Annual Report 2020

Sentencing Trends and Practices

New South Wales
Sentencing Council

NSW GOVERNMENT

NSW Sentencing Council

August 2021

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Cataloguing-in-publication

Cataloguing-in-publication data is available from the National Library of Australia.

ISBN 978-1-922254-51-1 (electronic)

ISSN 1835-5234

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Executive summary

0.1 This report details the projects the NSW Sentencing Council undertook in the 2020 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 2020:

- **Repeat traffic offenders:** reference received 18 April 2018; consultation paper released 4 December 2018; submissions received; report transmitted to the Attorney General 21 September 2020.
- **Homicide:** reference received 23 November 2018; preliminary submissions invited 7 December 2018; consultation paper released 31 October 2019; report completed in 2021.
- **Assaults on emergency services workers:** reference received 27 July 2020; submissions invited 5 August 2020; report completed in 2021.

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:

- Circle sentencing, incarceration and recidivism – *Crime and Justice Bulletin No 226* (April 2020).
- Public confidence in the New South Wales criminal justice system: 2019 update – *Crime and Justice Bulletin No 227* (June 2020).
- The impact of the 2018 NSW sentencing reforms on supervised community orders and short-term prison sentences – *Bureau Brief No 148* (August 2020).
- NSW sentencing reforms: Results from a survey of judicial officers – *Crime and Justice Bulletin No 230* (August 2020).
- The long-term effect of the NSW Drug Court on recidivism – *Crime and Justice Bulletin No 232* (September 2020).
- Evaluating the first tranche of the Table Offences Reform: Impacts on District Court finalisations, time to finalisation and sentencing outcomes – *Crime and Justice Bulletin No 231* (October 2020).

Cases of interest (Chapter 3)

0.4 In 2020, the NSW Court of Criminal Appeal ("CCA") and the Supreme Court of NSW delivered judgments of interest on the topics set out below.

0.5 Three of the cases raise potential law reform issues, in relation to:

- intensive correction orders and their operation when some offences are dealt with on a Form 1
- guideline judgments and the need for them to take into account 20 years of sentencing developments since they were handed down, and
- the operation of the historic child sex offence sentencing reforms when offenders, who were sentenced before the reforms, are resentenced on appeal after the reforms.

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- Approach to guideline judgments – *Foaiaulima v R* [2020] NSWCCA 270.
- Youthfulness as a factor in the Henry guideline – *Yildiz v R* [2020] NSWCCA 69.

The impact of COVID-19 on sentencing

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- COVID-19 as a factor on resentencing – *Scott v R* [2020] NSWCCA 81.
- Admissibility of evidence on appeal about the impact of COVID-19 – *Cabezuela v R* [2020] NSWCCA 107

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- Youthfulness and immaturity – *TL v R* [2020] NSWCCA 265, and *Singh v R* [2020] NSWCCA 353.

- Offences of violence committed against users of public transport – *Foaiaulima v R* [2020] NSWCCA 270.
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- Breach of trust in relation to social security offences – *Tham v R* [2020] NSWCCA 338.
- Breach of trust in relation to a job applicant – *Mohindra v R* [2020] NSWCCA 340.
- Firearms – inherent dangerousness – *Ah-Keni v R* [2020] NSWCCA 122.

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- Use of the expression “remarks on sentence” – *You v R* [2020] NSWCCA 71, and *Maxwell v R* [2020] NSWCCA 94.

Sentencing trends (Chapter 4)

Use of penalties

0.6 2020 was the second full year of operation of the new sentencing regime, which commenced in September 2018.

0.7 In 2020, 109,376 adult offenders were sentenced to one of the current penalties available in NSW.

0.8 The most common penalty was the fine (37.5%), followed by a community correction order (22%) and a conditional release order without a conviction (11.5%). A term of imprisonment was imposed in 10.5% of cases.

0.9 We particularly examined the proportion of each penalty imposed by gender and Aboriginal status.

0.10 We identified 19,255 Aboriginal men who received a relevant sentence in 2019, compared with 65,692 male offenders who were not Aboriginal or whose Aboriginal status was unknown.

0.11 Aboriginal men represent 3.5% of the male resident population in NSW. Yet male offenders who are recorded as Aboriginal represent:

- 22.7% of all male offenders
- 38% of male offenders sentenced to imprisonment for more than 6 months
- 46% of male offenders sentenced to imprisonment for 6 months or less
- only 6.9% of male offenders who did not have a conviction recorded, and
- only 7.7% of male offenders who received conditional release orders without a conviction.

0.12 Compared with other male offenders, a significantly greater proportion of Aboriginal men received sentences of imprisonment (21.8% compared with 9.4%) and a significantly smaller proportion of Aboriginal men received a sentence that did not involve a conviction (4.6% compared with 16.4%).

0.13 We identified 6,490 Aboriginal women who received a relevant sentence in 2020, compared with 16,851 women who were not Aboriginal or whose Aboriginal status was unknown.

0.14 Aboriginal women represent 3.4% of the resident female population in NSW. Yet, female offenders who are recorded as Aboriginal represent:

- 27.8% of all female offenders
- 45.8% of female offenders sentenced to imprisonment for more than 6 months
- 58.3% of female offenders sentenced to imprisonment for 6 months or less
- only 11.7% of female offenders who received conditional release orders without a conviction, and
- only 11% of female offenders who did not have a conviction recorded.

0.15 Compared with other offenders, a significantly greater proportion of Aboriginal women received sentences of imprisonment (8.5% compared with 3.2%) and a significantly smaller proportion of Aboriginal women received a sentence that did not involve a conviction (8.5% compared with 24.9%).

0.16 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.

Functions and membership of the Council (Chapter 5)

0.17 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. Due to the COVID-19 pandemic, the monthly meetings were held partly or wholly by remote connection from 18 March 2020.

0.18 There are 16 members of the Council representing a range of experience and expertise.

0.19 On 1 February 2020, the Hon James Wood AO, QC, resigned as Chairperson. The Hon Peter McClellan was appointed to the role on 1 June 2020.

0.20 On 1 June 2020, Assistant Commissioner Scott Cook was appointed to the Council as member with expertise or experience in law enforcement, and Ms Karly Warner was appointed member with expertise or experience in Aboriginal justice matters.

0.21 On 18 September 2020, Professor John Anderson was appointed member with relevant academic or research expertise or experience.

0.22 Three members were reappointed after their terms expired in the second half of 2020.

0.23 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.

0.24 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.

1. The Council's projects

In Brief

We worked on three projects in 2020: repeat traffic offenders; homicide and assaults on emergency services workers. We produced a report on repeat traffic offences, worked on a report on homicide, and invited submissions and conducted consultations about assaults on emergency services workers.

1.1 In 2020, we completed one project, and had two ongoing projects:

- repeat traffic offenders (completed)

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

Report

1.7 We transmitted our report to the Attorney General on 21 September 2020. The report was released on 15 December 2020. It made 12 recommendations. We summarise the contents of the report below.

Introduction

1.8 The existing penalty system for traffic offences works relatively well for the vast majority of drivers. It is not necessarily effective, however, for the relatively small number of traffic offenders who continue to offend in ways that pose an ongoing risk to the community. The report, therefore, identifies and deals with repeat serious traffic offenders.

1.9 Drivers with one or more offences (including high risk offences) in the past 5 years are overrepresented in fatal and serious injury crashes, while drivers with no offences are underrepresented. Nevertheless, drivers with multiple offences (including high risk offences) account for 3% of all licence holders. We estimate that there are approximately 10,000 offenders a year who are dealt with by the courts for repeat major offences for the purposes of the *Road Transport Act 2013* (NSW). However, we also note that the reoffending rates for driving offences that involve a specified harm or risk of harm (such as death or bodily harm) are relatively low when compared with the rates for serious assault.

1.10 The report concludes that serious repeat traffic offenders should generally be subject to program requirements and similar interventions aimed at changing offending behaviour. This is preferable to simply increasing levels of punishment either for serious first offences or repeat offences. Our recommendations also seek to focus on the group of repeat serious traffic offenders who are not already potentially subject to specific, targeted interventions.

1.11 In order to reinforce the deterrent message, we recommend further raising community awareness of available penalties for traffic offences, including the fact that some driving offences are punishable by imprisonment. (**Recommendation 1.1**)

Offence and offender categories and their coverage

1.12 The category of "major offence" used by the *Road Transport Act 2013* (NSW) is inadequate for identifying high risk repeat offenders. It is both over inclusive (in that it covers low range alcohol offences) and under inclusive (in that it does not include any speeding offences, not even high range speeding offences).

1.13 Rather than proposing significant amendments to the definition of "major offence", which would have consequences for the administration of existing parts of the *Road Transport Act 2013* (NSW), we propose a new category of "repeat serious traffic offender" which seeks to include offences that can be identified with high risk driving activities. However, we do propose one minor amendment relating to dangerous driving offences. Although technically included, the dangerous driving offences in s 52A of the *Crimes Act 1900* (NSW) should be expressly included in the definition of "major offence". (**Recommendation 2.1**)

1.14 A "repeat serious traffic offender" should be anyone convicted of a "major offence" (according to the *Road Transport Act*) that has a sentence of imprisonment as a maximum penalty or of various unauthorised racing and related offences, and has committed at least one other such offence in the previous 5 years. (**Recommendation 2.2**) We equate the offences included in this definition with high risk driving activities.

1.15 This definition of "repeat serious traffic offender" should not include unauthorised driving generally, and instead should focus on the offences that lead to the disqualification of the driver or suspension of the licence in the first place.

1.16 We use this definition of "repeat serious traffic offender" in our recommendations to determine:

- eligibility for programs that address attitudes to risk (chapter 3 of the report)
- ineligibility for a restricted (or "work") licence (chapter 4 of the report), and
- eligibility, in certain circumstances, to take part in a sober driver program as a program that addresses attitudes to risk (chapter 5 of the report).

1.17 We considered expanding the circumstances that amount to dangerous driving under s 52A of the *Crimes Act 1900* (NSW), in particular, to include mobile telephone use. We concluded that there was insufficient evidence about driver distraction to support such a change. However, we do recommend making it easier to prove dangerous driving offences involving drugs by allowing blood samples to be taken from a driver when an accident results in grievous bodily harm. (**Recommendation 2.3**)

Addressing the attitudes to risk of repeat serious traffic offenders

1.18 Transport for NSW should consider developing programs that address repeat serious traffic offenders' attitudes to risk and should be empowered to require that a repeat serious traffic offender complete such a program before they can drive again. Such

programs should also be available as a condition of a sentencing order and should also be available to prisoners, whether on remand or serving a sentence of imprisonment. (**Recommendation 3.1**)

1.19 Programs aimed at changing driver attitudes to risk and risk management are particularly relevant for repeat offenders who are unaffected by the current penalty regime. There are a number of programs that currently address drivers' attitudes to risk, including the TRIP program (in NSW), the RYDA program (in NSW), and the UK National Speed Awareness Course.

1.20 The programs should be targeted at those drivers who are potentially not subject to other available programs, such as drug and/or alcohol related schemes. Making any programs available to offenders who are in custody or as a condition of a sentencing order will help ensure that all who may benefit can take part.

1.21 The programs should also be made available state-wide in a timely, efficient way and disadvantaged offenders should not be prevented from taking part because of the cost of a program.

1.22 There is already some limited evidence about the effectiveness of such approaches. However, we recommend that the introduction of these intensive programs be accompanied by a rigorous evaluation of their effectiveness for repeat serious traffic offenders.

Restricted licences

1.23 A restricted licence scheme, sometimes also referred to as a "work licence" scheme, should be introduced for appropriate cases to avoid the disproportionate impact (and negative safety outcomes) of the automatic disqualification regime particularly in relation to Aboriginal people, and rural and other disadvantaged communities. (**Recommendation 4.1**)

1.24 A restricted licence would be available for drivers facing disqualification after court proceedings. It is intended only for cases where drivers, who are not repeat serious traffic offenders, do not pose a traffic safety risk to the community and loss of a licence would make it practically impossible for them or their family members to seek or provide essential medical treatment or care, or to participate in employment or meet obligations arising from legal proceedings.

1.25 Excluded from the scheme would be drivers who are:

- subject to mandatory alcohol interlock
- subject to a mandatory program as a result of high range speeding that we propose in Recommendation 6.2, or
- convicted of one of the unauthorised driving offences, except for those who are driving while their licence is suspended for non-payment of fines.

1.26 The conditions of a restricted licence may include restrictions as to time, locality, type of vehicle and purpose of the trip. A driver who breaches any conditions will be returned to a court which may revoke the licence.

1.27 There are costs involved in a restricted licence scheme, but also benefits which outweigh them.

1.28 A restricted licence scheme would allow some offenders to participate in necessary activities without further offending or taking part in associated risky behaviours that may be associated with unauthorised driving. It would reduce reoffending and the associated costs in court time and, in some cases, imprisonment. Restricted licences also aim to avoid the "double punishment" imposed on drivers who often live in areas that are inadequately served by public transport (such as rural or outer urban areas). The scheme would also benefit drivers' broader networks. For example, it would lessen the negative (and potentially criminogenic) impact of a license disqualification on a driver's family, and would ensure continuation of the family's level of income.

1.29 These benefits outweigh the concerns about detecting non-compliance and practical concerns about the movement of necessary data between the relevant electronic data systems maintained by Transport for NSW, the Department of Communities and Justice and the NSW Police Force. While making such changes may be difficult, especially with legacy systems, it is not impossible. Forms of technology used to monitor drivers, when rolled out for other purposes, may also be adapted to monitor drivers who are subject to restricted licences.

1.30 We suggest a trial period for the scheme that is not geographically restricted. The scheme should only be extended if positively reviewed.

Drug and alcohol repeat offenders

1.31 Alcohol and drug use is one of the top factors involved in traffic accidents that result in death or serious injury.

1.32 In light of recent changes to the law around drug and alcohol driving offences, we recommend only a number of small changes to improve the operation of the system and reduce the possibility of repeat offending that risks community safety.

1.33 The law should be changed to allow drivers to apply to a court for an alcohol interlock exemption when their circumstances change. (**Recommendation 5.1**) This would remedy the anomaly that a driver who must undertake an interlock period cannot apply for an interlock exemption if there has been a change in circumstances.

1.34 It should also be possible to require a driver who is subject to a mandatory alcohol interlock order to undertake a drink driving or related education program. (**Recommendation5.2**) Some research has found that drink driving behaviour tends to return after an interlock period ends, and suggests there is a need to combine interlock programs with interventions that are more likely to foster long-term behavioural change.

1.35 The NSW Sober Driver Program is a 3-day (20-hour total) therapeutic course that seeks to change the "attitudes and behaviours of repeat and high-risk drink drive offenders". Studies have found it effective in reducing repeat drink driving offences. Currently it is limited to offenders under an interlock exemption order or who are subject to a community-based order arising from a drink driving offence. The Sober Driver Program (or equivalent program) should therefore also be made available

- as a specified alcohol or other drug education program under the yet to be commenced s 215C of the *Road Transport Act 2013* (NSW)
- as a drink driving or related education program for drivers under a mandatory interlock order (see Recommendation 5.2), and
- as a program that satisfies the program requirement for a suspended or disqualified repeat traffic offender to drive again (see Recommendation 3.1), so long as one of the qualifying offences involved the use of drugs or alcohol. (**Recommendation 5.3**)

High range speeding offenders

1.36 Drivers who exceed the speed limit by more than 45km/h are a relatively small group of offenders with a relatively high rate of reoffending. Such speeding carries a high risk of serious injury and death. We recommend a number of approaches to reduce the high risk of reoffending.

1.37 The current outdated speed inhibitor provisions should be replaced by a provision that is flexible enough to allow a variety of technological options for limiting and monitoring a driver's speed. (**Recommendation 6.1(1)**) Trials of speed limiting and monitoring technology in NSW and elsewhere have shown that intelligent speed adaptation (ISA) devices can stop at least some drivers from speeding while the devices are in place. They can, therefore, reduce accidents and deaths that result from speeding.

1.38 As part of these new arrangements, the government should investigate the feasibility of a speed monitoring/limiting program that allows selected speeding offenders to have part of their suspension period lifted where they have an ISA device fitted to their vehicle. (**Recommendation 6.1(2)**) Since speeding usually results in suspension after a penalty notice has been issued, the requirement to participate would be imposed by Transport for NSW rather than the courts.

1.39 Given the relatively high chance of reoffending, many among the high range speeding offenders would benefit from being required to undertake a program aimed at changing their attitudes to risk and, consequently, their offending behaviour. It should, therefore, be possible for Transport for NSW to require a driver who has exceeded the speed limit by more than 45km/h to participate in a program proposed by Recommendation 3.1. Any period of suspension or disqualification should not end until the driver has undertaken the program to the satisfaction of Transport for NSW. (**Recommendation 6.2**) Because of the need for further evidence and analysis to determine the benefits and costs of such a scheme, we consider that there should be a trial subject to review

by Transport for NSW. Any such trial should be available across the state and, specifically, not limited to metropolitan areas.

1.40 In NSW, a driver who exceeds the speed limit by more than 45km/h is subject to a fine of $3,300 (30 penalty units) and 6 months disqualification, or, in the case of the driver of a heavy vehicle or coach $5,500 (50 penalty units) and 6 months disqualification. When dealt with as a penalty notice offence, the fines range (depending on vehicle type and whether or not the offence occurs in a school zone) between $2435 and $3821.

1.41 The extreme risk of injury or death involved in exceeding the speed limit by more than 45km/h and the obviously deliberate nature of such offending, warrants more serious maximum penalties than these. Therefore, a driver who exceeds the speed limit by more than 45km/h and has, in the previous 5 years, committed one or more offences of exceeding the speed limit by more than 45km/h should not be dealt with by way of penalty notice but should instead be subject to a maximum penalty of:

- imprisonment for 9 months and/or 50 penalty units, and automatic disqualification for 12 months (with a minimum disqualification of 6 months), or
- imprisonment for 12 months and automatic disqualification for 12 months (with a minimum disqualification of 6 months), in the case of the driver of a heavy vehicle or coach. (**Recommendation 6.3**)

1.42 Since demographic information is not included in penalty notice records, the government should closely monitor the impact of these new penalties on vulnerable communities.

Homicide

Terms of reference

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

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

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

Preliminary submissions

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

Consultation paper and submissions

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

1.46 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.

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

Report

1.48 The report was completed in 2021. A summary of the contents of the report will be included in our 2021 *Annual Review*.

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

Assaults on emergency services workers

Terms of reference

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

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

Submissions

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

Consultations

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

Report

1.52 The report was completed in 2021. A summary of the contents of the report will be included in our 2021 *Annual Review*.

2. Sentencing related research

In Brief

In 2020, the NSW Bureau of Crime Statistics and Research produced all the notable research relating to the operation of sentencing in NSW. The studies related to the effectiveness of legislation (reform to community-based sentencing options, Table Offence Reform) and programs (Circle Sentencing, the NSW Drug Court) as well as an update on public confidence in the NSW criminal justice system.

2.1 This chapter summarises notable research relating to the operation of sentencing in NSW that was conducted in 2020. The NSW Bureau of Crime Statistics and Research ("BOCSAR") produced the research summarised below.

Circle sentencing, incarceration and recidivism

NSW Bureau of Crime Statistics and Research, *Crime and Justice Bulletin,* No 226 (April 2020) by Steve Yeong and Elizabeth Moore

2.2 This study explored whether participating in Circle Sentencing made an offender less likely to receive a sentence of imprisonment, less likely to reoffend and, where they do reoffend, take longer to do so.

2.3 Circle Sentencing typically involves a presiding magistrate determining the appropriate sentence by working with a group of Aboriginal elders, victims, respected members of the community and the offender's family.

2.4 The authors used BOCSAR'S Reoffending Database and the internal database of the Aboriginal Services Unit (of the Department of Communities and Justice) to compare outcomes from 656 court appearances finalised through Circle Sentencing with over 90,000 appearances finalised through traditional sentencing from 1 March 2005 and 31August 2018.

2.5 After controlling for factors like age, gender, socio-economic status and prior sentences, the study found that, compared to offenders sentenced traditionally, those who participated in Circle Sentencing:

- had an imprisonment rate of less than half
- were nearly 10% less likely to reoffend within 12 months, and
- when they did commit a new offence within 12 months, took 55 days longer to reoffend.

2.6 The study demonstrates that Circle Sentencing is associated with lower levels of incarceration and recidivism, though the authors acknowledge that selection bias may be responsible for their results.

Public confidence in the New South Wales criminal justice system: 2019 update

NSW Bureau of Crime Statistics and Research, *Crime and Justice Bulletin,* No 227 (June 2020) by Elizabeth Moore

2.7 This is the fourth wave in BOCSAR's *Confidence in the Criminal Justice System Survey.* Similar studies have been conducted in 2007, 2012, and 2014. This summary focuses on perceptions of sentencing and of the criminal justice system.

2.8 The current study surveyed 2,000 NSW residents to:

- explore the level of public confidence in the NSW criminal justice system in 2019, and the variation in confidence levels across different segments of the population, and
- document changes in public confidence, knowledge of the criminal justice system and punitive attitude from 2007 to 2019.

Views on sentencing

2.9 The majority of respondents (66%) felt that sentences were “a little” or “much” too lenient. Just under 30% of respondents felt that sentences handed down were “about right”.

2.10 Perceptions of punitiveness in sentencing have fluctuated over time. The percentage of respondents who consider sentences to be “much too lenient” was 39% in 2007, and dropped to just over 31% in 2012, before rising and remaining steady (36% in 2014 and 35% in 2019).

2.11 After adjusting for socio-demographic factors (such as age, income and level of education) and perceptions of crime, the proportion of respondents who viewed sentences as “about right” was significantly lower in 2019 compared with 2007.

Perceptions of the criminal justice system

2.12 Respondents were asked to rate their confidence in five dimensions of the criminal justice system. Results are outlined below, and compared with 2007 levels.

Dimension of criminal justice system	Respondents “fairly” or “very” confident	Comparison to 2007 confidence levels
Respecting the rights of the accused	74%	Similar
Treating the accused fairly	74%	Decrease
Bringing people to justice	60%	Similar
Meeting the needs of victims	44%	Increase
Dealing with cases promptly	31%	Similar

2.13 It is important to note that the 2014 survey found a significant increase in confidence across all dimensions compared to 2007. The current results therefore point to a decrease of confidence since the last survey.

2.14 A comparison of confidence levels in the police and the courts demonstrates that:

- police were rated higher in terms of bringing people to justice, meeting the needs of victims and dealing with cases promptly, and
- courts were rated slightly higher in terms of respecting the rights of the accused and treating the accused fairly.

2.15 The authors note that the introduction of significant criminal justice reforms and a slight increase in accurate knowledge of crime trends have not translated into increased

confidence in the criminal justice system. In order to increase confidence, they recommend exploring opportunities to:

- make independent reports and crime trends and court penalties accessible to the general public
- improve community knowledge about the intersection between police and the court system, and
- use social media to target criminal justice information directly to young people.

2.16 These results demonstrate a decrease in confidence over time. The 2014 survey found a significant increase in confidence across all dimensions compared with 2007, but this boost has not been sustained.

The impact of the 2018 NSW sentencing reforms on supervised community orders and short-term prison sentences

NSW Bureau of Crime Statistics and Research, *Bureau Brief* No 148 (August 2020) by Neil Donnelly

Background

2.17 The *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* reformed community-based sentencing options, in response to recommendations made by the NSW Law Reform Commission in 2013.[1]

2.18 The reforms aimed to facilitate flexibility for sentencing judges, allowing them to respond to the circumstances of the individual offender. The main changes were:

- abolition of the suspended sentence
- a new intensive corrections order, replacing the old intensive corrections order and home detention
- a new community correction order, replacing the community service order and good behaviour bond, and
- a new conditional release order, replacing the conditional discharge bond or order.

1. NSW Law Reform Commission, *Sentencing,* Report 139 (2013).

Study

2.19 The study aimed to determine if the new sentencing regime:

- increased the percentage of adult offenders who received a supervised community-based order, and
- decreased the percentage of adult offenders who received a short-term prison sentence.

2.20 Using BOCSAR's Reoffending Database, sentencing outcomes were compared for the periods 24 September 2017–23 September 2018, and 24 September 2018–31 January 2020.

2.21 The study found that both in the Local Court and in the District and Supreme Courts, the percentage of adult offenders receiving a community-based order increased significantly following the reforms. Additionally, a significant decrease in the percentage of offenders receiving a short-term sentence of imprisonment (12 months or less) was found in relation to all courts. These findings remained valid after controlling for other factors influencing sentencing outcomes, such as offence type, number of concurrent offences, plea and prior offending.

2.22 In the Local Court, the results found above were even more pronounced in relation to domestic violence offenders and offenders who were Aboriginal. This was not replicated in the higher courts, but this could be explained by a low sample size.

2.23 Further research is required to determine if the increase in community-based orders led to a reduction in reoffending rates.

NSW sentencing reforms: results from a survey of judicial officers

NSW Bureau of Crime Statistics and Research and Judicial Commission of NSW, *Crime and Justice Bulletin,* No 230 (August 2020) by Elizabeth Moore, Suzanne Poynton, Pierrette Mizzi and Una Doyle

2.24 This study sought to explore the perspectives of judicial officers on the sentencing reforms outlined above [2.17]–[2.18]. In particular, the study sought data and opinions on:

- judicial officers' perceptions of the sentencing reforms; particularly perceptions of whether they had created greater flexibility in sentencing decisions

- whether the process of obtaining a Sentence Assessment Report (SAR)[2] had improved (previously, there were several types of report, depending on the order being considered), and
- any barriers to implementing the new orders in this sentencing regime.

2.25 Overall, the majority of judicial officers agreed that the reforms were operating as intended. In particular, the majority felt that the new sentencing options provided more flexibility in sentencing, and had increased the availability of community-based orders (71% agreed). Nearly two-thirds of judicial officers felt that SARs provided sufficient information to assess the appropriateness of making a community-based order.

2.26 Concerns raised with the scheme included:

- the deterrent value of an intensive correction order is reduced if breaches are inadequately dealt with
- inappropriate exclusions from the regime (for example, sexual offences involving children where both parties were minors)
- difficulties in imposing the full range of conditions because of the lack of services, particularly in rural areas (for example, rehabilitation programs and options for community service work), and
- inadequate implementation of supervision conditions.

2.27 In relation to the final point, Community Corrections can suspend a supervision condition if an offender is assessed at a low or medium risk of reoffending. Nearly half of the judicial officers surveyed commented that suspension of supervision after it was deemed necessary reduced the effectiveness of an intensive corrections order at ensuring the protection of the community.

2.28 The authors suggest that addressing these practical issues would lead to judicial officers using community-based sentencing options more frequently.

2. Document provided by Community Corrections to assist a judicial officer determine an appropriate sentence.

The long-term effect of the NSW Drug Court on recidivism

National Drug and Alcohol Research Centre and NSW Bureau of Crime Statistics and Research, *Crime and Justice Bulletin,* No 232 (September 2020) by Don Weatherburn, Steve Yeong, Suzanne Poynton, Nikky Jones and Michael Farrell

2.29 The NSW Drug Court has been in operation since 1999. It provides a treatment program in lieu of imprisonment to individuals dependent on prohibited drugs who are charged with an offence which can be dealt with summarily (other than serious offences).

2.30 Comparing Drug Court participants with people deemed eligible for the program but not accepted (due to over-demand), the study examined whether the NSW Drug Court has any long-term positive effect on:

- the likelihood of committing:
  - an offence of any type
  - an offence against the person
  - a property offence
  - a drug offence, or
- a person's number of further convictions.

2.31 The study found that participating in the Drug Court increased the time to an offender's next offence against the person and decreased their overall likelihood of reoffending. However, no effects were found in relation to the other types of offences.

2.32 The authors offer two possible explanations for the null results:

- The benefits of Drug Court participation may have faded over time. The time of their entry onto the program suggests that the participants were likely to have been dependent on heroin. The article describes heroin dependence as a "chronic relapsing condition"; the likelihood of relapse meant the participants were predisposed to reoffend after the support and surveillance of the program ended.
- Only 40% of the group who completed treatment did so to the satisfaction of the Drug Court — completion of the program may be necessary for the reduction in reoffending to occur.

2.33 The authors suggest that further evaluation also take account of the Magistrates' Early Referral into Treatment (MERIT) program also run in NSW. Some important differences between the MERIT program and the Drug Court are noted:

- the MERIT program is not restricted to offenders at risk of receiving a sentence of imprisonment and involves less intensive supervision and surveillance than the Drug Court, and
- the treatment program is managed by clinicians in the MERIT program, while the Drug Court manages its own treatment program.

Evaluating the first tranche of the Table Offences Reform: Impacts on District Court finalisations, time to finalisation and sentencing outcomes

NSW Bureau of Crime Statistics and Research, *Crime and Justice Bulletin,* No 231 (October 2020) by Clare Ringland

2.34 The Table Offences Reform ("Reform") involved reclassifying a subset of strictly indictable offences (which must be dealt with in the higher courts, particularly in the District Court) to "Table Offences", which can be dealt with summarily in the Local Court unless an election is made to proceed in the District Court. The reform was part of a suite of measures aiming to improve the efficiency of court processes and reduce District Court delay.

2.35 This study aimed to evaluate the first tranche of the Reform, which dealt with a group of break and enter offences and commenced in November 2016. In particular, the study aimed to:

- describe changes in the number of finalised appearances for these offences before and after the Reform, particularly the number of trials and sentence finalisations in the District Court
- compare the time from charge to finalisation before and after the Reform, and
- find whether the offenders were more or less likely to receive a sentence of imprisonment for these offences after the Reform.

2.36 BOCSAR's Reoffending Database was used to compare two groups of matters in the relevant category, namely:

- charge dates between 1 and November 2014 and 31 October 2016 (pre-Reform), and
- charge dates between 11 November 2016 and 31 October 2018 (post-Reform).

2.37 It is noted that cases not finalised within 16 months (until February 2020) are likely to be more complex and finalised in the District Court.

2.38 The main findings of the study were:

- 75% of matters relating to post reform charges were finalised within 12 months, compared to 20% of the relevant charges pre-Reform
- there were an estimated 30 fewer trials and 230 fewer sentencing finalisations per year in the District Court post-Reform
- the median time from charge to finalisation was 6 months less for matters related to post-Reform charges, and
- offenders found guilty of the relevant offences were less likely to receive a sentence of imprisonment post-Reform, and even less likely to receive penalties of imprisonment of more than 12 months (16% compared to 46% in pre-Reform cases).

2.39 Even after adjusting for bail status and time spent in custody between charge and finalisation, there were large and significant differences between pre-Reform sentencing outcomes in the District Court and post-Reform sentencing outcomes in the Local Court.

2.40 These findings may be affected by other reforms introduced during this period, and the failure to account for charges being withdrawn during plea negotiations in the pre-Reform period. Not accounting for withdrawn charges could lead to an overestimation in the differences between time to finalisation and the proportion of offenders receiving sentence of imprisonment.

2.41 The reduction in matters in the District Court should lead to a simultaneous increase in complex matters in the Local Court (for example, almost 25% of matters in the study were finalised by a defendant hearing in the Local Court). The authors suggest that an evaluation of the second tranche of the Reform's offence changes should consider the impact on the Local Court, including the capacity of magistrates to deal with more complex matters and the implications for victims.

3. Cases of interest

In Brief

The NSW higher courts have delivered a number of judgments of interest relating to sentencing in 2020. These judgments consider matters that are taken into account at sentencing, as well as procedural and other issues. Issues relating to possible law reform were raised in relation to intensive correction orders where matters are dealt with on a Form 1, sentencing for historical offences and guideline judgments.

3.1 This chapter sets out cases of interest related to sentencing decided by the NSW Court of Criminal Appeal ("CCA") and the Supreme Court of NSW in 2020.

3.2 Three of the cases outlined below raise potential law reform issues, in relation to:

- intensive correction orders and their operation when some offences are dealt with on a Form 1[1]
- guideline judgments and the need for them to take into account 20 years of sentencing developments since they were handed down,[2] and

1. [3.37]–[3.41].

- the operation of the historic child sex offence sentencing reforms when offenders, who were sentenced before the reforms, are resentenced on appeal after the reforms.[3]

Use of sentencing statistics

3.3 The following cases illustrate ongoing problems with the use of sentencing statistics in the sentencing exercise.

Use of Judicial Commission sentencing statistics and comparable cases

***Al Masri v R* [2020] NSWCCA 1**

3.4 The offender pleaded guilty to aggravated break, enter and commit a serious indictable offence,[4] and received a sentence of imprisonment of 5 years 8 months with a non-parole period of 4 years 3 months. Appealing on the ground of manifest excess, the offender specifically relied on the sentencing patterns disclosed by Judicial Commission statistics and a schedule of sentencing outcomes for comparable cases.

3.5 The CCA referred to High Court authority that producing bare statistics about sentences is at best "unhelpful" when in the form of numerical tables, bar charts and graphs.[5] However, the CCA considered that statistical material could serve as a yardstick for assessing a proposed sentence and for an assessment of manifest inadequacy or excess on appeal,[6] in light of the fact that the *Judicial Officers Act 1986* (NSW) authorises the Judicial Commission to disseminate information and reports on sentences for the purpose of assisting courts to achieve consistency in sentencing.[7]

3.6 The CCA emphasised that the pattern that may appear from sentencing statistics can never be decisive since sentencing involves dispensing individualised justice. Comparable cases and statistics can provide no more than a yardstick and "ultimately must remain a subordinate, even if mandatory, consideration where they are supplied".[8]

3.7 In relation to the offence itself, the court observed that "break, enter and steal offences are infinite in their variety as to the circumstances of offending including circumstances

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2. [3.79], [3.83]–[3.87].
3. [3.70]–[3.77].
4. *Crimes Act 1900* (NSW) s 112(2).
5. *R v Pham* [2015] HCA 39, 256 CLR 550 [32].
6. *Al Masri v R* [2020] NSWCCA 1 [45] referring to the dissenting judgment of Bell and Gaegler JJ in *R v Pham* [2015] HCA 39, 256 CLR 550 [47].
7. *Judicial Officers Act 1986* (NSW) s 8.
8. *Al Masri v R* [2020] NSWCCA 1 [46].

of aggravation, the gravity of offending, the moral culpability of the offender, and other relevant subjective circumstances".[9] The CCA could not derive any useful yardstick from the schedule presented to the sentencing judge that included details of 67 cases decided between 1998 and 2018, noting that none of them had each of the three aggravating features present in the case.

3.8 In relation to statistics derived from the Judicial Information Research System (JIRS) database, the court observed that, in the period January 2008 to 23 September 2018, there were 163 cases that dealt with relevant offenders sentenced for one offence only, with no prior criminal record and having pleaded guilty. Only 23 of these were sentenced to imprisonment and only 3 of these were aged between 26 and 30. The Court concluded that the statistics provided no guidance since the number of relevant cases was insufficient to provide any useful information about patterns of sentencing or to provide a useful yardstick against which to measure the sentence imposed.[10] The Court therefore concluded that the sentence was not manifestly excessive, noting that the fact that it may be, "comparatively, a longer sentence than even many others is not to the point".[11]

Inappropriateness of submissions on the sentencing range

Tatur v R [2020] NSWCCA 255

3.9 The offender pleaded guilty to aggravated sexual intercourse without consent[12] and was sentenced to 5 years' imprisonment with a non-parole period of 2 years 6 months. One of the grounds of appeal was that the sentencing judge was distracted from undertaking a proper analysis of the offence's objective seriousness by placing too much weight on the range of sentences in the Judicial Commission's sentencing statistics and on the prosecutor's submissions as to what an appropriate range might be.

3.10 In the sentencing proceedings, during a discussion about the appropriate classification of objective seriousness and the appropriate sentence, the judge referred to the Judicial Commission statistics and, in particular, referred to "the most common" sentence and "the most common non-parole period". While not relevant to the issue of distraction, the CCA noted that the discussion was highly inappropriate since it infringed the rule against making submissions to a sentencing judge about the bounds of the available sentencing range on the basis that it is for the judge alone to determine the sentence.[13]

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9. *Al Masri v R* [2020] NSWCCA 1 [58].
10. *Tatur v R* [2020] NSWCCA 255 [62].
11. *Tatur v R* [2020] NSWCCA 255 [63].
12. *Crimes Act 1900* (NSW) s 61J(1).
13. *Tatur v R* [2020] NSWCCA 255 [34]–[35].

3.11 The Court found that the reference to the statistics in the discussion and in the remarks on sentence was an improper use of the JIRS statistics:

> There is a fundamental distinction between the range available for a particular offender in relation to a particular offence and the past pattern of sentencing for offences of a similar kind or offenders with a similar age or criminal history. The pattern of past sentencing allows a court to check a sentence that it otherwise has in mind from the sentencing judge's application of sentencing principles to achieve the purposes of sentencing. The sentencing statistics should not be used as a starting point for the calculation, seemingly mathematically, from that point.[14]

3.12 Having found error, the Court resentenced the offender to 4 years' imprisonment with a non-parole period of 2 years, taking into account the sentencing judge's failure to give sufficient weight to the offender's subjective case.

Imprisonment as a penalty last resort

Where conviction alone is sufficient

***Kennedy v R* [2020] NSWCCA 49**

3.13 The offender pleaded guilty to supplying MDMA on an ongoing basis,[15] that is, on three separate occasions. The sentencing judge sentenced her to 15 months' imprisonment to be served by way of an intensive correction order.

3.14 The offender was a 20-year old university student and part-time childcare worker. She was using MDMA and LSD, believing that they alleviated some physical and mental health issues. She supplied the MDMA at the request of undercover police officers. The sentencing judge was satisfied that these were the only occasions on which she had ever supplied prohibited drugs.

3.15 One ground of appeal was that the sentence was manifestly excessive. The CCA observed that it was difficult to conceive of an offence of supply on an ongoing basis which is "of substantially lesser seriousness than the present case" and also that the offender's subjective circumstances were very much in her favour.

3.16 The CCA found that it was not open to the sentencing judge to find that no sentence other than a sentence of imprisonment was appropriate in all the circumstances of the

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14. *Tatur v R* [2020] NSWCCA 255 [47].
15. *Drug Misuse and Trafficking Act 1985* (NSW) s 25A.

case, observing that there was no particular need to ensure that the offender was further punished for the offence. In particular the Court observed:

- "She had already been through the humiliating and traumatic experience of being subjected to the search warrant when she was, effectively, naked and defenceless."
- A conviction of itself would be a significant matter to the offender.
- Specific deterrence was not required since she had stopped the offending conduct before the search warrant was executed.
- The community did not need protection in light of her remorse and prospects of rehabilitation.
- Her rehabilitation was already in train before the search warrant was executed.
- The seriousness of the offending did not call for particular denunciation.
- Her evidence at sentencing showed that she appreciated the harm she had done by committing the offence.[16]

3.17 The Court noted that the sentencing judge may have felt obliged to impose a sentence of imprisonment to show he thought the ongoing drug supply offences to be serious, but noted that "sentencing is a matter of individualised justice and it is just as erroneous to impose a sentence which is too severe as it is to impose one which fails to reflect the seriousness of the offence".[17]

3.18 The Court resentenced the offender to conviction with no other penalty,[18] observing that conviction was the "most punitive consequence" for the offender since she would have a criminal record that would require disclosure in future and that might limit her vocational opportunities. It was also noted that there was no utility in making a conditional release order since she had already completed her community service, was not assessed to be in need of supervision and no longer posed a risk to the community.[19]

16. *Kennedy v R* [2020] NSWCCA 4 [44].
17. *Kennedy v R* [2020] NSWCCA 4 [45].
18. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10A.
19. *Kennedy v R* [2020] NSWCCA 4 [53].

Indicative sentences for multiple offences

***Mohindra v R* [2020] NSWCCA 340**

3.19 The offender pleaded guilty (on the fourth day of the trial) to six sexual offences – five of aggravated indecent assault[20] and one of indecent assault.[21] He received an aggregate sentence of 3 years 4 months' imprisonment with a non-parole period of 2 years. The judge set out indicative sentences for the aggravated offences ranging from 10 to 18 months (with non-parole periods of 6 to 11 months) and, for the indecent assault, of 9 months.

3.20 One ground for appeal was that the judge erred in determining that no sentence other than imprisonment was appropriate for the indecent assault offence and one of the aggravated indecent assault offences. The CCA accepted that the indecent assault offence was the first offence committed by the applicant, was not an aggravated form of the offence and occurred several years before the next offence and that, if it had occurred in isolation, it would not have warranted imprisonment. However, the offender accepted the proposition, established in 2007,[22] that the fact that an offender is being sentenced for multiple offences may be relevant to determining each individual sentence. The CCA observed:

> One important reason for having regard to other matters for which the offender is being sentenced is to avoid imposing inconsistent sentences. For example, it is not possible to impose a community corrections order, requiring community service work, where the person is incarcerated under another sentence. Similarly, a form of conditional release order would be inappropriate if it ran concurrently with a sentence of imprisonment.[23]

3.21 The sentencing judge was entitled to conclude that, if sentences were notionally imposed in isolation, "some significant penalty should be imposed and, in the circumstances of the case, the only appropriate penalty would have been one of imprisonment".[24]

3.22 The offender referred to a case where someone had been sentenced, on appeal, to a good behaviour bond of 18 months for one offence and a concurrent sentence of 19 months' imprisonment with a non-parole period of 9 months.[25] The Court, however, expressed "serious doubts about the appropriateness of imposing a good behaviour

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20. *Crimes Act 1900* (NSW) s 61M(1).
21. *Crimes Act 1900* (NSW) s 61L.
22. *R v JRD* [2007] NSWCCA 55 [27], [33].
23. *Mohindra v R* [2020] NSWCCA 340 [49].
24. *Mohindra v R* [2020] NSWCCA 340 [50].
25. *R v Grealish* [2013] NSWCCA 336.

bond to be served concurrently with a period of imprisonment, even assuming that the imprisonment is not directly inconsistent with the conditions of the bond". The Court rejected this ground finding that there was no error in the sentencing court's approach.[26]

Domestic violence

3.23 The following cases illustrate the seriousness with which the courts treat offences that involve domestic violence and also, in some cases, the preparedness of the courts to take into account a context of domestic violence where appropriate.

Murder of an intimate partner

***Goodbun v R* [2020] NSWCCA 77**

3.24 The offender pleaded guilty to the murder of his wife[27] and to three related offences of contravening an apprehended domestic violence order,[28] using an unregistered firearm,[29] and an assault occasioning actual bodily harm against his daughter.[30] The Supreme Court, after allowing a 25% discount for the plea of guilty, imposed an aggregate sentence of 41 years 6 months with a non-parole period of 31 years 1 month.

3.25 One of the grounds of appeal was that the sentence was manifestly excessive. The majority of the CCA rejected this ground. In disposing of the appeal, Justice Bellew referred to number of relevant sentencing principles[31] and then considered it necessary to emphasise a number of matters, including that:

> the offending in the present case occurred against a background of, and in the context of, a history of significant domestic violence. To the extent that any of the cases previously discussed involved the involved the murder of a domestic partner, none of them were characterised by the level of domestic violence which pervaded the applicant's relationship with the deceased. That history manifested itself, at least in part, by the applicant being charged with assaulting the deceased in June 2016. It was following those events that the applicant and the deceased separated, and began discussing the issue of property settlement. It was against this background that the sentencing judge found that the applicant was motivated to kill the deceased by a deep and long held anger because she had sought to exercise her rights, and because

26. *Mohindra v R* [2020] NSWCCA 340 [53].
27. *Crimes Act 1900* (NSW) s 18(1)(a).
28. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14(1).
29. *Firearms Act 1996* (NSW) s 36(1).
30. *Crimes Act 1900* (NSW) s 59(1).
31. *Goodbun v R* [2020] NSWCCA 77 [254]–[259].

> she had been instrumental in the issue of the ADVO and the bringing of associated criminal charges. Whilst there is no specific category of "domestic violence murder", the offending in the present case cannot be divorced from the context in which it was committed. The commission of offences in the context of domestic violence, and in the context of a breach of an ADVO, were circumstances which attracted a need for specific deterrence, general deterrence and denunciation.[32]

3.26 Justice Fullerton also added that:

> although the aggregate sentence imposed is very severe, so also is the gravity of the applicant's overall offending. The domestic context in which that offending occurred, including the breach of the interim AVO in place for Mrs Goodbun's protection, were sentencing factors entitled to considerable weight in the assessment of the objective seriousness of the murder … and the objective seriousness of the offence committed against the [offender's] daughter … as she sought to defend her mother by deflecting the [offender's] further attack.[33]

***R v Ryan (No 4)* [2020] NSWSC 1629**

3.27 The offender (who was born in 1954) was found guilty, after a trial by judge alone, of the murder of his former partner of some decades and of breaching an apprehended domestic violence order. He killed the victim in her own home, while subject to a provisional ADVO, on the evening before she was "intending to take the first steps into a new life" with another romantic partner. Before the killing, the offender held a knife to the victim's throat, ordered her to telephone her sister and brother-in-law and demanded that her sister advise the victim not to leave him. The Supreme Court observed that his motivation was "a refusal to accept her right to live her life as she saw fit, romantically and otherwise".

3.28 In imposing a sentence of 23 years' imprisonment with a non-parole period of 17 years, the Supreme Court weighed the objective seriousness of the offence against subjective factors including the offender's age, his chronic abuse of alcohol and prescription drugs, his lack of prior convictions and prospects of rehabilitation. The Court concluded:

> Patently, despite the favourable subjective matters … denunciation on behalf of the community of a murder committed in these circumstances, and general deterrence of others who might be considering inflicting harm upon current or former intimate partners who dare to disobey them, loom large in this sentencing exercise. I fully appreciate that the sentence that I shall now

32. *Goodbun v R* [2020] NSWCCA 77 [261].
33. *Goodbun v R* [2020] NSWCCA 77 [129].

> impose could well lead to the offender dying in gaol. But that is the inevitable consequence of the immensity of his crime, and the stage of his life at which he committed it.[34]

Violence against a former partner

Yaman v R [2020] NSWCCA 239

3.29 The offender pleaded guilty to aggravated break, enter and commit a serious indictable offence[35] (in this case, assault occasioning actual bodily harm) against his former girlfriend. He was sentenced to an effective sentence of 6 years 10 months' imprisonment with a non-parole period of 4 years 6 months for this offence and contravening an ADVO.

3.30 One of the grounds of appeal was manifest excess. In dismissing this ground, the CCA observed:

> General deterrence had a significant role to play. Offences committed by (mostly) men who, like the applicant, refuse to accept that a partner or former partner is entitled to a life of her own choosing, must be dealt with sternly by the courts, to mark society's strong disapprobation of such conduct, and to reinforce the right of women to live unmolested by a former partner. Offences involving domestic violence are frequently committed, and the criminal justice system must play a part in protecting those who have been or may be victims of it. ...
>
> The right of all women to determine their own path in life must be protected and upheld by the courts. Where a woman's right is ignored or disregarded by an offender, that right must be vindicated, including by punitive and strongly deterrent sentences where necessary.
>
> The applicant had failed to accept that his former partner had chosen a life that did not include him and, by the commission of a violent crime against her, he sought to force her to resume a relationship with him. His act had to be denounced; stern punishment had to be imposed, and the applicant and others deterred from future conduct of that nature.[36]

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34. *R v Ryan (No 4)* [2020] NSWSC 1629 [50]–[52].
35. *Crimes Act 1900* (NSW) s 112(2).
36. *Yaman v R* [2020] NSWCCA 239 [131], [135]–[136].

Ebsworth v R [2020] NSWCCA 229

3.31 The offender pleaded guilty to a series of domestic violence-related offences against his partner after she had ended the relationship. The offences involved one count of aggravated break, enter and assault occasioning actual bodily harm,[37] and two counts of use a knife with intent to assault.[38] Four offences of intimidation and one of recklessly damaging property were taken into account on a Form 1. There were also five related summary offences of contravening an apprehended violence order. The aggregate sentence imposed was imprisonment for 5 years 6 months, with a non-parole period of 3 years 6 months.

3.32 In addition to the choking which constituted the assault occasioning actual bodily harm, the remarks on sentence referred to range of conduct, including punching the victim to the face a number of times, kicking her while she was on the kitchen floor, grabbing her by the hair and dragging her down the street, and kicking her face.

3.33 One of the grounds of appeal was that the sentencing judge erred by taking into account conduct which was not the conduct relied upon in support of the offence.

3.34 The CCA found that the sentencing judge had accurately depicted the circumstances that led to the offending that was charged and observed that to have omitted the preceding conduct would have misrepresented what occurred. The court concluded that it was appropriate to recite the events which "gave rise to the motivation for the offence and provided the context for the assault that was charged".[39]

Sexual assault in the context of relationship breakdown

Bussey v R [2020] NSWCCA 280

3.35 The offender was convicted, after a jury trial, of sexual intercourse without consent in circumstances of aggravation (deprivation of liberty).[40] The offender had been in the victim's apartment to retrieve some personal property, after the relationship had come to an end. He was sentenced to 4 years 6 months' imprisonment with a non-parole of 3 years.

3.36 One of the grounds of appeal was that the sentencing judge erred in not having sufficient regard or giving any weight to the "historical extent and nature of the prior sexual experience" between the offender and the victim. The court rejected this ground. After considering some case law submitted by the offender, the CCA referred to:

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37. *Crimes Act 1900* (NSW) s 112(2).
38. *Crimes Act 1900* (NSW) s 33B(1)(a).
39. *Ebsworth v R* [2020] NSWCCA 229 [50]–[52].
40. *Crimes Act 1900* (NSW) s 61J(1).

a regrettable tendency in some cases to refer to the fact that the assault occurred within, or following the breakdown of, a relationship as something that might "mitigate" the seriousness of the particular offence. This type of language has the unfortunate potential erroneously to dilute the significance of the offence under consideration. Put simply, the objective seriousness of sexual intercourse without consent cannot be reduced because of factors such as a prior sexual history between an offender and his victim without making unjustified and impermissible assumptions about the effect upon the victim. It depreciates the notion that no means no, whatever other factors may be involved. To accept that a prior relationship can ever operate to mitigate the seriousness of the offending completely abandons that uncontroversial wisdom and reverts to the type of attitude that once saw domestic violence treated as less culpable than other assaults. It also proceeds upon the implicit and unsafe adoption of non-consensual sexual intercourse with a stranger as the default position.

I cannot accept that a statement such as "the violation of the person and the defilement that are inevitable features where a stranger rapes a woman are not always present to the same degree when the offender and the victim had previously had a longstanding sexual relationship" is now or could ever have been an acceptable, far less correct, summary of the law or that it should continue to influence this Court in the determination of cases such as the present. Violation and defilement of the victim are quintessential aspects of the offence and the victim's familiarity with an assailant can have no bearing upon that fundamental circumstance. Indeed, such an assault, committed by a person with whom the victim may have had a formerly close and respectful relationship, is potentially more likely to exacerbate the seriousness of the offence than otherwise. I cannot accept the proposition that there can be varying degrees of violation and defilement. Such a concept appears to derive from the offensive notion that a man should in certain circumstances be entitled to raise his prior relationship with the victim as some kind of limited excuse for disregarding the absence of consent to an act of intercourse with him to which activity the victim had historically consented.[41]

Intensive correction orders

3.37 The first of the following two cases that deal with intensive correction orders illustrates some of the continuing problems with the ways in which ICOs interact with other aspects of the sentencing process, in this case where matters are dealt with on a Form 1.

41. *Bussey v R* [2020] NSWCCA 28 [95]–[96].

Where matters are dealt with on a Form 1

***Abel v R* [2020] NSWCCA 82**

3.38 The offender pleaded guilty to supplying cocaine[42] and agreed to an offence of dealing with the proceed of crime[43] being dealt with on a Form 1. The sentencing judge indicated in remarks on sentence that he proposed to impose a head sentence of 2 years 5 months' imprisonment with a non-parole period of 1 year 4 months. Under s 68 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), a single sentence of 2 years' imprisonment may be served by way of an intensive correction order (ICO), or an aggregate or total effective sentence of 3 years' imprisonment may be served by way of an ICO. With the consent of the prosecution, the offender withdrew his request to have the proceeds offence taken into account on a Form 1 and, instead, agreed to have the offence dealt with by way of indictment. As a result, after an adjournment to allow the preparation of a sentencing assessment report to consider the offender's suitability for an ICO with a home detention condition, the court imposed an aggregate sentence of 2 years 5 months for the two offences to be served by way of an ICO (with a home detention condition).

3.39 One of the grounds of appeal was that the sentence was manifestly excessive. In support of this ground, the offender argued that the home detention condition interfered with his liberty and that, if he breached the ICO, he would be liable to spend a significant period in custody. In rejecting this ground of appeal, the CCA observed that, while an ICO is a "not insignificant imposition" on liberty:

> it cannot be remotely compared to the experience of being incarcerated in prison. And if the ICO is breached and converted into a more weighty imposition, that is an outcome that is within the power of the [offender]. The potentiality of the ICO to be converted into something more onerous does not render it excessive.[44]

3.40 The CCA, in rejecting all grounds of appeal, raised a number of matters that required comment, including:

- A sentencing judge should rarely agree, at the end of their remarks on sentence, to adjourn the matter and "start again" months later. The adjournment in this case was a waste of time, money, and effort and, also, unseemly.
- It is doubtful that an application to have an offence taken into account on a Form 1 can simply be withdrawn after the end of evidence in sentencing proceedings and

42. *Drug Misuse and Trafficking Act 1985* (NSW) s 25(1).
43. *Crimes Act 1900* (NSW) s 193C(2).
44. *Abel v R* [2020] NSWCCA 82 [75].

> seriously doubtful that an application can be withdrawn at the conclusion of the remarks on sentence.[45]

3.41 The court particularly drew attention to the fact that the current structure of s 68 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) leads to the highly counter-intuitive result that offenders may believe that it is not in their interests to have an offence dealt with on a Form 1. This is directly contrary to the philosophy behind the provisions that allow less serious matters to be disposed of conveniently and consensually in a way that is fair to both parties, and in the interests of the administration of criminal justice. Referring to some 2019 cases that have also led to anomalous results,[46] the court suggested that parliament should reconsider the mechanics of the current structure of s 68.[47]

Sentencing for additional offences where an ICO is revoked

Rizk v R [2020] NSWCCA 291

3.42 The offender pleaded guilty to two charges of knowingly taking part in the supply of a prohibited drug.[48] Around the time of the offence, the offender was serving a 7-month ICO for a second or subsequent offence of driving a motor vehicle while disqualified. The drug offences were committed before and during the term of the ICO. As a result of the drug offences, he was ordered to serve the balance of the ICO (5 months) in custody. The sentencing judge imposed a head sentence of imprisonment of 3 years 6 months with a non-parole period of 2 years 7 months. The sentence commenced at the end of the balance of the term related to the ICO.

3.43 One ground of appeal was that, when fixing a commencement date for the aggregate sentence, the sentencing judge erred by failing to consider the earlier period of custody. In rejecting this ground, the CCA observed that, in the circumstances of the case:

> the commission of serious offences before and immediately after the imposition and confirmation of an ICO showed considerable contempt for the justice system. To have made the aggregate sentence in the present case partially concurrent with the balance of the ICO could properly be seen as not providing adequate punishment and denunciation of the offending for which he was sentenced ...[49]

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45. *Abel v R* [2020] NSWCCA 82 [81]–[82].
46. *R v Qi* [2019] NSWCCA 73; *Cross v R* [2019] NSWCCA 280.
47. *Abel v R* [2020] NSWCCA 82 [84].
48. *Drug Misuse and Trafficking Act 1985* (NSW) s 25(1).
49. *Rizk v R* [2020] NSWCCA 291 [115].

Child abuse material

3.44 The following cases illustrate the factors to be considered in assessing child abuse material offences, particularly in relation to material that involves fictional descriptions of child abuse.

Relevant factors in determining objective seriousness

***CR v R* [2020] NSWCCA 289**

3.45 The offender pleaded guilty to four offences relating to child abuse material, including one of producing it,[50] one of possessing it,[51] and two of using a child aged under 14 years to produce it.[52] An additional offence of possession was taken into account on a Form 1. He received an aggregate sentence of 8 years' imprisonment with a non-parole period of 5 years.

3.46 The CCA found that the sentencing judge erred in applying a non-existent standard non-parole period to two of the offences. The offender was, therefore, resentenced in a fresh exercise of the sentencing discretion. The court set out a non-exhaustive list of relevant factors in determining the objective seriousness of the offences:

> (i) whether actual children were used in the creation of the material;
>
> (ii) the nature and content of the material, including the age of the children and the gravity of the sexual activity portrayed;
>
> (iii) the extent of any cruelty or physical harm occasioned to the children that may be discernible from the material;
>
> (iv) the number of images or items of material;
>
> (v) in a case of possession, the offender's purpose and specifically whether such possession was for the personal use of the offender on the one hand, or for the purposes of sale or dissemination on the other;
>
> (vi) in a case of dissemination or transmission, the number of persons to whom the material was disseminated or transmitted;
>
> (vii) whether any payment or other material benefit (including the exchange of child pornographic material) was made, provided or received for the acquisition or dissemination/transmission;

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50. *Crimes Act 1900* (NSW) s 91H(2).
51. *Crimes Act 1900* (NSW) s 91H(2).
52. *Crimes Act 1900* (NSW) s 91G(1)(a).

(viii) the proximity of the offender's activities to those responsible for bringing the material into existence;

(ix) the degree of planning, organisation, sophistication and/or deception employed by the offender in acquiring, storing, disseminating or transmitting the material;

(x) the age of any person with whom the offender was in communication in connection with the acquisition or dissemination of the material (relative to the age of the offender);

(xi) whether the offender acted alone or in a collaborative network of like-minded individuals;

(xii) any risk of the material being seen or acquired by vulnerable persons, particularly children;

(xii) any risk of the material having been seen or acquired by persons susceptible to act in the manner described or depicted.[53]

3.47 In imposing an aggregate sentence of 6 years 3 months' imprisonment with a non-parole period of 4 years 1 month, the CCA was mindful of the paramount importance of general deterrence and denunciation.[54]

Seriousness of fictional descriptions of sex acts

***Burton v R* [2020] NSWCCA 127**

3.48 The offender pleaded guilty to the Commonwealth offence of using a carriage service to transmit child pornography material,[55] and the NSW offence of possessing child abuse material.[56] He received a total effective sentence of 21 months' imprisonment with a non-parole period of 12 months.

3.49 The material in the NSW offence consisted of four images contained on the offender's computer. The material in the Commonwealth offence consisted of written communications sent to others by Skype chat which used explicit language to describe sexual acts with children.

3.50 One of the grounds of appeal was that it was not open for his Honour to have assessed the objective seriousness of the Commonwealth offence as mid-range.

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53. *CR v R* [2020] NSWCCA 289 [55].
54. *CR v R* [2020] NSWCCA 289 [84] (citations omitted).
55. *Criminal Code* (Cth) s 474.19(1).
56. *Crimes Act 1900* (NSW) s 91H(2).

3.51 In considering the appeal, the CCA summarised propositions that have emerged recently in relation to the Commonwealth offence:[57]

- The vice is using the internet to access the market for child pornography and the resulting boost to that market.[58]
- The possession of such material creates a "market for the continued corruption and exploitation of children".[59]
- There is a "paramount public interest objective in promoting the protection of children as the possession of child pornography is not a victimless crime; children are sexually abused in order to supply the market".[60]
- The harm to the children exploited has been described as profound, exacerbated by the indefinite circulation of images on the internet.[61]

3.52 The offender's principal contention was that the vice ordinarily present in such an offence was reduced because no actual children were involved in the creation of the material, which consisted entirely of words written by the offender. The absence of any actual child victims meant that the usual inferences drawn about supporting a market did not resonate, and the source of the material in the offender's imagination mitigated the call for general deterrence.

3.53 In rejecting this ground, the CCA observed that a fair reading of the sentencing remarks showed the judge was well aware there were no child victims. The conclusion that the offence was a mid-range offence was supported by the highly inappropriate and sexualised content of the material, in particular the use of explicit language to describe sexual acts with children including one occasion involving physical violence with a 13-year old girl. The sentencing judge was also taken to be aware of the importance attached to the possibility that such material might be disseminated to vulnerable recipients or "those susceptible to act" in the ways described.[62]

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57. *Burton v R* [2020] NSWCCA 127 [26].
58. *R v Gordon* (2011) 1 Qd R 429 [37]; *R v Port*e [2015] NSWCCA 174 [55]–[56].
59. *R v Coffey* [2003] VSCA 155 [30]; *R v Cook; Ex parte DPP (Cth)* [2004] QCA 469 [21].
60. *DPP (Cth) v D'Alessandro* [2010] VSCA 60 [23].
61. *R v Porte* [2015] NSWCCA 174 [69]–[70].
62. *Burton v R* [2020] NSWCCA 127 [36].

Seriousness of fictional descriptions of sex acts with real children

_R v LS_ [2020] NSWCCA 148

3.54 The offenders, who were husband and wife, pleaded guilty to a number of offences against two children of their family involving child abuse material and sexual intercourse. The husband received an aggregate sentence of 4 years' imprisonment with a non-parole period of 18 months. The wife received, for similar, related offences, an aggregate sentence of 3 years' imprisonment with a non-parole period of 21 months. The sentences were appealed on the grounds of manifest inadequacy.

3.55 In reaching the conclusion that manifest inadequacy was readily established, the CCA listed some features that must be given greater weight in assessing the gravity of child abuse material offences, namely the relationship of the children to the offenders who produced disseminated and possessed the material and the circumstances in which they produced, disseminated and possessed them.[63]

3.56 Some of the child abuse material involved written messages exchanged between the offenders. The sentencing judge considered that these were less serious because they contained no images of actual children. The CCA considered that the sentencing judge's assessment did not comprehend that the written descriptions of explicit sexual acts referred to real children rather than imaginary children and, further, children who were under their protection. The CCA observed:

> written descriptions of sexual acts with real children must be regarded as more serious than those which describe sexual acts with imaginary children. Both are grave in that they normalise the conduct described, and elevate the risk of abuse for all children. … How much more is that the case where the child abuse material involves a written description of real children, who are under the care of the relevant adult. The production, dissemination and possession of this material in such circumstances gives rise to a much heightened, immediate, and specific risk to the children so described.[64]

3.57 The CCA resentenced the offenders, imposing 7 years' imprisonment with a non-parole period of 3 years and six months for the husband and 5 years' imprisonment with a non-parole period of 3 years for the wife.

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63. _R v LS_ [2020] NSWCCA 148 [135].
64. _R v LS_ [2020] NSWCCA 148 [137]–[138].

Child sex offences

Prevalence of step-father offenders

JJ v R [2020] NSWCCA 165

3.58 The offender was found guilty by a jury of aggravated sexual intercourse[65] with his step-daughter. He was sentenced to 12 years' imprisonment with a non-parole period of 9 years. The sole ground of appeal was that the sentence was manifestly excessive.

3.59 In rejecting the appeal, the CCA observed:

> The prevalence of aggravated sexual intercourse without consent by step-fathers against girls in their early teens requires that the consideration of general deterrence must be influential in fixing an appropriate sentence.[66]

Factors relevant to assessing the seriousness of persistent child sex offending

Burr v R [2020] NSWCCA 282

3.60 The offender pleaded guilty to persistent sexual abuse of a child,[67] involving 12 incidents of sexual intercourse with a child aged between 14 and 16 years[68] who was the daughter of a woman with whom he was in a relationship. The incidents included penile-vaginal intercourse, fellatio, cunnilingus, digital penetration of the anus and insertion of a vibrator into the victim's vagina. The offender received a sentence of imprisonment of 10 years 9 months with a non-parole period of 7 years.

3.61 The incidents contributing to the offence took place between 1 January 2006 and 26 August 2007 and, therefore, involved the form of the offence that existed before amendments in 2018. Before the amendments, the offence proscribed engaging in conduct in relation to a child that constitutes a sexual offence on 3 or more separate occasions occurring on separate days. In 2018, the offence was reframed to proscribe maintaining an unlawful sexual relationship with a child, that is, engaging in two or more unlawful sexual acts in relation to a child over any period.[69]

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65. *Crimes Act 1900* (NSW) s 61J(1).
66. *JJ v R* [2020] NSWCCA 165 [25].
67. *Crimes Act 1900* (NSW) s 66EA.
68. *Crimes Act 1900* (NSW) s 66C(3)–(4).
69. *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1 [20].

3.62 In considering the appeal, the CCA summarised several factors relevant to assessing the objective seriousness of the offence before the 2018 amendments:[70]

- the number of "sexual offences" which were committed on separate occasions; the offence being more serious the greater the number of offences there are beyond the threshold of three offences
- the nature of the sexual offences committed
- the victim's age at the time of the offences
- the period of time during which the offences were committed
- the age of the offender at the time of the offences and the age difference between the offender and the victim, and
- the context in which the offender had access to the victim, including the power differential and the victim's susceptibility or vulnerability.

3.63 One of the grounds of appeal against the sentence was that the sentence was manifestly excessive. In finding this ground was not made out, the CCA accepted the following features submitted by the prosecution as being of particular significance:[71]

- the maximum penalty of 25 years' imprisonment for the offence along with the maximum penalty of 10 years' imprisonment which applied to the ingredient offences
- the numerous instances of offending on at least eight separate days, which far exceeded the threshold of three offences
- the fact that the ingredient offences themselves represented a wider course of conduct and were not isolated incidents or aberrations (bearing on the degree of leniency which the Court might extend)
- the duration of the offences was a significant period of some 20 months
- the regularity of the offending
- the nature of the sexual offences, involving different, escalating, forms of sexual intercourse
- the significant age difference of 27 years

70. *Burr v R* [2020] NSWCCA 282 [106].
71. *Burr v R* [2020] NSWCCA 282 [171].

- the fact that the offender took advantage of his age and his relationship in the family to access the victim
- the element of control and exploitation
- the grooming that was found to have occurred
- the finding that the offender was using and exploiting the victim purely for his pleasure
- the finding that the offender took steps to conceal the offending, and
- the fact that general deterrence loomed large in such matters.

Inadequacy appeal – sexual intercourse with a child under 10

***R v RC* [2020] NSWCCA 76**

3.64 The offender was convicted, after trial by jury, of sexual intercourse with a child under 10.[72] The offending consisted of the offender inserting his finger into his grandson's anus, causing pain. The offender was sentenced to a community corrections order of 18 months. He was 76 years old at the time of sentencing and had no prior convictions. The DPP appealed the sentence as manifestly inadequate.

3.65 The CCA noted that the legislative guideposts for the offence – a maximum penalty of life imprisonment and a standard non-parole period of 15 years – "without more demonstrate the very grave view taken by the Parliament and the community of [such] offences" and that:

> Stern sentences are required in offending involving the sexual abuse of children to protect these most vulnerable members of our community. Children, and particularly young children, have little or no capacity to protect themselves against sexual assaults. The criminal justice system must supply that protection.[73]

3.66 Given the maximum penalty, SNPP and the particular relevance to such offences of general deterrence, denunciation and protection of the community, the CCA observed that "it could only be in the most extraordinary and unusual circumstances that a sentence of full-time imprisonment would not be imposed upon an offender". The court concluded that no such extraordinary or unusual circumstances were present.[74]

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72. *Crimes Act 1900* (NSW) s 66A(1).
73. *R v RC* [2020] NSWCCA 76 [230].
74. *R v RC* [2020] NSWCCA 76 [233]–[234].

3.67 Having found the sentence to be manifestly inadequate, the CCA observed:

> This is a case through which it is useful to clarify the gravity with which sentencing courts should view offences that carry a maximum penalty of life imprisonment, and a significant SNPP. This Court has frequently highlighted the need for stern sentences where children have been sexually assaulted … It should be well understood that a sentence of anything less than full-time imprisonment must be exceedingly rare for an offence contrary to s 66A, and could only be available where there are wholly exceptional circumstances.[75]

3.68 The court decided, in the circumstances, that a sentence of 3 years' imprisonment was appropriate and, taking into account the offender's age and respiratory condition, found special circumstances to set a non-parole period of 1 year. The court observed that announcing a sentence of 3 years' imprisonment served "the primary purpose of a Crown appeal against sentence, that being to lay down principles for the governance and guidance of sentencing courts".[76]

3.69 However, the court exercised its residual discretion not to interfere with the original sentence in light of the COVID-19 emergency, noting it was "reasonable to conclude that … a man of advanced age who suffers from a long-term bronchial condition, will experience a level of stress, anxiety, and even fear at the potentially fatal consequences to him were he to be infected with the COVID-19 virus in prison, that would not be the case for a younger, fitter, prisoner".[77]

Historical child sex offences – application of recent amendments to resentencing

3.70 This case raises issues in relation to sentencing for historical child sex offences that may need to be considered in drafting any further displacement of the principle relating to sentencing and resentencing historical offences other than child sexual offences. The government is currently investigating extending the reforms of sentencing for historical child sex offences to other types of historical offences.[78]

Corliss v R [2020] NSWCCA 65

3.71 The offender received an aggregate sentence of 7 years with a non-parole period of 4 years 4 months for a number of sexual offences against a child under 16 years of age that were committed between 1 January 1979 and 31 December 1980. The sentence was imposed on 12 April 2018 in accordance with the principle that for historical offences an offender is to be sentenced in accordance with the law and sentencing

75. *R v RC* [2020] NSWCCA 76 [247].
76. *R v RC* [2020] NSWCCA 76 [252].
77. *R v RC* [2020] NSWCCA 76 [254].
78. C Hildebrandt, "Historic Crimes Dealt with by Today's Standards", *The Daily Telegraph* (online, 25 March 2021).

practices applicable when the offences were committed. However, by the time the appeal was heard on 14 August 2019, amendments had been passed to displace this principle with respect to child sex offences.

3.72 Section 25AA, which commenced on 31 August 2018, requires a sentencing court to sentence an offender for a child sexual offence in accordance with sentencing patterns and practices at the time of sentencing and not at the time of the offence.

3.73 This raised the question of the proper approach to resentencing where an offender was sentenced before the commencement of s 25AA and, in particular, the interaction with s 6(3) of the *Criminal Appeal Act 1912* (NSW) which provides that the CCA shall quash a sentence and impose another sentence, "if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed".

3.74 The question of resentencing did not arise since the majority of the CCA rejected all grounds of appeal. Although not strictly necessary, the Court considered it was appropriate to express a conclusion on this question because of the importance of the issue and the fact that other appeals had noted that this issue was reserved in the current case. The majority stated:

> The text of s 25AA, confirmed by relevant extrinsic material, makes clear the intention of the legislature to abolish forthwith for the purpose of all sentencing decisions for child sexual offences falling within s 25AA(5), the general law principle ... The intention of the legislature having been made clear in this way, it is the duty of sentencing courts (including the Court of Criminal Appeal) to give effect to that legislative intention.[79]

3.75 The majority observed that, in the face of the clear legislative intention to require courts to give attention to contemporary sentencing patterns and practices, fairness to offenders was addressed by the provisions that preserve the application of the maximum penalty that applied at the time of the offence and any relevant standard non-parole period.[80] The majority concluded:

> These features constitute the express statutory qualifications to the otherwise absolute operation of the provision which confines the attention of all sentencing courts to current sentencing patterns and practices for child sexual offences.[81]

3.76 Dissenting on this point, Justice Brereton noted that the phrase in s 6(3) of the *Criminal Appeal Act 1912* (NSW) "pass such *other* sentence" refers back to the sentence that

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79. *Corliss v R* [2020] NSWCCA 65 [85].
80. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25AA(2), s 25AA(4).
81. *Corliss v R* [2020] NSWCCA 65 [87].

"should have been passed" by the sentencing judge and does not refer to "a sentence which *should now be passed* if the offender first came before the court for sentence at the time of the appeal". He also referred to the "resentencing principle" in *Radenkovic v R*[82] that an offender should ordinarily be resentenced according to the law as it stood at the time of the original sentence, particularly when that law was more favourable than the law at the hearing of the appeal, observing:

> This is because an offender is entitled to a sentence in accordance with law at the date on which it is passed, and ought not be deprived of it just because the sentencing judge made an error.[83]

3.77 Justice Brereton concluded that, while s 25AA clearly intended to displace the principle that relates to sentencing for historical offences, it did not intend to displace the resentencing principle.[84]

Guideline judgments

3.78 The guideline judgments below are considered in three cases:

- *R v Henry*[85] (armed robbery), and
- *R v Whyte*[86] (dangerous driving).

3.79 We outline these as part of our statutory obligation to report on the operation of guideline judgments.[87] One of these cases notes the considerable developments in sentencing that have occurred since any guideline judgments have been handed down and raises the possibility of revised guidelines to take these developments into account.

Impact of the Whyte guideline on sentence length

***Wraydeh v R* [2020] NSWCCA 309**

3.80 The offender pleaded guilty to the offences of dangerous driving causing death,[88] and failing to stop an assist after a vehicle impact causing death.[89] For the first offence, he

82. *Radenkovic v R* (1990) 170 CLR 623.
83. *Corliss v R* [2020] NSWCCA 65 [15].
84. *Corliss v R* [2020] NSWCCA 65 [18]–[21].
85. *R v Henry* [1999] NSWCCA 111, 46 NSWLR 346.
86. *R v Whyte* [2002] NSWCCA 343, 55 NSWLR 25.
87. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100J(1)(c).
88. *Crimes Act 1900* (NSW) s 52A.
89. *Crimes Act 1900* (NSW) s 52AB.

received a sentence of imprisonment of 5 years 3 months with a non-parole period of 3 years 6 months. For the second offence he received a fixed term of imprisonment of 2 years 3 months. The effective overall sentence was 7 years with a non-parole period of 5 years 3 months.

3.81 The offender appealed against the severity of the overall sentence. The offender relied on sentencing statistics from the Judicial Commission for the dangerous driving offence to submit that the sentence was at the upper end of the sentencing range and not appropriate for an offence that was found to be below the mid-range of objective seriousness.

3.82 The CCA found that, while stern, the overall sentence could not be said to be patently beyond the sentencing judge's discretion so as to demonstrate error. In dismissing the appeal, Justice Button stated:

> I do not propose to discuss comparative sentences countenanced or interfered with by this Court, except to say that, since the promulgation of the guideline judgment in *R v Whyte*[90] … there has been an obvious trend over the past 20 years towards the imposition of more severe sentences in more serious fatal driving cases.[91]

Approach to guideline judgments

Foaiaulima v R [2020] NSWCCA 270

3.83 The offender pleaded guilty to robbery in company[92] and received a sentence of imprisonment for 4 years 3 months with a non-parole period of 2 years 9 months. An offence of disposing of stolen property[93] was taken into account on a Form 1.

3.84 Several grounds of appeal related to the sentencing judge's application of the *Henry* guideline judgment,[94] which applies to sentencing for armed robbery. In particular, the offender submitted that the structure of the sentencing remarks may reflect a two-stage approach whereby the sentencing judge gave primary significance to the guideline and then embarked on a consideration of objective seriousness and aggravating and mitigating factors.

3.85 The majority of the CCA dismissed the appeal. Members of the court generally agreed that the *Henry* guideline is a matter to be taken into account in arriving at an appropriate

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90. *R v Whyte* [2002] NSWCCA 343; 55 NSWLR 25.
91. *Wraydeh v R* [2020] NSWCCA 309 [57].
92. *Crimes Act 1900* (NSW) s 97(1).
93. *Crimes Act 1900* (NSW) s 189.
94. *R v Henry* [1999] NSWCCA 111, 46 NSWLR 346.

sentence through the process of instinctive synthesis.[95] Justice Johnson stated that, in passing sentence for a relevant robbery offence:

> it is necessary to take into account the *R v Henry* guideline judgment as a statutory factor to be considered, together with a wide range of other statutory and common law factors, as part of the process of instinctive synthesis culminating in a value judgment expressed in numerical terms as the sentence.[96]

The majority of the court found that the sentencing judge did not depart from this approach by adopting a staged approach.

3.86 In considering this appeal, a number of general observations were made about guideline sentences and the *Henry* guideline in particular:

- Guideline judgments are statutory matters to be taken into account on sentence for a relevant offence.[97]
- Unlike standard non-parole periods, the *Henry* guideline refers to range of sentences determined by the particular factors referred to in the judgment.[98]
- The *Henry* guideline was handed down in 1999 and the last guideline judgment was handed down in 2004.[99]
- There have been substantial developments in statutory and common law sentencing principles since *Henry* was decided.[100]
- The availability of standard non-parole periods since 2002 and the enactment of the purposes of sentencing and aggravating and mitigating factors are some reasons for guideline judgments falling into disuse.[101]
- There has been no application for a revised guideline judgment for the robbery offence covered by *Henry*.[102]

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95. *Foaiaulima v R* [2020] NSWCCA 270 [6], [30], [135].
96. *Foaiaulima v R* [2020] NSWCCA 270 [30] citing *Markarian v R* [2005] HCA 25, 228 CLR 357 [51]; *Muldrock v R* [2011] HCA 39, 244 CLR 120 [26].
97. *Foaiaulima v R* [2020] NSWCCA 270 [7], [28]–[29]. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 42A; *Moodie v R* [2020] NSWCCA 160 [24].
98. *Foaiaulima v R* [2020] NSWCCA 270 [8], [136]-[139].
99. *Foaiaulima v R* [2020] NSWCCA 270 [16]–[17], [130].
100. *Foaiaulima v R* [2020] NSWCCA 270 [24].
101. *Foaiaulima v R* [2020] NSWCCA 270 [17]–[21].
102. *Foaiaulima v R* [2020] NSWCCA 270 [26].

3.87 While not urging a particular approach to be taken by the parliament or the Attorney General, the Chief Justice observed that a revised guideline judgment "would have the advantage of setting a guideline in the contemporary context of sentencing law", including the purposes of sentencing and aggravating and mitigating factors, "together with principles which have been stated by the High Court of Australia and by this court since 1999".[103]

Youthfulness as a factor in the Henry guideline

Yildiz v R [2020] NSWCCA 69

3.88 The offender pleaded guilty to the offence of robbery in company,[104] which she committed at the aged of 18 years 5 months. She was sentenced to 3 years' imprisonment with a non-parole period of 18 months. The sentencing judge had regard to the guideline judgment, *R v Henry*,[105] finding the objective seriousness of the offence was slightly below mid-range.

3.89 One of the grounds of appeal was that the sentencing judge failed to take into account the offender's youth as a relevant factor. In considering this ground, the CCA observed:

> the mere fact … that the Guideline Judgment in Henry takes into account that the sentence is being imposed on a "young offender", with no or little criminal history, does not mean that youth is an irrelevant factor. Nor does it mean that youth is not a factor that should be considered in the overall determination of the sentence to be imposed.
>
> There is a fundamental difference between a 14-year-old that is engaged in a robbery and a 20-year-old that is engaged in the same robbery. Thus, the particular age of any offender must be a factor the relevance of which is determined when applying the Henry Guideline.[106]

3.90 The CCA's reading of the remarks on sentence led to the suspicion that the guideline judgment was applied without sufficient attention being directed to the objective and subjective aspects of the offender's individual circumstances. The CCA concluded that the manner in which the sentencing judge treated the age of the offender would result in all young people being treated identically, rather than being appropriately assessed "bearing in mind the degree of immaturity associated with the offending".[107]

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103. *Foaiaulima v R* [2020] NSWCCA 270 [26]–[27].
104. *Crimes Act 1900* (NSW) s 97(1).
105. *R v Henry* [1999] NSWCCA 111, 46 NSWLR 346.
106. *Yildiz v R* [2020] NSWCCA 69 [48]–[49].
107. *Yildiz v R* [2020] NSWCCA 69 [63], [70].

3.91 Error having been found, the CCA resentenced the offender, taking into account, among other things, the offender's youth, observing that the offence "disclosed a degree of immaturity of a young person whose executive functioning, as a result of her immaturity, did not allow her to understand the full consequences of the conduct".[108] She was resentenced to 2 years 4 months' imprisonment with a non-parole period of 14 months.

The impact of COVID-19 on sentencing

3.92 A number of CCA cases have dealt with questions of the COVID-19 pandemic arising on appeal. These are outlined below, in addition to the case of *R v RC*, above.[109] In summary, these cases show:

- by itself, the occurrence of the pandemic is not a reason to review an existing sentence
- the pandemic may be a relevant consideration when an offender is being resentenced after a successful appeal on another ground, and
- after a sentence has been handed down (either at first instance or after an appeal), changes in risk relating to the pandemic may be addressed by executive government, or legislation, but not by the courts acting on their own.

Relevance of COVID-19 on appeal where no other ground is established

***Borg v R* [2020] NSWCCA 67**

3.93 The offender was found guilty, after a jury trial, of supplying not less than a commercial quantity of methylamphetamine.[110] She received a sentence of 4 years 6 months' imprisonment with a non-parole period of 2 years 8 months. Her sole ground of appeal was that the sentence was manifestly excessive.

3.94 In rejecting the appeal, the CCA referred to further submissions by the offender about COVID-19 and its effect on the offender if she were to remain incarcerated. The majority judgment did not consider these further submissions on the grounds that the CCA was not entitled to resentence the offence since no error had been established in the original sentence.[111] Justice McCallum agreed with this conclusion but nonetheless addressed some of the issues.

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108. *Yildiz v R* [2020] NSWCCA 69 [83].
109. [3.64]–[3.69].
110. *Drug Misuse and Trafficking Act 1985* (NSW) s 25(2).
111. *Borg v R* [2020] NSWCCA 67 [48].

3.95 The offender had relied on a recent Supreme Court decision in a bail release application.[112] Justice McCallum observed that the judge was correct in that context to have regard to the evidence and information about the medical crisis and "the impact of the pandemic on the criminal justice and prison systems in New South Wales". Such matters were relevant to a bail decision but the position was different for an appeal against sentence. Justice McCallum agreed that "any review of a sentence in the light of subsequent events is properly the province of the Executive Government". Recent amendments to the *Crimes (Administration of Sentences) Act 1999* (NSW) were noted that, as an emergency measure to address COVID-19, gave the Commissioner of Corrective Services power to order the release on parole of an inmate belonging to certain classes of inmates if satisfied that it was reasonably necessary because of the risk to public health or to the good order and security of correctional premises arising from the pandemic. Justice McCallum concluded that the CCA "has no authority to arrogate any such emergency power to itself".[113]

COVID-19 as a factor on resentencing

Scott v R [2020] NSWCCA 81

3.96 The offender was convicted, after a jury trial, of offences against his granddaughter – three of assault with an act of indecency on a child under 16 years,[114] and one of sexual intercourse with a child under 10 years.[115] In August 2018, he received an aggregate sentence of 6 years with a non-parole period of 3 years 6 months. At the time of sentencing he was 70 years old and in frail health.

3.97 The offender's appeal on the ground that the sentence was manifestly excessive was successful. On resentencing, some evidence was admitted supporting the submission that the offender's age and some of his medical conditions made him more susceptible to complications if he contracted COVID-19. The CCA noted evidence suggesting that Corrective Services NSW had implemented strategies to minimise the risk of the virus entering the NSW prison system. The court accepted that some of those strategies made the conditions of incarceration more onerous and also accepted that the offender:

> due to his age and medical conditions, will "experience a level of stress, anxiety, and even fear at the potentially fatal consequences to him were he to become infected with the COVID-19 virus in prison" that is far greater than a younger, healthier, inmate.[116]

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112. *Rakielbakhour v DPP* [2020] NSWSC 323.
113. *Borg v R* [2020] NSWCCA 67 [8]–[9].
114. *Crimes Act 1900* (NSW) s 61M(2).
115. *Crimes Act 1900* (NSW) s 66A(1).
116. *Scott v R* [2020] NSWCCA 81 [162].

3.98 The court, therefore, took into account the offender's advanced age, his asthma and other medical conditions that made him more vulnerable to potentially grave complications from the virus and the fact that the suspension of all social and family visits made the conditions of incarceration of most inmates more onerous.[117] The court particularly noted that "an offender's advanced age and ill-health are always relevant to the length of a custodial sentence, particularly where those matters make a gaol term 'significantly harder' for the particular individual".[118]

3.99 The offender received a lesser aggregate sentence of 5 years with a non-parole period of 2 years 6 months.

Admissibility of evidence on appeal about the impact of COVID-19

Cabezuela v R [2020] NSWCCA 107

3.100 The offender was found guilty, after a District Court jury trial, of 27 historical sexual offences against four sisters, committed between 1966 and 1981. On 7 June 2019, an aggregate sentence of 28 years' imprisonment was imposed with a non-parole period of 18 years. He was 79 years old at the time of sentencing

3.101 One of the grounds of appeal was that the sentence was manifestly excessive having regard to the COVD-19 pandemic and its relationship to the offender's advanced age, poor health status and custodial arrangements.

3.102 The CCA noted three essential difficulties with the submissions on this ground:

- The evidence was not admissible in the appeal because it was not fresh evidence in the sense that there was any material relating to COVID-19 at the relevant time, the import of which was not known or not fully appreciated.
- The evidence was directed to the additional burden the offender would have because of his age and health (factors that were given considerable weight by the sentencing judge) and could not be used to impugn the sentencing judgment that was not otherwise susceptible to challenge on the grounds of manifest excess.
- The evidence would not have impacted on the sentence imposed because the offending was of such seriousness that, even if substantially greater weight were given to subjective factors due to the effects of COVID-19, no different sentence would properly follow.[119]

3.103 For completeness, the CCA noted that the evidence from both parties:

117. *Scott v R* [2020] NSWCCA 81 [166].
118. *Scott v R* [2020] NSWCCA 81 [168].
119. *Cabezuela v R* [2020] NSWCCA 107 [125]–[132].

> suggested that, despite initial fears, the prison system has not been the source of any outbreaks of COVID-19, such as the type that has occurred, for example, in aged care facilities. It may be accepted that the appellant would be anxious as to the present circumstances but the risk which he faces are moderated by the controls introduced by Corrective Services and the vigilant screening of staff serving prisons.[120]

Other matters taken into account at sentencing

Bugmy principles may be applicable even if not expressly put

***Kliendienst v R* [2020] NSWCCA 98**

3.104 The offender pleaded guilty to two offences arising from an assault in which he "glassed" the victim at a hotel.[121] He received an aggregate sentence of 4 years' imprisonment with a non-parole period of 2 years 3 months.

3.105 One of the grounds of appeal was that the sentencing judge failed to make a proper assessment of moral culpability in light of the offender's difficult and violent upbringing as required by the *Bugmy* case.[122] The sentencing judge referred extensively to the offender's difficult and violent upbringing, but did not mention the principles in *Bugmy* or deal with the question of reducing the offender's moral culpability. No submissions had been put to the sentencing judge on these principles or how they would apply to the offender's moral culpability.

3.106 In allowing this ground, the CCA considered authority to the effect that it will not lightly entertain arguments that could have been put at sentencing, but concluded that, because of the uncontested material before the court on the offender's upbringing, there was error, despite the fact that the offender did not raise *Bugmy* principles:

> Although it was not squarely put to his Honour that the Bugmy principles were relevant, they are nonetheless applicable when there is uncontested evidence that the factual basis for raising them is present.[123]

3.107 The CCA resentenced the offender to a slightly shorter sentence of 3 years 9 months' imprisonment with a non-parole period of 2 years 1 month.

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120. *Cabezuela v R* [2020] NSWCCA 107 [133].
121. *Crimes Act 1900* (NSW) s 33B(1)(a), s 35(4).
122. *Bugmy v R* [2013] HCA 37; 249 CLR 571.
123. *Kliendienst v R* [2020] NSWCCA 98 [68].

Youthfulness and immaturity

3.108 Two recent cases of interest have dealt with offenders in their mid-20s.

TL v R [2020] NSWCCA 265

3.109 The offender was convicted, after trial, of the murder of his 2.5-year-old stepdaughter. He was sentenced to 36 years' imprisonment with a non-parole period of 27 years. One of the grounds of appeal was that the sentence was manifestly excessive. In addressing that ground counsel submitted that the sentencing judge had erred by failing to make any allowance for the offender's youth (he was 23 years old at the time of the offence and 27 years old at the time of sentencing).

3.110 The CCA referred to the well-established principles relating to the sentencing of young offenders and concluded that they had no role to play in the circumstances of the case for the following reasons:

- noting the age of the offender, there was no evidence that immaturity played any role in the commission of the offence
- the principles which govern the sentencing of youthful offenders may be moderated when the offender has acted in the way that an adult might, and has "committed a crime of violence or a crime of considerable gravity", and
- the weight to be given to youth diminishes the closer the offender approaches maturity, such that the younger the offender, the greater the weight to be afforded to youth.[124]

3.111 Error was established on other grounds. However, on resentencing, the court imposed a sentence that was not different to the original sentence.

Singh v R [2020] NSWCCA 353

3.112 The offender pleaded guilty to three offences of dishonestly obtaining a financial advantage by deception,[125] having defrauded a subsidiary of a worldwide advertising agency of $3.2m. The offender was 23 years old at the time of the first offence and almost 27 years old by the time of the third offence. The District Court imposed an aggregate sentence of 6 years' imprisonment with a non-parole period of 4 years that also took into account three further offences on a Form 1.

3.113 One of the grounds of appeal was that the sentencing judge erred when assessing moral culpability in not taking into account the "comparatively young age of the

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124. *TL v R* [2020] NSWCCA 265 [359]–[361].
125. *Crimes Act 1900* (NSW) s 192E(1)(b).

[offender] when he commenced trading in, and when he became addicted to trading in contracts for a difference".

3.114 The CCA referred to relevant case law and the reasons given in *TL v R* for not finding the principles relevant in the case of a 23 year old[126] and observed that:

> These principles are not confined to offences involving physical violence but also extend to a "white collar" context and offences involving fraud and financial deception. Indeed in such cases, the very nature of the offences will often require a level of sophistication and intelligence, albeit wholly misguided, especially where numerous acts of defalcation are involved.[127]

3.115 The CCA concluded the complaint that the sentencing judge did not have regard to the offender's youth was not justified. The court observed that the offender was significantly older than 18 and older than the majority of offenders in the cases referred to. Further, the nature of his conduct and offending, which involved planning, premeditation, a degree of sophistication, and the holding of a position of trust, "did not manifest the immaturity associated with young offenders which has been recognised as warranting some reduction in sentence in appropriate cases".[128] The court particularly noted that "[t]he "audacity of youth" … is not to be conflated with immaturity".[129]

Offences of violence committed against users of public transport

Foaiaulima v R [2020] NSWCCA 270

3.116 In this case, referred to above,[130] the offence of robbery in company was committed on a train, involving physical and verbal intimidation and assaults on the victim before her handbag and telephone were taken. In rejecting the ground of appeal that the sentence was manifestly excessive, Justice Johnson, who was in the majority, considered the CCA's past emphasis on the "need for appropriate punishment, and the importance of general deterrence, where crimes of violence are committed against persons using the public transport system".[131] The offender had sought to confine comments in past cases as applying only to offences committed on public transport late at night, since the offence in question occurred on a Sunday afternoon. Justice Johnson rejected this submission and observed that people:

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126. *TL v R* [2020] NSWCCA 265 [359]–[361]. See [3.110] above.
127. *Singh v R* [2020] NSWCCA 353 [41].
128. *Singh v R* [57].
129. *Singh v R* [55].
130. [3.83]–[3.87].
131. *R v JW* [2010] NSWCCA 49, 77 NSWLR 7 [207]–[208]; *Hampton v R* [2014] NSWCCA 131 [51]; *R v Dennis* [2015] NSWCCA 297 [2]–[3], [65].

> use the public transport system as a necessary part of daily life. The community is entitled to expect that significant punishment will be visited upon those who commit crimes of violence, whether planned or random, directed to members of the public using public transport whether by day or night.
>
> What was said in the authorities … concerning protection of members of the community on public transport applies equally to offences of violence directed to innocent members of the public, who have done nothing to attract attention or provoke an offender in circumstances where the victim is, in effect, confined on the public transport system and thus exposed to an attack by a person such as the [offender].[132]

3.117 In considering the purpose of sentencing that is to recognise the harm done to the victim of the crime and the community,[133] Justice Johnson observed that there is harm to the community when such offences undermine public confidence in the safety of the public transport system.[134]

Dangerous driving – consumption of alcohol as an aggravating factor

***Rummukainen v R* [2020] NSWCCA 187**

3.118 The offender was found guilty, after trial by jury in the District Court, of dangerous driving causing death.[135] He received a sentence of 3 years' imprisonment with a non-parole period of 18 months. The sole ground of appeal was that the sentencing judge erred in taking into account the offender's consumption of alcohol before the collision in circumstances where the prosecution had not proven beyond reasonable doubt that the offender's blood alcohol concentration was greater than 0.05 (the legally permitted limit) at the time of the collision. There was uncontradicted expert evidence at the trial that the scientific consensus is that there is no blood alcohol concentration at which there is no impairment of driving skills.

3.119 The essence of the complaint was that the sentencing judge could not take into account evidence about impairment because the prosecution had not shown that the offender had committed a drink driving offence with the prescribed concentration of alcohol.[136]

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132. *Foaiaulima v R* [2020] NSWCCA 270 [65]–[66].
133. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g).
134. *Foaiaulima v R* [2020] NSWCCA 270 [68].
135. *Crimes Act 1900* (NSW) s 52A(1)(c).
136. *Road Transport Act 2013* (NSW) s 108, s 110.

3.120 The CCA rejected this submission and did not:

> accept that the policy choice of the legislature to permit people to consume alcohol and still be able to drive means that in assessing the appropriate sentence for a quite separate criminal offence, dangerous driving causing death, a sentencing judge must regard as irrelevant evidence of impairment in driving ability by reason of alcohol consumption that is properly before the court.[137]

3.121 The court also noted that one of the eleven aggravating factors in the guideline judgment in *R v Whyte* was "the degree of intoxication or of substance abuse" which relates to the offender's moral culpability which is relevant in determining objective seriousness.[138] The CCA then observed:

> It is correct to say that the legislature has made a policy choice that it is not unlawful, per se, to drive after consuming alcohol or to drive "sleep deprived" or having ingested medication which was lawfully prescribed. That does not mean that in sentencing an offender for dangerous driving occasioning death it is irrelevant that the offender had been consuming alcohol or was sleep deprived or that his or her driving skills were impaired by having ingested prescription medication. Examples may be multiplied. Item (4) identified in Whyte as an aggravating factor going to moral culpability is the degree of intoxication. That aggravating factor is not limited to intoxication which constitutes a separate offence.
>
> There is no basis in sentencing for dangerous driving causing death to treat as irrelevant evidence of one of the Whyte factors unless the Crown can establish beyond reasonable doubt that a separate offence was thereby committed.[139]

3.122 The CCA, therefore found that it was open to the trial judge to take into account the offender's consumption of alcohol before the collision in three ways:

- as relevant to moral culpability and thus objective seriousness
- as showing the offence was more objectively serious because the offender drove dangerously while impaired to some extent by alcohol, and
- as relevant to general deterrence.[140]

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137. *Rummukainen v R* [2020] NSWCCA 187 [19].
138. *Rummukainen v R* [2020] NSWCCA 187 [20]–[22].
139. *Rummukainen v R* [2020] NSWCCA 187 [23]–[24].
140. *Rummukainen v R* [2020] NSWCCA 187 [29].

3.123 The court concluded:

> It is undoubtedly correct, as the sentencing judge remarked, that the road toll in this State remains at far too high a level and the sentences imposed for this type of offence must constitute a real deterrent. In this context, his Honour's observation that the consumption of alcohol should be seen as significantly increasing the risk to other users of the road even where it cannot be found beyond reasonable doubt that an offender was above the legal limit was not an error.[141]

Aggravating factor – offence was part of a planned or organised criminal activity

Pham v R [2020] NSWCCA 269

3.124 The offender pleaded guilty to two offences: knowingly participating in cultivating a large commercial quantity of cannabis,[142] and knowingly directing the activities of a criminal group (involved in the commercial cultivation of cannabis).[143] The District Court imposed an aggregate sentence of 7 years' imprisonment with a non-parole period of 3 years 10 months.

3.125 The offender appealed on the ground that the sentencing judge erred in finding that the cultivation offence was aggravated because it was "part of a planned or organised criminal activity".[144] The offender submitted that, in circumstances where there was only evidence which established the limited role of the offender as a knowing participant in the cultivation of the cannabis, it was not open to the judge to find the aggravating factor made out beyond reasonable doubt.

3.126 The offender drew the CCA's attention to apparently divergent opinions in the court as to whether the aggravating factor applies only where an offender has been involved in the planning and preparation for the offence, or whether it is sufficient that offence itself involved planning and preparation, irrespective of the extent to which the offender was directly or personally involved.[145]

3.127 The CCA observed that the differences in approach should not be seen so much as revealing a difference of opinion about the construction of the aggravating factor but as reflecting a difference in the way it might be applied in different factual contexts. In concluding that error was not established, the court listed the considerations in determining the extent to which the aggravating factor applied:

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141. *Rummukainen v R* [2020] NSWCCA 187 [29].
142. *Drug Misuse and Trafficking Act 1985* (NSW) s 23(2)(a).
143. *Crimes Act 1900* (NSW) s 93T.
144. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(n).
145. See *Legge v R* [2007] NSWCCA 244; *DPP (NSW) v Cornwall* [2007] NSWCCA 359.

- the particular offence charged
- the particular offending that is being sentenced within what might be a broad category of offending
- the extent of the offender's involvement, "including cases where an offender might be subject to threats of violence or non-exculpatory duress before participating in the offence", and
- the significance of the offender's role in the commission of the offence and knowledge of the criminal enterprise.[146]

3.128 The court concluded it was open to the judge to find beyond reasonable doubt that the offence was aggravated by being part of "a planned or organised criminal activity", even if the evidence as to the offender's actual contribution to the planning and organisation of that offence was limited.[147]

Failure to stop – relevance of post-offence conduct

***Geagea v R* [2020] NSWCCA 350**

3.129 The offender pleaded guilty to dangerous driving causing death[148] and failing to stop and assist after a vehicle impact causing death.[149] He received an aggregate sentence of imprisonment for 6 years 6 months with a non-parole period of 4 years 2 months. In relation to the failure to stop offence, the sentencing judge nominated an indicative sentence (after allowing a 25% discount for the early guilty plea) of 4 years 1 month.

3.130 One of the grounds of appeal was that the sentencing judge, in considering the objective seriousness of the failure to stop, erred in finding that the offence was "made substantially worse" by the offender's actions in "the period thereafter". These actions included an attempt, over a week later, to dispose of the van involved in the accident.

3.131 In allowing this ground, the CCA found that the later attempts to conceal the offence did not form part of the offence's objective circumstances. The court observed that the fact that the failure to stop offence "is in part directed to an obligation of the driver to assist police, as opposed to assisting the injured person", does not lead to a conclusion that actions taken over one week later, designed to avoid detection and to dispose of evidence, can be regarded as part of the offence's objective circumstances.[150]

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146. *Pham v R* [2020] NSWCCA 269 [47].
147. *Geagea v R* [2020] NSWCCA 350 [50].
148. *Crimes Act 1900* (NSW) s 52A(1)(c).
149. *Crimes Act 1900* (NSW) s 52AB(1).
150. *Geagea v R* [2020] NSWCCA 350 [25].

3.132 The court also rejected the prosecution's argument that these post-offence actions contributed to the level of the offence's moral culpability, observing that "[i]f the later actions are not part of the commission of the offence then they are not part of the moral culpability involved in it".[151]

3.133 In light of the sentencing judge's reliance on the post-offence conduct in assessing the gravity of the offence as "significantly above a mid-range offence", the CCA concluded that a lesser aggregate sentence was warranted.[152] On resentencing, the court imposed an aggregate sentence of 3 years 10 months with a non-parole period of 2years 6 months, nominating an indicative sentence of 2 years for the failing to stop offence.

Breach of trust in relation to social security offences

Tham v R [2020] NSWCCA 338

3.134 The offender pleaded guilty to two passport offences[153] and to obtaining financial benefits (payment of a Newstart allowance and an age pension) by deception.[154] The District Court imposed an overall sentence of imprisonment for 6 years 9 months, with a non-parole period of 4 years.

3.135 One of the grounds of appeal was that the sentencing judge erred in assessing the objective seriousness of the social security fraud offences. The judge found that the offences were "well above middle range at least and moving towards the upper end of the scale of seriousness".

3.136 The offender submitted that it was relevant to take into account the fact that the offending did not involve a breach of trust and that to do otherwise would impermissibly extend "the ordinarily accepted notion of trust in sentencing law". The CCA rejected this submission and observed that the offending involved a significant breach of trust:

> Those who claim social security benefits are often in such genuine and urgent need of assistance that there is no time to undertake an investigation of the veracity of the information submitted in support of a claim at the time that it is made. If a system of more stringent checks were introduced, it may cause delay in the payment of benefits to those genuinely in need. Accordingly, the price of avoiding hardship to genuine claimants by granting them speedy relief is the risk of abuse by those who are not genuine.

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151. *Geagea v R* [2020] NSWCCA 350 [25].
152. *Geagea v R* [2020] NSWCCA 350 [27]–[28].
153. *Australian Passports Act 2005* (Cth) s 29, s 35.
154. *Criminal Code* (Cth) s 134.2(1).

> Those circumstances necessarily create a relationship in which the government relies upon, and trusts, the honesty of those who make applications for monetary benefits, and the veracity of the information which is provided. In the present case, that trust was breached by the [offender] over a long period of time, and to a significant extent.[155]

Breach of trust in relation to a job applicant

***Mohindra v R* [2020] NSWCCA 340**

3.137 The offender pleaded guilty, on the fourth day of a trial in the District Court, to sexual offences against six people – one indecent assault offence,[156] and five aggravated indecent assault offences.[157] He received a sentence of 3 years 4 months, with a non-parole period of 2 years.

3.138 One of the grounds of appeal was that the sentencing judge erred in finding that the indecent assault was aggravated by the abuse of a position of trust. The victim of this offence was applying for a job as a warehouse assistant when the offence took place. The offender submitted that there was no established relationship between the offender and victim that could give rise to a special relationship of trust, since they had first met on the day and the offender was not the victim's employer. In rejecting this ground, the CCA observed that this submission:

> gave too narrow a scope to the concept of a relationship of trust. It is not insignificant that equal opportunity legislation, which proscribes sexual harassment in particular situations, makes it unlawful for an employer to sexually harass either an employee or a person who is seeking employment with the employer. Not only is there a significant power imbalance between the person seeking work and the potential employer, but the person seeking work may have to attend at a place identified by a complete stranger and submit to an interview in the privacy of the prospective employer's premises, as happened in the present case. There is no incongruity in describing the making of sexual advances in such circumstances as abusing a position of trust.[158]

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155. *Tham v R* [2020] NSWCCA 338 [54]–[55].
156. *Crimes Act 1900* (NSW) s 61L.
157. *Crimes Act 1900* (NSW) s 61M(1).
158. *Mohindra v* R [2020] NSWCCA 340 [27].

Firearms – inherent dangerousness

***Ah-Keni v R* [2020] NSWCCA 122**

3.139 The offender pleaded guilty to two offences – one of using an unauthorised pistol,[159] and one of firing a firearm in or near a public place.[160] He received an effective sentence of imprisonment for 5 years 3 months with a non-parole period of 3 years 11 months.

3.140 The offender and a friend (while under the influence of drugs and alcohol) decided to play a prank by holding a gun to a taxi driver's head in order to scare them. In carrying out this plan, there was a struggle with the taxi driver in which a pistol was discharged.

3.141 One of the grounds of appeal was that the sentencing judge erred in determining the objective seriousness of the offences. In the course of submissions, the offender argued that the pistol was produced as part of a prank and this would allow the court to find that it was more probable than not that the discharge of the pistol was unplanned.

3.142 In finding the ground was not made out, the CCA observed that it did not matter whether the offender:

> was motivated by a desire to engage in a "prank" or intended some more sinister purpose. The risk and potential consequences were the same. Using a loaded pistol and pointing it at the neck of a victim in the confined space of a taxi in close proximity to other persons was inherently dangerous. This is particularly so when regard is had to the intoxication of the [offender]. It is difficult to imagine a more potentially dangerous set of circumstances than those which prevailed here. Not only was the pointing of the pistol at the neck of the victim extremely dangerous, but the victim's reactions were completely unpredictable. In any event, the possibility that the victim might resist and further add to the danger should have been within the contemplation of the [offender]. Finally, the possible long term effect on the taxi driver of this "prank" should have been anticipated.
>
> Not only could one of the occupants in the taxi have been killed or seriously injured but persons in the neighbouring houses were also put at risk by this reckless and dangerous behaviour resulting as it did in the discharge of the pistol.[161]

159. *Firearms Act 1996* (NSW) s 7(1).
160. *Crimes Act 1900* (NSW) s 93G(1)(b).
161. *Ah-Keni v R* [2020] NSWCCA 122 [59]–[60].

Procedural and other issues

Penalty reduction for assistance

Droudis v R [2020] NSWCCA 322

3.143 The offender was found guilty, after a judge alone trial, of the murder of her then partner's former wife and sentenced to 44 years' imprisonment with a non-parole period of 33 years.

3.144 One of the grounds of appeal was that the sentencing judge erred in applying s 22A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) which gives a court the power, after a trial on indictment, to impose a lesser penalty than it would otherwise impose having regard to the degree to which the defence has facilitated the administration of justice (whether by disclosures made pre-trial or during the trial or otherwise). The offender submitted that the judge had failed to assess the degree to which the defence had facilitated the administration of justice and treated s 22A as if it were a mitigating factor rather than a discount.

3.145 In relation to this ground, the CCA observed that the sentencing judge had referred to a discount in dealing with the offender's submission, however, the court held that, even if the judge had taken s 22A into account as a mitigating factor, he did not err in doing so.[162] In reaching this position, the CCA contrasted s 22A with provisions relating to taking guilty pleas into account for offences that are not dealt with on indictment[163] and the provisions for reducing penalties for assistance provided to law enforcement authorities.[164] The court observed that s 22A does not:

- impose a mandatory requirement to make a record of the reasons for not imposing a lesser sentence
- set out matters which a court must consider in exercising its discretion, nor
- impose an obligation to state the penalty it would have imposed had it not exercised the discretion.[165]

3.146 The court also considered that the statement in the relevant second reading speech that s 22A "merely provides the ability to reduce a penalty where the course of justice has been facilitated" does not suggest that it requires a two-stage process (of applying a

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162. *Droudis v R* [2020] NSWCCA 322 [100].
163. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22.
164. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23.
165. *Droudis v R* [2020] NSWCCA 322 [102].

discount) instead of taking the matter into account as part of the instinctive synthesis approach to sentencing.[166]

3.147 The court further considered that the words in s 22A "impose a lesser penalty than it would otherwise impose" do not create a legal requirement for a sentencing judge to specify a percentage discount or to quantify mathematically the extent of the sentence reduction.[167]

3.148 The court, therefore, concluded that a failure to quantify the discount will not, by itself, establish error. In rejecting the ground of appeal, the court, however, agreed that it may be appropriate to specify the penalty which would be imposed but for the facilitation of the administration of justice:

> In general terms that would be desirable where the facilitation made a significant difference to the sentence which would otherwise have been imposed. It has the benefit of providing transparency to the sentencing process and encouraging accused people and their legal representatives to conduct criminal trials efficiently and expeditiously.[168]

3.149 The CCA, however, allowed the sentencing appeal on other grounds and resentenced the offender to 35 years' imprisonment with a non-parole period of 26 years 3 months.

When bail conditions are not equivalent to time in custody

***Banat v R* [2020] NSWCCA 321**

3.150 The offender was found guilty, after a District Court jury trial, of a kidnapping offence.[169] He was sentenced for this offence and three unrelated offences to which he had pleaded guilty. He received an aggregate sentence of 9 years' imprisonment with a non-parole period of 6 years. Before the sentencing, the offender had been subject two relevant periods of conditional bail – one in relation to the offences to which he pleaded guilty (which ended when he was arrested for the kidnapping offence) and another in relation to the kidnapping offence (which ended when he was taken into custody after the guilty verdict). In setting the commencement date for the aggregate sentence, the sentencing judge took into account the second period of bail, but not the first.

3.151 One of the grounds of appeal was that the sentencing judge had failed to take into account the first period of conditional bail. The offender submitted that both bail periods

166. *Droudis v R* [2020] NSWCCA 322 [103].
167. *Droudis v R* [2020] NSWCCA 322 [104].
168. *Droudis v R* [2020] NSWCCA 322 [105].
169. *Crimes Act 1900* (NSW) s 86(3).

involved very strict bail conditions amounting to quasi-custody so that, if one was taken into account, the other should also have been taken into account.

3.152 The CCA, however, found no error. The court observed that, while both periods involved the condition that the offender could not leave his home without being in company with named individuals, the curfew condition and electronic monitoring requirement in the second period were material differences that justified taking the second period into account but not the first.[170] The court further observed that, during the first period, the restrictions did not "in practice" prevent the offender from committing the kidnapping offence and being present on at least two occasions during the kidnapping:

> The rationale for taking into account bail conditions is that they correspond to some form of custody, or at least a restriction on liberty. If they are disregarded, then they are not imposing any practical constraint on liberty, and there is less reason to take them into account.[171]

Application of discounts when sentencing offences are dealt with summarily

Park v R [2020] NSWCCA 90

3.153 The offender pleaded guilty to five offences: intimidation intending to cause fear of physical harm,[172] common assault,[173] aggravated sexual assault with infliction of actual bodily harm,[174] choking with intent to commit an indictable offence,[175] and sexual intercourse without consent.[176] A further three offences were taken into account on Form 1s. A further two offences of taking and driving a vehicle without consent[177] (which are indictable offences that are to be dealt with summarily unless the prosecutor elects otherwise) were dealt with summarily under s 166 of the *Criminal Procedure Act 1986* (NSW) and an offence of stealing property from a dwelling house was taken into account in respect of one of these offences.

3.154 The District Court imposed an aggregate sentence of 11 years' imprisonment with a non-parole period of 8 years. All of the indicative sentences for these offences were subject to a discount of 25% for the guilty plea.

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170. *Banat v R* [2020] NSWCCA 321 [25].
171. *Banat v R* [2020] NSWCCA 321 [26].
172. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13(1).
173. *Crimes Act 1900* (NSW) s 61.
174. *Crimes Act 1900* (NSW) s 61J(1).
175. *Crimes Act 1900* (NSW) s 37(2).
176. *Crimes Act 1900* (NSW) s 61I.
177. *Crimes Act 1900* (NSW) s 154A(1)(a).

3.155 One of the grounds of appeal was that the sentence was manifestly excessive. In dealing with this ground, the CCA considered the indicative sentence of 2 years for one of the offences of taking and driving a vehicle and whether the sentencing judge erred in expressly allowing the 25% discount to be applied to a head sentence of 2 years 8 months which was beyond the jurisdictional maximum of 2 years that applies to offences dealt with summarily.

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

3.157 The majority of the CCA rejected this narrow literal construction of s 22(1) and concluded that the term "would otherwise have imposed" referred to the sentence a court considers appropriate taking into account the maximum penalty and all the facts and circumstances of the case. This sentence would then be subject to any discounts and only then would the question arise whether any jurisdictional limit applies.[178]

3.158 Chief Justice Bathurst noted that this approach is consistent with the provisions for Table offences when dealt with summarily which set the maximum term that the Local Court can impose at 2 years or the maximum penalty for the offence, whichever is shorter.[179] He also observed that "[i]t would be anomalous and lead to incoherence if a different approach was to be taken to sentencing for Table offences in circumstances where a discount for a plea of guilty falls to be considered" and added that the preferred approach seems to be:

> consistent with the purpose of the provisions to provide discounts for the pleas whilst ensuring that a sentence disproportionate to the gravity of the offence is not imposed. In many cases, Table offences if dealt with on an indictment would attract a significantly greater penalty than the jurisdictional limit. It would, in my opinion, be contrary to the requirement that the discount not result in a sentence disproportionate to the gravity of the offence, to discount from the jurisdictional limit as distinct from what the judge would otherwise consider to be the appropriate starting point.[180]

178. *Park v R* [2020] NSWCCA 90 [30], [174], [197].

179. *Park v R* [2020] NSWCCA 90 [29]; *Criminal Procedure Act 1986* (NSW) s 267(2), s 268(1A).

180. *Park v R* [2020] NSWCCA 90 [30].

3.159 In a subsequent case, involving a similar ground of appeal where the Drug Court indicated sentences of 2 years for offences that were dealt with summarily and subject to a discount for early guilty pleas, the CCA accepted the authority in *Park v R.*[181]

Commonwealth offences cannot be included in a Form 1 attached to a NSW offence

Ilic v R [2020] NSWCCA 300

3.160 The offender pleaded guilty to two NSW offences of knowingly dealing with proceeds of crime[182] and requested that six other offences be taken into account on a Form 1, including two Commonwealth offences arising from the possession of signal jammers.

3.161 The sole ground of appeal was that the sentencing judge erred in taking the two Commonwealth offences into account when sentencing the offender for a NSW offence.

3.162 The question raised by this ground was whether the provisions that relate to the Form 1 procedures[183] can be picked up an applied to Commonwealth offences under the *Judiciary Act 1903* (Cth).[184]

3.163 The CCA concluded that the prohibition under the Commonwealth law on fixing a single non-parole period in respect of both federal and state sentences[185] must be understood as prohibiting the "mixing" of Commonwealth and state sentences of imprisonment, whether in an aggregate sentence or by taking offences into account on a Form 1. This inconsistency, therefore, stands as an impediment to the application of the Form 1 provisions as surrogate Commonwealth law.[186]

3.164 Although it was not necessary to find another relevant inconsistency, the court's attention was drawn to the fact that the *Crimes Act 1914* (Cth) makes its own provision for Commonwealth offences to be taken into account on a document in the nature of a Form 1, and this form must be signed by a relevant Commonwealth prosecutor.[187] There was also a provision under the *Director of Public Prosecutions Act 1983* (Cth) that the prosecution of indictable Commonwealth offences is a function of the Commonwealth DPP.[188] The CCA agreed that this showed an intention that a Commonwealth offence should not be disposed of contrary to the determination of a

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181. *Hanna v R* [2020] NSWCCA 125 [5], [86]–[87], [98].
182. *Crimes Act 1900* (NSW) s 193B.
183. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 3 div 3.
184. *Judiciary Act 1903* (Cth) s 68(1), s 79.
185. *Crimes Act 1914* (Cth) s 19AJ.
186. *Ilic v R* [2020] NSWCCA 300 [41].
187. *Crimes Act 1914* (Cth) s 16BA.
188. *Director of Public Prosecutions Act 1983* (Cth) s 6(1).

Commonwealth prosecutor. Including a Commonwealth offence on a Form 1 would have the effect that no sentence would be imposed for that offence regardless of the attitude of the Commonwealth prosecutor.[189]

3.165 The matter was remitted to the District Court to be sentenced according to law. This would involve dealing with the Commonwealth offences as summary matters under s 166 of the *Criminal Procedure Act 1986* (NSW) rather than on a Form 1.

Drug Court – final sentencing

***Beal v R* [2020] NSWCCA 357**

3.166 The Local Court referred the offender to the Drug Court, where she pleaded guilty to 14 offences and received an initial sentence consisting of an aggregate sentence of imprisonment for 3 years for eight of the offences, a conviction with no further penalty for five of the offences and a deferral of sentence for 12 months for one of the offences. The sentence of imprisonment was suspended to allow the offender to enter into the Drug Court program, but she failed to comply with its conditions and committed three further offences. She appeared in the Drug Court and received a final sentence for the 13 offences that were initially sentenced, the one offence that was deferred and the three additional offences that amounted to an aggregate sentence of 3 years 6 months with a non-parole period of 2 years. The indicative sentences for 13 of the original offences remained unchanged.

3.167 The first ground of appeal was that the sentencing judge erred on final sentence by not considering the initial sentence and determining the final sentence as required by s 12 of the *Drug Court Act 1998* (NSW). Section 12 requires the Drug Court, on terminating a program, to "reconsider" the offender's initial sentence. It also lists a number of matters for the Court to take into consideration when reconsidering an initial sentence, including the nature of the offender's participation in the program. The offender contended that the term "reconsider" obliged the judge on final sentence to engage in a resentencing exercise. The terms "reconsider", "consider" and "determine" are not defined in the *Drug Court Act* and had not previously been subject to consideration by an appeal court.

3.168 The CCA rejected the proposition that there was an intention to disregard the initial sentence in the final sentencing exercise (as part of a resentencing exercise) on the grounds that it is "illogical and inconsistent with the object and scheme of the Act". The CCA observed that:

> The initial sentence would lose its potency as a warning of what awaits a participant who decides to abandon the program, if it is irrelevant to the final sentence. Such a proposition is also, in my view, inconsistent with the terms

189. *Ilic v R* [2020] NSWCCA 300 [44].

> of s 12, which make clear the central role of the participant's performance in the Drug Court program in reconsidering and determining the final sentence. The obvious meaning of "reconsider", in that context, is to take into account the matters enunciated in s 12(2).[190]

3.169 The second ground of appeal was effectively that the judge imposing the final sentence did not apply *Bugmy* principles and take into account evidence of the offender's childhood deprivation that was tendered in the final sentencing proceedings. The court concluded that this evidence warranted a reconsideration of the initial sentence, so that the offences could be re-assessed.[191] On resentencing, in relation to 11 of the offences, the CCA imposed a lesser aggregate sentence of 3 years' imprisonment with a non-parole period of 1 year 9 months 3 weeks.

Use of the expression "remarks on sentence"

3.170 The following two cases reflect differing judicial views about the desirability of using the expression "remarks on sentence".

You v R [2020] NSWCCA 71

3.171 In an appeal against a sentence imposed for two offences arising out of a serious motor vehicle accident, one of the grounds was that the sentencing judge erred in his application of the guideline judgment of *R v Whyte*.[192]

3.172 The offender submitted that the sentencing judge had misunderstood the criteria specified in the guideline judgment, relying entirely on an exchange with counsel in the course of the sentencing hearing. The CCA concluded that the transcript may have revealed an ambiguous statement by counsel but it did not reveal error by the sentencing judge. Justice Basten, in separate comments, observed that it was not uncommon for the CCA to be invited to construe reasons by referring to exchanges with counsel[193] and added:

> It is possible that the practice of referring to a judgment on sentence (that phrase being used by the judge in this case) by the depreciatory phrase "remarks on sentence", may tend to equate those "remarks" with remarks made in the course of the hearing. The phrase "remarks on sentence" is, in any event, an inaccurate description of the judicial function being exercised in

190. *Beal v R* [2020] NSWCCA 357 [76].
191. *Beal v R* [2020] NSWCCA 357 [84].
192. *R v Whyte* [2002] NSWCCA 343, 55 NSWLR 25.
193. *You v R* [2020] NSWCCA 71 [20].

> delivering a judgment. It might be better if that terminology were abandoned, despite long standing usage and the habits of a generation.[194]

***Maxwell v R* [2020] NSWCCA 94**

3.173 Justice Johnson used his judgment in this appeal to respond to Justice Basten's comments. He noted that the sentencing judge in the case had used the term "remarks" to describe his sentencing decision and that:

> Different terms are used by different Judges and Magistrates to describe a sentencing decision, including "remarks on sentence", "sentencing remarks", "sentencing reasons" or "sentencing judgment".[195]

3.174 He noted that:

- "sentencing remarks" or "remarks on sentence" are terms well understood by those engaged in the criminal courts
- "sentencing remarks" is not an outdated or confusing term in England and Wales where it is used regularly by the judiciary and in the criminal courts, and
- "sentencing remarks" has contemporary status in statutes aimed at informing the community about sentencing, for example, by providing for a presumption in favour of recording and broadcasting "judgment remarks" in the Supreme and District Courts.[196]

3.175 Justice Johnson also stated it is wrong to suggest that "remarks on sentence" is a "depreciatory phrase" which is outdated and should be abandoned and added that any possible confusion between "remarks on sentence" and "remarks" made in the course of a sentencing hearing has not been suggested elsewhere.[197]

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194. *You v R* [2020] NSWCCA 71 [21].
195. *Maxwell v R* [2020] NSWCCA 94 [137].
196. *Maxwell v R* [2020] NSWCCA 94 [141]–[147].
197. *Maxwell v R* [2020] NSWCCA 94 [142].

4. Sentencing trends

In Brief

In 2020, 109,376 adult offenders were sentenced to one of the current penalties available in NSW. The most common penalty is the fine (37.5%), followed by a community correction order (22%). A term of imprisonment is imposed in 10.5% 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.

4.1 This chapter sets out general data relating to the Local Court and higher courts' use of penalties in 2020, with particular data relating to gender and Aboriginal and Torres Strait Islander status as well as the regional location of offenders.

4.2 In the next annual report, we intend to set out available data on successful discharge of intensive correction orders (ICOs) and the breach and revocation of ICOs and other non-custodial sentencing orders (community correction orders and conditional release orders).

Use of penalties

4.3 2020 was the second full year of operation of the new sentencing regime, which commenced in September 2018. The following penalties are available under this regime:

- imprisonment[1]

1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5, pt 4.

- intensive correction order (ICO)[2]
- fine[3]
- community correction order (CCO)[4]
- conviction with no other penalty[5]
- conditional release order (CRO) both with or without a conviction recorded,[6] and
- no conviction (dismissal).[7]

4.4 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.

4.5 This part of the chapter sets out data for 2020 relating to each sentencing option both generally and in relation to particular offender categories (based on gender, Aboriginal status and region).

General

4.6 We have identified 109,376 offenders who received one of the relevant penalties in the Local Court and higher courts in NSW. Figure 4.1 sets out the percentage of offenders who received each penalty. The most common penalty is a fine (37.5%), followed by a community correction order (CCO) (22%), and conditional release order without conviction (11.5%). Imprisonment for 6 months or less accounts for 3.1% of penalties imposed and imprisonment for more than 6 months accounts for 7.4%.

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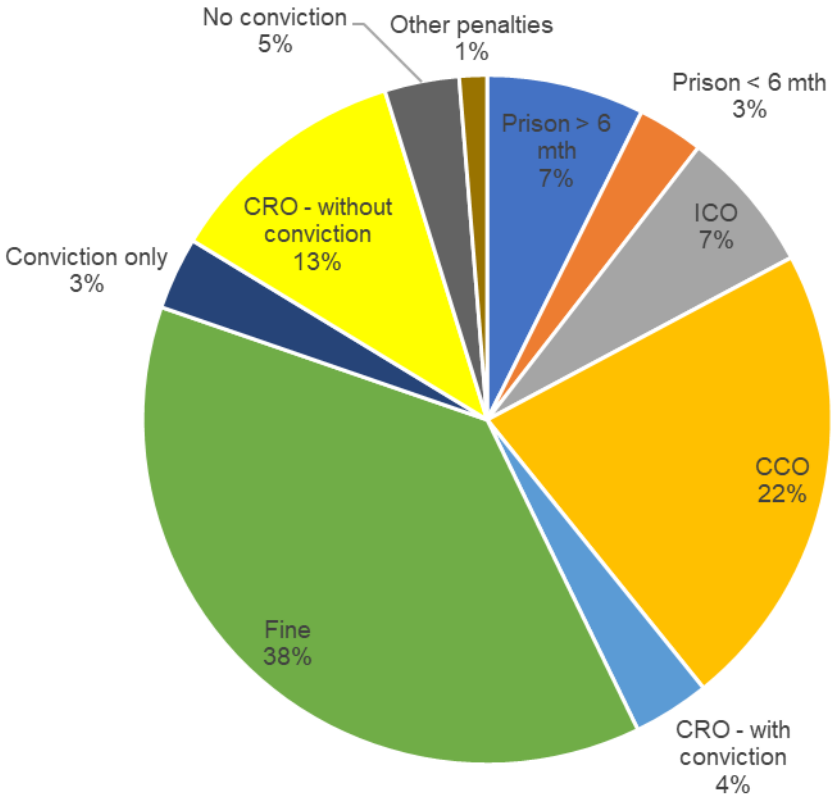
2. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7, pt 5*; Crimes (Administration of Sentences) Act 1999* (NSW) pt 3, pt 7 div 1.
3. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 2 div 4.
4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8, pt 7; *Crimes (Administration of Sentences) Act 1999* (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.

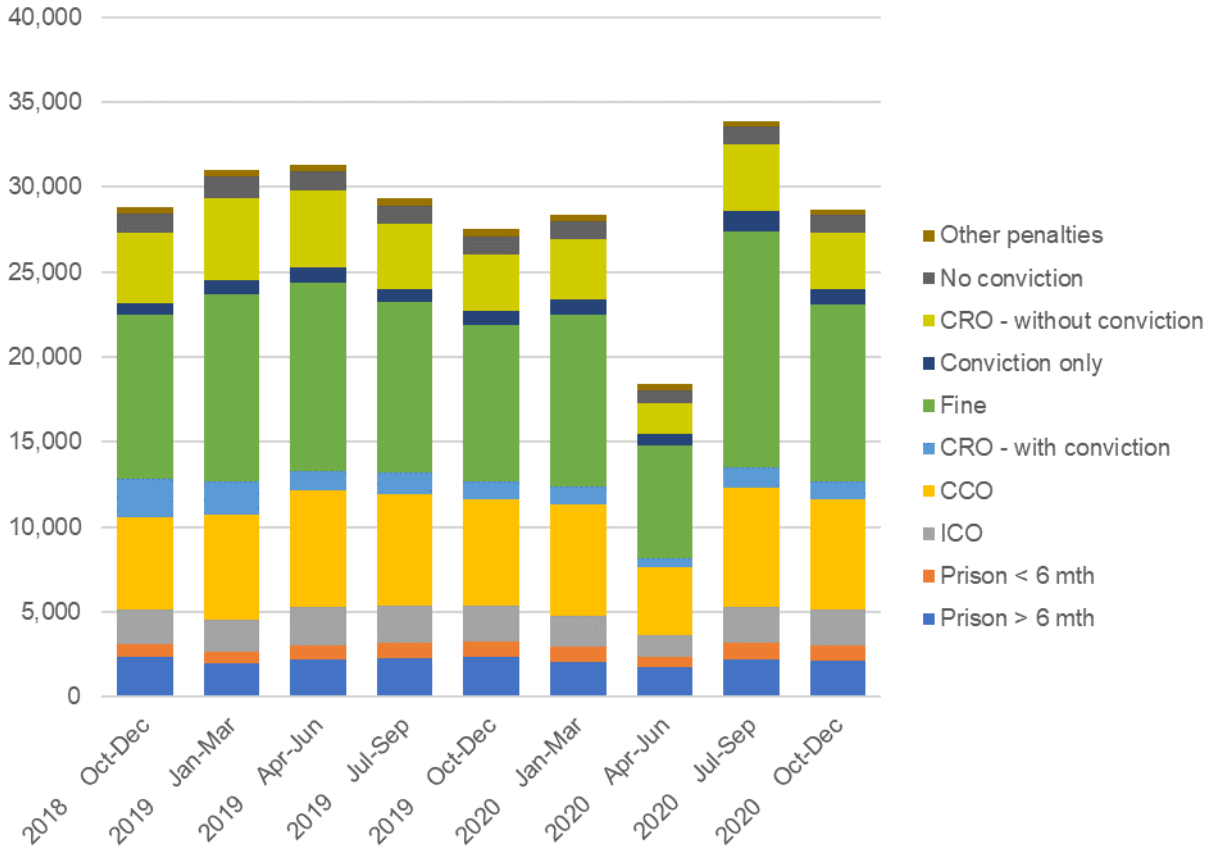
Figure 4.1: NSW higher and local criminal courts, penalties imposed, 2020



Source: NSW Bureau of Crime Statistics and Research, reference 21-20188.

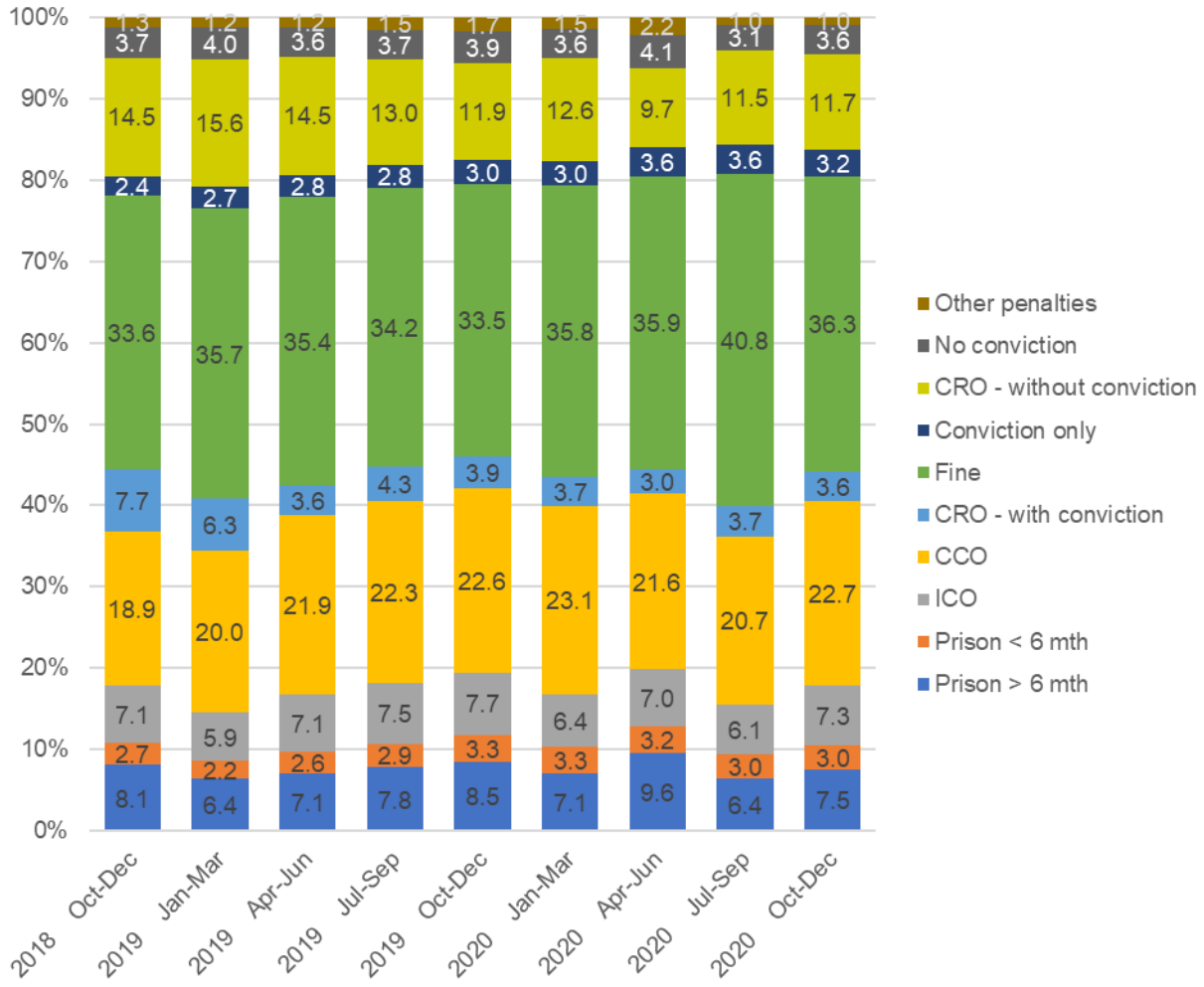
4.7 Figure 4.2 shows the number of penalties imposed in each quarter since the introduction of the new sentencing regime in the final quarter of 2018. Since 2020 is an unusual year for court proceedings because of the COVID-19 pandemic, we have included a figure to illustrate the volume of matters as well as the proportion of matters in each quarter. Figure 4.3 shows the proportion of penalties imposed in the same period.

Figure 4.2: NSW higher and local criminal courts, number of penalties imposed for each quarter, October 2018 – December 2020



Source: NSW Bureau of Crime Statistics and Research, reference 21-20188.

Figure 4.3: NSW higher and local criminal courts, percentage of penalties imposed for each quarter, October 2018 – December 2020

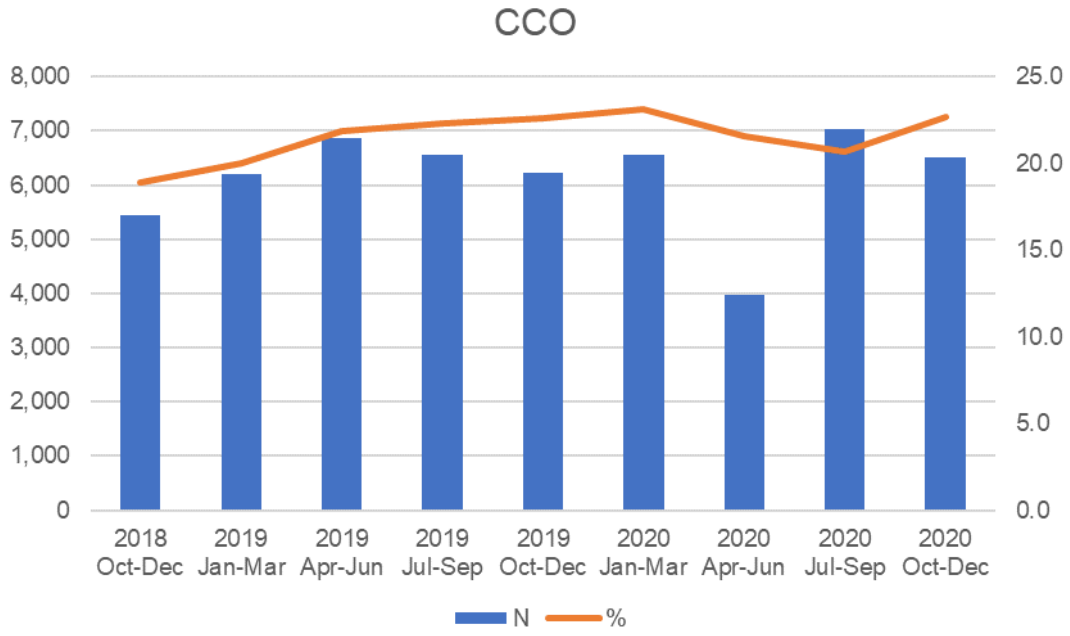


Source: NSW Bureau of Crime Statistics and Research, reference 21-20188.

4.8 Since October 2018, trends can be observed in three of the new sentencing orders: the community correction order, the conditional release order with conviction and the conditional release order without conviction. The following figures show this data more clearly for each penalty type.

4.9 Figure 4.4 shows the data for the community correction order, indicating a proportionate increase in the use of the penalty over the period.

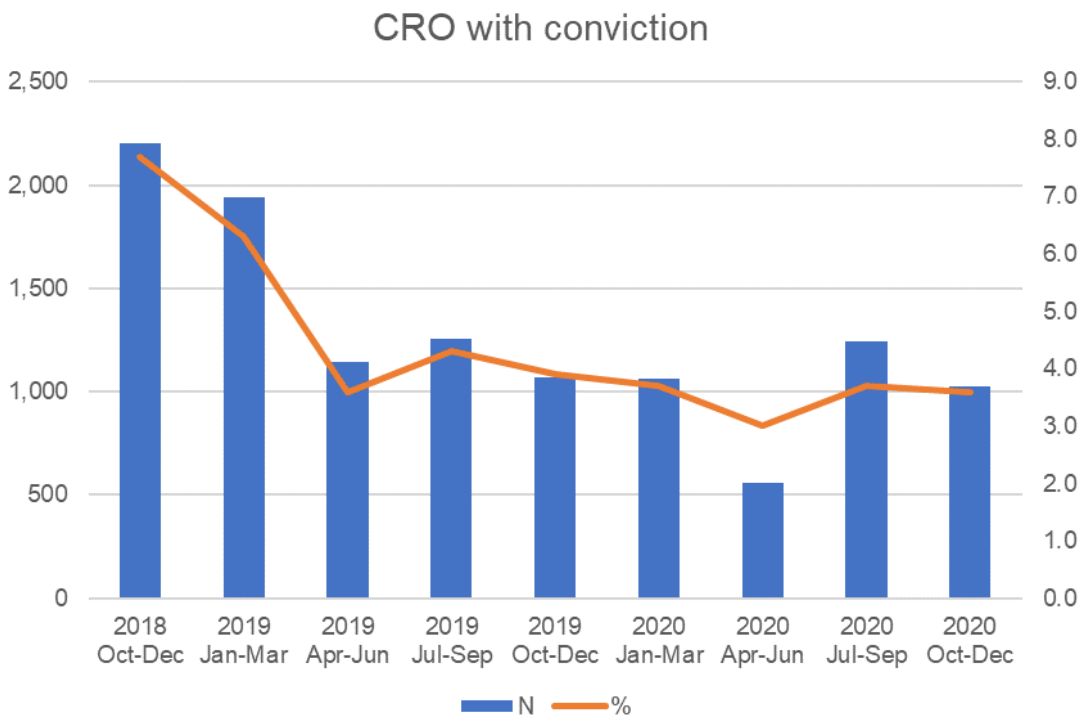
Figure 4.4: Number and proportion of community correction orders imposed, October 2018 – December 2020



Source: NSW Bureau of Crime Statistics and Research, reference 21-20188.

4.10 Figure 4.5 shows the data for the conditional release order with conviction, indicating a steep proportional and numeric decline in the first two quarters of operation. The use of this penalty has remained mostly stable since July 2019.

Figure 4.5: Number and proportion of conditional release orders with conviction imposed, October 2018 – December 2020



Source: NSW Bureau of Crime Statistics and Research, reference 21-20188.

4.11 Figure 4.6 shows the data for the conditional release order without conviction, showing a proportional and numerical decline in use over the period.

Figure 4.6: Number and proportion of conditional release orders without conviction imposed, October 2018 – December 2020

Source: NSW Bureau of Crime Statistics and Research, reference 21-20188.

Gender and Aboriginal status

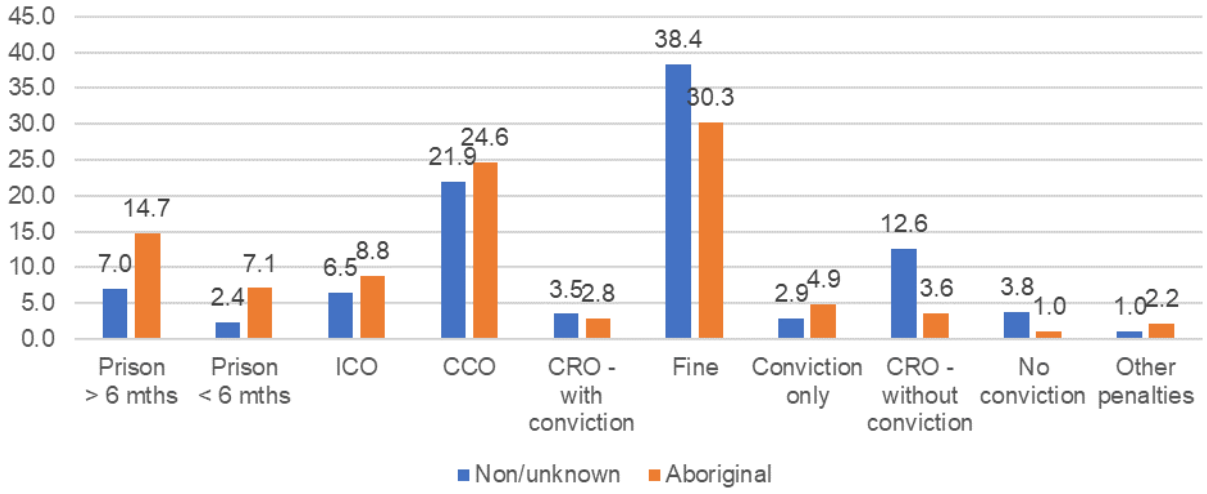
Male offenders

4.12 We have identified 19,255 Aboriginal men who received a relevant sentence in 2020, compared with 65,692 male offenders who were not Aboriginal or whose Aboriginal status was unknown. According to these numbers, 22.7% of all male offenders were recorded as Aboriginal. Aboriginal men represent 3.5% of the male resident population in NSW.[10]

4.13 Figure 4.7 shows the proportion of penalties imposed on male offenders by Aboriginal status. Compared with other offenders, a significantly greater proportion of Aboriginal men received sentences of imprisonment (21.8% compared with 9.4%) and a significantly smaller proportion of Aboriginal men received a sentence that did not involve a conviction (4.6% compared with 16.4%).

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

Figure 4.7: 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 21-20188.

4.14 Figure 4.8 shows the percentage of Aboriginal men who received each penalty, compared with those who are not Aboriginal or whose Aboriginal status is not known.

4.15 Considering that 22.7% of all male offenders were recorded as Aboriginal:

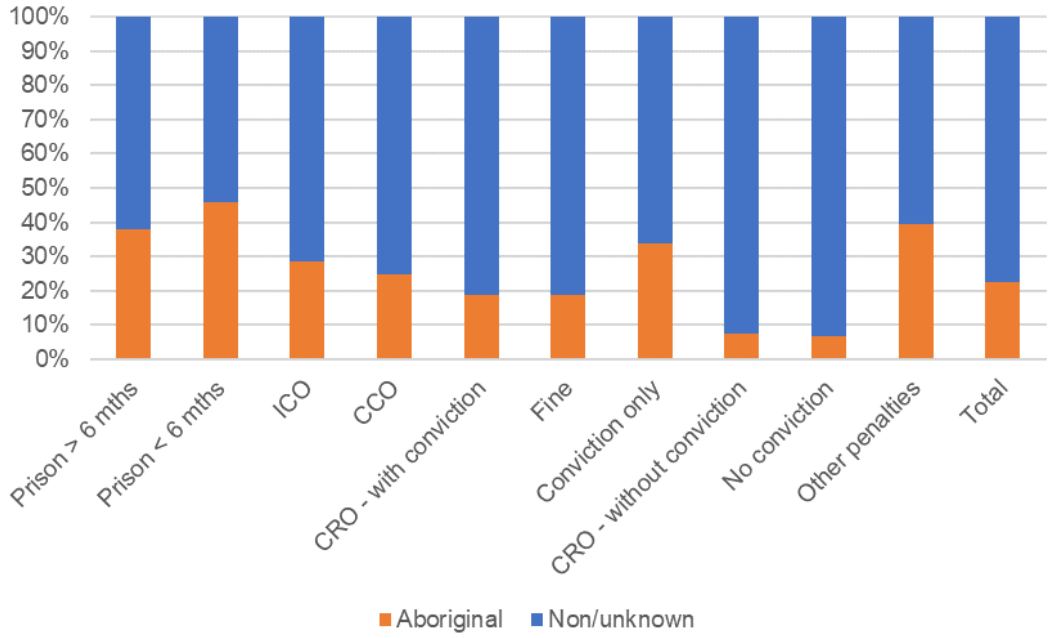
- a large proportion (46%) of the 2972 male offenders who received a sentence of imprisonment of 6 months or less were recorded as Aboriginal, and
- a large proportion (38%) of the 7427 male offenders who received a sentence of imprisonment of more than 6 months were recorded as Aboriginal.

4.16 By contrast:

- a very small proportion (7.7%) of the 8959 male offenders who received a conditional release order without conviction were recorded as Aboriginal, and
- a very small proportion (6.9%) of the 2649 male offenders who had no conviction recorded were recorded as Aboriginal.

4.17 We also note that, of the 2826 male offenders who received a conviction only, a large proportion (33.7%) 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 4.8: NSW higher and local criminal courts, proportion of each penalty imposed on Aboriginal and other male offenders, 2020



Source: NSW Bureau of Crime Statistics and Research, reference 21-20188.

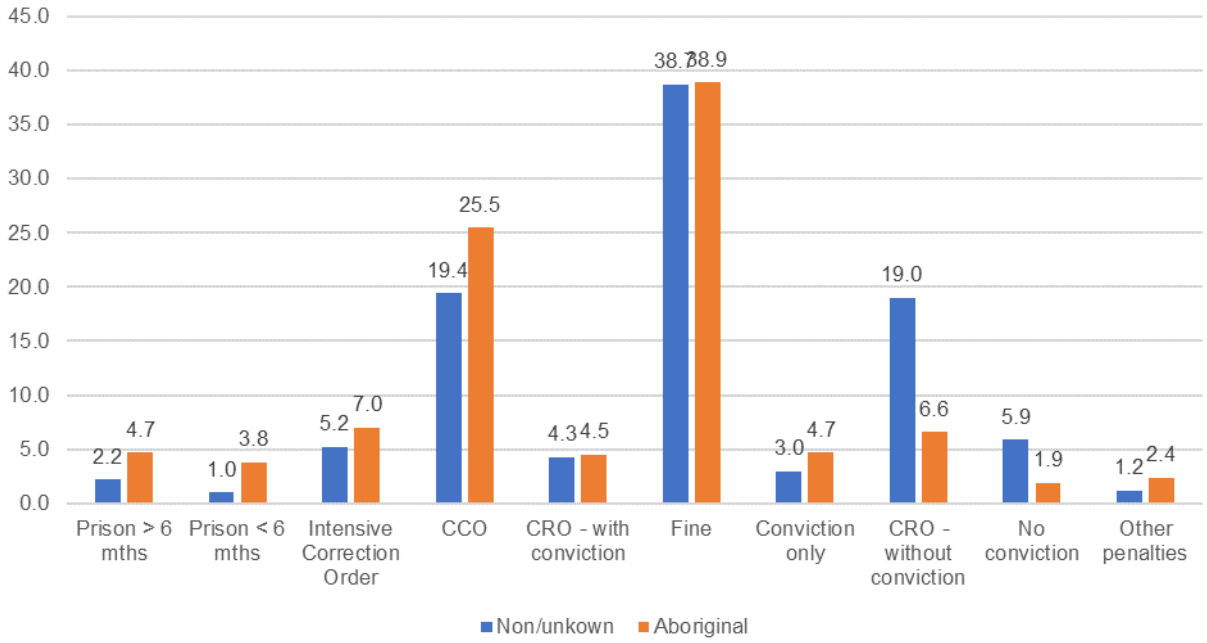
Female offenders

4.18 We have identified 6490 Aboriginal women who received a relevant sentence in 2019, compared with 16,851 women who were not Aboriginal or whose Aboriginal status was unknown. 27.8% of all female offenders were recorded as Aboriginal. Aboriginal women represent 3.4% of the resident female population in NSW.[11]

4.19 Figure 4.9 shows the proportion of penalties imposed on female offenders by Aboriginal status. A significantly greater proportion of Aboriginal women received sentences of imprisonment (8.5% compared with 3.2%) and a significantly smaller proportion of Aboriginal women received a sentence that did not involve conviction (8.5% compared with 24.9%).

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

Figure 4.9: NSW higher and local criminal courts, percentage of penalties imposed on Aboriginal and other female offenders, 2020



Source: NSW Bureau of Crime Statistics and Research, reference 21-20188.

4.20 Figure 4.10 shows the percentage of Aboriginal female offenders who received each penalty compared with other female offenders.

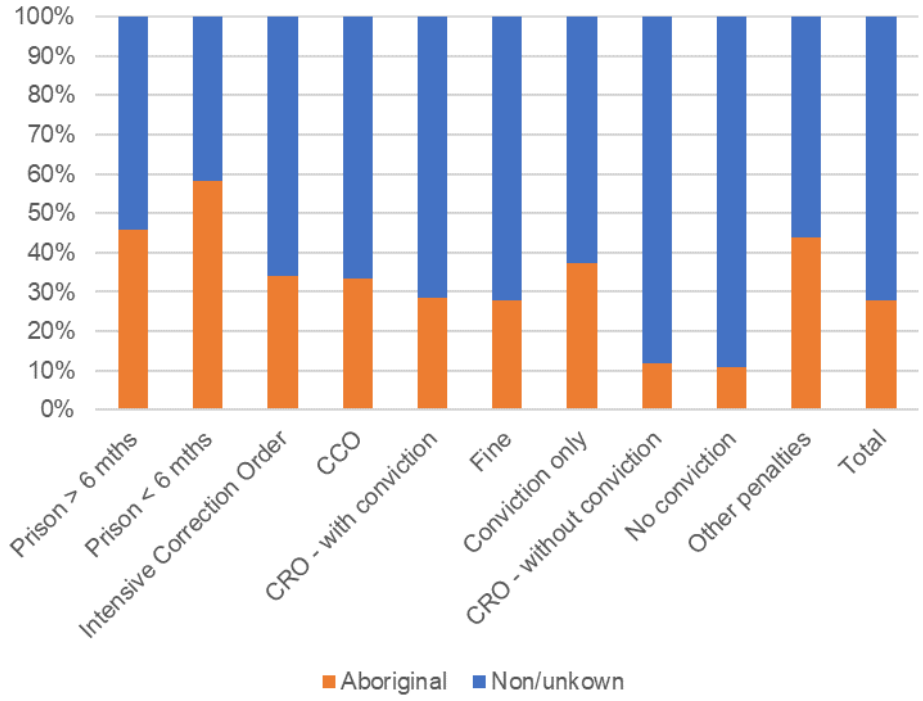
4.21 Considering that 27.8% of all female offenders were recorded as Aboriginal:

- a large proportion (58.3%) of the 422 female offenders who received a sentence of imprisonment of 6 months or less were recorded as Aboriginal, and
- a large proportion (45.8%) of the 672 female offenders who received a sentence of imprisonment of more than 6 months were recorded as Aboriginal.

4.22 By contrast:

- a small proportion (11.7%) of the 3628 female offenders who received a conditional release order without conviction were recorded as Aboriginal, and
- a small proportion (11%) of the 1115 women who had no conviction recorded were recorded as Aboriginal.

Figure 4.10: NSW higher and local criminal courts, percentage of each penalty imposed on Aboriginal and other female offenders, 2020



Source: NSW Bureau of Crime Statistics and Research, reference 21-20188.

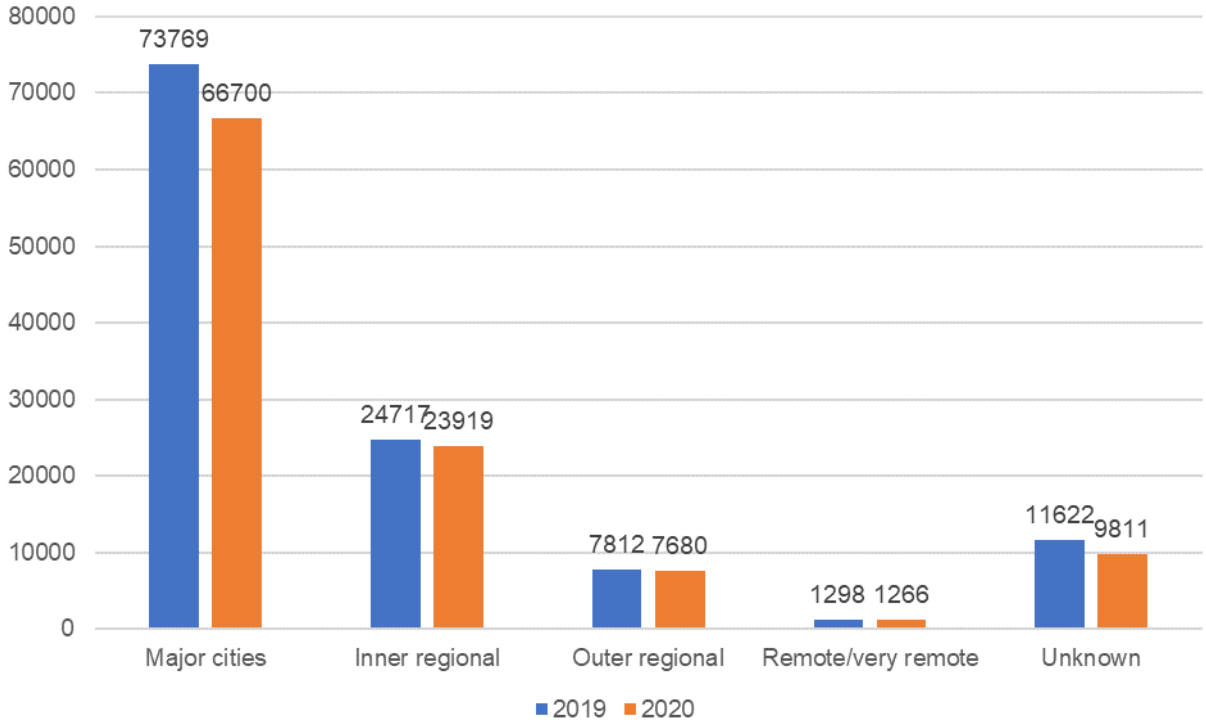
Regional data

4.23 Figure 4.11 sets out the total number of offenders who received a relevant penalty in each region in 2019 and 2020.

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

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

Figure 4.11: NSW higher and local criminal courts, number of offenders sentenced in each region, 2019-2020

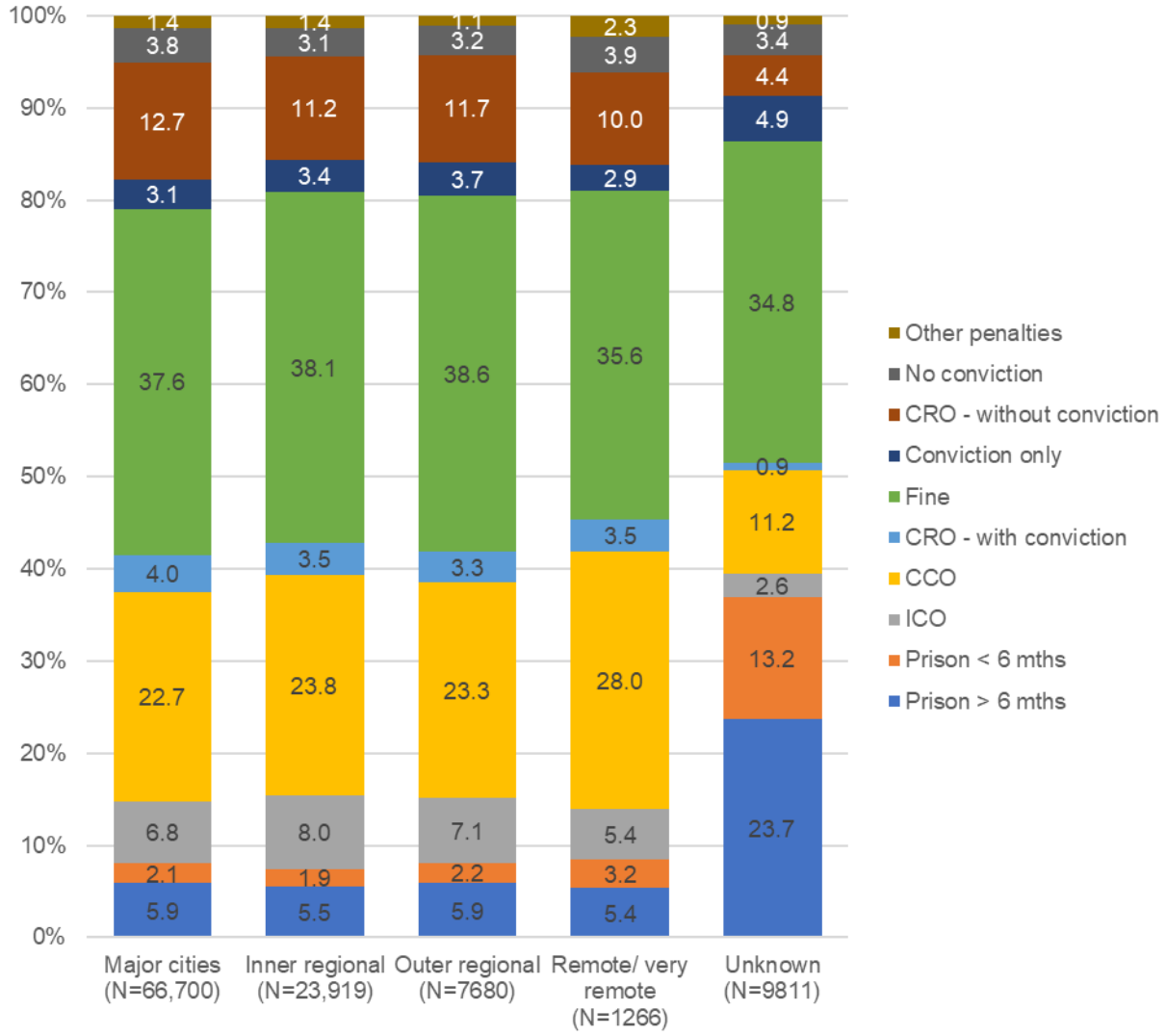


Source: NSW Bureau of Crime Statistics and Research, reference 21-20188.

4.25 Figure 4.12 sets out the proportion of each penalty imposed by region.

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

Figure 4.12: NSW higher and local criminal courts, proportion of penalties imposed in each region, 2020



Source: NSW Bureau of Crime Statistics and Research, reference 21-20188.

5. Functions and membership of the Council

In brief

We continue to carry out our statutory functions and Council meetings are scheduled monthly. 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.

Functions of the Council

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

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

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

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

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

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

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

(e) to educate the public about sentencing matters.

Council members

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

5.3 The Council's members (and their qualifications) at the end of 2019 are set out below.

Chairperson

The Hon Peter McClellan AM	Retired judicial officer

Members

His Honour Acting Judge Paul Cloran	Retired magistrate
Assistant Commissioner Scott Cook	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
Ms Karly Warner	Member with expertise or experience in Aboriginal justice matters
Mr Howard Brown OAM	Community member - experience in matters associated with victims of crime
Ms Thea Deakin-Greenwood	Community member - experience in matters associated with victims of crime
Associate Professor Tracey Booth	Community member
Ms Moira Magrath	Community member
Mr Peter Severin	Member with expertise or experience in corrective services
Mr Wayne Gleeson	Member with expertise or experience in juvenile justice
Mr Paul McKnight	Representative of the Department of Justice
Professor John Anderson	Member with relevant academic or research expertise or experience

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

5.4 The Hon James Wood AO, QC resigned as chairperson with effect from 1 February 2020 to take up an appointment as chairperson of the Compliance Review Committee of the World Anti-Doping Agency. Mr Wood served on the Council for almost 15 years, as chairperson for two periods, 2006-2009 and 2012-2021 and as deputy chairperson in 2009-2012.

5.5 The Hon Peter McClellan AM was appointed chairperson of the Council from 1 June 2020.

5.6 Assistant Commissioner Scott Cook was appointed member with expertise or experience in law enforcement on 1 June 2020.

5.7 Ms Karly Warner was appointed member with expertise or experience in Aboriginal justice matters on 1 June 2020.

5.8 Don Weatherburn PSM, resigned as member with relevant academic or research expertise or experience, on 8 March 2020. Professor John Anderson was appointed member with relevant academic or research expertise or experience on 18 September 2020.

5.9 The terms of three members – Professor Tracey Booth, Wayne Gleeson and Moira Magrath – expired in the second half of 2020. All were reappointed on 24 November 2020.

Staffing

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

Council business

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

5.12 Owing to the COVID-19 pandemic, some members attended the 18 March 2020 meeting by remote connection and from 22 April 2020 all members attended by remote connection.

5.13 We maintain 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.