexicon in this area of legal discourse, [she] was in effect no more than a minnow. She was dispensable and replaceable. The viability of the operation did not depend upon her remaining in the role she performed.²⁴

23. *Klomfar v R* [2019] NSWCCA 61 [40]–[41].

24. *Kay v R* [2019] NSWCCA 275 [25], [27].

- 3.39 The Court resentenced the offender to 2 years 5 months imprisonment with a non-parole period of 12 months.

Application of Bugmy principles

R v Irwin [2019] NSWCCA 133

- 3.40 The offender pleaded guilty to 10 charges relating to drugs and firearms and asked that a further 6 charges be taken into account. The Crown appealed the inadequacy of the aggregate sentence of 4 years with a non-parole period of 2 years 8 months.
- 3.41 The judge, in sentencing the offender, declined to apply the *Bugmy* principles which are concerned with the impact on sentencing of a history of disadvantage and deprivation.²⁵
- 3.42 Although it was unnecessary to deal with the question, Justice Simpson delivered a separate judgment to reinforce that the application of the *Bugmy* principles is not a matter of discretion, but rather a matter of evaluating what impact they should have given the circumstances of the offender's early life.²⁶ In emphasising that it was not a matter of discretion Justice Simpson drew attention to the High Court judgment in which it was said:

Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving "full weight" to an offender's deprived background in every sentencing decision.²⁷

Offence (involving self defence) when it occurs in victim's home

Patel v R [2019] NSWCCA 170

- 3.43 The offender was found guilty, after trial before a jury, of manslaughter based on a finding of excessive self defence.
- 3.44 The offender had been in a sexual relationship with a man and had lived with him for 18 months before he commenced a relationship with the victim (with a view to marriage). However, the offender continued to socialise with the man and the victim and the victim became aware of the extent of the continuing relationship between the man and the offender. In the early hours of the morning, the offender, for reasons the court was unable to discern, went to a unit occupied by the victim and the man (who she knew would be absent). An altercation arose between the offender and the victim and the offender believed that the victim was threatening her with a knife. However, after disarming the victim in a struggle, the offender

25. *Bugmy v R* [2013] HCA 37, 249 CLR 571.

26. *R v Irwin* [2019] NSWCCA 133 [1]–[5].

27. *Bugmy v R* [2013] HCA 37, 249 CLR 571 [44].

continued to believe that she needed to respond to the threats and smothered and strangled the victim to death.

- 3.45 The offender was sentenced to 9 years 4 months imprisonment with a non-parole period of 7 years. The sentence was arrived at after a 15% discount because the offender had offered to plead guilty to manslaughter.
- 3.46 The offender appealed the severity of the sentence on a number of grounds, including that the judge erred in finding that the offence was aggravated because it occurred in the victim's home.²⁸
- 3.47 The CCA allowed this ground. The Court found that the risk to the safety and security of the victim's home was brought about by the victim's own actions and concluded, in the circumstances, that the fact that the offence took place in the victim's home was not an aggravating factor:

It is a little difficult as a matter of principle to see how a crime assessed by reference to the reasonable person's response to the perceived threat created by those actions can be reliably or even fairly characterised by the fortuitous circumstance that it took place in [the victim's] home.²⁹

- 3.48 However, at resentencing, the Court determined that it would impose a sentence of 11 years 1 month with a non-parole period of 8 years 4 months. In accordance with the Court's practice in cases where the offender's appeal results in a longer sentence, the appeal was dismissed.

Terrorist offences

The weight of mitigating factors

***Alou v R* [2019] NSWCCA 231**

- 3.49 The offender pleaded guilty to aiding, abetting, counselling or procuring the commission of a terrorist act (the killing of a civilian employee of the NSW Police Force).³⁰ At the time of the offence, the offender was aged 18 years 2 months. He was sentenced to 44 years imprisonment with a non-parole period of 33 years, after a 15% discount for his plea of guilty.
- 3.50 The grounds of appeal against the sentence included that the judge erred in holding that strong elements of general and personal deterrence and denunciation were required and in giving primacy to general deterrence and denunciation over the ameliorating effect of youth. The CCA pointed to a clear body of authority that "in sentencing for terrorist offences, the significance of punishment, deterrence and

28. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(eb).

29. *Patel v R* [2019] NSWCCA 170 [20].

30. *Criminal Code* (Cth) s 11.2(1), s 101.1(1).

protection of the community means that mitigating factors such as youth and prospects of rehabilitation are given less weight”.³¹

- 3.51 The Court rejected a submission that there was a causal link between the offender’s youth (he was radicalised at the age of 17) and the commission of the offence (involving carefully planned acts) so as to reduce his moral culpability.³²
- 3.52 Another ground of appeal was that the judge, in assessing the need to take into account the protection of the community, had failed to consider there was a continuing detention scheme for high risk terrorist offenders. The offender submitted that there was ambiguity in the High Court’s statement in *Muldrock v R*³³ that a court may not, when sentencing a sex offender, refrain from imposing a sentence that, subject to proportionality, serves to protect the community because the offender may be subject to a continuing detention scheme. The Court held that the High Court’s statement was not ambiguous, was binding and applied “with equal force to the existing continuing detention scheme for any high risk terrorist offenders which presently exists or may exist in the future”.³⁴
- 3.53 As no error was demonstrated on any ground, the majority of the CCA granted leave, but dismissed the appeal.

Relevance of terrorist organisation’s ideology

***R v Lelikan* [2019] NSWCCA 316**

- 3.54 The offender pleaded guilty to an offence that, between 2011 and 2013, in Iraq, Turkey and elsewhere, he was intentionally a member of a proscribed terrorist organisation, the Kurdistan Workers’ Party (“PKK”).³⁵ The sentencing judge took into account the context of the offence, in particular that the offender was a Kurd born in Turkey and the historic suppression of Kurdish aspirations for self-determination, and the nature of the conflict between Turkey and the Kurds. The offender was sentenced to a community correction order. The Commonwealth DPP appealed the sentence. Grounds for the appeal included that the judge took into account irrelevant matters in assessing the objective seriousness of the offence and the offender’s moral culpability.
- 3.55 The CCA observed that the appeal raised “unusual and difficult questions” about the extent to which a judge, when assessing objective seriousness and moral

31. *Alou v R* [2019] NSWCCA 231 [131].

32. *Alou v R* [2019] NSWCCA 231 [138].

33. *Muldrock v R* [2011] HCA 39, 244 CLR 120 [61].

34. *Alou v R* [2019] NSWCCA 231 [149].

35. *Criminal Code* (Cth) s 102.3(1).

culpability, should take into account “the nature of the terrorist organisation and more particularly, the scope of its operations, aims and methodology”.³⁶

3.56 The Court observed that the legislation does not distinguish terrorist organisations on their merits and that taking merits into account would essentially involve considering an organisation’s ideology which was a matter for the legislature in declaring an organisation a terrorist organisation.³⁷

3.57 The Court stated that it could take into account an organisation’s history and objectives, as the nature of its past activities and potential future activities are relevant to determining the objective seriousness of the membership offence. In this case, it was relevant that the PKK’s activities have taken place in a “relatively confined geographical location” and have not presented a direct threat to Australia. It was also relevant that the PKK does not advocate or engage in the indiscriminate killing of civilians. However, it was doubtful the objective seriousness was lessened by the fact that the PKK directs its activities against the Turkish government and security forces.³⁸ The Court also noted that it was also not relevant that the PKK has made a commitment to international humanitarian law, observing that:

It is more relevant to look at what the PKK has done and what it is proposing. The fact that the PKK does not recruit children, engage in sexual violence or uses landmines lessens the seriousness of joining the organisation compared to one that does, but the fact remains that soldiers, government officials and citizens are killed as a result of their activities. ... [T]he fact that it is an established organisation which has shown an intention and capacity to carry out terrorists acts is relevant to the objective seriousness of the offence.³⁹

3.58 In relation to the offender’s moral culpability, the Court stated:

there can be no doubt that the [offender] joined the organisation and maintained his membership with the full knowledge of its objectives and the method by which it sought to achieve them. His moral culpability is greater than that of a person who joined the organisation with little knowledge of its aims and methods. Further, the length of time that the [offender] remained a member and the extent of his involvement is relevant to the assessment of his culpability.

I do not think that the [offender’s] belief in the rightness of the cause of itself affects his moral culpability. However, the fact that he joined the

36. *R v Lelikan* [2019] NSWCCA 316 [5].

37. *R v Lelikan* [2019] NSWCCA 316 [122].

38. *R v Lelikan* [2019] NSWCCA 316 [123]–[124].

39. *R v Lelikan* [2019] NSWCCA 316 [125]–[126].

organisation as a result of the cruel treatment he received at the hands of the Turkish authorities in his youth mitigates that culpability.⁴⁰

- 3.59 The Court found that, although the sentencing judge effectively stated she could not go behind the listing of the PKK, “she at least implicitly took into account ... the underlying merits of the PKK cause compared to that of other terrorist organisations”. The Court observed that although it was undoubtedly relevant to compare the PKK’s acts with those of jihadist organisations, the fact that the underlying ideology may be seen as more compatible with democratic values does not lessen the impact of terrorist acts or their seriousness. The Court, therefore, found the ground was made out.
- 3.60 Although error was found, the Court decided that there was no reason to interfere with the sentence. This was based in part on the fact that the prosecution had conceded at the sentencing hearing that it was appropriate to take into account the PKK’s stated commitment to international humanitarian law and had twice stated that the court could look at the nature and quality of the organisation.

Parity where offender’s prospects of rehabilitation are better than co-offenders’

***Bell v R* [2019] NSWCCA 271**

- 3.61 The offender pleaded guilty to one offence of manufacturing a large commercial quantity of methamphetamine. Four offences relating to possession of precursors were taken into account on a Form 1. The offender was sentenced to 13 years 4 months imprisonment with a non-parole period of 10 years. His co-offenders were also sentenced to 13 years 4 months imprisonment but with non-parole periods of 9 years. The co-offenders received shorter non-parole periods because the judge in each case found special circumstances to vary the ratio between the head sentence and non-parole period.
- 3.62 One of the grounds of appeal was the offender had a justifiable sense of grievance when comparing his sentence with that of his co-offenders. In finding this ground established, the CCA noted that there was no difference in criminality between the co-offenders and found that the different findings in relation to special circumstances only arose because the offender had, unlike his co-offenders, previously abstained from drugs, gambling and excessive use of alcohol. The Court concluded that “a reasonable mind looking objectively would consider that his sense of grievance is justified”.⁴¹
- 3.63 In resentencing the offender to a non-parole period of 9 years, the Court found that:

40. *R v Lelikan* [2019] NSWCCA 316 [128]–[129].

41. *Bell v R* [2019] NSWCCA 271 [68].

in view of the similarity between the co-offenders' level of criminality, their role in the commission of the offence and their personal circumstances (except that the applicant did not have any prior convictions or a history of a drug or alcohol abuse or a gambling problem), justice requires parity with his co-offenders in respect of any non-parole period. A justifiable sense of grievance would arise if the applicant had a longer non-parole period than his co-offenders merely because of his more positive pre-offence history.⁴²

Assault by a correctional officer

***Waterfall v R* [2019] NSWCCA 281**

- 3.64 The offender, a correctional officer employed by a private contractor was found guilty, after trial by jury, of recklessly inflicting grievous bodily harm on an inmate. In the course of a dispute about the offender's water bottle, the offender, in the presence of three other correctional officers, punched the victim at least three times to the jaw. A nurse subsequently assessed the injuries as minor. The offender was sentenced to 5 years 9 months imprisonment with a non-parole period of 3 years 9 months.
- 3.65 One of the grounds of appeal was that the judge erred in assessing the objective seriousness of the offence, in particular, that the judge failed to give sufficient weight to the fact that the injuries were at the lower end of the scale for grievous bodily harm. The offender relied on cases that tended to suggest that, as a matter of principle, the nature of the injuries must always be the determining feature when assessing objective seriousness. The CCA observed that there is no rule of principle that mandates this and that adopting such an approach would "unnecessarily fetter the broad discretion available to the sentencing judge".⁴³
- 3.66 The Court also observed that the sentencing judge correctly identified other factors that impacted on objective seriousness, in particular the "vast power differential which arises when a correctional officer assaults an inmate in the circumstances described".⁴⁴ This amounted to an aggravating factor that the offender abused the position of trust or authority in relation to the victim.⁴⁵ The Court noted that:

The role of the correctional officer is not merely to ensure that the general community is protected but also to ensure that the prisoners are kept under supervision in a safe, secure and humane environment and

42. *Bell v R* [2019] NSWCCA 271 [74].

43. *Waterfall v R* [2019] NSWCCA 281 [38].

44. *Waterfall v R* [2019] NSWCCA 281 [34].

45. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(k).

manner. This is given force by virtue of s 2A of the *Crimes (Administration of Sentences) Act 1999* (NSW).⁴⁶

- 3.67 The Court, in considering whether the sentence was manifestly excessive, also found that the sentence appropriately reflected general deterrence and denunciation, noting a case in which general deterrence was emphasised in relation to an offence committed by a customs officer which involved a breach of trust and authority.⁴⁷ The Court dismissed the appeal.

Offender's reduced life expectancy

***Lissock v R* [2019] NSWCCA 282**

- 3.68 The offender was found guilty, after trial by jury, of many child sexual offences against his stepdaughter, including one count of sexual intercourse with a child under 10 years, six counts of aggravated indecent assault and seven counts of aggravated sexual assault against a person under the age of 16 years. He received an aggregate sentence of 18 years imprisonment with a non-parole period of 12 years. The offender appealed the sentence on the grounds that it was manifestly excessive, but then added an application that the CCA re-sentence the offender on the basis of fresh evidence that was not available at the time of sentence, namely that the offender had been diagnosed with a terminal illness and had a life expectancy of 18 months.
- 3.69 The CCA rejected the appeal on the grounds of manifest excess, but the majority upheld the re-sentencing application on the basis that the terminal illness would make the offender's time in custody more difficult physically and psychologically than it would otherwise be. However, the majority agreed that the objective gravity of the offender still needed to be reflected in the sentence and imposed an aggregate sentence of 14 years with a non-parole period of 9 years 4 months. It was noted that, on the evidence of life expectancy, the reduced sentence provided the offender no actual relief "in terms of spending any of his remaining time at liberty". However, it was observed that the solution to this lay in the relevant clemency provisions,⁴⁸ and not in the Court imposing a manifestly inadequate sentence on resentence.⁴⁹

Moral culpability and objective seriousness

***Wood v R* [2019] NSWCCA 309**

- 3.70 The offender pleaded guilty to the murder of his former partner. The judge sentenced him to 25 years 6 months imprisonment with a non-parole period of 19

46. *Waterfall v R* [2019] NSWCCA 281 [36].

47. *Waterfall v R* [2019] NSWCCA 281 [52]. See *R v Lamella* [2014] NSWCCA 122 [57].

48. *Crimes (Administration of Sentences) Act 1999* (NSW) s 160, s 160AD, s 270.

49. *Lissock v R* [2019] NSWCCA 282 [114]–[117].

years 1 month, taking into account an offence of contravening an apprehended violence order on a Form 1. A discount of 25% was applied for the early plea. One of the grounds of appeal was that the sentencing judge erred in failing to take into account the offender's disadvantaged background as a factor relevant to moral culpability. In dealing with this ground, Justice Hoeben did not agree with the implicit suggestions, during the course of the appeal, that the concepts of objective seriousness and moral culpability were, to some extent synonymous:

My understanding of the concept of moral culpability is that it is a stand alone concept, which like totality and proportionality, can be affected by subjective matters and matters which go to objective seriousness. For example, evidence relating to a deprived and/or violent background clearly raises subjective matters which, as the High Court has pointed out, can influence a finding as to moral culpability. Equally, evidence of such matters as torture, which clearly go to the objective seriousness of the offending, can also influence a finding as to moral culpability.⁵⁰

Belief in victim's sexual interest irrelevant

***Cordeiro v R* [2019] NSWCCA 308**

- 3.71 The offender was found guilty, after trial by jury, of sexual assault of an employee who stayed on at his boat party after her shift had ended. He was sentenced to 3 years 6 months imprisonment with a non-parole period of 2 years 3 months.
- 3.72 One of the offender's grounds of appeal was that the sentencing judge erred in assessing the objective seriousness of the offence by finding that the offender acted knowing the victim was uninterested in sexual contact with him.
- 3.73 The CCA rejected the assumption underlying this ground that the objective seriousness of the offence would have been reduced if the judge had found that the offender believed that the victim was interested in sexual contact with him:

While an offender's knowledge that a complainant is not sexually interested in him may increase the objective seriousness of the offence, the obverse, in the circumstances of this case, is not necessarily true. This is because the point at which the applicant's conduct became criminal was when he sexually assaulted her knowing she did not consent. The fact that he may have believed at some earlier point that she was sexually interested in him, is not, in my opinion, relevant to the assessment of the seriousness of his offending. Absence of a potentially aggravating factor does not reduce the objective seriousness of offending.⁵¹

50. *Wood v R* [2019] NSWCCA 309 [125] Hoeben CJ at CL, [183] Price J agreeing.

51. *Cordeiro v R* [2019] NSWCCA 308 [114].

Whether the offender was in a position of authority is an objective question

Cordeiro v R [2019] NSWCCA 308

- 3.74 Another ground of appeal in the matter outlined above was that the sentencing judge erred in assessing the objective seriousness of the offence by taking into account that the offender was in a position of authority with respect to the victim. Submissions by counsel suggested that because the evidence allegedly established that the victim did not “feel” as though the offender was in a position of authority over her, the offender was, therefore, not in fact in a position of authority over her. The CCA rejected this reasoning:

the question of whether an offender was in a position of authority over a victim cannot be definitively determined by how the victim subjectively felt about her or his relationship with the offender. The question is instead to be determined objectively by examining such things as the nature of any relationship that might have existed between the two and factors such as the age discrepancy, if any, between them and the location of the offence.⁵²

- 3.75 The Court further noted that the finding that the offender was in a position of authority in relation to the victim was clearly open for the following reasons:
- The offender was the victim’s employer at the time of the offending.
 - The offence occurred only hours after the victim had finished her shift.
 - The offence was committed by the victim’s employer in the victim’s workplace. It was significant that the offender chose to assault the victim on a boat he owned and on which she was employed. The fact that the victim was by then a guest at a private party occurring in her workplace did not mean that she was not in her workplace.⁵³
- 3.76 It was also submitted that the sentencing judge had breached the *De Simoni* principle by finding that the offence was aggravated because the offender was in a position of authority over the victim. It was argued that the principle was breached because the offender had not been convicted of the more serious offence of aggravated sexual intercourse with the circumstance of aggravation that the victim was “under the authority” of the offender.⁵⁴ The Court, however, concluded that the concepts are factually distinct and that the sentencing judge did not find that the victim was under the authority of the offender.⁵⁵

52. *Cordeiro v R* [2019] NSWCCA 308 [132].

53. *Cordeiro v R* [2019] NSWCCA 308 [133].

54. *Crimes Act 1900* (NSW) s 61J(e).

55. *Cordeiro v R* [2019] NSWCCA 308 [135].

A person can abuse a position of trust even when they no longer hold the position

***Merhi v R* [2019] NSWCCA 322**

- 3.77 The offender pleaded guilty to three offences arising out of a planned illegal importation of tobacco products – bribery of a public official, aiding and abetting the importation of tobacco products knowing of an intent to defraud the revenue and dealing in proceeds of crime. At the time, the offender was a former Customs Officer. She received an aggregate sentence of 5 years 6 months imprisonment with a non-parole period of 3 years and 3 months.
- 3.78 One of the grounds of appeal was that the sentencing judge erred in finding that the offender's abuse of a position of trust or authority seriously aggravated the offending. The offender argued that there could be no breach of a position of trust or authority unless she was employed in the position at the time. The CCA rejected this contention, stating:

The fact that the applicant only misused the confidential information and knowledge that she obtained whilst employed after ceasing employment does not preclude such misuse as a significant aggravating factor.⁵⁶

- 3.79 In reaching this conclusion, the Court observed:

Bearing in mind the ongoing obligations of confidentiality ordinarily imposed upon persons in a position of authority and trust even after the employment ceases, it might be surprising if a misuse of such confidential information for criminal purposes after cessation of employment did not involve an abuse of trust such as to constitute an aggravating factor.⁵⁷

Aggravating factors for joint criminal enterprise manslaughter

***Tabbah v R* [2019] NSWCCA 324**

- 3.80 The offender was found guilty of manslaughter (on the basis of an extended joint criminal enterprise) after a trial by jury for murder. The offence took place in the context of a planned robbery which involved the offender and a co-offender breaking and entering the victim's home, while armed. The co-offender shot and killed the victim and was found guilty at trial of murdering the victim. The offender was sentenced to 14 years imprisonment with a non-parole period of 10 years.
- 3.81 One of the grounds of the appeal against sentence was that the sentencing judge erred in finding that the offence was aggravated because it was part of a planned criminal activity. The CCA considered planning both as a common law factor and as

56. *Merhi v R* [2019] NSWCCA 322 [41].

57. *Merhi v R* [2019] NSWCCA 322 [38].

an aggravating factor under s 21A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).⁵⁸

- 3.82 Since the offender was being sentenced for manslaughter and not for robbery, the CCA found that it was not open to the sentencing judge to have regard to the planning involved in the robbery as an aggravating factor. In upholding the appeal ground, the Court also observed that the type of manslaughter established was one which did not involve any planning to kill.⁵⁹
- 3.83 Another ground of appeal was that the sentencing judge erred in finding the offence was aggravated because it was committed in company with the co-offender. The CCA held that the offender's liability for manslaughter arose because he was present at the time the co-offender discharged the firearm and had contemplated the possibility that the co-offender would do so. The concept of being "in company" was, therefore, an integral part of the offence and could not be counted as an aggravating factor.⁶⁰
- 3.84 Error having been established, the Court resented the offender to 13 years imprisonment with a non-parole period of 8 years 6 months.

Procedural and other issues

Evidence of remorse and prospects of rehabilitation

Mihelic v R [2019] NSWCCA 2

- 3.85 The offender was sentenced to an effective sentence of 10 years imprisonment with a non-parole period of 4 years for two offences of supplying a large commercial quantity of prohibited drugs (MDMA and cocaine).
- 3.86 In the sentencing proceedings, the offender tendered a letter apologising to his mother and sister and expressing a view as to the devastating effect that drugs have on the community. He also relied on an affidavit from his sister dealing at length with his drug addiction. In the course of oral evidence (during which the judge also asked questions), he took "full responsibility" for his actions, apologised for them, and spoke of his efforts at rehabilitation and his intention to make a new start. The prosecution did not cross-examine him on these matters. The sentencing judge did not refer to the issue of remorse in his remarks on sentencing.
- 3.87 The offender sought leave to appeal, one of the grounds of appeal being that the sentencing judge erred in not finding that the offender was remorseful.

58. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(n).

59. *Tabbah v R* [2019] NSWCCA 324 [83]–[84].

60. *Tabbah v R* [2019] NSWCCA 324 [114].

- 3.88 The CCA observed that “where a sentencing judge does not refer to a required aspect of mitigation that is presented to a court, it must be assumed that no regard has been given to that aspect, notwithstanding the extraordinary workload on District Court judges”.⁶¹
- 3.89 The CCA noted the well-established principles that judges were not obliged to accept evidence of remorse, even when given under oath and in absence of cross-examination. The CCA also observed that “ordinarily, even where the rules of evidence do not apply, it is an essential rule of fairness that, if it is to be said that a witness is not telling the truth or is mistaken as to a fact, that proposition should be the subject of cross-examination”.⁶²
- 3.90 The CCA in finding the ground of appeal was made out, stated that, regardless of whether the prosecution needed to put in issue the genuineness of any remorse or prospects of rehabilitation, “at the very least, it should be expected that, if a sentencing judge is not to believe the expressions of the [offender], given in sworn testimony, some comment should be made to that effect”.⁶³
- 3.91 The CCA took into account his remorse and prospects of rehabilitation, but concluded that no lesser sentence was warranted in law and no lesser sentence would be appropriate.⁶⁴ The CCA, therefore, granted leave, but dismissed the appeal.

Adjournment of sentencing appeals due to insufficient funds

***Weldon v R* [2019] NSWCCA 205**

- 3.92 The offender sought leave to appeal against a sentence imposed for offences of supplying a prohibited drug. However, the offender subsequently filed a notice of motion to vacate the hearing date and adjourn the application. An affidavit in support advised that the offender had insufficient funds to fund the appeal at that time, but gave no real explanation as to why the funding became unavailable or any real assurance that funding would be available at the required time. The CCA refused the application for adjournment, noting:

This Court has considerable demands on its time generally from people who have been incarcerated following conviction and wish to challenge their conviction or sentence. Applications for adjournment of this nature not only cause difficulty with Court administration but injustice to those people whose appeals are unnecessarily delayed.⁶⁵

61. *Mihelic v R* [2019] NSWCCA 2 [64].

62. *Mihelic v R* [2019] NSWCCA 2 [73].

63. *Mihelic v R* [2019] NSWCCA 2 [77].

64. *Mihelic v R* [2019] NSWCCA 2 [99].

65. *Weldon v R* [2019] NSWCCA 205 [9].

Opportunity to address special circumstances

Kha v R [2019] NSWCCA 215

- 3.93 The offender pleaded guilty to three offences of supplying a prohibited drug (one of which involved a large commercial quantity) and was sentenced to an aggregate sentence of 11 years imprisonment with a non-parole period of 8 years 3 months. He appealed against the severity of the sentence.
- 3.94 One of the grounds of appeal was that the sentencing judge erred in omitting to adjust the non-parole period to reflect a finding of special circumstances, either by oversight or the result of procedural unfairness. At the sentencing hearing, the prosecution did not oppose the defence's submission for a finding of special circumstances, noting that "I'm sure he qualifies in one way or another for special circumstances". The sentencing judge responded: "Prima facie I think that must be so". In the remarks on sentence, the judge did not mention the issue of special circumstances at all.
- 3.95 The CCA observed that a finding of special circumstances does not necessarily mean that the ratio of the non-parole period to the total sentence will be adjusted to less than 75%:

However, by virtue of the denial of procedural fairness, the applicant was led to believe that it was unnecessary for him to further submit on that issue, in view of the express position of the Crown and the sentencing judge's stated preliminary view. By not being informed that his Honour had reversed that view, he lost the opportunity to persuade the sentencing judge to find special circumstances and adjust the sentencing ratio of the NPP to the total sentence favourably to the applicant.⁶⁶

- 3.96 The Court, on resentencing, observed that the special circumstances were not so significant as to justify an "over significant" variation to the ratio and sentenced the offender to an aggregate sentence of 9 years imprisonment with a non-parole period of 6 years.

Assessing the basis for expert evidence

Gibson v R [2019] NSWCCA 221

- 3.97 The offender was sentenced to an aggregate sentence of 3 years imprisonment with a non-parole period of 1 year 10 months for a series of offences relating to explosives, firearms, assault and intimidation arising from one incident at an Australia Day party.

66. *Kha v R* [2019] NSWCCA 215 [38].

- 3.98 One ground of appeal was that the judge erred in assessing the offender's risk of reoffending by relying on matters contained in a pre-sentence report and a report prepared by a forensic psychologist, referring in particular to his "propensity for explosives". The offender relied on a principle that a sentencing judge should be cautious before accepting untested hearsay evidence of what an offender has said to an expert when the offender is in court and declines to give evidence in the sentencing proceedings.⁶⁷ The CCA observed:

The principle does not extend to any need for caution when otherwise assessing the opinion of an expert who has set out the information upon which that opinion was based in their report. In the present case [the author of the pre-sentence report] clearly set out the basis upon which her report was obtained which included discussions with a number of people and access to Justice Health records and the [offender's] family. No objection was made to the report nor was any submission made to the effect that his Honour should not have had regard to the contents of [the pre-sentence] report or any other evidence before him.⁶⁸

- 3.99 The Court dismissed this ground and the appeal.

Totality where an aggregate sentence is not used

***Thomas v R* [2019] NSWCCA 265**

- 3.100 The offender was found guilty after trial by jury of 15 counts of aggravated indecent assault and aggravated act of indecency against four child victims.
- 3.101 The sentencing judge imposed separate sentences for each of the 15 counts which, after applying the principle of totality, amounted to an effective sentence of 11 years imprisonment with a non-parole period of 8 years. The sentencing judge did not impose an aggregate sentence. The offender's sole ground of appeal was that each of the sentences imposed, as well as the overall effective sentence, was manifestly excessive.
- 3.102 The CCA found that a number of the individual sentences were unreasonable or plainly unjust. The Court accepted that in many cases the objective circumstances of the offending were such that no one would "expect the penalty to be anywhere near the halfway point of the maximum penalty".
- 3.103 Having concluded the sentencing judge had erred, the Court resentenced the offender. However, the Court imposed an aggregate sentence of 11 years with a non-parole period of 8 years, which was the same as the effective sentence imposed by the sentencing judge. The Court stated that while the individual sentences had been manifestly excessive, the overall effective sentence was not,

67. *R v Qutami* [2001] NSWCCA 353, 127 A Crim R 369 [58]–[59].

68. *Gibson v R* [2019] NSWCCA 221 [79].

observing that, if the sentencing judge had imposed an aggregate sentence, the appeal would have been dismissed. It was only the length of the individual sentences that required intervention by the Court.⁶⁹ The principal reason for the aggregate sentence, which reflected all of the objective and subjective circumstances of the offending, was that the offending involved “persistent predation” by the offender “upon four primary school aged girls under his care”.⁷⁰

Use of “wicked” in sentencing remarks

Adams v R [2019] NSWCCA 295

- 3.104 The offender was convicted, after trial by jury, of a common law conspiracy to cheat and defraud the beneficiaries of a deceased estate. She was sentenced to 7 years imprisonment with a non-parole period of 5 years. The offender had been a cleaner employed by the deceased, who had been diagnosed with symptoms of vascular dementia. The offender gained influence over the deceased and, together with other conspirators, produced a fraudulent will leaving her the residue of the estate, after some small bequests. This will, while challenged at probate, was passed after false evidence as to its witnessing. It was submitted, but not accepted by the court, that the offender’s father, one of the other conspirators, had been the chief architect of the conspiracy.
- 3.105 The offender appealed the sentence. One of the grounds was that the judge erred in assessing the objective seriousness of the offence. The offender challenged the judge’s description of her offending as “wicked” as both inappropriate and unsupported by evidence and, therefore, leading to the error in assessing the objective seriousness as “towards the upper end of the range”. Counsel submitted that the judge’s characterisation of the offender’s actions as “wicked” imposed an additional level of mortal culpability reserved only for the person who planned the conspiracy. The CCA found that, in light of the rejection of the submission that the offender’s father had been the architect of the conspiracy, there was no need to consider whether the use of the term amounted to error. The Court, however, went on to observe:

while it was well open to the sentencing judge to describe the applicant’s conduct in terms reflecting his strong reprobation of her conduct, as it is for sentencing courts to use strong, even powerful language, where offending is so serious as to inspire strong condemnation, the use of the word “wicked” might have been avoided, given the potential for “wickedness” to be aligned with the outmoded concepts of “evil”, “depravity” or “sinfulness” (see the definitions in Macquarie Australian

69. *Thomas v R* [2019] NSWCCA 265 [61].

70. *Thomas v R* [2019] NSWCCA 265 [62].

Dictionary and The Oxford English Dictionary), concepts which have no application in contemporary sentencing jurisprudence.⁷¹

Steps in sentencing historic child sex offences

R v Cattell [2019] NSWCCA 297

- 3.106 The offender, a Roman Catholic priest, pleaded guilty to 7 sexual offences committed against 5 children between 1968 and 1991. After allowing a 25% discount for the guilty plea, the judge imposed an aggregate sentence of 30 months, with a non-parole period of 9 months. The judge observed that a delay in bringing the prosecution and the offender's rehabilitation (he had not committed further offences since 1991) meant that "considerations of fairness" played a dominant role in the sentence.
- 3.107 The DPP appealed the sentence on the grounds that it was manifestly inadequate.
- 3.108 The CCA found that the judge made no mention of the provision, introduced in 2018, that requires a court to sentence an offender for a child sexual offence "in accordance with the sentencing patterns and practices at the time of sentencing, not at the time of the offence".⁷² This led the Court to conclude that the judge had not taken the provision into account. The Court set out the following steps for a judge to follow when fixing a sentence for an old child sexual offence that falls within the new provision:
- (a) Take into account any discernible sentencing pattern which exists at the time of sentence.
 - (b) Determine the facts as now available to the court.
 - (c) Pay regard to the maximum penalty and any standard non-parole period that applied at the time of the offence.
 - (d) Identify where the offence falls in the range of objective gravity of that offence.
 - (e) Take into account any relevant aggravating factors and mitigating factors.
 - (f) Set a non-parole period in accordance with the current law.
 - (g) Fix the balance of the term of the sentence.⁷³
- 3.109 The Court also advised that a sentencing judge should expressly state that the offender has been sentenced in accordance with the new provision and also state that the court has had regard to the trauma of sexual abuse on the child.⁷⁴ The

71. *Adams v R* [2019] NSWCCA 295 [49].

72. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25AA(1).

73. *R v Cattell* [2019] NSWCCA 297 [123].

74. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25AA(3).

sentencing judge must also have no regard to patterns or practices of sentencing which may have operated at the time of the offending.⁷⁵

- 3.110 The Court observed that, although it was open to the judge to take into account the offender's voluntary cessation of offending, his remorse, contrition, rehabilitation, his time on bail and the adjournments in the sentencing proceedings, it was not open to the judge to conclude that due to delay and the rehabilitation of the respondent, considerations of fairness to him played "a dominant role in the sentence".⁷⁶ The Court concluded that to elevate considerations of fairness to the offender to a "dominant role" in the circumstances, went beyond giving this factor undue weight, but was a reviewable error of principle.⁷⁷
- 3.111 In deciding to resentence the offender, the Court concluded that public confidence in the justice system would not be served by allowing a manifestly inadequate sentence to stand.⁷⁸ The Court imposed an aggregate term of 3 years imprisonment with a non-parole period of 18 months.

Providing comparable cases to the sentencing judge

Ebrahami v R [2019] NSWCCA 273

- 3.112 The offender pleaded guilty to supplying a large commercial quantity of methylamphetamine and knowingly dealing with the proceeds of crime. After a discount of 20% for an early guilty plea, he received an aggregate sentence of 11 years 6 months imprisonment with a non-parole period of 7 years 6 months. One of the grounds of appeal to the CCA was that the sentence was manifestly excessive. At the appeal, counsel for the offender referred to a number of comparable cases involving the supply of large commercial quantities of drugs. These cases provided a "yardstick" for assessing the offender's sentence and the Court concluded that the aggregate sentence was manifestly excessive. The Court noted that it had been assisted by the list of cases but that the sentencing judge had not received the same assistance:

District Court judges have a heavy workload in sentence matters, and are called upon to deal with the entire gamut of indictable offences except murder. It is desirable that they be afforded as much assistance as possible through the provision of statistics and comparable cases if they are available, a responsibility borne by the representatives of the Crown and of the offender.⁷⁹

75. *R v Cattell* [2019] NSWCCA 297 [125]–[126].

76. *R v Cattell* [2019] NSWCCA 297 [141].

77. *R v Cattell* [2019] NSWCCA 297 [142].

78. *R v Cattell* [2019] NSWCCA 297 [179].

79. *Ebrahami v R* [2019] NSWCCA 273 [42].

- 3.113 The Court resented the offender to an aggregate sentence of 8 years imprisonment with a non-parole period of 5 years.

Manifestly inadequate sentences

- 3.114 Following are cases where the CCA has found sentences for various offences to be manifestly inadequate.

Possession of firearms

R v Campbell [2019] NSWCCA 1

- 3.115 The offender was sentenced to an aggregate sentence of 11 years imprisonment with a non-parole period of 7 years 4 months for six offences; four involving the manufacture of methylamphetamine and two involving firearms. The offender admitted 34 further offences and these were taken into account on a Form 1.
- 3.116 The Crown appealed the inadequacy of the aggregate sentence. The CCA concluded that the aggregate sentence was inadequate, and resented the offender to 16 years imprisonment with a non-parole period of 10 years 6 months.
- 3.117 In a separate judgment, Justice Rothman, made some observations about the seriousness of the firearms offences:

It must be accepted that the kernel of the criminal conduct involved in possession of firearm offences is the possession of the firearm. Where, as here, the firearm is real and not a replica firearm; is in working order; is a modern firearm and not an antique or collectors' piece; is possessed at the same time as the offender possesses ammunition; and is possessed in the context of the involvement of the offender in a criminal organisation and/or other criminal conduct, it is difficult to imagine any more serious circumstances.⁸⁰

Work health and safety offences

Attorney General (New South Wales) v Ceerose Pty Ltd [2019] NSWCCA 35

- 3.118 The offender, the principal contractor on a building site, pleaded guilty to a Category 2 offence for breach of a duty imposed by the *Work Health and Safety Act 2011* (NSW) whereby a person is exposed to the risk of death or serious injury or illness.⁸¹ In this case, a steel and glass skylight, weighing one tonne, which had been lifted into place (but not tethered to the roof beams or otherwise braced to the steel structure supporting the roof) fell and killed a labourer. The Attorney General appealed the inadequacy of the fine of \$300,000.

80. *R v Campbell* [2019] NSWCCA 1 [10].

81. *Work Health and Safety Act 2011* (NSW) s 19.

- 3.119 The CCA (by majority) was satisfied that the fine was manifestly inadequate. In resentencing the offender, the Court noted this was the offender's third breach of its duties as a principal contractor in the building and construction industry and was conscious of the need not to sentence the offender for past offences. However, the Court observed that "the issue of specific deterrence looms large ... as does the need for the sentence to reflect the importance of general deterrence in a high risk industry in which the respondent continues to operate".⁸² The offender was instead ordered to pay a fine of \$600,000.

Supply of methylamphetamine: large commercial quantity

R v Qi [2019] NSWCCA 73

- 3.120 The offender pleaded guilty to the offence of supplying a large commercial quantity of methylamphetamine and was sentenced to imprisonment for 2 years 6 months to be served by way of an intensive correction order ("ICO"). The prosecution appealed the sentence on the grounds that it was manifestly inadequate. The CCA concluded that the sentence was inadequate for the following reasons:
- The maximum penalty of imprisonment for life without the possibility of parole "speaks for itself in terms of the view of Parliament about the seriousness of supplying a large commercial quantity of a prohibited drug". By analogy with other offences attracting a maximum penalty of life imprisonment such as murder, sexual intercourse with a child under 10 and aggravated sexual assault in company, a court would impose a sentence other than full-time imprisonment only in "very exceptional circumstances".
 - The offence carries a significant standard non-parole period of 15 years.
 - The quantity of methylamphetamine was well over the border line between "commercial quantity" and "large commercial quantity".
 - The recent reduction of the border line was "also surely an indirect emphasis by Parliament on the gravity of this kind of offending".
 - The substantial amount of the drug, its purity, and its monetary value meant that the offence had the potential to do significant harm.
 - The offender was a "mere deliveryman", had limited knowledge of what he was transporting and others could and would have acted instead. However, "weighed against that is the obvious fact that *someone* has to undertake the essential task of transporting large and valuable amounts of prohibited drugs for criminal enterprises, and it was the [offender] who chose to do so on this occasion".

82. *Attorney General (NSW) v Ceerose Pty Ltd* [2019] NSWCCA 35 [105].

- The offender was to receive a significant financial benefit for the offence, in the form of the forgiveness of a debt which could be regarded, in the criminal context, as being “more valuable than its simple monetary amount”.
- A young person of otherwise good character with a challenging upbringing who has become dependent on gambling and prohibited drugs and who has become significantly involved in supplying drugs was “far from being exceptional” but rather “regrettably not an uncommon occurrence in Australian society”.
- While an ICO is characterised as a form of imprisonment and can significantly restrict an offender’s liberty, it has “its own obvious inherent leniency, and must be seen as a much lesser sentence than full-time imprisonment”.⁸³

3.121 The Court resented the offender to 3 years imprisonment with a non-parole period of 18 months.

Child sexual assault

***R v JJ* [2019] NSWCCA 148**

3.122 The offender was convicted, after trial, of two offences of sexual intercourse with his stepdaughter, a child under 10. He was sentenced to an aggregate term of 6 years imprisonment with a non-parole period of 3 years. The Crown appealed the sentence on the ground that it was manifestly inadequate.

3.123 The CCA concluded that, having regard to all the circumstances of the case, the sentence fell outside the discretion available to the sentencing judge and was manifestly inadequate for the following reasons:

- The maximum penalty of 25 years when the first offence was committed and life imprisonment when the second offence was committed “speaks for itself in terms of the view of Parliament about the seriousness of child sexual assault”. The significant standard non-parole period of 15 years is to similar effect.
- The victim was 6 years old at the time of the first offence. This called for condign punishment.
- Sexually assaulting children has the potential to do great damage to their lives.
- “[F]ar from being exceptional, these offences are regrettably not uncommon occurrences in Australian society.”⁸⁴

3.124 The Court, instead, imposed a sentence of 8 years imprisonment with a non-parole period of 5 years.

83. *R v Qi* [2019] NSWCCA 73 [72]–[83].

84. *R v JJ* [2019] NSWCCA 148 [48].

Protection of biodiversity

R v Kennedy [2019] NSWCCA 242, 101 NSWLR 121

3.125 The offender pleaded guilty to six offences relating to the illegal importation, exportation and possession of wildlife under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)⁸⁵ ("EPBC Act") and dealing with property reasonably suspected of being proceeds of crime.⁸⁶ The offender was sentenced to an aggregate term of 3 years imprisonment to be served by way of an intensive correction order.

3.126 The Commonwealth DPP appealed the sentence on the ground that it was manifestly inadequate. In allowing the appeal, the CCA observed:

General deterrence, denunciation and the protection of the community are critical principles of sentencing relevant to cases under the EPBC Act involving threats to Australian fish, fauna and biodiversity. Offending which threatens native species and Australia's biodiversity warrants stern punishment. The imposition of a 3 year ICO in this case does not adequately reflect the nature and circumstances of the offending, including the maximum penalties for the importation, exportation and possession offences and the principles of general deterrence, specific deterrence, punishment and denunciation.⁸⁷

3.127 The CCA offered the following reasons for its finding:⁸⁸

- The maximum penalties, including 10 years imprisonment for the importation and exportation offences, indicated the Commonwealth Parliament's view about the seriousness of threats to Australian fish, fauna and biodiversity.
- The importation offences had potentially catastrophic consequences for the Australian ecosystem, including predation of Australian native species and the introduction of pathogens.
- Two of the species were listed in Appendices II and III of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*.⁸⁹
- Six separate offences were committed in discrete episodes of repeat offending. Each of the actual and attempted importation and exportation offences warranted

85. *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 303DD, s 303EK(1), s 303GN(2).

86. *Criminal Code* (Cth) s 400.9(1A).

87. *R v Kennedy* [2019] NSWCCA 242, 101 NSWLR 121 [85].

88. *R v Kennedy* [2019] NSWCCA 242, 101 NSWLR 121 [86].

89. *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 993 UNTS 243 (Washington, 3 March 1973) [1976] ATS 29 (entered into force 13 January 1976).

a sentence of imprisonment, two of which involved substantial risk to the ecosystem such as to warrant a sentence of full-time custody.

- Offending of this kind is “notoriously difficult to detect”. When detected, courts should give effect to the principles of general deterrence, specific deterrence, punishment and denunciation.

3.128 The Court concluded that the sentence imposed did not reflect the overall gravity of the offending or satisfy the principles of sentencing which, in this case, elevated the importance of general deterrence and accountability over the objective of rehabilitation.

3.129 The Court resentenced the offender to 4 years imprisonment with a non-parole period of 2 years 6 months.

Attempted murder (multiple victims)

***R v Amati* [2019] NSWCCA 193**

3.130 The offender was found guilty, after trial by jury, of three offences under s 27 of the *Crimes Act 1900* (NSW) in relation to three separate victims: wounding with intent to murder; causing grievous bodily harm with intent to murder; and attempting to wound with intent to murder.

3.131 The offender, while affected by a combination of illicit drugs, alcohol and prescription medication, responded to perceived rejection (because she was transgender) by a person she met on a dating app, by going to a nearby convenience store armed with a large axe and a knife. Two of her victims were customers in the convenience store and one (who received no injuries) was a nearby pedestrian.

3.132 The offender received an aggregate sentence of 9 years imprisonment with a non-parole period of 4 years 6 months. The Crown appealed on the ground that the sentence was manifestly inadequate.

3.133 An examination of some sentencing decisions for the offence of attempted murder (with non-parole periods ranging from 4 years imprisonment to 13 years imprisonment) suggested the aggregate sentence was “outside any putative range of sentence” for three attempted murder offences.

3.134 In finding that the aggregate sentence was manifestly inadequate, the CCA observed that the fact that the three offences were committed over a relatively short period provided little assistance to the offender since they were “three deliberate and separate attacks upon different individuals” where each victim believed that they were going to die. The aggregate non-parole period was effectively 6 months longer than the non-parole period for the indicative sentence for one of the offences.

The CCA observed that, where there were two other victims, this clearly showed manifest inadequacy in the sentence.⁹⁰ The aggregate sentence did not, in relation to the other two victims, recognise in any real way the important sentencing factor of recognising the harm done to the victims of crime and the community.⁹¹

Notwithstanding the need to give substantial weight to the offender's mental health difficulties to reduce her moral culpability, the aggregate sentence and indicative sentences needed to reflect the objective gravity of the offences, namely that the offender armed herself with an axe and knife and set out to inflict homicidal violence against strangers, the attack on one victim resulted in very serious injuries, the attack on another resulted in physical and mental scarring and the attack on the third, while not resulting in physical injury, was terrifying.⁹²

- 3.135 In a split decision on resentencing, in light of the offender's "unusual and compelling personal circumstances",⁹³ the Court imposed a sentence of 14 years imprisonment with a non-parole period of 8 years.

Armed robbery

***R v Chandler* [2019] NSWCCA 250, 101 NSWLR 208**

- 3.136 The offender pleaded guilty to an offence of robbery armed with an offensive weapon and was sentenced to 4 years imprisonment with a non-parole period of 1 year 8 months.
- 3.137 The DPP appealed the sentence on the grounds that it was manifestly inadequate.
- 3.138 The CCA observed that, despite the prosecution referring to the guideline judgment of *R v Henry* in some detail, the sentencing judge's treatment of it was "brief and somewhat dismissive". The Court, in particular, noted that the guideline judgment raised the important principle of deterrence, both personal and general. In the Court's view, general deterrence was relevant as was personal deterrence given the offender's criminal record and the nature of the offending, yet it was not clear that the sentencing judge had considered the issue of deterrence.⁹⁴ The Court therefore concluded that the sentence involved an erroneous application of principle.⁹⁵
- 3.139 The Court resentenced the offender, taking into account the fact that the objective seriousness of the offending was just below mid-range, and the offender's subjective features. It also allowed a 25% discount for an early guilty plea. The sentence was imprisonment for 4 years 6 months with a non-parole period of 2 years 8 months.

90. *R v Amati* [2019] NSWCCA 193 [112].

91. *R v Amati* [2019] NSWCCA 193 [115].

92. *R v Amati* [2019] NSWCCA 193 [119]–[120].

93. *R v Amati* [2019] NSWCCA 193 [7], [148].

94. *R v Chandler* [2019] NSWCCA 250, 101 NSWLR 208 [61]–[63].

95. *R v Chandler* [2019] NSWCCA 250, 101 NSWLR 208 [66].

4. Intensive correction orders and the community safety consideration

In Brief

The new Intensive Correction Order (“ICO”) sentencing option commenced in September 2018. There are a number of recent cases in which the NSW Court of Criminal Appeal, deals with the paramount consideration of community safety and other considerations in making a new ICO.

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- 4.1 Since 2011, our annual reviews have looked at the operation of intensive correction orders (“ICOs”), which were introduced as a sentencing option in 2010.
- 4.2 The ICO that was introduced in 2010 was effectively abolished when a new sentencing regime was introduced in NSW. The new regime arose from

recommendations made by the NSW Law Reform Commission (“LRC”) in 2013.¹ It commenced on 24 September 2018.²

- 4.3 The ICO under the new sentencing regime is similar to the ICO under the previous one. However, the new ICO has broader application, as it replaced several sentencing options under the old regime. It also gives some additional flexibility to sentencing judges and involves fewer mandatory conditions.
- 4.4 There are also different considerations for imposing an ICO. The “paramount consideration” is community safety, and in determining community safety, the court must consider whether an ICO or fulltime detention is more likely to reduce the offender’s risk of reoffending.³
- 4.5 In addition, the sentencing court must consider other matters in deciding whether to make an ICO, including the purposes of sentencing set out in s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (“*Crimes (Sentencing Procedure) Act*”).⁴
- 4.6 In this Chapter, we outline the new ICO. We also discuss recent NSW Court of Criminal Appeal (“CCA”) cases about the community safety consideration and other considerations in imposing an ICO. The CCA has reached different conclusions about how to assess “community safety”, and whether this consideration takes primacy over the other considerations. These different interpretations at the appellate level may create uncertainty for sentencing courts in determining whether to make an ICO in a particular case.

The new intensive correction order

- 4.7 The new ICO is one of three sentencing options in the new sentencing regime. The other options are the community correction order and the conditional release order.⁵
- 4.8 The new ICO replaced the ICO under the previous sentencing regime, as well as the sentencing option of home detention. The old ICO and home detention were custodial sentences that existed as alternatives to fulltime imprisonment available under the *Crimes (Sentencing Procedure) Act*. The LRC’s review found that they were underused sentencing options, despite having important advantages in terms of reducing reoffending, reducing costs and keeping offenders out of prison.⁶

1. NSW Law Reform Commission, *Sentencing*, Report 139 (2013).
2. *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW).
3. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 66(1)–(2).
4. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 66(3).
5. See *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 7, pt 8.
6. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [0.20], [9.2], [9.16]–[9.18].

- 4.9 The old ICOs and home detention orders had structural issues that stopped many offenders with complex needs from accessing them. Instead, they would be given short prison terms or suspended sentences.⁷
- 4.10 However, there were also significant problems with suspended sentences. Research showed that 44% of them were unsupervised and only required offenders to be of good behaviour.⁸ As a result, suspend sentences have now been abolished.
- 4.11 The new ICO is available where a court decides to sentence an offender to up to two years' imprisonment for a single offence, or an aggregate sentence of three years for multiple offences.⁹ The court may impose an ICO as an alternative, which enables the offender to serve the sentence in the community under strict conditions. The term of the ICO is the same as the term of imprisonment, unless it is revoked sooner.¹⁰
- 4.12 The sentencing court must not make an ICO unless it has obtained an assessment report in relation to the offender. However, the court is not required to obtain a report if satisfied that it has enough information available to justify making the ICO without one.¹¹
- 4.13 An ICO must not be made for offenders under 18.¹² It also cannot be imposed for certain offences, including murder, manslaughter, certain sexual offences, terrorism offences and offences involving the discharge of a firearm.¹³
- 4.14 An ICO can only be made for a domestic violence offence where the court is satisfied that the victim of the offence, and any person with whom the offender is likely to reside, will be adequately protected.¹⁴
- 4.15 The conditions for ICOs are meant to be stricter than those for community correction orders and conditional release orders.¹⁵ All ICOs have two standard conditions, which require the offender:
- not to commit any offence, and

7. NSW, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, 273–274 (M Speakman, Attorney General).

8. NSW, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, 273 (M Speakman, Attorney General).

9. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 68.

10. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 70.

11. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17D, s 69.

12. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7(3).

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

14. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 4B.

15. Explanatory Note, *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill 2017*, 2.

- to submit to supervision by a community corrections officer.¹⁶
- 4.16 ICOs must also include at least one additional condition, unless the court is satisfied that there are exceptional circumstances. It is also meant to “enable courts to tailor the order to hold offenders accountable and to tackle their offending behaviour”.¹⁷ Additional conditions can relate to:
- home detention
 - electronic monitoring
 - a curfew (with no specific limit on hours)
 - community service work (not exceeding 750 hours in total)
 - a requirement to participate in a rehabilitation program or receive treatment
 - a requirement to abstain from alcohol or drugs
 - a requirement not to associate with particular people, or
 - a requirement not to go to a particular place or area.¹⁸
- 4.17 The sentencing court may impose further conditions, provided they are not inconsistent with any of the standard or additional conditions of the ICO.¹⁹ This is meant to “give the courts more flexibility to tailor the order to an individual offender’s circumstances”.²⁰
- 4.18 The State Parole Authority may, in certain circumstances, impose, vary or revoke any conditions of an ICO, including those imposed by the sentencing court.²¹

Considerations in imposing an intensive corrections order

Community safety as the paramount consideration

- 4.19 Section 66 of the *Crimes (Sentencing Procedure) Act* provides that the “paramount consideration” in determining whether to impose an ICO is community safety. When

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

17. NSW, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, 275 (M Speakman, Attorney General).

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

19. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 73B.

20. NSW, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, 275 (M Speakman, Attorney General).

21. *Crimes (Administration of Sentences) Act 1999* (NSW) s 81A(1).

considering community safety, the sentencing court must assess whether an ICO or fulltime imprisonment is more likely to address the offender's risk of reoffending.²²

- 4.20 In his Second Reading Speech, the Attorney General introduced the new s 66 and explained the “community safety” consideration as follows:

Community safety is not just about incarceration. Imprisonment under two years is commonly not effective at bringing about medium- to long-term behaviour change that reduces reoffending. Evidence shows that community supervision and programs are far more effective at this. That is why new section 66 requires the sentencing court to assess whether imposing an intensive correction order or serving the sentence by way of fulltime detention is more likely to address the offender's risk of reoffending.²³

Other considerations in imposing an ICO

- 4.21 Section 66(3) provides that, when deciding whether to impose an ICO, the sentencing court:
- must also consider the purposes of sentencing set out in s 3A of the *Crimes (Sentencing Procedure) Act* and any relevant common law sentencing principles, and
 - may consider any other matters that the court thinks relevant.²⁴
- 4.22 The purposes of sentencing in s 3A of the *Crimes (Sentencing Procedure) Act* are to:
- ensure the offender is adequately punished for the offence
 - prevent crime by deterring the offender and other people from committing similar offences
 - protect the community from the offender
 - promote the rehabilitation of the offender
 - make the offender accountable for their actions
 - denounce the conduct of the offender, and
 - recognise the harm done to the victim of the crime and the community.

22. *Crimes (Sentencing Procedure) 1999* (NSW) s 66(1)–(2).

23. NSW, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, 274 (M Speakman, Attorney General).

24. *Crimes (Sentencing Procedure) 1999* (NSW) s 66(3).

4.23 Common law sentencing principles include:

- proportionality (that is, the court must impose a sentence that is proportional to the offence committed by the offender)²⁵
- imprisonment as sentencing option of “last resort”²⁶
- parity (that is, there must be parity between the sentences imposed on co-offenders),²⁷ and
- totality (that is, where a court sentences an offender for multiple offences, the overall sentence imposed must be “just and appropriate” to the totality of the offending behaviour).²⁸

Cases about community safety and other considerations

- 4.24 Since the new ICO commenced on 24 September 2018, there have been several CCA cases that deal with community safety and the other considerations in s 66 of the *Crimes (Sentencing Procedure) Act*.
- 4.25 The CCA has reached different conclusions about how “community safety” in s 66 is to be assessed. In *Fangaloka*, the Court adopted a restrictive interpretation, such that an ICO should not be imposed unless it is more likely to address the offender’s risk of reoffending than fulltime imprisonment.²⁹ However, other CCA decisions have questioned this interpretation.³⁰
- 4.26 The CCA has also reached different conclusions about whether the community safety consideration is paramount. In *Pullen*, the Court held that the other considerations in s 66 are necessarily subordinate to it.³¹ However, other CCA decisions have rejected this approach.³²
- 4.27 These different interpretations of s 66 may create uncertainty for sentencing courts in determining whether to impose an ICO in a particular case.

25. *Veen v R* (1979) 143 CLR 458; *Veen v R (No 2)* (1988) 164 CLR 465.

26. *Way v R* [2004] NSWCCA 131; 60 NSWLR 168 [115].

27. *Lowe v R* (1984) 154 CLR 606; *Green v R* [2011] HCA 49, 244 CLR 462 [28].

28. *Mill v R* (1988) 166 CLR 59, 63.

29. *R v Fangaloka* [2019] NSWCCA 173 [63].

30. *Casella v R* [2019] NSWCCA 201 [106]–[108], [111]; *R v Kennedy* [2019] NSWCCA 242 [81]; *Karout v R* [2019] NSWCCA 253 [57]–[60].

31. *R v Pullen* [2018] NSWCCA 264 [86].

32. *R v Fangaloka* [2019] NSWCCA 173 [65]–[66]; *Karout v R* [2019] NSWCCA 253 [88]–[90].

Assessing community safety

R v Pullen [2018] NSWCCA 264

- 4.28 *Pullen* is the first appellate decision involving the new ICO. The offender pleaded guilty to one count of dangerous driving occasioning grievous bodily harm and one count of fail to stop and assist after impact causing grievous bodily harm. He was sentenced to imprisonment for 15 months, to be served by way of an ICO.
- 4.29 The prosecution appealed the sentence, on the basis that it was manifestly inadequate.³³ The CCA allowed the appeal and in resentencing the offender, turned its attention to the concept of “community safety”.
- 4.30 The CCA noted that s 66 recognises that community safety is not achieved simply by incarcerating an offender, but that incarceration may have the opposite effect. This is because the court must assess whether an ICO or fulltime imprisonment is more likely to address the offender’s risk of reoffending.³⁴ The concept of community safety in s 66 is “therefore inextricably linked” with considerations of rehabilitation, which is more likely to occur with supervision and access to treatment programs in the community.³⁵
- 4.31 In this case, the Court concluded that an ICO was more likely to address the offender’s risk of reoffending. The evidence before the Court suggested that the offender was progressing well on his existing ICO. He had been complying with his conditions, maintained stable employment, undergone counselling and generally abstained from alcohol and drugs.³⁶
- 4.32 The CCA also had regard to the sentencing judge’s findings that the offender’s rehabilitation prospects were “excellent” and he was “highly unlikely” to reoffend. As a result, the Court was satisfied that the offender did not pose a risk to the community.³⁷
- 4.33 The Court quashed the original sentence and resentenced the offender to 3 years’ imprisonment, to be served by way of an ICO.

R v Fangaloka [2019] NSWCCA 173

- 4.34 The offender pleaded guilty to the offences of robbery in company, assault occasioning actual bodily harm in company, and assault. He received two ICOs with

33. *R v Pullen* [2018] NSWCCA 264 [5].

34. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 66(2).

35. *R v Pullen* [2018] NSWCCA 264 [84].

36. *R v Pullen* [2018] NSWCCA 264 [90].

37. *R v Pullen* [2018] NSWCCA 264 [91].

a total duration of 2 years.³⁸ The CCA allowed the prosecution's appeal on the basis of three specific errors and manifest inadequacy of the sentences.

- 4.35 Justice Basten determined how "community safety" should be assessed, by reference to what form of sentence is more likely to address the offender's risk of reoffending. He observed that "community safety can operate in different ways in different circumstances", and the purpose of s 66:

is merely to ensure that the court does not assume that fulltime detention is more likely to address a risk of reoffending than a community-based program of supervised activity ... In short, there is nothing in s 66 which favours an ICO over imprisonment by way of fulltime custody.³⁹

- 4.36 Justice Basten (with whom Justice Johnson and Justice Price agreed) expressed the view that s 66 should be given a restrictive interpretation. An ICO should not be imposed unless it is more likely to reduce the offender's risk of reoffending than fulltime imprisonment.⁴⁰
- 4.37 Justice Basten concluded that, in this case, there was no evidence to support the view that one form of custody was "more likely to reduce the risk of reoffending than another".⁴¹ The offender was resentenced to fulltime imprisonment for two years and six months, with a non-parole period of 20 months.

Casella v R [2019] NSWCCA 201

- 4.38 The offender pleaded guilty to the offence of concealing a serious indictable offence. He was sentenced to term of fulltime imprisonment for eight months, with a non-parole period of six months.
- 4.39 The offender appealed against his sentence. One of the issues on appeal was whether, in resentencing the offender, an ICO was appropriate.
- 4.40 Justice Beech-Jones questioned the restrictive view of s 66 taken in *Fangaloka*. He observed that it "appears to extract from s 66 a prohibition on the imposition of an ICO", unless the sentencing court thinks that an ICO is more likely to address the offender's risk of reoffending than fulltime imprisonment.⁴²
- 4.41 Justice Beech-Jones (with whom Justice Adams agreed) concluded that s 66 does not impose a prohibition to this effect. It only requires an assessment of whether an ICO or fulltime imprisonment is more likely to address the risk of reoffending.

38. *R v Fangaloka* [2019] NSWCCA 173 [1]–[2].

39. *R v Fangaloka* [2019] NSWCCA 173 [66].

40. *R v Fangaloka* [2019] NSWCCA 173 [63].

41. *R v Fangaloka* [2019] NSWCCA 173 [68].

42. *Casella v R* [2019] NSWCCA 201 [108].

A court would not necessarily be precluded from imposing an ICO if, for example, the outcome of the assessment is neutral.⁴³

- 4.42 The Court was satisfied that “imposing an ICO in this case gives effect to s 66”.⁴⁴ It resented the offender to six months’ imprisonment, to be served by way of an ICO.

Karout v R [2019] NSWCCA 253

- 4.43 The offender pleaded guilty to knowingly taking part in supplying a prohibited drug. He was sentenced to fulltime imprisonment for two years, with a non-parole period of one year.⁴⁵
- 4.44 One the offender’s grounds of appeal was that the sentencing judge, in refusing to impose an ICO, failed to have regard to the protection of the community under s 66 of the *Crimes (Sentencing Procedure) Act*.⁴⁶
- 4.45 Justice Brereton noted that s 66 had been given a restrictive interpretation in *Fangaloka*, which was later questioned in *Casella*. However, it was unnecessary to resolve that controversy in the present case. On either approach, a sentencing court must still determine what form of sentence is more likely to address an offender’s risk of reoffending.⁴⁷
- 4.46 In Justice Brereton’s view, it could not be discerned from the sentencing judgment whether the judge had addressed the community safety consideration. However, due to the offender’s submission that there should be an ICO, and the sentencing judge’s conclusion that he had good rehabilitation prospects, this matter “required serious consideration”.⁴⁸ Justice Brereton therefore upheld this ground of appeal.⁴⁹
- 4.47 However, Justice Fullerton (with whom Justice Hoeben agreed) disagreed that “there was any failure to give appropriate consideration to the protection of the community”.⁵⁰ The sentencing judge made positive findings about the offender’s prospects of rehabilitation and that he was unlikely to reoffend.⁵¹ It is clear that, in declining to make an ICO, the objective seriousness of the offending and the

43. *Casella v R* [2019] NSWCCA 201 [108].

44. *Casella v R* [2019] NSWCCA 201 [108].

45. *Karout v R* [2019] NSWCCA 253 [3].

46. *Karout v R* [2019] NSWCCA 253 [38].

47. *Karout v R* [2019] NSWCCA 253 [57]–[60].

48. *Karout v R* [2019] NSWCCA 253 [60].

49. *Karout v R* [2019] NSWCCA 253 [61].

50. *Karout v R* [2019] NSWCCA 253 [91].

51. *Karout v R* [2019] NSWCCA 253 [94].

principles of general deterrence “overwhelmed other considerations that were in play”.⁵²

- 4.48 The CCA dismissed the appeal and confirmed the original sentence of two years’ imprisonment.

Cross v R [2019] NSWCCA 280

- 4.49 The offender pleaded guilty to two counts of aggravated kidnapping in company. She was sentenced to fulltime imprisonment for 30 months, with a non-parole period of 15 months. The sentences for the two counts were concurrent.⁵³
- 4.50 One of the grounds of the offender’s appeal was that the sentencing judge failed to have regard to s 66 and whether an ICO or fulltime imprisonment was more likely to address the risk of offending.⁵⁴ The offender submitted that a proper consideration of community safety, and the risk of reoffending, should have led the sentencing judge to impose an ICO.⁵⁵
- 4.51 The CCA concluded that the sentencing judge was not required to consider s 66. This requirement only arises when deciding whether to make an ICO. However, the sentencing judge had determined a sentence length for one of the concurrent sentences that precluded her from making an ICO.⁵⁶
- 4.52 The CCA also observed that, in terms of community safety, there was no evidence indicating that one form of sentence was more likely to reduce the risk of reoffending than the other. The sentencing judge, having regard to the offender’s assessment report, found that her rehabilitation prospects were limited. The sentencing judge also found that the offender’s rehabilitation prospects would be enhanced if she was offered psychiatric treatment while in custody.⁵⁷
- 4.53 The CCA dismissed the appeal.

The status of the other considerations

R v Pullen [2018] NSWCCA 264

- 4.54 In this case already discussed above, the CCA determined that the other considerations in s 66 are necessarily subordinate to the “paramount consideration” of community safety.⁵⁸ That is, community safety takes priority over the purposes of

52. *Karout v R* [2019] NSWCCA 253 [94].

53. *Cross v R* [2019] NSWCCA 280 [5]–[6].

54. *Cross v R* [2019] NSWCCA 280 [7]–[8], [24].

55. *Cross v R* [2019] NSWCCA 280 [25].

56. *Cross v R* [2019] NSWCCA 280 [35], [38], [40].

57. *Cross v R* [2019] NSWCCA 280 [36]–[37].

58. *R v Pullen* [2018] NSWCCA 264 [86].

sentencing outlined in s 3A of the *Crimes (Sentencing Procedure) Act*, any relevant common law sentencing principles, and any other relevant matters.

- 4.55 The CCA concluded that, as a result of the new s 66:

in cases where an offender's prospects of rehabilitation are high and where their risk of reoffending will be better managed in the community, an ICO may be available, even if it may not have been under the old scheme.⁵⁹

- 4.56 As mentioned above, the Court thought that an ICO was more likely to reduce the offender's risk of reoffending. It quashed the original sentence and resented the offender to three years' imprisonment, to be served by way of an ICO.

R v Fangaloka [2019] NSWCCA 173

- 4.57 In this case discussed above, Justice Basten dealt with the question whether s 66 "qualif[ied] the need to have regard to the general purposes of sentencing set out in s 3A".⁶⁰

- 4.58 Justice Basten (with whom Justice Johnson and Justice Price agreed) concluded that s 66 requires a sentencing court "to have regard to a specific consideration, namely the likelihood of a particular form of order addressing the offender's risk of reoffending". However, this is not in derogation of the purposes of sentencing outlined in s 3A, nor other relevant matters. All of these must be considered and given due weight.⁶¹

- 4.59 Justice Basten observed that, while s 66 expressly refers to the sentencing purposes in s 3A, it identifies them as a set of mandatory, rather than subordinate, considerations. In his view:

It would be wrong for a court to treat every consideration other than the means of addressing the risk of reoffending as a subordinate consideration.⁶²

- 4.60 The CCA quashed the original sentence and resented the offender to fulltime imprisonment for two years and six months, with a non-parole period of 20 months.
- 4.61 Recently, the offender sought special leave to appeal the CCA's decision in the High Court. The High Court dismissed the application, as it "does not give rise to any reason to doubt the correctness of the decision of the Court of Criminal

59. *R v Pullen* [2018] NSWCCA 264 [89].

60. *R v Fangaloka* [2019] NSWCCA 173 [45].

61. *R v Fangaloka* [2019] NSWCCA 173 [63], [65].

62. *R v Fangaloka* [2019] NSWCCA 173 [66].

Appeal”.⁶³ This special leave application was confined and the issues outlined in this chapter have not been resolved.

Karout v R [2019] NSWCCA 253

4.62 In this case, one of the grounds of appeal was that the sentencing judge, in deciding not to impose an ICO, failed to give paramount consideration to the protection of the community.⁶⁴

4.63 Justice Fullerton (with whom Justice Hoeben agreed) observed that this argument was based on a misunderstanding of the operation of s 66. She concluded that:

the Legislature should not, in my view, be taken to have intended that community protection be elevated to a mandatory consideration in the sentencing exercise, in the sense that it should dominate considerations of broader sentencing principles.⁶⁵

4.64 Justice Fullerton agreed with Justice Basten’s observations in *Fangaloka* about the status of broader sentencing considerations. She concluded that s 66 does not require sentencing courts to give paramount consideration to community supervised programs as a means of ensuring community safety. If this was the case, she “would have expected the Legislature would have made that plain when the 2018 amending Act was passed”.⁶⁶

4.65 The CCA confirmed the original sentence of two years’ imprisonment.

R v Kennedy [2019] NSWCCA 242

4.66 The offender pleaded guilty to six Commonwealth offences of illegally exporting, importing and possessing of wildlife and dealing with proceeds of crime. He was sentenced in the NSW District Court to an aggregate term of three years’ imprisonment, to be served by way of an ICO. In determining whether to impose an ICO, the sentencing judge referred to the purposes of the 2018 amendments to the *Crimes (Sentencing Procedure) Act*, the Attorney General’s second reading speech and the CCA’s decision in *Pullen*.⁶⁷

4.67 The prosecution appealed against the sentence, on the basis that it was manifestly inadequate. It was submitted that the sentencing judge, in referring to *Pullen*, implicitly treated the new s 66 “as qualifying the need to have regard to the general purposes of sentencing”.⁶⁸

63. *Fangaloka v R* [2020] HCASL 12 [1].

64. *Karout v R* [2019] NSWCCA 253 [38], [86].

65. *Karout v R* [2019] NSWCCA 253 [88].

66. *Karout v R* [2019] NSWCCA 253 [89]–[90].

67. *R v Kennedy* [2019] NSWCCA 242 [52].

68. *R v Kennedy* [2019] NSWCCA 242 [62]. See also *R v Fangaloka* [2019] NSWCCA 173 [45].

4.68 The CCA did not think that the sentencing judge's reference to *Pullen* was an error. It also did not regard the decision in *Pullen* as having been overruled by *Fangaloka*. In light of the decision in *Casella*, "[w]hat *Fangaloka* itself decides may be open to doubt".⁶⁹

4.69 The CCA allowed the prosecution's appeal and imposed a new aggregate sentence of full-time imprisonment for four years, with a non-parole period of two years and 6 months.

Cross v R [2019] NSWCCA 280

4.70 In this case, the offender argued that the sentencing judge was expressly required to have regard to s 66. She also argued that the section makes community safety the paramount consideration, taking precedence above other considerations, including the purposes of sentencing set out in s 3A of the *Crimes (Sentencing Procedure) Act*.⁷⁰

4.71 As discussed above, the CCA concluded that the sentencing judge was not required to consider s 66 in this case, as she had determined a length of sentence that precluded her from imposing an ICO.⁷¹ In these circumstances, the CCA thought it unnecessary to consider further the issues raised in *Fangaloka* and later considered in *Karout*.⁷²

4.72 The CCA dismissed the appeal.

Blanch v R [2019] NSWCCA 304

4.73 The offender was convicted of three related offences of supplying a prohibited drug. She was sentenced to an aggregate sentence of two years and nine months' imprisonment, with a non-parole period of one year and six months.⁷³

4.74 One of the grounds of the offender's appeal was that the sentencing judge, in deciding whether to make an ICO, failed to give paramount consideration to community safety as required by s 66.

4.75 The offender submitted that the sentencing judge's reasons did not show what weight was afforded to the paramount consideration of community safety, nor other considerations. The reasons did not indicate that community safety "was deserving of any greater recognition than any other purpose of sentencing".⁷⁴

69. *R v Kennedy* [2019] NSWCCA 242 [81].

70. *Cross v R* [2019] NSWCCA 280 [25].

71. *Cross v R* [2019] NSWCCA 280 [35], [38], [40].

71. *Cross v R* [2019] NSWCCA 280 [35], [38], [40].

72. *Cross v R* [2019] NSWCCA 280 [39]–[40].

73. *Blanch v R* [2019] NSWCCA 304 [12].

74. *Blanch v R* [2019] NSWCCA 304 [54].

- 4.76 Justice Campbell noted there are different opinions about whether the other matters in s 66 are subordinate to the community safety consideration. However, he concluded that it was not necessary to settle these controversies for the purpose of the case at hand.⁷⁵
- 4.77 Justice Campbell determined that the sentencing judge was required to treat community safety as a paramount consideration, as well as the other matters in s 66. However, the sentencing judge appeared to by-pass the community safety consideration and proceed directly to those other considerations.⁷⁶
- 4.78 The CCA quashed the original sentence and resented the applicant to two years and nine months' imprisonment, to be served by way of an ICO.

75. *Blanch v R* [2019] NSWCCA 304 [52].

76. *Blanch v R* [2019] NSWCCA 304 [61].

5. Sentencing trends

In Brief

In 2019, 117,695 adult offenders were sentenced to one of the current penalties available in NSW. The most common penalty is the fine (34.1%), followed by a community correction order (22%). A term of imprisonment is imposed in 10.3% of cases. Aboriginal people are over-represented in the data. In particular Aboriginal women are generally more likely to receive sentences of imprisonment or community based sentences with supervision than other female offenders.

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- 5.1 This chapter consists of two parts. The first part sets out general data relating to the Local Court and higher courts' use of penalties in 2019, with particular data relating to gender and Aboriginal and Torres Strait Islander status as well as the regional location of offenders. The second part focuses on data relating to Aboriginal female offenders as the most over-represented demographic group in the data set out in the first part.

Use of penalties

- 5.2 2019 was the first full year of operation of the new sentencing regime, which commenced in September 2018. The following penalties are available under this regime:
- imprisonment¹
 - intensive correction order (ICO)²
 - fine³
 - community correction order (CCO)⁴
 - conviction with no other penalty⁵
 - conditional release order (CRO) both with or without a conviction recorded,⁶ and
 - no conviction (dismissal).⁷
- 5.3 Other sentencing outcomes include compulsory drug treatment detention,⁸ deferral of sentencing for rehabilitation, participation in intervention programs or other purposes,⁹ and a sentence to the rising of the court.
- 5.4 This part of the chapter sets out data for 2019 relating to each sentencing option both generally and in relation to particular offender categories (based on gender, Aboriginal status and region).

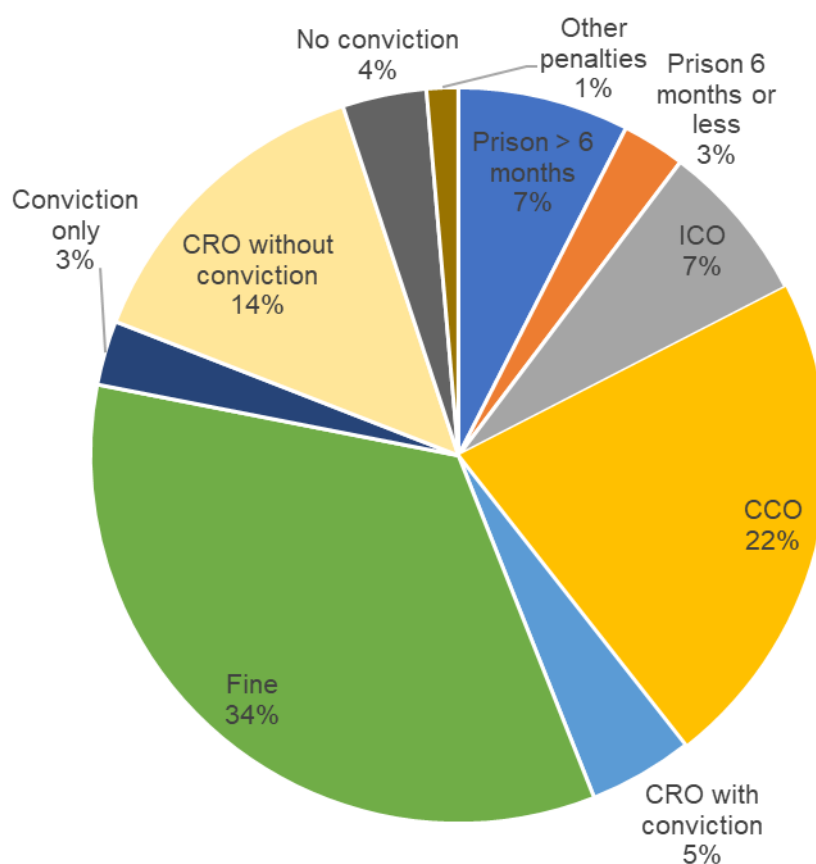
General

- 5.5 We have identified 117,695 offenders who received one of the relevant penalties in the Local Court and higher courts in NSW. Figure 5.1 sets out the percentage of offenders who received each penalty. The most common penalty is a fine (34.1%), followed by a community correction order (CCO) (22%), and conditional release order without conviction (14%). Imprisonment for 6 months or less accounts for

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

2.8% of penalties imposed and imprisonment for more than 6 months accounts for 7.5%.

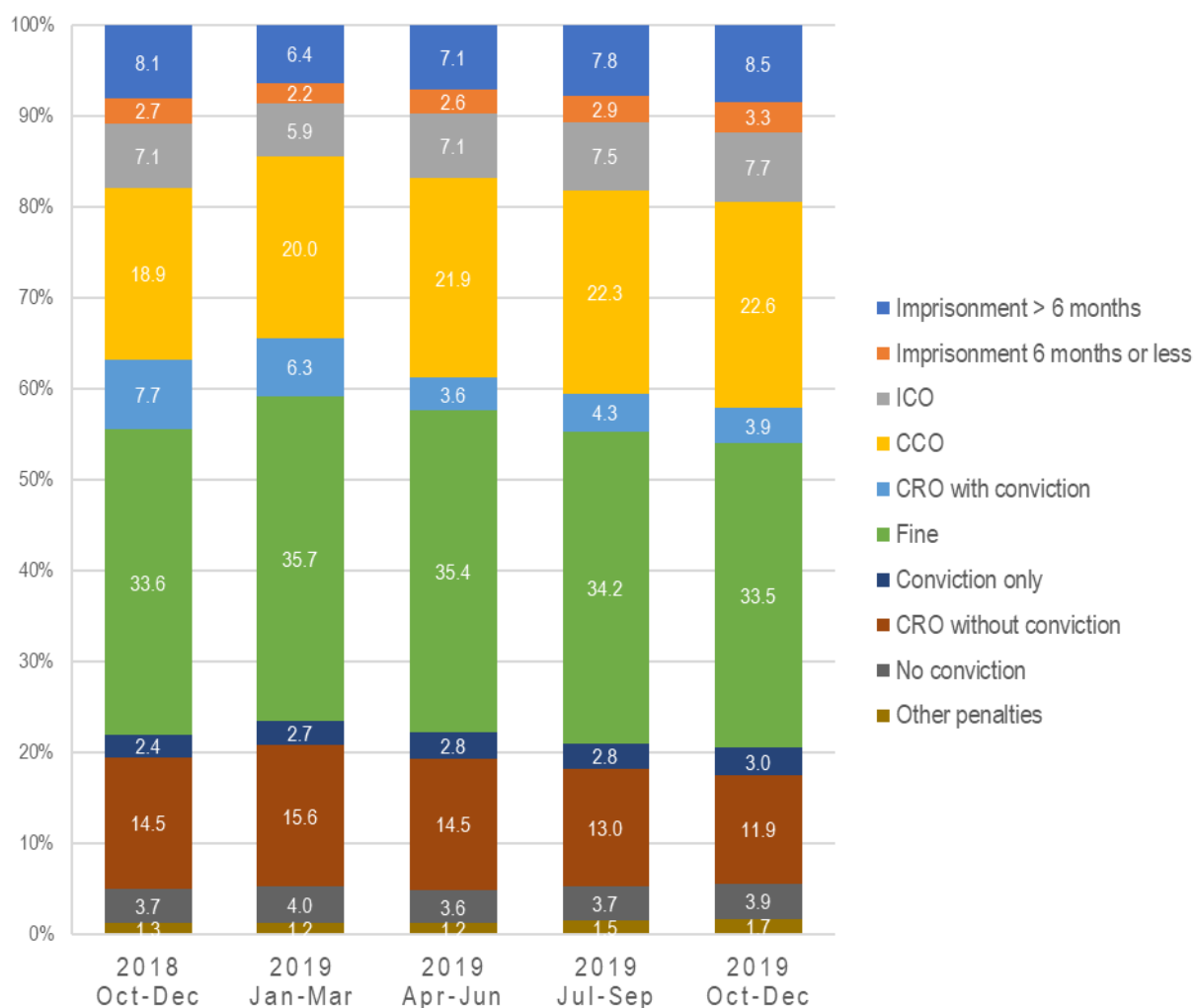
Figure 5.1: NSW higher and local criminal courts, penalties imposed, 2019



Source: NSW Bureau of Crime Statistics and Research, reference 19-19169.

- 5.6 Figure 5.2 shows the percentage of penalties imposed in each quarter since the introduction of the new sentencing regime in the final quarter of 2018.

Figure 5.2: NSW higher and local criminal courts, penalties imposed for each quarter, October 2018 – December 2019



Source: NSW Bureau of Crime Statistics and Research, reference 19-19169.

Gender and Aboriginal status

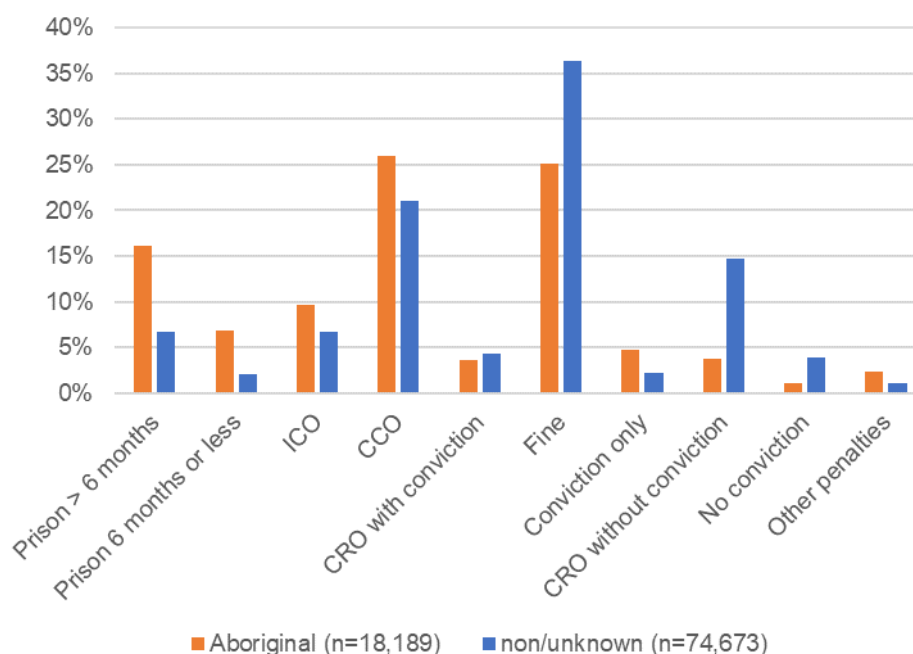
Male offenders

- 5.7 We have identified 18,189 Aboriginal men who received a relevant sentence in 2019, compared with 74,673 male offenders who were not Aboriginal or whose Aboriginal status was unknown. According to these numbers, 19.6% of all male offenders were recorded as Aboriginal. Aboriginal men represent 3.5% of the male resident population in NSW.¹⁰
- 5.8 Figure 5.3 shows the proportion of penalties imposed on male offenders by Aboriginal status. Compared with other offenders, a significantly greater proportion

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

of Aboriginal men received sentences of imprisonment (22.9% compared with 8.9%) and a significantly smaller proportion of Aboriginal men received a sentence that did not involve a conviction (4.9% compared with 18.5%).

Figure 5.3: NSW higher and local criminal courts, proportion of penalties imposed on Aboriginal and other male offenders, 2019

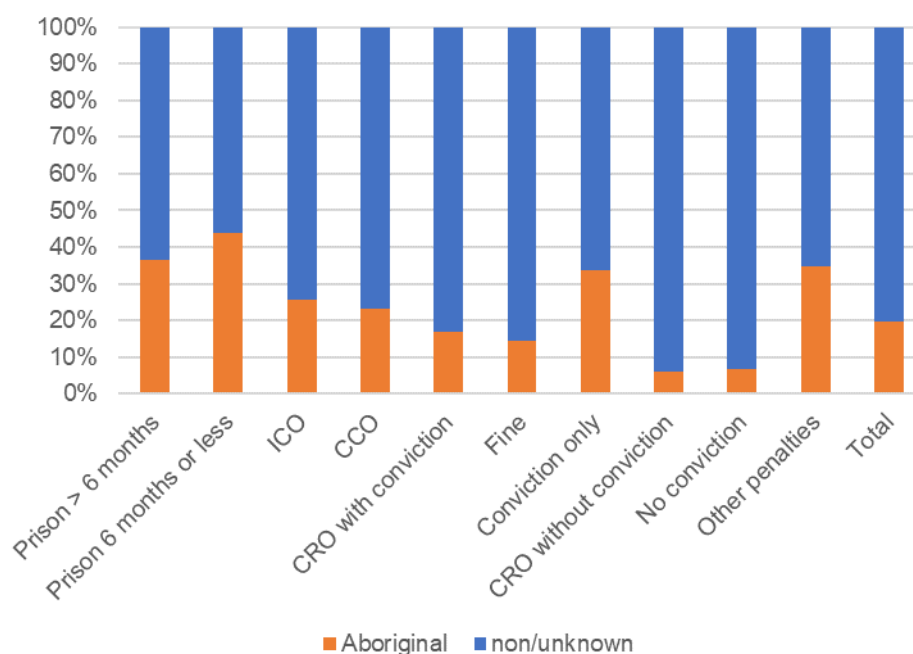


Source: NSW Bureau of Crime Statistics and Research, reference 19-19169.

- 5.9 Figure 5.4 shows the percentage of Aboriginal men who received each penalty, compared with those who are not Aboriginal or whose Aboriginal status is not known.
- 5.10 Considering that 19.6% of all male offenders were recorded as Aboriginal:
- a large proportion (43.9%) of the 2842 male offenders who received a sentence of imprisonment of 6 months or less were recorded as Aboriginal, and
 - a large proportion (36.5%) of the 8006 male offenders who received a sentence of imprisonment of more than 6 months were recorded as Aboriginal.
- 5.11 By contrast:
- a very small proportion (6%) of the 11,638 male offenders who received a conditional release order without conviction were recorded as Aboriginal, and
 - a very small proportion (6.5%) of the 3089 male offenders who had no conviction recorded were recorded as Aboriginal.
- 5.12 We also note that, of the 2582 male offenders who received a conviction only, a large proportion (33.8%) were Aboriginal people. Further investigation is required to

determine the extent to which the courts take into account, for example, time served in custody because bail was refused.

Figure 5.4: NSW higher and local criminal courts, proportion of each penalty imposed on Aboriginal and other male offenders, 2019



Source: NSW Bureau of Crime Statistics and Research, reference 19-19169.

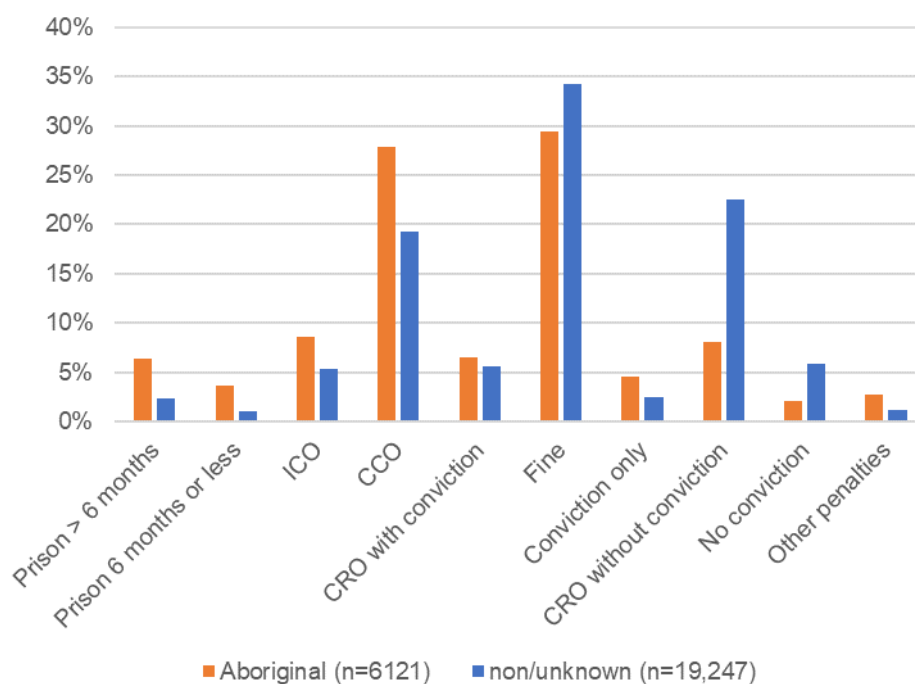
Female offenders

- 5.13 We have identified 6121 Aboriginal women who received a relevant sentence in 2019, compared with 19,247 women who were not Aboriginal or whose Aboriginal status was unknown. 24.1% of all female offenders were recorded as Aboriginal. Aboriginal women represent 3.4% of the resident female population in NSW.¹¹
- 5.14 Figure 5.5 shows the proportion of penalties imposed on female offenders by Indigenous status. A significantly greater proportion of Aboriginal women received sentences of imprisonment (10.2% compared with 3.4%) and a significantly smaller proportion of Aboriginal women received a sentence that did not involve conviction (10.1% compared with 28.4%). Further data on Aboriginal women is provided later in this chapter.¹²

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

12. [5.22]-[5.63].

Figure 5.5: NSW higher and local criminal courts, percentage of penalties imposed on Aboriginal and other female offenders, 2019



Source: NSW Bureau of Crime Statistics and Research, reference 19-19169.

5.15 Figure 5.6 shows the percentage of Aboriginal female offenders who received each penalty compared with other female offenders.

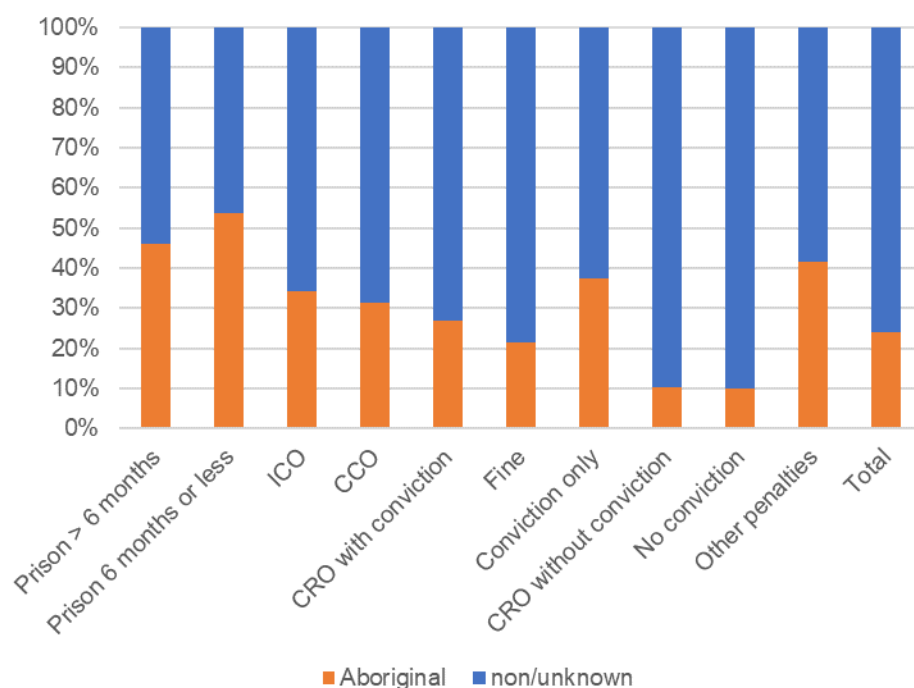
5.16 Considering that 24.1% of all female offenders were recorded as Aboriginal:

- a large proportion (53.8%) of the 424 female offenders who received a sentence of imprisonment of 6 months or less were recorded as Aboriginal, and
- a large proportion (46%) of the 857 female offenders who received a sentence of imprisonment of more than 6 months were recorded as Aboriginal.

5.17 By contrast:

- a small proportion (10.2%) of the 4827 female offenders who received a conditional release order without conviction were recorded as Aboriginal, and
- a small proportion (10%) of the 1257 women who had no conviction recorded were recorded as Aboriginal.

Figure 5.6: NSW higher and local criminal courts, percentage of each penalty imposed on Aboriginal and other female offenders, 2019

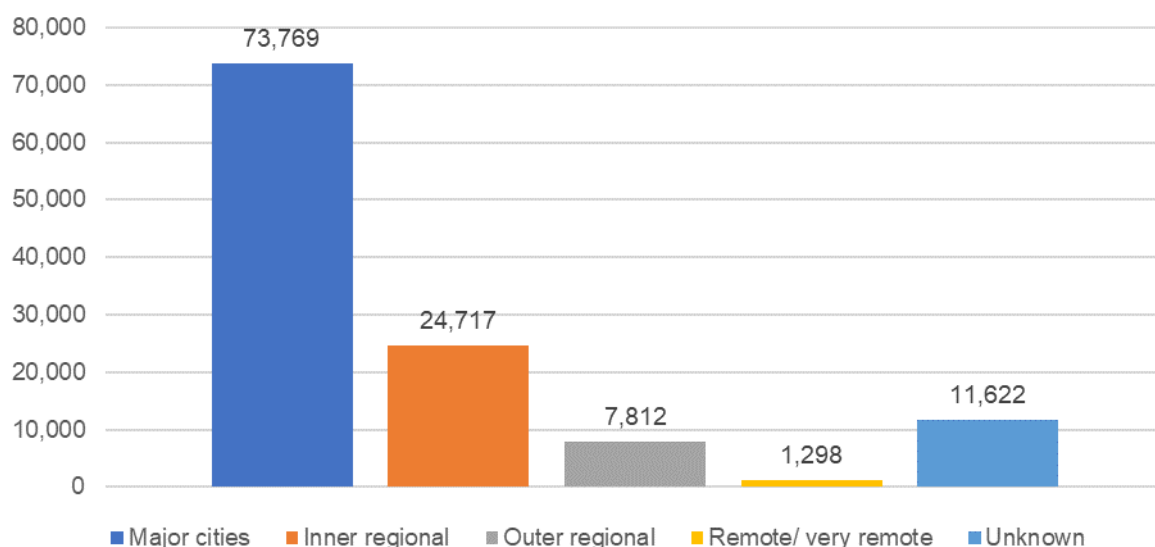


Source: NSW Bureau of Crime Statistics and Research, reference 19-19169.

Regional data

- 5.18 Figure 5.7 sets out the total number of offenders who received a relevant penalty in each region in 2019.
- 5.19 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.

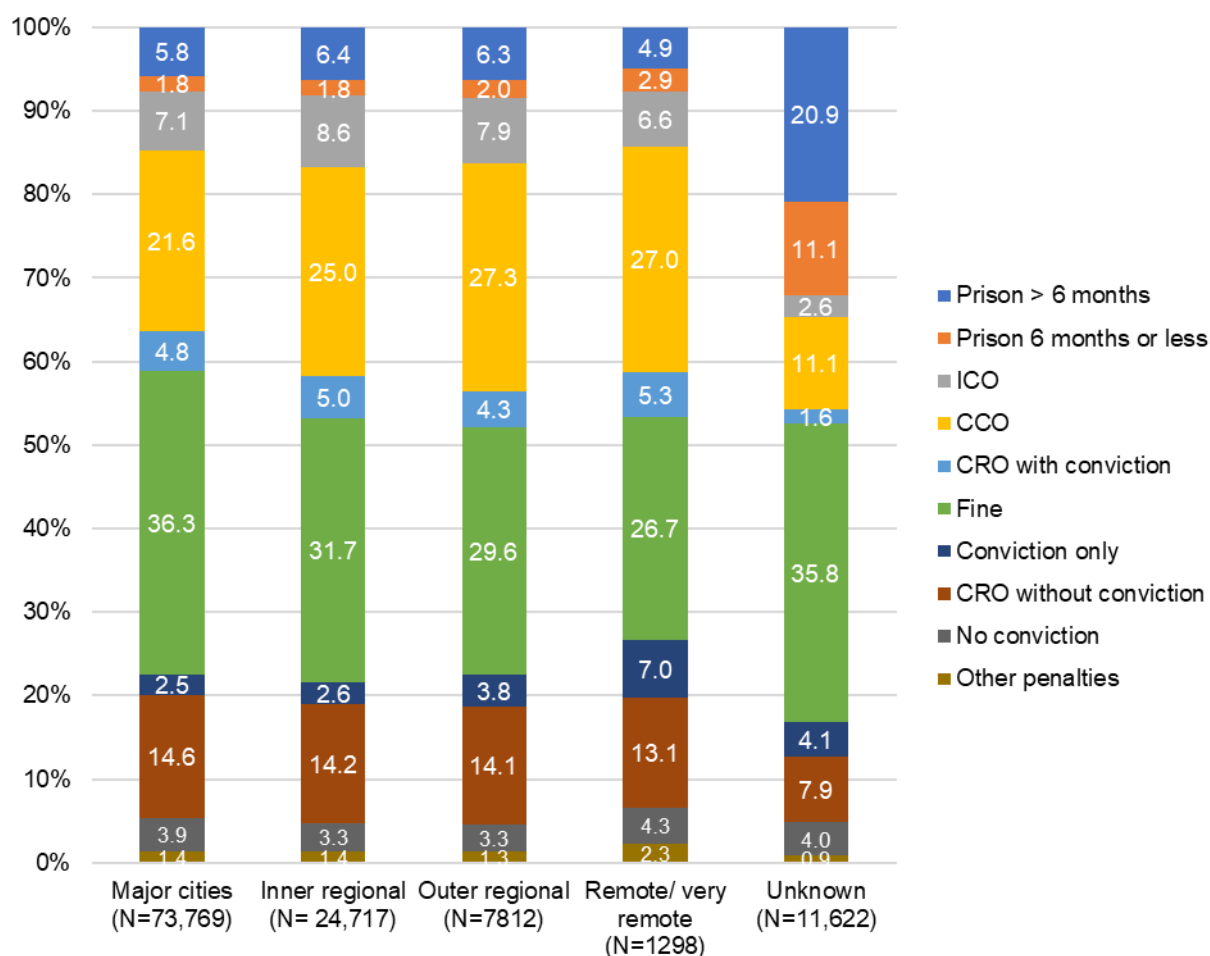
Figure 5.7: NSW higher and local criminal courts, number of offenders sentenced in each region, 2019



Source: NSW Bureau of Crime Statistics and Research, reference 19-19169.

- 5.20 Figure 5.8 sets out the proportion of each penalty imposed by region. Broadly, it shows that offenders who live outside the major cities are more likely to receive a CCO and less likely to receive a fine than those who live in the major cities.
- 5.21 We note that a large number of offenders do not have a region recorded. The bulk of these are those who received sentences of imprisonment – approximately 40% of those who received sentences of 6 months or less and 28% of those who received sentences of more than 6 months. Further investigation is required to determine why region has not been recorded.

Figure 5.8: NSW higher and local criminal courts, proportion of penalties imposed in each region, 2019



Source: NSW Bureau of Crime Statistics and Research, reference 19-19169.

Aboriginal women offenders

- 5.22 We compared the 6128 Aboriginal women offenders who were sentenced in the NSW Local Court and higher courts in 2019, with the 19,251 women offenders who were not Aboriginal (15,027) or their Aboriginal status was unknown (4224).
- 5.23 Those recorded as Aboriginal represent 24.1% of the total number of female offenders. In 2016, 3.4% of the NSW female population were Aboriginal and/or Torres Strait Islander.¹³
- 5.24 The data in the remainder of this chapter presents a snapshot. Trends over time will be considered in future reports.

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

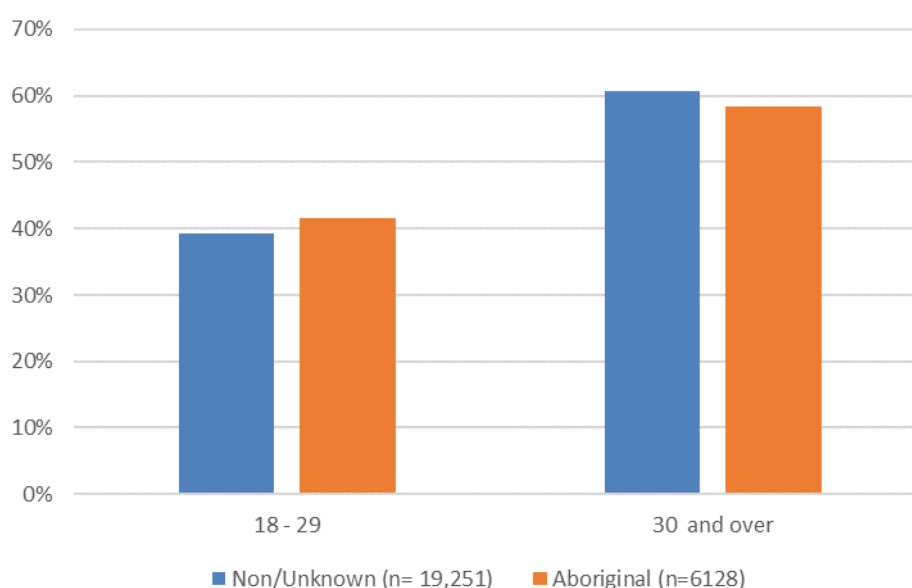
- 5.25 In comparing the groups of offenders, we have not been able to control for factors that are known to influence sentencing outcomes. It is possible that apparent differences in penalties imposed are the result of other differences between offenders, such as age and prior offences. The data relating 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.
- 5.26 The observations in this chapter, therefore, can only point to trends and patterns that may require further investigation and more sophisticated analysis.

Profile of offenders

Age

- 5.27 Figure 5.9 shows the age profile of female offenders. In 2019, 41% of Aboriginal women offenders were aged 18-29 years. This is a slightly higher proportion than the 39.3% of women aged 18-29 years who were not Aboriginal or whose Aboriginal status was unknown.

Figure 5.9: NSW higher and local criminal courts, proportion of Aboriginal and other female offenders by age, 2019.



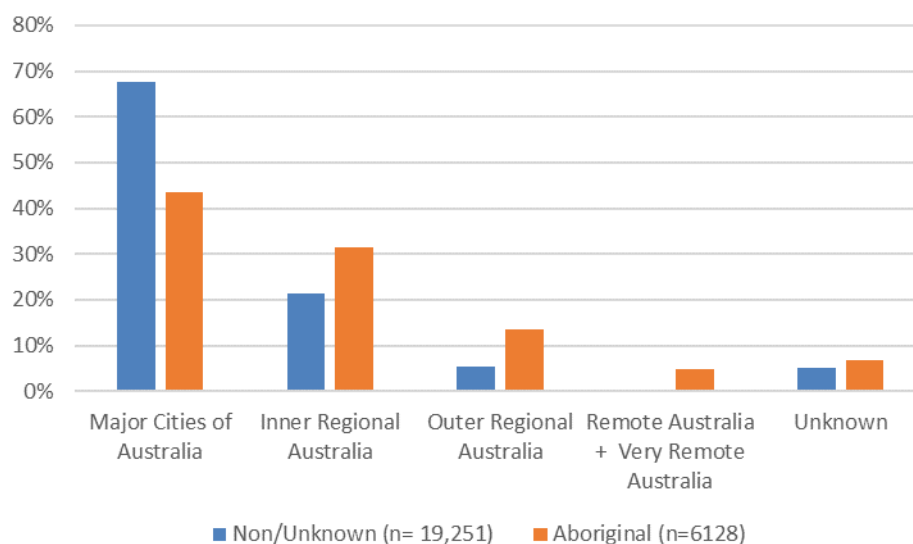
Source: NSW Bureau of Crime Statistics and Research Reference: kf20-18790.

Region

- 5.28 Figure 5.10 shows the proportion of Aboriginal and other female offenders in each remoteness area. In 2019, only 43.4% of Aboriginal female offenders lived in major cities, compared with 67.6% of female offenders who were not Aboriginal or whose Aboriginal status was unknown. A greater proportion of Aboriginal women lived in regional and remote areas compared with other female offenders.

- 5.29 These figures for Aboriginal offenders appear to accord with general population statistics. In 2016, 46.6% of the NSW Aboriginal population lived in major cities, 34.6% in inner regional areas, 15.3% in outer regional areas, 2.6% in remote, and 0.9% in very remote areas.¹⁴

Figure 5.10: NSW higher and local criminal courts, proportion of Aboriginal and other female offenders in each remoteness region, 2019.



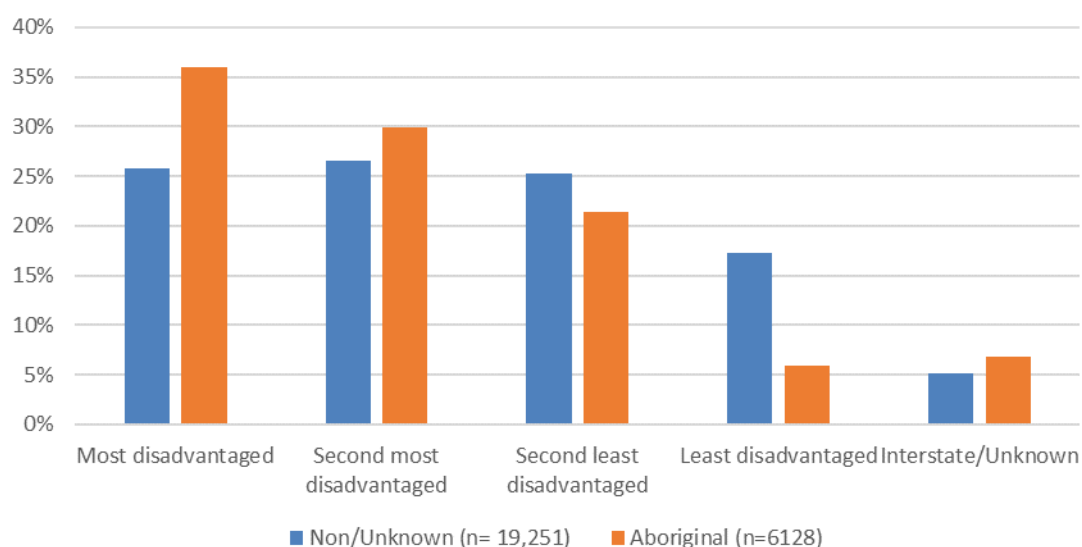
Source: NSW Bureau of Crime Statistics and Research Reference: kf20-18790.

Disadvantage

- 5.30 Figure 5.11 sets out the proportion of Aboriginal and other female offenders who live in areas graded according to disadvantage. In 2019, a greater proportion of Aboriginal women lived in more disadvantaged areas compared with other female offenders (65.9% compared with 52.3%). Conversely, a greater proportion of other female offenders lived in less disadvantaged areas compared with Aboriginal women (42.6% compared with 27.3%).

14. Australia, Department of Aboriginal Affairs, "Key Data – Aboriginal People" (Research and Evaluation, July 2019).

Figure 5.11: NSW higher and local criminal courts, proportion of Aboriginal and other female offenders in areas graded by disadvantage, 2019



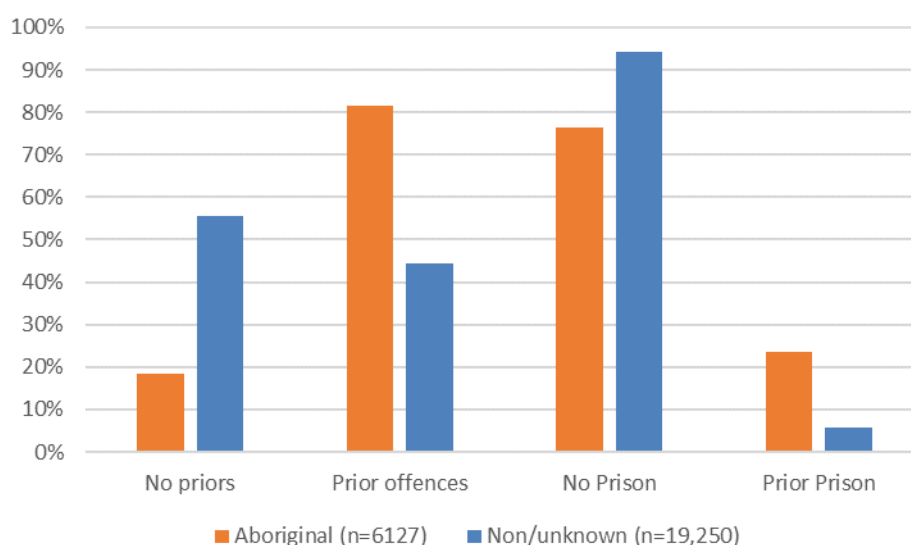
Source: NSW Bureau of Crime Statistics and Research Reference: kf20-18790.

Offending history

- 5.31 Figure 5.12 shows the proportion of Aboriginal and other female offenders according to their criminal history in the past 5 years. In 2019, only 18.4% of Aboriginal female offenders had committed no other offences in the past 5 years. This compares with 55.5% of female offenders who were not Aboriginal or whose Aboriginal status was unknown.
- 5.32 We can expect that a criminal record will contribute to harsher penalties. This is explored further in the section on sentencing patterns, below.¹⁵

15. [5.41]–[5.49].

Figure 5.12: NSW higher and local criminal courts, proportion of Aboriginal and other female offenders by criminal record in the past 5 years, 2019

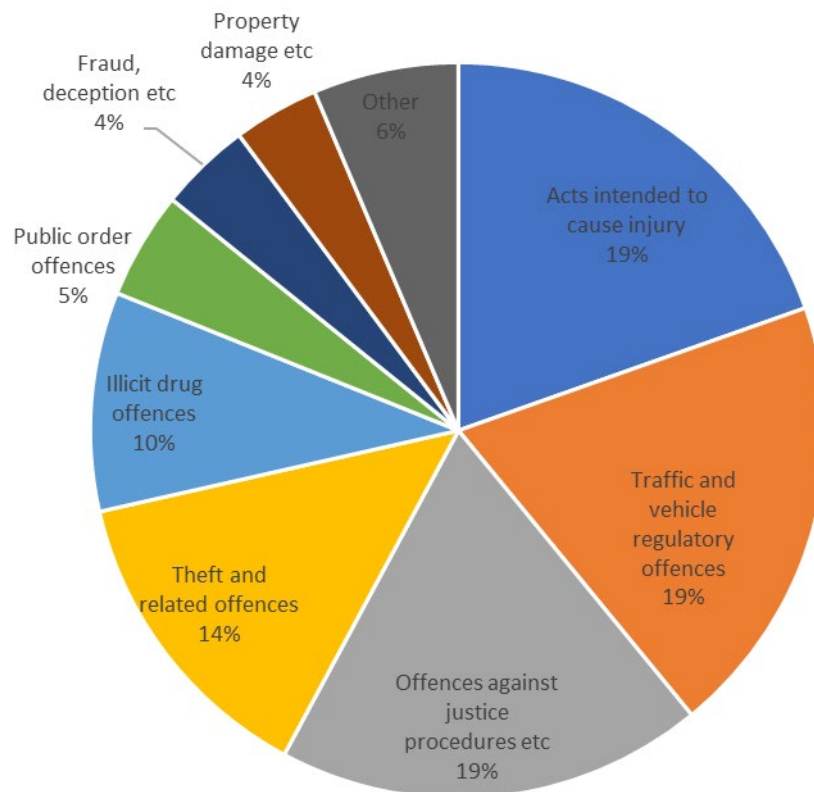


Source: NSW Bureau of Crime Statistics and Research Reference: kf20-18790.

Principal offences

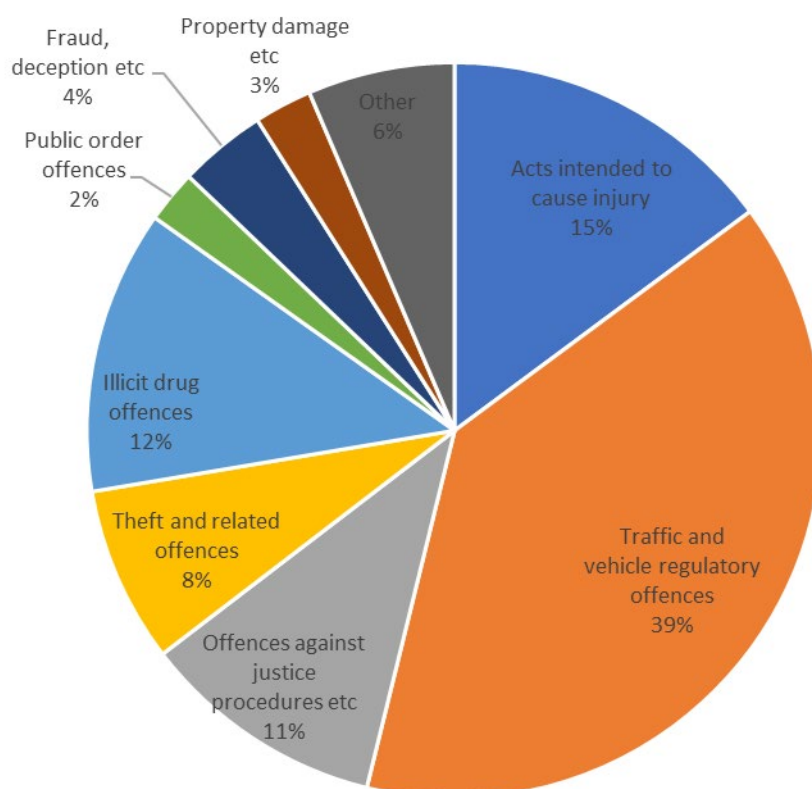
- 5.33 Figures 5.13 and 5.14 set out the proportion of each group that has committed particular categories of offences as a principal offence. This shows that a much greater proportion of women who are not Aboriginal or whose Aboriginal status is not known commit traffic and vehicle regulatory offences, whereas a greater proportion of Aboriginal women commit offences against justice procedures, government security and government operations, and theft and related offences.

Figure 5.13: NSW higher and local criminal courts, principal offences committed by Aboriginal female offenders, 2019



Source: NSW Bureau of Crime Statistics and Research Reference: kf20-18790.

Figure 5.14: NSW higher and local criminal courts, principal offences committed by other female offenders, 2019



Source: NSW Bureau of Crime Statistics and Research Reference: kf20-18790.

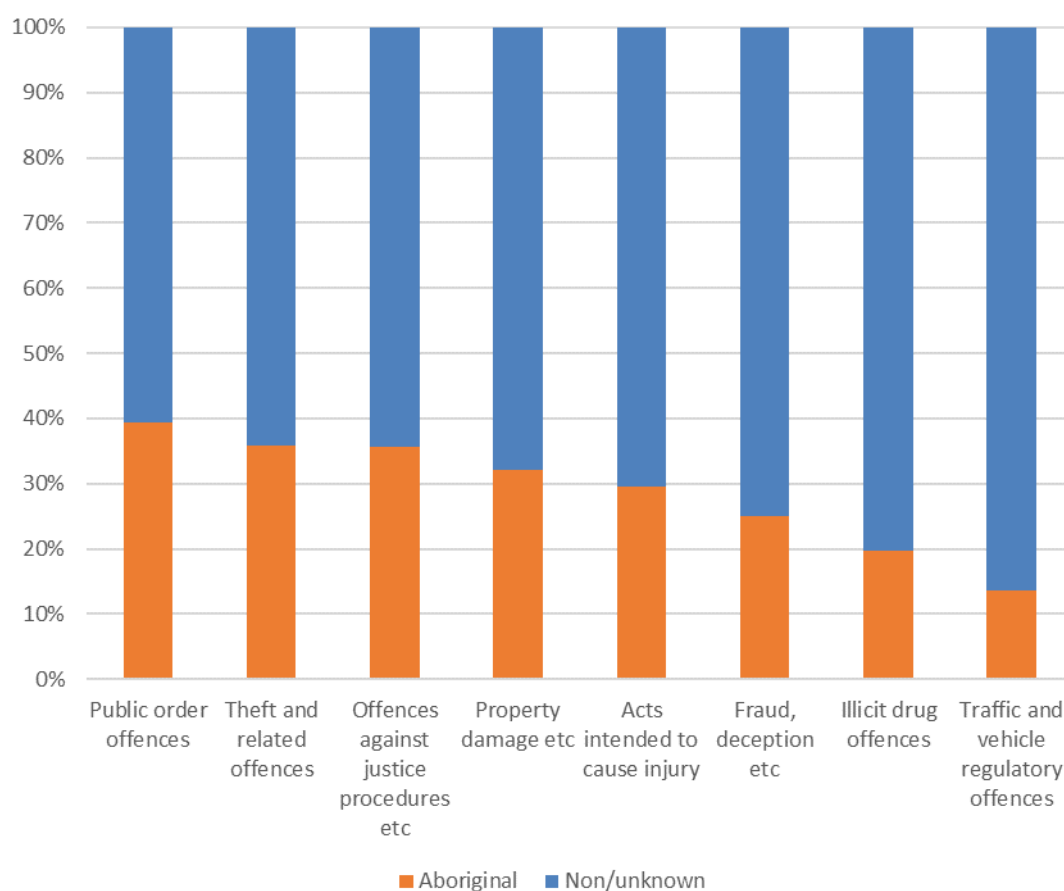
5.34 Figure 5.15 shows the percentage of Aboriginal women offenders for each offence category, compared with the percentage of non-Aboriginal women and women whose Aboriginal status is unknown. Given that Aboriginal women make up 24.1% of female offenders, it can be seen that Aboriginal women are significantly over-represented for:

- public order offences (39.4% of 734 offences)
- theft and related offences (35.9% of 2324 offences), and
- offences against justice procedures, etc (35.7% of 3223 offences)

5.35 On the other hand, Aboriginal women are under-represented for:

- traffic and vehicle regulatory offences (13.7% of 8698 offences), and
- illicit drug offences (19.7% of 2992 offences).

Figure 5.15: NSW higher and local criminal courts, proportion of Aboriginal and other female offenders for selected offence categories, 2019



Source: NSW Bureau of Crime Statistics and Research Reference: kf20-18790.

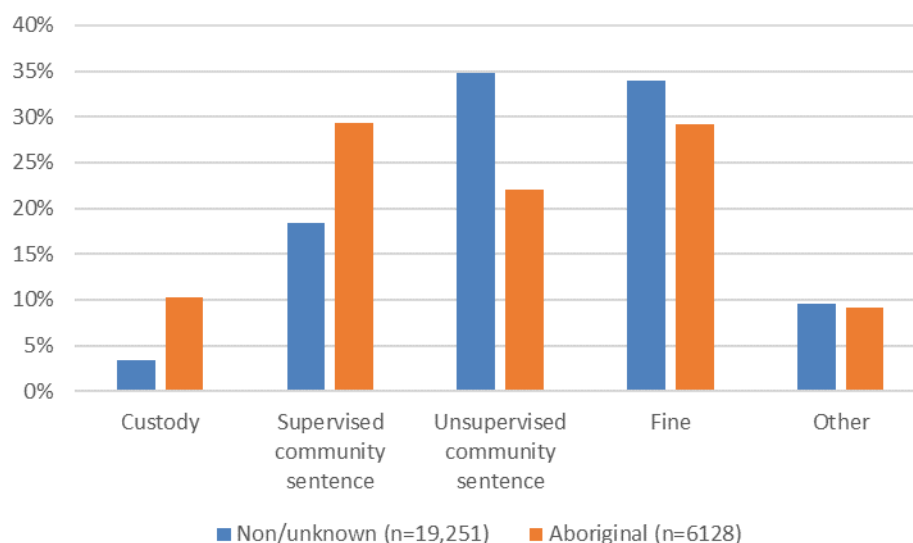
Sentencing patterns

- 5.36 Generally, it appears that when compared with women who are not Aboriginal or whose Aboriginal status is not known, Aboriginal women are more likely to receive a sentence of imprisonment or a supervised community sentence and less likely to receive an unsupervised community sentence or a fine.

Overall

- 5.37 Figure 5.16 shows that, in 2019, a greater proportion of Aboriginal women received either a sentence of imprisonment or a supervised community sentence. A smaller proportion of Aboriginal women received unsupervised community sentences or fines.
- 5.38 Further research is needed into the effectiveness of supervised community sentences for Aboriginal women.

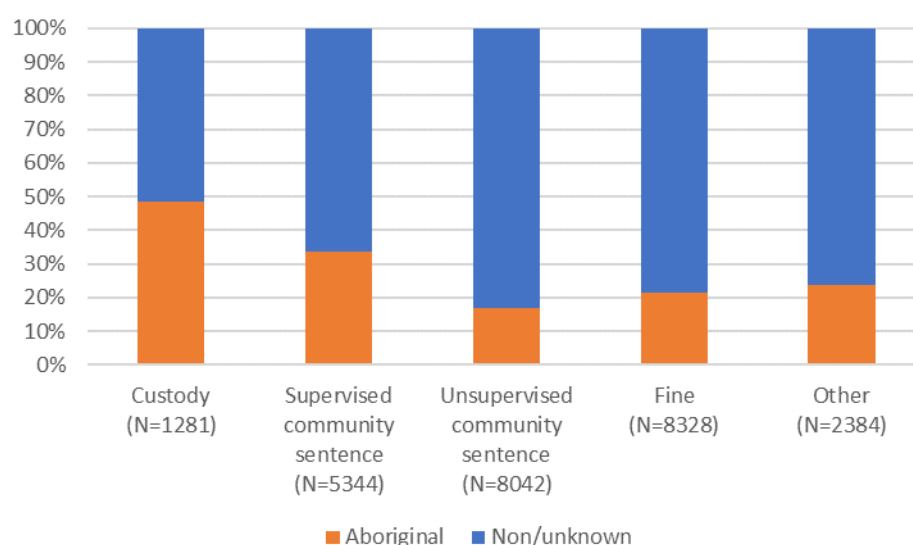
Figure 5.16: NSW higher and local criminal courts, proportion of penalties imposed on Aboriginal and other female offenders, 2019



Source: NSW Bureau of Crime Statistics and Research Reference: kf20-18790.

- 5.39 Figure 5.17 shows the proportion of Aboriginal women for each sentencing outcome. As we note above, Aboriginal women represent 3.4% of the female population in NSW and 24.1% of female offenders.
- 5.40 The proportion of Aboriginal women with imprisonment and supervised community sentences is substantially greater than 24.1%, while the proportion of Aboriginal women with unsupervised community sentences and fines is less than 24.1%.

Figure 5.17: NSW higher and local criminal courts, proportion of each penalty imposed on Aboriginal and other female offenders, 2019



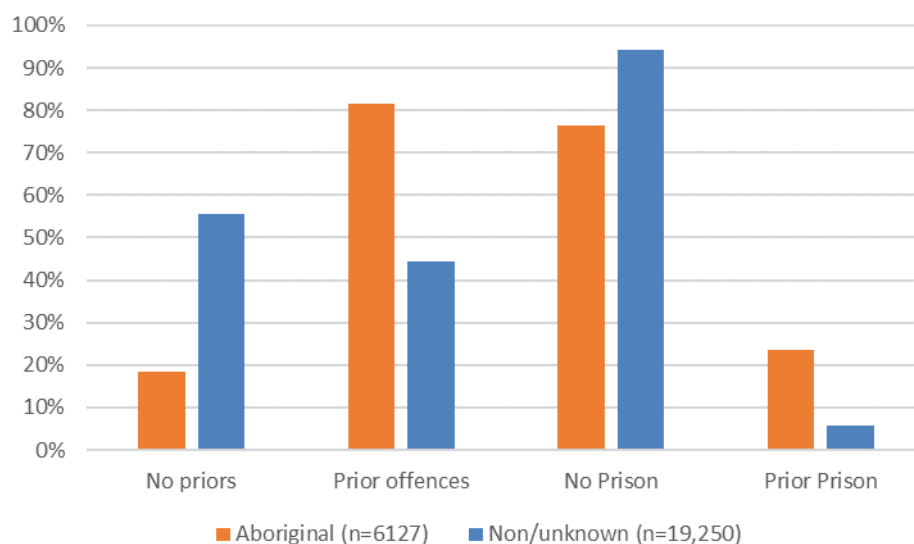
Source: NSW Bureau of Crime Statistics and Research Reference: kf20-18790.

Criminal history

5.41 Figure 5.18 shows the proportion of offenders with criminal histories in the past 5 years, including those with and without prior proven offences (including prior prison sentences) and those with and without prior prison sentences. It shows that:

- 18.4% of the 6127 Aboriginal women had no prior proven offences in the past 5 years, compared with 55.5% of the 19,250 women who were not Aboriginal or whose Aboriginal status was unknown, and
- 23.5% of the 6127 Aboriginal women had been sentenced to a term in prison in the past 5 years, compared with just 5.7% of the 19,250 women who were not Aboriginal or whose Aboriginal status was unknown.

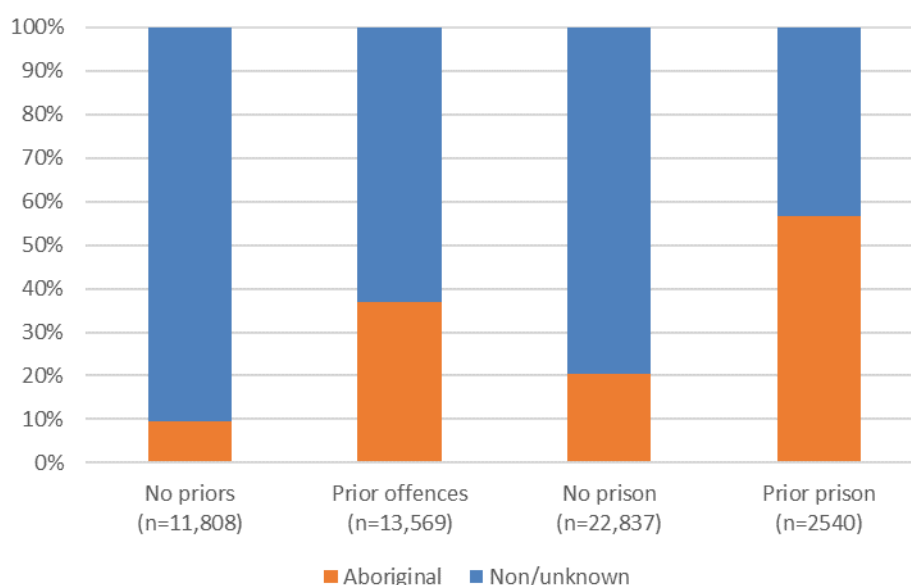
Figure 5.18: NSW higher and local criminal courts, proportion of Aboriginal and other female offenders by criminal history in the past 5 years, 2019



Source: NSW Bureau of Crime Statistics and Research Reference: kf20-18790.

5.42 Figure 5.19 shows the proportion of Aboriginal women in each of the prior criminal history categories. It shows that Aboriginal women represent only 9.5% of the 11,808 women with no prior proven offences in the past 5 years. It also shows that Aboriginal women represent 56.7% of the 2,540 women with a prison sentence in the past 5 years.

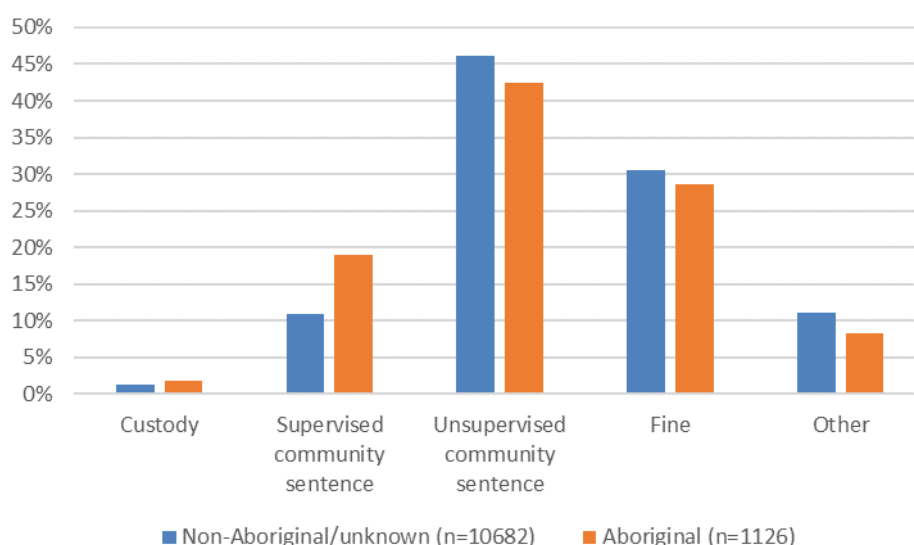
Figure 5.19: NSW higher and local criminal courts, proportion of Aboriginal and other female offenders according to criminal history in the past 5 years, 2019



Source: NSW Bureau of Crime Statistics and Research Reference: kf20-18790.

- 5.43 Each of the categories is important to consider for sentencing outcomes.
- 5.44 In 2019, there were 1126 Aboriginal women offenders who had no prior offences in the past 5 years. This compares with 10,682 women who were not Aboriginal or whose Aboriginal status was unknown. Figure 5.20 shows:
- a greater proportion of Aboriginal women received a supervised community sentence (18.9% compared with 10.9%), and
 - a slightly greater proportion of Aboriginal women (numbering only 20) received a custodial sentence (1.8% compared with 1.3%).

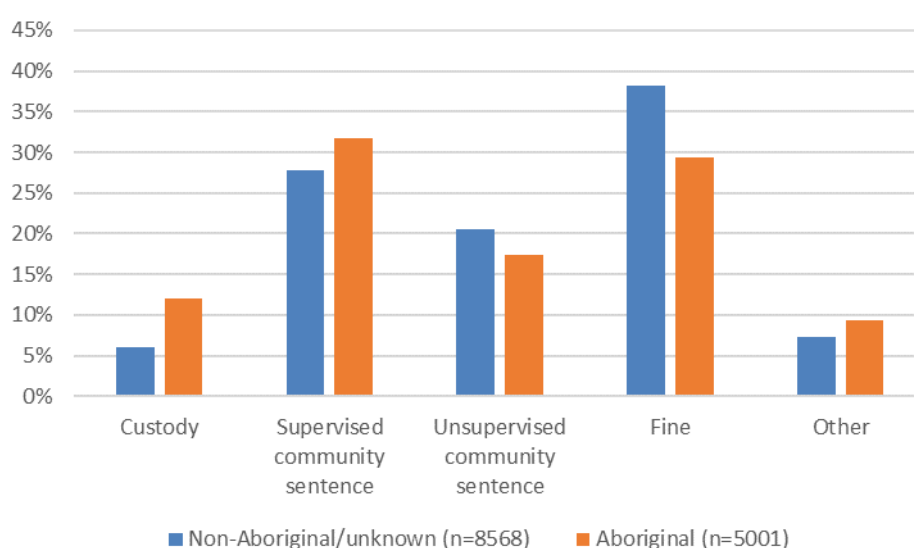
Figure 5.20: NSW higher and local criminal courts, proportion of penalties imposed on Aboriginal and other female offenders with no proven offences in the past 5 years, 2019



Source: NSW Bureau of Crime Statistics and Research Reference: kf20-18790.

- 5.45 In 2019, 5001 Aboriginal women offenders had committed another offence in the previous 5 years. This compares with 8568 women who were not Aboriginal or whose Aboriginal status was unknown. Figure 5.21 shows a greater proportion of Aboriginal women received a custodial sentence (12% compared with 6.1%). The higher proportion of custodial sentences may depend, in part, on the number and seriousness of past offences.

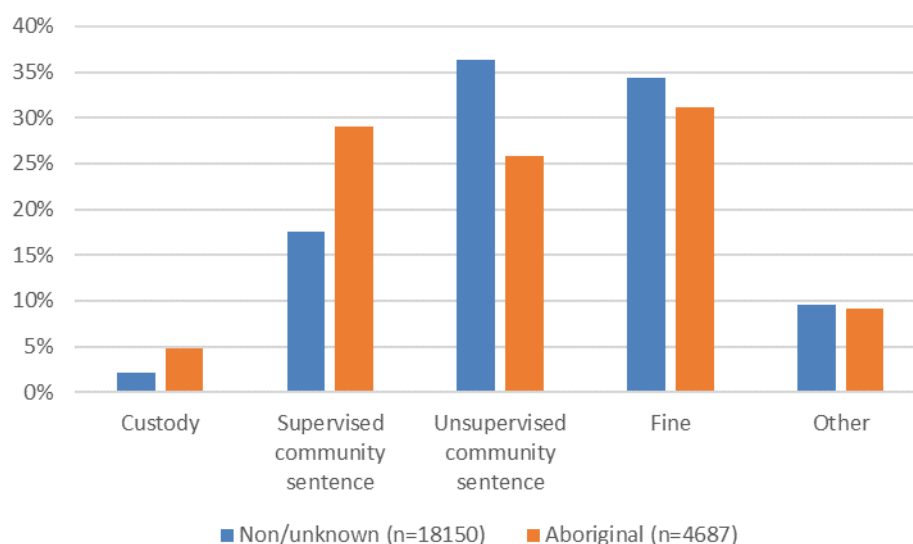
Figure 5.21: NSW higher and local criminal courts, proportion of penalties imposed on Aboriginal and other female offenders with proven offences in the past 5 years, 2019



Source: NSW Bureau of Crime Statistics and Research Reference: kf20-18790.

- 5.46 In 2019, 4687 Aboriginal women offenders had not received a custodial sentence in the past 5 years. This compares with 18,150 women who were not Aboriginal or whose Aboriginal status was unknown. This category includes those who have had no prior convictions as well as those who have had prior convictions but without imprisonment.
- 5.47 Figure 5.22 shows that a greater proportion of Aboriginal women received a supervised community sentence (29.1% compared with 17.5%). A greater proportion of Aboriginal women also received a custodial sentence (4.7% compared with 2.2%).

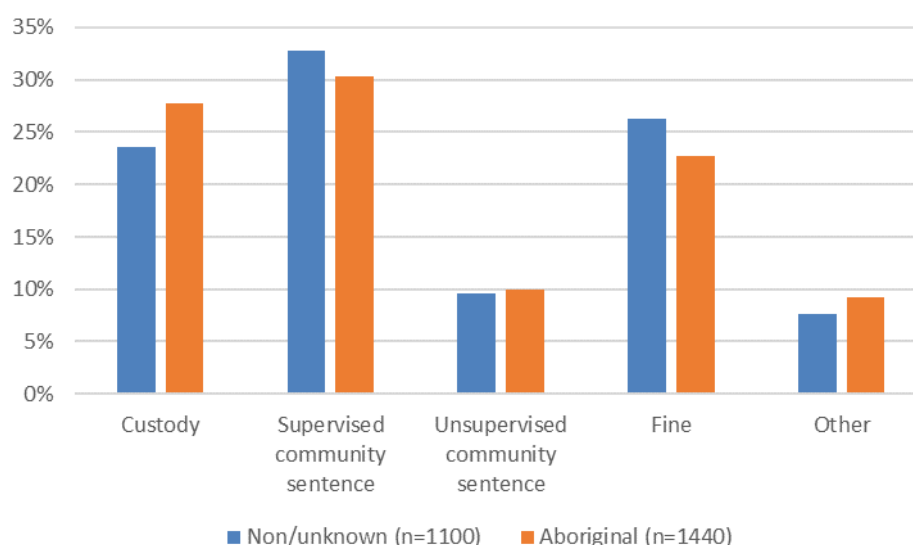
Figure 5.22: NSW higher and local criminal courts, proportion of penalties imposed on Aboriginal and other female offenders with no sentence of imprisonment in the past 5 years, 2019



Source: NSW Bureau of Crime Statistics and Research Reference: kf20-18790.

- 5.48 In 2019, 1440 Aboriginal women offenders had received a sentence of imprisonment in the past 5 years. This compares with 1100 women who were not Aboriginal or whose Aboriginal status was unknown.
- 5.49 Figure 5.23 shows that, even with this category, a greater proportion of Aboriginal women received another custodial sentence (27.8% compared with 23.6%). A slightly lesser proportion received a supervised community sentence (30.3% compared with 32.8%).

Figure 5.23: NSW higher and local criminal courts, proportion of penalties imposed on Aboriginal and other female offenders with a sentence of imprisonment in the past 5 years, 2019

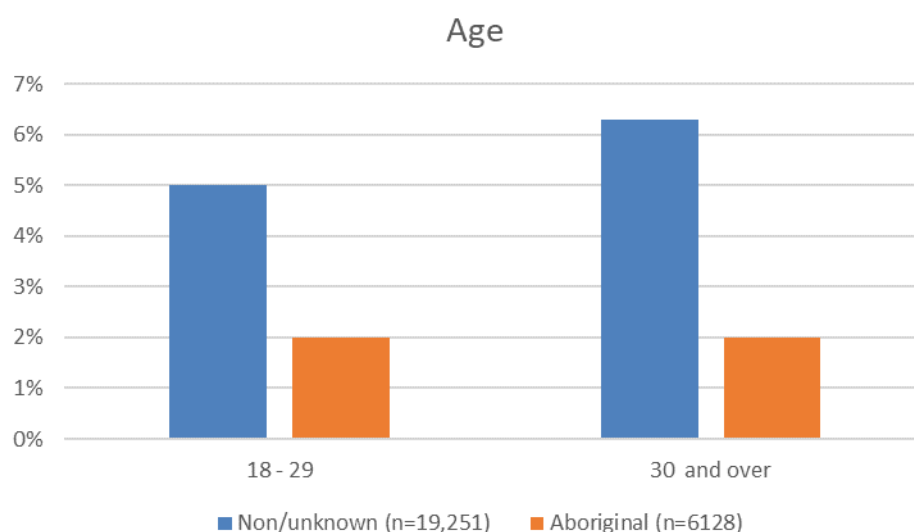


Source: NSW Bureau of Crime Statistics and Research Reference: kf20-18790.

Dismissals

- 5.50 In 2019, of the 6128 Aboriginal women offenders, 122 (2%) received a dismissal under s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) after being found guilty. This compares with 1115 (5.8%) of the 19251 of the women who were either not Aboriginal or whose Aboriginal status was not known.
- 5.51 Figure 5.24 shows that a greater percentage of older female offenders who were not Aboriginal or whose Aboriginal status was not known received s 10 dismissals compared with similar younger offenders. The proportion of Aboriginal offenders remained unchanged regardless of age.

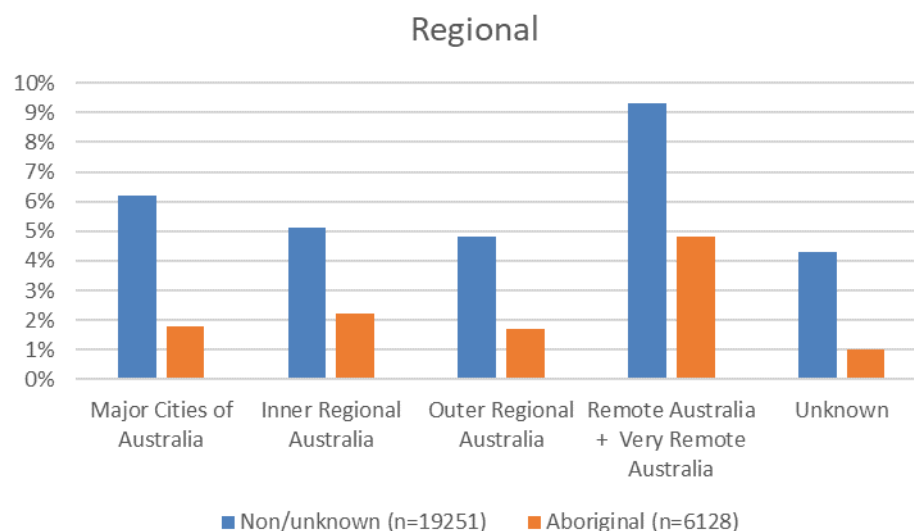
Figure 5.24: NSW higher and local criminal courts, proportion of Aboriginal and other female offenders receiving dismissals, by age, 2019



Source: NSW Bureau of Crime Statistics and Research Reference: kf20-18790.

5.52 Figure 5.25 shows that the difference persists across regions, including those where a greater proportion of s 10 dismissals are granted overall.

Figure 5.25: NSW higher and local criminal courts, proportion of Aboriginal and other female offenders receiving dismissals, by region, 2019

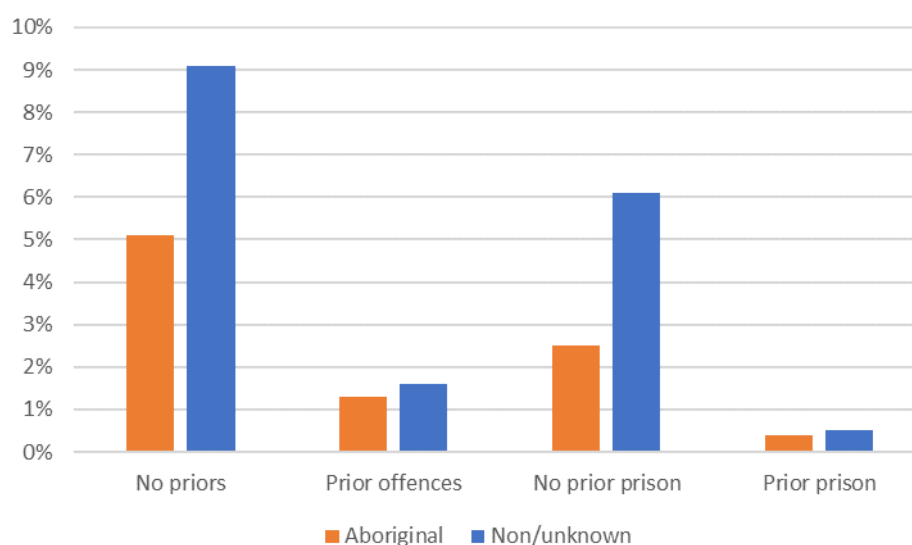


Source: NSW Bureau of Crime Statistics and Research Reference: kf20-18790.

5.53 Figure 5.26 shows that when an offender's criminal history in the past 5 years is taken into account, the difference in proportions between Aboriginal female offenders and other female offenders receiving dismissals is:

- much less favourable for Aboriginal women with no proven offences in the past 5 years compared with those who have proven offences in the past 5 years, and
- much less favourable for Aboriginal women who have not received a sentence of imprisonment in the previous 5 years compared with those who have.

Figure 5.26: NSW higher and local criminal courts, proportion of Aboriginal and other female offenders receiving dismissals, by criminal history, 2019



Source: NSW Bureau of Crime Statistics and Research Reference: kf20-18790.

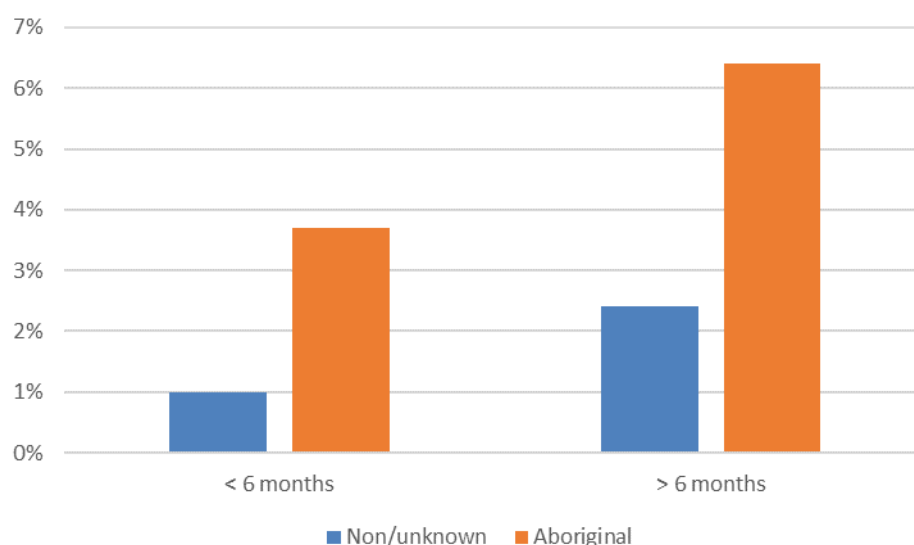
Short sentences

5.54 Figure 5.27 compares the proportion of women offenders who received a head sentence of imprisonment of up to 6 months with those who received a head sentence of imprisonment of more than 6 months. A head sentence is the maximum sentence (including any parole periods) to be served by an offender.

5.55 When compared with other female offenders, Aboriginal women were:

- about 3.7 times more likely to receive a head sentence of up to 6 months, and
- about 2.7 times more likely to receive a head sentence of more than 6 months,

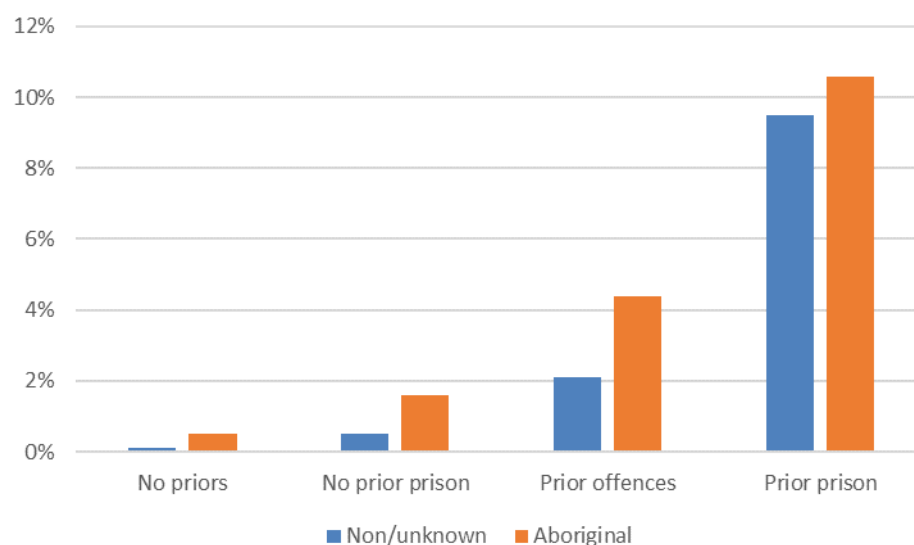
Figure 5.27: NSW higher and local criminal courts, proportion of Aboriginal and other female offenders receiving sentences of imprisonment, by length of head sentence, 2019



Source: NSW Bureau of Crime Statistics and Research Reference: kf20-18790.

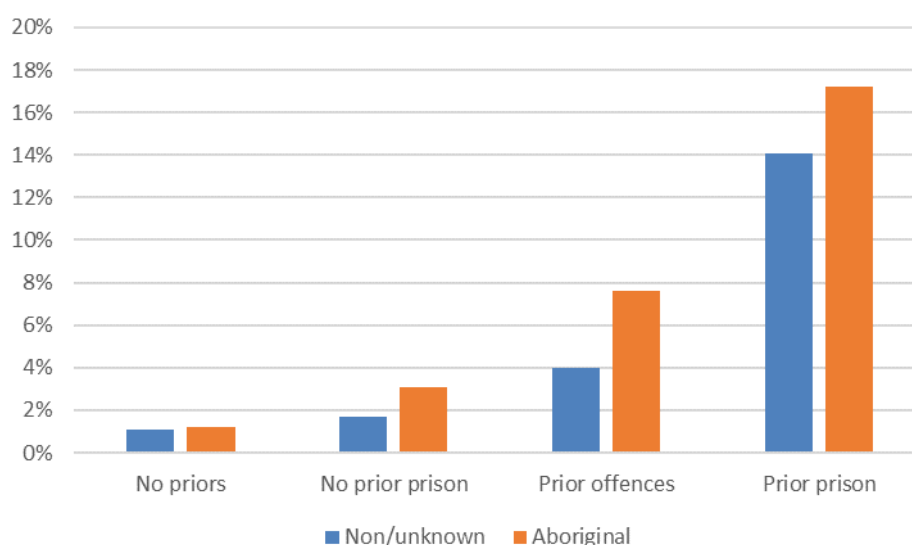
- 5.56 The following two figures set out the proportions of women offenders who received sentences of imprisonment of up to 6 months (Figure 5.28) and more than 6 months (Figure 5.29) based on criminal history in the past 5 years.

Figure 5.28: NSW higher and local criminal courts, proportion of Aboriginal and other female offenders receiving head sentences of up to 6 months, by criminal history, 2019



Source: NSW Bureau of Crime Statistics and Research Reference: kf20-18790.

Figure 5.29: NSW higher and local criminal courts, proportion of Aboriginal and other female offenders receiving head sentences of more than 6 months, by criminal history, 2019



Source: NSW Bureau of Crime Statistics and Research Reference: kf20-18790.

Selected offences

5.57 We have looked at the three most common offences committed by Aboriginal women. These offences are:

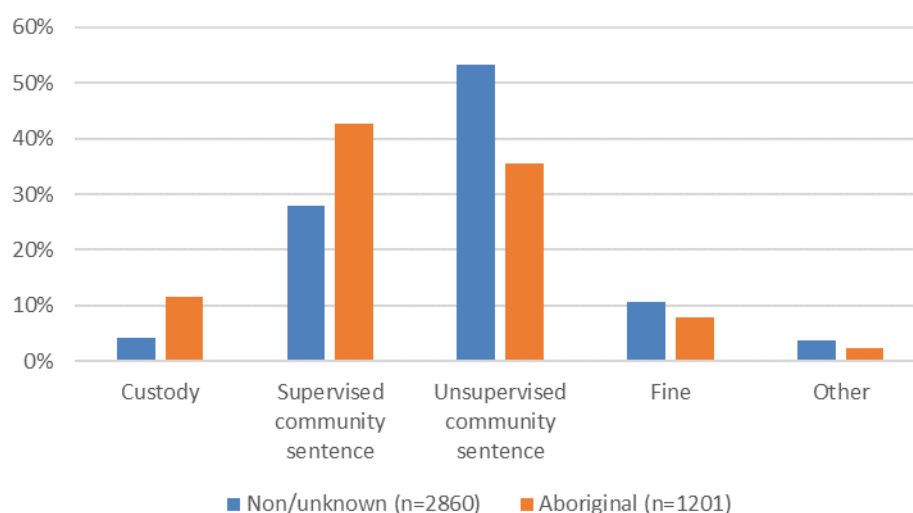
- acts intended to cause injury
- offences against justice procedures, government security and government operations, and
- theft and related offences.

5.58 The general patterns persist across these categories.

5.59 Figure 5.30 sets out the sentencing outcomes for the 1201 Aboriginal women and 2860 other female offenders for acts intended to cause injury, which include:

- serious assault resulting in injury
- serious assault not resulting in injury
- common assault
- intimidation/stalking, and
- other acts intended to cause injury.

Figure 5.30: NSW higher and local criminal courts, sentences imposed on Aboriginal and other female offenders for acts intended to cause injury, 2019

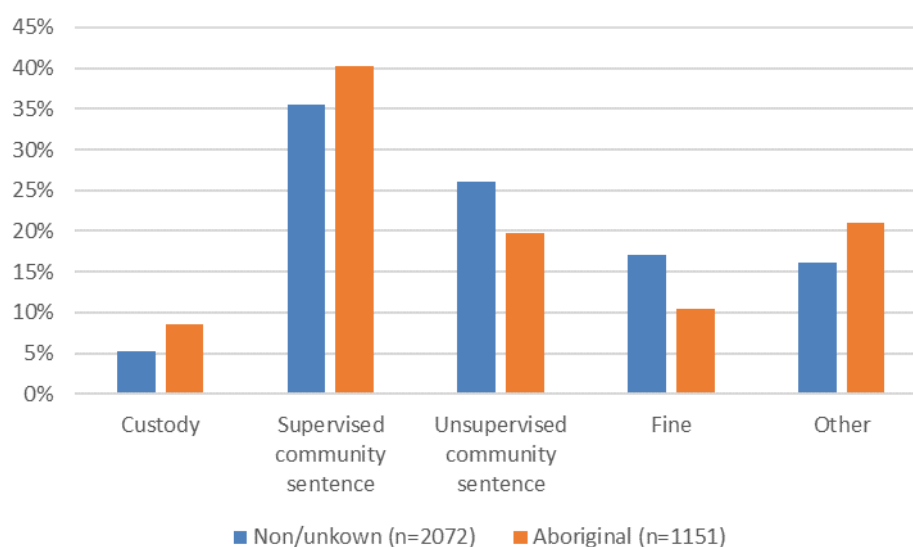


Source: NSW Bureau of Crime Statistics and Research Reference: kf20-18790.

5.60 Figure 5.31 sets out the sentencing outcomes for the 1151 Aboriginal women and 2072 other female offenders for the ASOC category of offences against justice procedures, government security and government operations, which includes:

- escape custody offences
- breach of community-based order
- breach of violence order
- resist or hinder police officer or justice official
- resist or hinder other government official, and
- prison regulation offences.

Figure 5.31: NSW higher and local criminal courts, sentences imposed on Aboriginal and other female offenders for offences against justice procedures etc, 2019

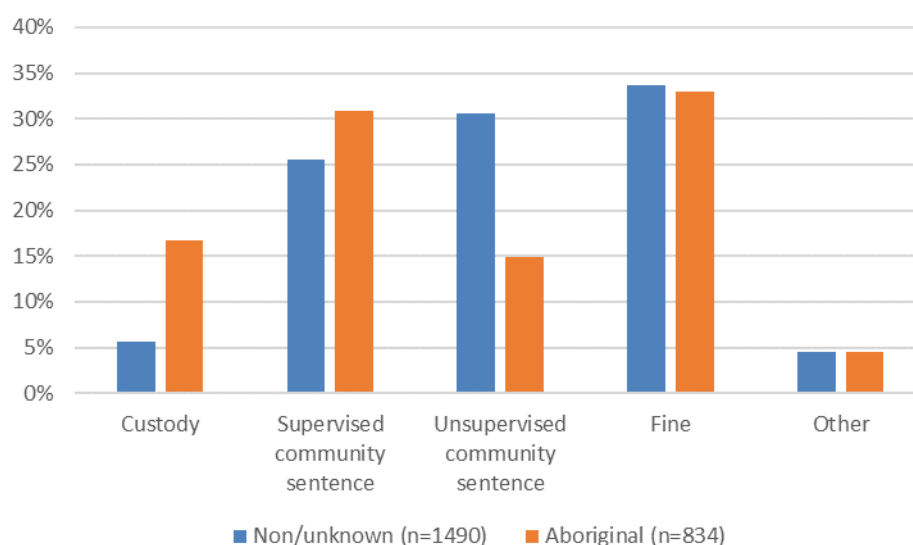


Source: NSW Bureau of Crime Statistics and Research Reference: kf20-18790.

5.61 Figure 5.32 sets out the sentencing outcomes for the 834 Aboriginal women and the 1490 other female offenders for the ASOC category of theft and related offences, which includes:

- theft of a motor vehicle
- illegal use of a motor vehicle
- theft from a person (excluding by force)
- theft from retail premises
- other theft, and
- receive or handle proceeds of crime.

Figure 5.32: NSW higher and local criminal courts, sentences imposed on Aboriginal and other female offenders for theft and related offences, 2019

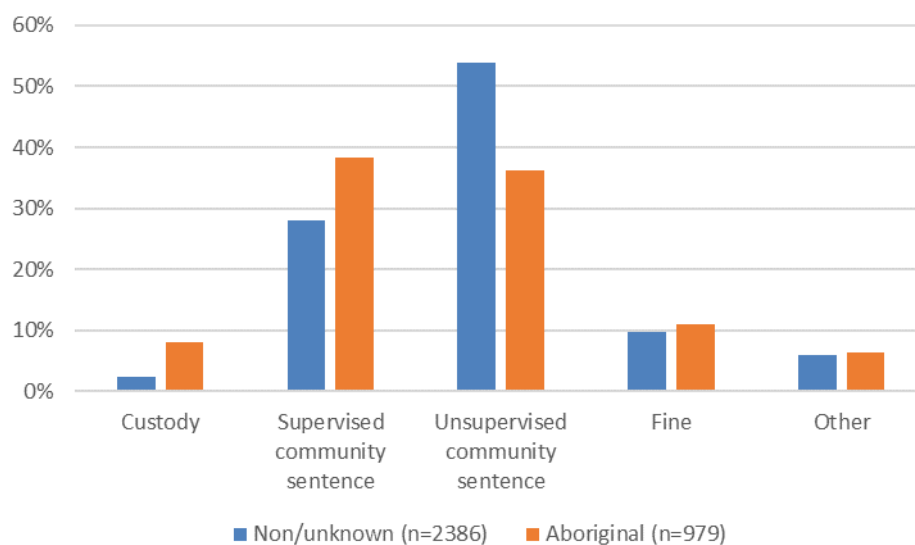


Source: NSW Bureau of Crime Statistics and Research Reference: kf20-18790.

Offences involving domestic violence

- 5.62 We have also examined offences that involved domestic violence within the following offence categories:
- acts intended to cause injury
 - offences against justice procedures, government security and government operations, and
 - property damage [and environmental pollution].
- 5.63 In 2019, 979 Aboriginal women committed these domestic violence related offences, compared with 2386 women who were either not Aboriginal or whose Aboriginal status was not known. Figure 5.33 shows that the data generally follows the same patterns as above.

Figure 5.33: NSW higher and local criminal courts, sentences imposed on Aboriginal and other female offenders for selected DV offences, 2019



Source: NSW Bureau of Crime Statistics and Research Reference: kf20-18790.

6. 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 part of the Policy, Reform and Legislation Branch of the Department of Communities and Justice) support our work.

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Functions of the Council

6.1 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:
 - (i) matters suitable for guideline judgments under Division 4 of Part 3, and
 - (ii) the submissions to the Court of Criminal Appeal to be made by the Minister in guideline proceedings,
- (c) to monitor, and to report annually to the Minister on, sentencing trends and practices, including the operation of standard non-parole periods and guideline judgments,
- (d) at the request of the Minister, to prepare research papers or reports on particular subjects in connection with sentencing,
- (e) to educate the public about sentencing matters.

Council members

- 6.2 The CSPA provides that the Sentencing Council is to consist of members with various qualifications.¹
- 6.3 The Council's members (and their qualifications) at the end of 2019 are set out below.

Chairperson

The Hon James Wood AO QC	Retired judicial officer
--------------------------	--------------------------

Members

His Honour Acting Judge Paul Cloran	Retired magistrate
(vacant)	Member with expertise or experience in law enforcement
Mr Lloyd Babb SC	Member with expertise or experience in criminal law or sentencing – prosecution
Ms Belinda Rigg SC	Member with expertise or experience in criminal law or sentencing – defence
Ms Christina Choi	Member with expertise or experience in criminal law or sentencing
Ms Felicity Graham	Member with expertise or experience in criminal law or sentencing
(vacant)	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
(vacant)	Member with relevant academic or research expertise or experience

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

- 6.4 In November 2019, Mr Christopher Craner, the member with expertise or experience in law enforcement resigned, upon his secondment to the Federal Police.
- 6.5 Mr Mark Ierace SC, the member with expertise or experience in criminal law or sentencing – defence, resigned effective upon appointment to the Supreme Court on 31 January 2019. Ms Belinda Rigg SC, Senior Public Defender was appointed to the position in July 2019.
- 6.6 The terms of 11 members expired in the second half of 2019. All, with the exception of Professor Megan Davis (member with expertise or experience in Aboriginal justice matters) and Professor David Tait (member with relevant academic or research expertise or experience), were reappointed.
- 6.7 We thank all retiring members for their commitment to the Sentencing Council.

Council business

- 6.8 Council meetings are scheduled on a monthly basis with business being completed at these meetings and out of session.
- 6.9 During 2019 we received presentations from:
- Assistant Commissioner Mick Corboy and members of the NSW Police Crash Investigation Unit who spoke to some of the issues raised in the Consultation Paper on repeat traffic offenders (17 April 2019).
 - Assistant Commissioner Rosemary Caruana from Corrective Services NSW who briefed the Council on risk assessment in the context of supervised orders (15 May 2019).
 - Anna Butler and Marisa Wright-Smith who spoke about the work of the Domestic Violence Death Review Team and the Secretariat that supports it as part of the Council's review of homicide (19 June 2019).
 - James Ferguson from Corrective Services NSW who provided information about the Sober Driver Program and TRIP program as part of the Council's review of repeat traffic offenders (20 November 2019).
- 6.10 The Council also welcomed Professor Dr Elisa Hoven from Universität Leipzig as a guest to the November meeting.
- 6.11 We have maintained close working relationships with the Bureau of Crime Statistics and Research, the Secretariat's colleagues within the Policy, Reform and Legislation Branch and other parts of the NSW Department of Communities and Justice.

Staffing

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

