NSW GOVERNMENT Justice Sentencing Council

Sentencing Trends and Practices

Annual Report 2014

NSW Sentencing Council

August 2015

www.sentencingcouncil.justice.nsw.gov.au/
Phone: 02 8061 9270
Email: sentencingcouncil@agd.nsw.gov.au
GPO Box 6
SYDNEY NSW 2001

Disclaimers

The views expressed in this report do not necessarily reflect the private or professional views of individual Council members or the views of their individual organisations. A decision of the majority is a decision of the Council – *Crimes (Sentencing Procedure) Act 1999* (NSW) Schedule 1A, clause 12.

This document has been prepared by the NSW Sentencing Council for general information purposes and while every care has been taken in relation to its accuracy, no warranty is given or implied. Readers should obtain their own independent advice before making any decisions that rely on this information.

This publication deals with the law at the time it was first published and may not necessarily represent the current law.

Translating and Interpreter Service

If you need an interpreter ring 131 450 and ask the operator to contact us on the above number.

For alternative formats (audio tape, electronic or Braille versions) of this publication contact the NSW Sentencing Council or Diversity Services:

email: diversityservices@agd.nsw.gov.au
phone: 02 8688 7507
fax: 02 8688 9626
TTY: 02 8688 7733 for people who have a speech or hearing impairment.

ISBN 978-1-922254-06-1

ISSN 1835-5234

Table of contents

Table of abbreviations

Abbreviation	Definition
BOCSAR	NSW Bureau of Crime Statistics and Research
CCA	NSW Court of Criminal Appeal
CDPP	Commonwealth Director of Public Prosecutions
CSNSW	Corrective Services NSW
CSPA	*Crimes (Sentencing Procedure) Act 1999* (NSW)
ICO	Intensive correction order
JSC	Joint Select Committee on Sentencing Child Sexual Assault Offenders
LRC	NSW Law Reform Commission
SNPP	Standard non-parole period
SPA	State Parole Authority

1. Executive summary

1.1 This is the NSW Sentencing Council's 11th statutory report on sentencing trends and practices,[1] which covers the period from January to December 2014. It also provides a summary of the work of the Council, and a review of the operation of intensive correction orders (ICOs) during 2014.

The work of the Council

1.2 On 28 April 2014, the Deputy Chairperson of the Council, the Hon Anthony Whealy QC, gave evidence to the Joint Select Committee on Sentencing of Child Sexual Assault Offenders. The Council's 2013 report on Standard Non-Parole Periods had been provided to the Committee. Summaries of the both the Council and Committee final reports are included in this Annual Report.

1.3 The Council also worked with Victims Services and Criminal Law Review in the Department of Justice to update the NSW Sentencing Information Pack. The Pack had previously been revised in 2011 and the current version is available on the Council's website.

1.4 In September 2014 we began preparing a stand-alone report on suggested additions to the categories of offences for which the accused must 'show cause' before bail can be granted. That report was delivered to the Attorney General on 22 May 2015.

1.5 In October 2014, the Council published its 2013 report on standard non-parole periods.

1.6 The Council's website received an overhaul in 2014, as the Department of Justice transitioned onto a new Web Content Management System. This transition coincided with a unified website design across all Department of Justice agencies.

1.7 The Council has also begun development of a range of new information regarding sentencing and related criminal justice issues, which will be published on our website once complete.

Trends and Issues

1.8 We have identified a number of issues relating to sentencing and the work of the Council that arose over the course of 2014.

1.9 Government responses to alcohol and drug fuelled violence received much attention at the beginning of 2014, including the passage of the *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014*, which, amongst other

1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100J(1)(c) requires the Sentencing Council to "monitor, and to report annually to the Minister on sentencing trends and practices, including the operation of the standard non-parole periods and guideline judgments".

things, introduced a mandatory minimum penalty for the new offence of assault occasioning death while intoxicated.

1.10 This issue has remained a focus in 2015, and the Council currently has a reference on the issue for reporting in August 2015.

1.11 In October 2014, the Joint Select Committee on Sentencing of Child Sexual Assault Offenders released its report – *Every Sentence Tells a Story*. Some of the report's recommendations drew on the work of the Council in its 2013 report on Standard non-parole periods.

1.12 Following the commencement of the *Bail Act 2013* in May 2014, the issue of bail also received much attention. The Government commissioned a review of the 2013 Act not long after its commencement, and made a number of amendments in September 2014. In the context of those amendments, the former Attorney General, the Hon Brad Hazzard MP, asked the Council to consider possible additions to the show cause categories introduced in the September amendments. In January 2015, this reference was expanded to become an ongoing monitoring role of the show cause categories.

Review of intensive correction orders

1.13 The report provides a snapshot of the use of ICOs in 2014. After an initial dip in the total number of offenders subject to an ICO, similar to that seen at the start of 2013, the number again increased over the course of the year, indicating increased adoption of this sentencing option. As required under the enabling legislation, we will conduct a more in depth review of the operation of ICOs, commencing in October 2015, for report to the Attorney General and Minister for Justice by October 2016.

2. The work of the Council

Standard non-parole periods

2.1 The Council received a reference from the Attorney General in September 2013 to review and make recommendations about aspects of the standard non-parole period (SNPP) scheme.

2.2 The reference flowed from a recommendation of the Law Reform Commission in its 2013 report on sentencing.[1] We were tasked with identifying which offences should be included in the SNPP Table, advising what the SNPPs should be for those offences and outlining the process by which further offences should be considered.

2.3 In August 2013, the Parliament established the Joint Select Committee on sentencing of child sexual assault offenders to review the current sentencing options and to determine, first, whether they remain effective and, second, whether introducing alternative sentencing options could improve sentencing consistency and public confidence.[2]

2.4 In light of the Joint Select Committee, we were to pay particular attention to whether any additional child sexual assault offences should be included in the SNPP scheme and whether any special factors should be taken into account when determining SNPPs for these offences. Before compiling our final report, we issued a consultation paper and an interim report.

Principles to identify SNPP offences

2.5 The report set out the factors that should be considered when deciding whether an offence should be an SNPP offence.

2.6 The factors include whether the offence:

- has a significant maximum penalty
- is triable on indictment only
- involves elements of aggravation
- involves a vulnerable victim
- involves special risk of serious consequences to the victim and community
- is prevalent
- is subject to a pattern of inadequate sentencing
- is subject to a pattern of inconsistent sentences.

1. NSW Law Reform Commission, Sentencing, (2013) Recommendation 7.1.
2. Joint Select Committee on Sentencing of Child Sexual Assault Offenders, Parliament of NSW, *Every Sentence Tells a Story — Report on Sentencing of Child Sexual Assault Offenders* (2014) [1.1].

Offences to be retained in or added to the SNPP scheme

2.7 We concluded that the current SNPP offences are sufficiently serious to be retained in the scheme.

2.8 In addition to the child sexual offences already in the SNPP regime, we recommended the following *Crimes Act 1900* (NSW) offences be included, with the listed proposed SNPPs:

Crimes Act 1900	Offence	Proposed SNPP (years)	% of maximum penalty
s 66B	Attempt sexual intercourse with a child under 10 years	10	40%
s 66C(1)	Sexual intercourse with a child 10-14 years	7	44%
s 66C(2)	Aggravated sexual intercourse with a child 10-14 years	9	45%
s 66C(4)	Aggravated sexual intercourse with a child 14-16 years	5	42%
s 66EB(2)	Procure a child under 14 years for unlawful sexual activity	6	40%
s 66EB(2)	Procure a child 14-16 years for unlawful sexual activity	5	42%
s 66EB(2A)	Meet a child under 14 years following grooming	6	40%
s 66EB(2A)	Meet a child 14-16 years following grooming	5	42%
s 66EB(3)	Groom a child under 14 years for unlawful sexual activity	5	42%
s 66EB(3)	Groom a child 14-16 years for unlawful sexual activity	4	40%
s 91D(1)	Induce a child under 14 years to participate in child prostitution	6	43%
s 91E(1)	Obtain benefit from child prostitution, child under 14 years	6	43%
s 91G(1)	Use a child under 14 years for pornographic purposes	6	43%

2.10 We also recommended that three other offences in the *Crimes Act 1900* (NSW) be included in the SNPP scheme:

Crimes Act 1900	Offence	Proposed SNPP (years)	% of maximum penalty
s 33A(1)	Discharge firearm with intent to cause grievous bodily harm	9	36%
s 33A(2)	Discharge firearm with intent to resist arrest or prevent lawful arrest or detention	9	36%
s 38	Use intoxicating substance to commit an indictable offence	9	36%
s 93GA(1)	Fire at building with reckless disregard for safety	5	36%
s 93GA(1A)	Fire at building with reckless disregard for safety during public disorder	6	38%
s 93GA(1B)	Fire at building with reckless disregard for safety, organised criminal activity	6	38%

2.11 We also considered other offences in the *Crimes Act 1900* (NSW), including the remaining child sexual assault offences, outlining why they are currently unsuitable for the SNPP scheme, but indicating that they could potentially be included in the future.

Method for setting SNPPs

2.12 Given the inconsistencies in the existing scheme, we deemed it appropriate to set out a methodology for determining SNPPs. We noted that any methodology should account for the High Court's decision in *Muldrock v R*[3] as well as s 54B of the *Crimes (Sentencing Procedure) Act 1999* (NSW), both of which promote a flexible approach to SNPPs. Having said this, we also highlighted the need for transparency and consistent proportionality.

2.13 We recommended using a fixed proportion of the maximum sentence for an offence as a starting point, which could be adjusted for different offences in light of relevant considerations.

2.14 We recommended that the fixed proportion start at 37.5%. This proportion could be adjusted upwards or downwards depending on the offence, but should not lead to an SNPP that is more than 50% of the maximum penalty. The adjustment should be made having regard to the following matters:

- the need for special deterrence
- the need to recognise where an offence causes exceptional harm
- the vulnerability of victims
- the extent to which the offence involved a breach of trust

3. [2011] HCA 39; 244 CLR 120.

- sentencing statistics and practices as well as sentencing guidance from appellate courts.

Adjusting existing SNPPs

2.15 After applying our methodology to the existing SNPP offences we recommended several changes. These included:

- s 33(2) *Crimes Act 1900* (NSW) – wounding etc with intent to resist arrest. The SNPP should be increased to 9 years.
- s 61M(1) *Crimes Act 1900* – aggravated indecent assault. The maximum penalty should be increased to 8 years imprisonment and the SNPP reduced to 4 years.
- s 61M(2) *Crimes Act 1900*– indecent assault of a child under 16 years. The maximum penalty should be increased to 12 years imprisonment and the SNPP reduced to 4 years.
- s 7 *Firearms Act 1996* (NSW) – unauthorised possession of a pistol or prohibited firearm. The SNPP should be increased to 4 years.
- s 7 *Weapons Prohibition Act 1988* (NSW) – unauthorised possession of a prohibited weapon. The SNPP should be increased to 5 years.

2.16 The SNPP for sexual intercourse with a child under 10 years currently stands at 60% of the maximum penalty. However, we did not recommend reducing the SNPP since the maximum penalty for the offence is already 25 years imprisonment and reducing the SNPP to 50% may destabilise sentencing patterns in an area that the community is particularly concerned about.

Dealing with SNPPs in the future

2.17 We recommended that the methodology we applied to existing and proposed SNPP offences should be applied to future or amended offences, and that the Government consult with the Council whenever a question of adding, removing or adjusting an SNPP arises.

Bail reference

Additional show cause categories

2.18 On 10 September 2014 the Attorney General referred to the Council a proposal by the NSW Police Association to expand the show cause categories. We were to report back by 31 May 2015. We provided a report to the Attorney General on 22 May 2015.

2.19 The Council was asked to consider circumstances where an accused person is charged with a serious indictable offence committed while:

- subject to a good behaviour bond, intervention program order, intensive correction order; or

- serving a sentence in the community; or

- in custody.

2.20 The Attorney General requested that the Sentencing Council consider and advise on:

(1) the extent to which concerns raised by these circumstances can be mitigated by the existing unacceptable risk test and show cause categories in the *Bail Amendment Bill 2014* (NSW)

(2) the expected impact of expanding show cause requirements to these circumstances

(3) taking into account the above, whether there is a need to create a new show cause category for these circumstances; and if so what the appropriate limitations on this category should be in terms of:

a. the type of offences it applies to; and

b. the type of conditional liberty (or custody) that should trigger the show cause requirement, if an offence is committed.

2.21 In reviewing the proposals we analysed the interpretation and operation of show cause provisions in Victoria and Queensland, and examined how this may guide interpretation of the amendments contained in the *Bail Amendment Act 2014*.

Monitoring and reviewing show cause categories

2.22 On 14 January 2015, the Attorney-General requested that the Council take an ongoing role in monitoring and reviewing the show cause categories. In particular, the Council was to consider two issues that had arisen since the original reference:

- the Office of the Director of Public Prosecutions (ODPP) had suggested that the "show cause category for repeat serious violent offenders should be more closely aligned with the similar category of offences which had a presumption against bail under the *Bail Act 1978*".

- there had also been significant stakeholder concern regarding the breadth of the show cause requirement applying to all serious indictable offences committed while on bail.

2.23 The Attorney-General asked for an interim report on the two new issues by 31 May 2015. We responded to these issues in the report provided on 22 May 2015.

3. Trends and issues

Alcohol related violence

3.1 From January 2014 the issue of alcohol related violence, and the Government's response to it, received attention in the media and public discourse. Following a number of alcohol related assaults which resulted in deaths, a range of responses was developed, including changes to liquor licensing laws, and the creation of a new offence, with a mandatory minimum penalty.

Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014

3.2 Before the legislation was introduced in 2014, one-punch offenders where the victim died were generally charged with manslaughter. To prosecute successfully, the state had to prove that the offender should have foreseen that his or her actions put the victim at risk of serious injury.[1]

3.3 A public perception emerged that sentencing for such offences was too lenient, in particular following the initial sentencing for the manslaughter of Thomas Kelly, who died following an assault in Kings Cross in July 2012. The offender was originally sentenced to six years imprisonment with a non-parole period of four years for the offence.[2]

3.4 Following the death of another young person from a single punch assault on New Year's Eve 2013, the Government recalled Parliament early in 2014 to introduce and pass the *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW).

3.5 The Act introduced a new offence of assault causing death with a maximum penalty of 20 years. A person is guilty of the offence if they unlawfully assault another person by intentionally hitting them and that assault causes the person's death.[3] The death can be caused by the assault even if it death is caused because the person hit the ground or an object as a consequence of the assault.[4]

3.6 If an adult commits the offence while intoxicated, the maximum penalty is 25 years imprisonment,[5] with a mandatory minimum sentence of eight years imprisonment.[6] The only other offence in NSW that has a mandatory minimum sentence is murdering a police officer in the course of his or her duty.[7]

1. NSW, *Parliamentary Debates*, Legislative Assembly, 30 January 2014, 26621–5 (B O'Farrell).
2. *R v Loveridge* [2013] NSWSC 1638. It is noted that, after the enactment of the *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014*, the Crown successfully appealed the sentence, and in July 2014 the Court of Criminal Appeal resentenced Loveridge to 10.5 years imprisonment with a non-parole period of 7 years – *R v Loveridge* [2014] NSWCCA 120.
3. *Crimes Act 1900* (NSW) s25A (1).
4. *Crimes Act 1900* (NSW) s25A (3).
5. *Crimes Act 1900* (NSW) s25A (2).
6. *Crimes Act 1900* (NSW) s25B (1).
7. *Crimes Act 1900* (NSW) s19B(1).

3.7 Under the new offence, the prosecution need only prove that an intoxicated offender, intended to hit the victim.[8] It need not prove that he or she intended to cause death or that death was a reasonably foreseeable result of the offender's actions.[9]

3.8 The relevant intoxication can result from intake of drugs or alcohol.[10] Evidence of intoxication by alcohol will be conclusive if the offender had 0.15 grams or more of alcohol in 210 litres of breath or 100 millilitres of blood.[11]

3.9 It is a defence to a charge of assault causing death while intoxicated if the intoxication was not self-induced or if the offender had a significant cognitive impairment at the time of the offence.[12]

Alcohol and drug fuelled violence reference

3.10 On 5 March 2015, the Attorney General, the Hon Brad Hazzard MP, asked the Sentencing Council to consider a number of proposals from the Thomas Kelly Youth Foundation to amend the *Crimes (Sentencing Procedure) Act 1999* (NSW) aimed at deterring alcohol and drug fuelled violence. The Foundation was established in December 2012 after Thomas Kelly's death to foster a more responsible drinking culture and ultimately a safer and healthier community.

3.11 The Attorney also asked the Council to examine possible sentencing measures to achieve deterrence and behavioural change in relation to alcohol and drug fuelled violence, including measures taken by other jurisdictions, the success of such measures and their possible suitability for NSW.

3.12 The report is due by 31 August 2015.

Joint Select Committee on the Sentencing of Child Sexual Assault Offenders

3.13 In 2013, the Joint Select Committee on Sentencing Child Sexual Assault Offenders (JSC) was tasked with inquiring into and reporting on whether the current sentencing options for perpetrators of child sexual assault remain effective and whether greater consistency could be achieved through alternative sentencing options.[13] It compiled a comprehensive report and made numerous suggestions for legislative change as well as other recommendations.

8. *Crimes Act 1900* (NSW) s25A (2); NSW, *Parliamentary Debates*, Legislative Assembly, 30 January 2014, 26621–5 (B O'Farrell).
9. *Crimes Act 1900* (NSW) s25A (4); NSW, *Parliamentary Debates*, Legislative Assembly, 30 January 2014, 26621–5 (B O'Farrell).
10. *Crimes Act 1900* (NSW) s428A (definition of 'intoxication').
11. *Crimes* Act *1900* (NSW) s25A (6)(b).
12. *Crimes Act 1900* (NSW) s25A (5).
13. Joint Select Committee on Sentencing of Child Sexual Assault Offenders, Parliament of NSW, *Every Sentence Tells a Story — Report on Sentencing of Child Sexual Assault Offenders* (2014) v.

3.14 The JSC was provided with the Council's interim and final reports on standard non-parole periods (SNPPs) in December 2013. The Hon Anthony Whealy QC appeared before the JSC on 28 April 2014 as a witness on behalf of the Council. The JSC adopted a number of our recommendations in full or in part.

Legislative recommendations

3.15 The JSC recommended that the NSW Government conduct a comprehensive review of child sexual assault offences and that the review should:

- make recommendations to consolidate and simplify NSW's child sexual assault provisions to make the legislation more user-friendly[14]
- highlight any child sexual offences that are not covered by State or Commonwealth law[15]
- consider whether the age categories within NSW's child sexual offence provisions should be retained[16]
- consider any overlap between provisions governing prohibition orders under the *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) and non-association and place restriction orders under the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA) with a view to determining whether it would be appropriate to consolidate or revise these provisions.[17]

3.16 The JSC outlined the varied considerations that go into sentencing a child sexual assault offender, paying particular attention to the aggravating and mitigating factors in s 21A of the CSPA as well as the relevant maximum penalties and SNPPs.

3.17 The JSC recommended that:

- Given the potential for confusion and the risk of double counting,[18] s 21A of the CSPA should be replaced with the revised set of aggravating and mitigating factors set out by the NSW Law Reform Commission in its report on *Sentencing.*[19]
- Section 21A(5A) of the CSPA should be retained since it is important that sentencing courts not take into account good character and lack of prior convictions where they assisted the offender to commit a child sexual offence.[20]
- Discounts for guilty pleas should remain available for child sex offenders since, among other things, they help prevent victims undergoing the traumatic trial process.[21]

---

14. Joint Select Committee on Sentencing of Child Sexual Assault Offenders, Parliament of NSW, *Every Sentence Tells a Story — Report on Sentencing of Child Sexual Assault Offenders* (2014) [2.59], [2.69], [2.73].
15. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) [2.60], [2.73].
16. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) [2.73].
17. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) [2.72].
18. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) [3.16]–[3.18].
19. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) [3.36]–[3.37].
20. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) [3.36]–[3.38].
21. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) [3.27], [3.38].

- Given the inconsistent proportionality between SNPPs for various child sexual assault offences and their respective maximum penalties,[22] the JSC proposed setting a consistent starting point for SNPPs which represents a percentage of the maximum penalty for each offence (no more than 50% of the maximum).[23] *This differs slightly from our recommendation that a fixed proportion of 37.5% should be initially applied, which could then be adjusted upwards or downwards depending on the offence, without exceeding 50% of the maximum.*[24]

- The maximum penalty for offences of sexual intercourse with a child under 10, including s 66A(1) of the *Crimes Act 1900* (NSW), should be changed to life imprisonment. However, the current 15-year SNPP for an offence against s 66A(1) should be retained.[25]
  We did not recommend increasing the maximum penalty to life imprisonment because the aggravated form of the offence in s 66A(2) already carries this maximum and increasing the penalty for the basic offence would effectively make the aggravated offence redundant.

  The JSC's recommendation regarding the SNPP for a s 66A(1) offence reflected ours.[26] *This means that the SNPP for an offence under s 66A(1) represents 60% of the maximum penalty. While this diverges from the our recommendation that a SNPP not exceed 50% of the maximum, we made an exception in this instance because there was no room to recommend an increase to the existing maximum penalty (25 years imprisonment) and to reduce the SNPP might run the risk of destabilising patterns in an area of exceptionally serious offending that is of particular concern to the community.*[27]

- The following provisions of the *Crimes Act 1900* (NSW) should be added to the SNPP scheme: sections 66B, 66C(1), 66C(2), 66C(4), 91G(1), 66EB(2), 66EB(2A), 66EB(3), 91D and 91E.[28]
  This recommendation mirrors ours.[29] *The JSC also agreed with our recommendation that for sections 91D and 91E, only those offences that relate to a child under 14 years should be included in the SNPP regime.*[30]

3.18 The JSC considered examples of mandatory minimum sentencing in Australia and noted that mandatory minimums for child sexual assault offenders would only be appropriate in very limited circumstances,[31] since they limit judicial discretion and could lead to a decrease in the number of offenders pleading guilty and could contribute to an increase in the prison population.[32] For these reasons it did not

22. Joint Select Committee on Sentencing of Child Sexual Assault Offenders, Parliament of NSW, *Every Sentence Tells a Story — Report on Sentencing of Child Sexual Assault Offenders* (2014) [3.56].
23. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) [3.86].
24. NSW Sentencing Council, *Standard non-parole periods*, (2013) [4.24].
25. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) [3.83].
26. NSW Sentencing Council, *Standard non-parole periods*, (2013) [4.58] (recommendation 4.3).
27. NSW Sentencing Council, *Standard non-parole periods*, (2013) [4.46]
28. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) [3.86].
29. NSW Sentencing Council, *Standard non-parole periods*, (2013) [3.4] (recommendation 3.1).
30. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) [3.55] (table 4), [3.86] (recommendation 8); NSW Sentencing Council, *Standard non-parole periods*, (2013) [3.4] (recommendation 3.1).
31. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) [5.54].
32. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) [5.58], [5.64], [5.68].

recommend introducing mandatory minimum sentences for child sexual assault offences in NSW.[33]

Court processes

3.19 The JSC considered the fact that most child sexual assault offences are tried summarily in the Local Court, where magistrates can only impose a maximum sentence of two years imprisonment for a single offence.[34] The JSC agreed with our 2010 recommendation against expanding the Local Court's jurisdiction.[35]

3.20 The JSC considered the establishment of a specialist court for child sexual assault matters. It noted the positive impact of a 2003 pilot program to improve court processes in such cases.[36] The JSC recommended that a Child Sexual Assault Task Force be established to investigate and report to the Government on a preferred model for a Child Sexual Assault Offences Specialist Court in NSW.[37]

3.21 The JSC reviewed the effectiveness of guideline judgments, and noted strong stakeholder support for their use.[38] The JSC supported the idea that the NSW Sentencing Council be given an expanded role in undertaking research for the Attorney General or Court of Criminal Appeal (CCA) so that the CCA could consider a broader range of information when determining guideline judgments.[39] It also recommended that the Attorney General consider applying for a guideline judgment, or guideline judgments, for child sexual assault offences.[40]

Sentencing patterns

3.22 The JSC considered the use and adequacy of sentencing data in sentencing decisions and made several recommendations aimed at making information and statistics about the sentencing of child sexual assault offenders more accessible to the public and to journalists.[41]

Transparency

3.23 The JSC noted the lack of public confidence in the way child sex offenders are currently sentenced and the importance of improved public communication of sentencing decisions.[42] The JSC recommended that the Attorney General consider

---

33. Joint Select Committee on Sentencing of Child Sexual Assault Offenders, Parliament of NSW, *Every Sentence Tells a Story — Report on Sentencing of Child Sexual Assault Offenders* (2014) [5.71]–[5.73].
34. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) [3.87].
35. NSW Sentencing Council, *An examination of the sentencing powers of the Local Court in NSW*, (2010) pp45-6.
36. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) [5.167].
37. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) [5.194].
38. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) [5.82].
39. JSC, Parliament of NSW, *Every Sentence Tells a Story* [5.91], [5.96], [5.99].
40. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) [5.99].
41. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) (recommendations 9, 15 and 16).
42. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) [5.4], [5.20]–[5.21].

publishing all NSW sentencing decisions about child sexual assault after they are handed down.[43]

Treatment and management of offenders

3.24 The JSC noted that current sentencing procedures allow an order to be made requiring an offender to complete an early intervention or diversionary program.[44]

3.25 However, it pointed out that referral into the pre-trial diversionary program, Cedar Cottage, ceased in September 2012, despite independent evaluators finding that the program reduced the likelihood of low-risk sex offenders reoffending.[45] Without the Cedar Cottage program, there are no diversionary programs available for adult sex offenders charged as of 1 September 2012.

3.26 Stakeholders expressed concern that without available diversionary programs offenders would be less likely to plead guilty and there would be an accompanying risk that more victims and their families would have to endure the trial process.[46] The JSC also indicated its support for diversionary programs, considering them beneficial in reducing recidivism among low-risk offenders and, given the closure of Cedar Cottage, it recommended that Corrective Services NSW and Health NSW develop new diversionary programs and treatment options for low-risk offenders.[47]

3.27 In addition to discussing pre-trial diversionary programs, the JSC considered the various in-custody treatment options, community based programs and pharmacological treatments currently available.[48]

3.28 With respect to medication management, the JSC suggested that a standard policy for referring offenders for anti-libidinal treatment be developed and the NSW Government provide more resources for conducting these assessments.[49] It further recommended that treatment should be commenced before the offender's release into the community, that extended supervision orders should be used more extensively to monitor rehabilitation of reoffenders and that an inter-agency working group should be formed to devise pre-release strategies to help child sex offenders prepare for and obtain employment and find appropriate housing and health care.[50]

3.29 Finally, the JSC suggested it would be beneficial to conduct research into whether the Child Protection Register has helped reduce child sex offending and/or reoffending behaviour.[51]

---

43. Joint Select Committee on Sentencing of Child Sexual Assault Offenders, Parliament of NSW, *Every Sentence Tells a Story — Report on Sentencing of Child Sexual Assault Offenders* (2014) [5.25].
44. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) [6.7].
45. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) [6.14].
46. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) [6.17].
47. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) [6.25]–[6.26].
48. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) [6.33]–[6.69].
49. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) [6.80], [6.112], [6.119].
50. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) [6.80], [6.112], [6.119].
51. JSC, Parliament of NSW, *Every Sentence Tells a Story* (2014) [6.148].

Government Response

3.30 On 13 May 2015, the Government published a response to the JSC's report. The response endorsed the underlying objectives of the JSC's recommendations to protect children and deter future abuse, reduce the stress of court proceedings and provide offenders with effective treatment and rehabilitation.

3.31 The Government indicated that it had already committed to:

- including additional child sexual offences in the standard non-parole period scheme;
- increasing the maximum penalty for sexual intercourse with a child under 10 from 25 years imprisonment to life imprisonment;
- assisting victims of child sexual assault through the criminal trial process by piloting the use of children's champions, specialised judges and pre-recording of a child 's testimony; and
- establishing a Taskforce, including representatives of victim groups, justice, health and police officials, to examine options for anti-libidinal medical treatment for sex offenders.[52]

Bail

3.32 Although not directly within the remit of the Sentencing Council, the issue of bail emerged in 2014 as a significant and contentious area of reform for the criminal justice system. As noted in Chapter 2, we now have an ongoing reference to monitor and review the show cause categories in the *Bail Act 2013* (NSW).

3.33 The Act commenced in May 2014. A few weeks into its operation, concerns were expressed by the community and victims about the new bail regime following a number of decisions to grant bail to alleged serious offenders.[53]

Hatzistergos Review

3.34 In response to these concerns, the NSW Government requested former Attorney General John Hatzistergos review the Act. The report was released in July 2014.

3.35 The report recommended a number of changes to the Act. The key recommendations were that:

- the purpose clause in s 3(2) of the Act (the presumption of innocence and the general right to be at liberty) be removed and instead inserted into a preamble;
- the two-step unacceptable risk test be replaced with a one-step test with bail conditions being considered at the risk assessment stage; and

---

52. *NSW Government response to the Report of the Joint Select Committee on Sentencing of Child Sexual Assault Offenders, Every Sentence Tells a Story - Report on Sentencing of Child Sexual Assault Offenders*, available at: http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/D25CD5DB3B384061CA257D7100011126

53. *R v Fesus* [2014] NSWSC 770; *R v Lago* [2014] NSWSC 660; *R v Hawi* [2014] NSWSC 837.

- a category of offences be created for which an accused must show cause why detention in custody is not justified.[54]

3.36 The report found that the additional show cause requirement was found to be the best option to address community concerns about serious offenders being granted bail, while also providing a greater level of consistency.[55]

3.37 The test the report proposed for determining which offences should be subject to the show cause requirement was that it should:

> apply to offenders whose alleged offences are such that in the ordinary course, the consequences of materialisation of the risk to the community and the administration of justice are such that they outweigh the likelihood of it occurring.[56]

3.38 It was important, therefore, that categories and types of offences be deemed 'show cause' rather than specific lists of offences.[57]

3.39 The report recommended the show cause requirement apply to the following categories of serious offences where:

- The alleged offence involved the use of a firearm, or the unauthorised possession, acquisition, supply or manufacture of a prohibited firearm or military-style weapon.
- The alleged offence involved the sexual assault of a child under 16 years of age and the accused was an adult.
- The alleged offence is a serious indictable offence committed whilst on bail or parole or subject to a supervision order under the *Crimes (High Risk Offenders) Act 2006* (NSW).
- The alleged offence carries a penalty of life imprisonment.
- The alleged offence involves the supply, manufacture, cultivation, importation or exportation of a commercial quantity of a prohibited substance.
- The alleged offence is a serious personal violence offence, and the accused has a previous conviction for such an offence.

3.40 The report proposed that any expansion to the show cause categories should be referred to the NSW Sentencing Council for consideration.[58]

Bail Amendment Act 2014

3.41 The Government accepted the report, and implemented the recommendations, as well as an additional offence for attempting to commit a show cause offence, in the *Bail Amendment Act 2014* (NSW).[59]

54. J Hatzistergos, NSW Government, *Review of the Bail Act 2013*, Report (2014) (recommendations 1, 2 and 6).
55. J Hatzistergos, NSW Government, *Review of the Bail Act 2013*, Report (2014) [220]
56. J Hatzistergos, NSW Government, *Review of the Bail Act 2013*, Report (2014) [227].
57. J Hatzistergos, NSW Government, *Review of the Bail Act 2013*, Report (2014) [228].
58. J Hatzistergos, NSW Government, *Review of the Bail Act 2013*, Report (2014) [247].

3.42 The 'show cause test' introduced by the Act requires the bail applicant first to show cause why detention in custody is not justified, before the bail authority makes a decision as to whether the applicant poses an unacceptable risk of committing one of the defined bail concerns.

Remand

3.43 Before the commencement of the *Bail Act 2013* (NSW), the remand population had begun to decline from 3170 in April 2014, to a low of 2688 in July 2014.[60]

3.44 However, the population began to rise steeply from November 2014, and, by February 2015 had reached a high of 3535.[61] This contributed to an overall prison population of 11,207.

3.45 It is too soon to assess the impact of the commencement of the *Bail Act 2013* and the subsequent show cause amendments, but we will continue to monitor the remand population in the context of our ongoing role in reviewing the show cause categories.

Sentencing related research

Intensive correction orders and re-offending

3.46 The *Crimes (Sentencing Legislation) Amendment (Intensive Corrections Orders) Act* 2010 (NSW) abolished the sentencing option of periodic detention and replaced it with a new sentencing option – the intensive correction order (ICO). ICOs are "designed to reduce an offender's risk of re-offending through the provision of intensive rehabilitation and supervision in the community".[62] ICOs were designed to address some of the shortcomings of periodic detention, including that it was not available throughout the State and that periodic detention detainees were not effectively case managed or rehabilitated.[63]

3.47 In May 2014, BOCSAR released a report evaluating the effects of ICOs on re-offending.

3.48 BOCSAR compared offenders who received ICOs with two groups who received other alternatives to imprisonment, which past research had shown to be imposed on similar offender-types.[64] The first comparison group received a periodic detention sentence prior to the introduction of ICOs.[65] This group was chosen

---

59. The *Bail Amendment Act 2014* (NSW) received assent on 25 September 2014, and commenced on 28 January 2015.
60. Bureau of Crime Statistics and Research, *NSW Custody Statistics, Quarterly Update March 2015*, 27.
61. Bureau of Crime Statistics and Research, *NSW Custody Statistics, Quarterly Update March 2015*, 27.
62. NSW, *Parliamentary Debates*, Legislative Council, 22 June 2010, 24426
63. C Ringland and D Weatherburn, *The impact of intensive correction orders on re-offending*, Crime and Justice Bulletin No 176 (NSW Bureau of Crime Statistics and Research, December 2013) 1.
64. Ringland and Weatherburn, Crime and Justice Bulletin No 176 (2013) 3.
65. Ringland and Weatherburn, Crime and Justice Bulletin No 176 (2013) 3.

because ICOs essentially replaced periodic detention in NSW's sentencing regime. The second comparison group received a suspended sentence with supervision after the introduction of ICOs.[66]

3.49 The re-offending analyses compared the time to re-offence for those who received ICOs with those who received periodic detention before the introduction of ICOs, and with those who received a supervised suspended sentence after the introduction of ICOs.[67] Cumulative re-offending rates over time and at 12 months after the index offence finalisation were calculated.

3.50 Modelling indicated that 12 months after the sentence for the index offence was imposed, approximately 18% of those who had received ICOs had re-offended. This was in comparison to the estimated 26% of the matched cohort who had received periodic detention. This equated to a 30% lower risk of re-offending for an offender on an ICO than an offender on periodic detention.

3.51 Relative to supervised suspended sentences, offenders on ICOs also had a lower rate of re-offending. Modelling found that in the 12 months after index finalisation, 29% of those who received a supervised suspended sentence had re-offended but only 19% of the matched ICO cohort had re-offended. This was a 33% lower risk of re-offending.[68]

3.52 An important caveat to the findings was that they could only match offenders on demographic and offending variables in ICO-periodic detention comparisons. This was in contrast to ICO-suspended sentence comparisons that could match offenders on further variables.

3.53 The result was that "these findings make it impossible to draw firm conclusions about the relative effectiveness of ICOs, compared with periodic detention and suspended sentences, in reducing re-offending".[69] But the findings at least indicated that ICOs were a viable sentencing option, and could be more effective than periodic detention.

3.54 BOCSAR also noted that it is important to undertake process, as well as outcome, evaluations for correctional programs.[70]

Implications

3.55 The study indicates that ICOs may lead to lower rates of re-offending, which is an encouraging sign. The above study is consistent with an argument that the rehabilitative objectives underlying the implementation of ICOs are being achieved. Further monitoring and evaluation of ICOs is required, but the results of this study may lead to sentencing judges making suitability assessment orders for offenders, and, consequently, ICOs being imposed with greater frequency on a large proportion of offenders.

66. C Ringland and D Weatherburn, *The impact of intensive correction orders on re-offending*, Crime and Justice Bulletin No 176 (NSW Bureau of Crime Statistics and Research, December 2013) 3.
67. Ringland and Weatherburn, Crime and Justice Bulletin No 176 (2013) 9.
68. Ringland and Weatherburn, Crime and Justice Bulletin No 176 (2013) 12.
69. Ringland and Weatherburn, Crime and Justice Bulletin No 176 (2013) 12.
70. Ringland and Weatherburn, Crime and Justice Bulletin No 176 (2013) 13.

3.56 We will commence a statutory review of ICOs in 2015, and the BOCSAR findings will inform that review.

Increasing prison population

3.57 After a three year reduction in the NSW prison population between mid-2009 and mid-2012, the prison population increased by 13% between late September 2012 and late March 2014.[71] This rapid growth in the prison population is a significant concern, given impacts on offenders, the wider community, and government resources.

3.58 BOCSAR released a study in May 2014 providing a preliminary analysis of why the prison population has risen, focusing on the growth in sentenced prisoners in the period from January 2013 to March 2014.

3.59 An increase in the prison population could be driven by an increase in the numbers sent to prison and/or an increase in how long prisoners are held.

3.60 Statistics indicate that the weekly number of receptions increased over the second half of 2013 and the first three months of 2014.[72] The reasons behind this increase in prison receptions could include an increase in the percentage of defendants refused bail, increased crime and/or increased enforcement activity by police, and growth in the proportion of convicted offenders given a prison sentence because of a change in offender profiles.[73]

3.61 Statistics suggest that there was no rise in length of stay in custody during 2013, but increases in sentence length during 2013, particularly non-parole periods, may put further upward pressure on the prison population in the future.[74]

3.62 The study was unable to predict with any certainty whether the increase in the prison population would continue. Much of the increase in arrest rates is due to changes in policing policy and/or resources rather than increases in the crime rate. The future course of bail and sentencing decisions are even harder to gauge.

3.63 On the assumption that current policy settings, policing practice and other relevant factors remain unchanged, BOCSAR forecast that the prison population would rise by 17% by March 2015 to about 12,500 inmates.[75] The December 2014 BOCSAR quarterly custody statistics indicated that there were 10,630 people in custody; 3015 of whom were on remand and 7615 who were sentenced.[76]

---

71. D Weatherburn, W Wan and S Corben, *Why is the NSW prison population growing?* Bureau Brief No 95 (NSW Bureau of Crime Statistics and Research, April 2014) 1.
72. Weatherburn et al, Bureau Brief No 95 (2014) 2.
73. Weatherburn et al, Bureau Brief No 95 (2014) 2-4.
74. Weatherburn et al, Bureau Brief No 95 (2014) 5.
75. Weatherburn et al, Bureau Brief No 95 (2014) 5.
76. Bureau of Crime Statistics and Research, *Quarterly Update – December 2014*, NSW Custody Statistics, 17.

3.64 The March 2015 BOCSAR quarterly update indicated that there were 11,363 people in custody,[77] falling short of BOCSAR's prediction, although still a record high for NSW.

3.65 The study concluded that the rapid rise in the NSW prison population was substantially the result of conditions internal to the criminal justice system such as policing, bail and penal policy.[78] This has two practical implications:

- Management of the demand for correctional resources requires close liaison between police and those responsible for criminal justice policy and correctional administration.
- Forecasting models need to be supplemented with tools that allow administrators to explore the potential impact of policies likely to affect the demand for prison accommodation.[79]

Implications

3.66 A direct consequence of the rapid increase in the prison population is an increasing burden on government resources. The Council will continue to monitor the size of the in-custody population, and the division between the remand and sentenced populations.

The effect of suspended sentences on imprisonment

3.67 Between 2000 and 2013, the use of suspended sentences by NSW courts increased by over 180%.[80] Since a suspended sentence should only be ordered where a sentence of full-time imprisonment would normally be appropriate, it is reasonable to expect that such an increase would lead to a decrease in the use of full-time imprisonment.

3.68 A 2010 report by McInnis and Jones found that an increase in the use of suspended sentences had not been accompanied by a decrease in the use of full-time imprisonment. Instead, it had been accompanied by the decreased use of other non-custodial penalties. In particular, there had been a notable decline in the use of community service orders. McInnis and Jones hypothesised that the increased use of suspended sentences may have led to the increased use of imprisonment.[81] A BOCSAR report released in September 2014 tested this hypothesis.[82]

3.69 The study found that, between 2002 and 2013, as the number of proven offenders increased, so did the rate of imprisonment. It also showed that as the number of suspended sentences rose, the imposition of prison sentences increased as well. The study found a very strong cross-correlation between the variables it considered,

77. Bureau of Crime Statistics and Research, *Quarterly Update – March 2015*, NSW Custody Statistics, 17
78. D Weatherburn, W Wan and S Corben, *Why is the NSW prison population growing?* Bureau Brief No 95 (NSW Bureau of Crime Statistics and Research, April 2014) 6.
79. Weatherburn et al, Bureau Brief No 95 (2014) 6.
80. P Menéndez and D Weatherburn, *The Effect of Suspended Sentences on Imprisonment*, Issue Paper No 97 (NSW Bureau of Crime Statistics and Research, 2014) 1.
81. L McInnis and C Jones, *Trends in the use of suspended sentences in NSW*, Bureau Brief No 47 (NSW Bureau of Crime Statistics and Research, 2010).
82. Menéndez and Weatherburn, Bureau Brief No 97 (2014) 2.

which provided prima facie evidence that the increased use of suspended sentences brought with it the increase in offenders being sentenced to prison.[83]

3.70 The study suggests these findings lend weight to McInnis and Jones' concern that the availability of suspended sentences is causing an increase in imprisonment. This is because suspended sentences are being imposed on people who would not otherwise have gone to prison and, if the conditions of the sentence are breached, the offender is generally incarcerated.[84]

3.71 Ultimately, the study questions the assumption that abolishing suspended sentences would lead to a dramatic increase in the prison population and proposes that one way to reduce imprisonment would be to replace suspended sentences with other non-custodial penalties that do not automatically lead to imprisonment if breached.[85]

Implications

3.72 In 2011, we expressed concern about evidence that suggested that suspended sentences were sometimes being imposed as a substitute for non-custodial options, despite the requirement that they only be imposed where no sentence other than imprisonment is appropriate.[86] We were concerned that this could potentially lead to an increase in the prison population.[87]

3.73 However, rather than recommending that suspended sentences be replaced with other non-custodial penalties, we made a number of other suggestions:

- It may be helpful to provide courts with further guidance as to when a suspended sentence might be appropriate.[88]
- Courts should have greater discretion when deciding how to address a breach of a suspended sentence.[89]

3.74 In its 2013 report on sentencing, the NSW Law Reform Commission recommended replacing suspended sentences with an alternative sentencing option – a community detention order (CDO).[90] In particular, the LRC was concerned about the "net widening" effect of suspended sentences, noting that this penalty has been used in place of other non-custodial sentencing options.[91]

83. P Menéndez and D Weatherburn, *The Effect of Suspended Sentences on Imprisonment*, Bureau Brief No 97 (NSW Bureau of Crime Statistics and Research, 2014) 3.
84. Menéndez and Weatherburn, Bureau Brief No 97 (2014) 4.
85. Menéndez and Weatherburn, Bureau Brief No 97 (2014) 4–5.
86. Sentencing Council, Government of NSW, *Suspended Sentences: A Background Report by the NSW Sentencing Council* (2011) [3.34].
87. Sentencing Council, Government of NSW, *Suspended Sentences* (2011) [3.35].
88. Sentencing Council, Government of NSW, *Suspended Sentences* (2011) [4.56].
89. Sentencing Council, Government of NSW, *Suspended Sentences* (2011) [4.65].
90. NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [10.38].
91. NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [10.16].

3.75 A CDO would require an offender to be supervised in the community and could incorporate community service work as a condition. In this way, the penalty would be more intensive and also more punitive compared with a suspended sentence.[92]

3.76 However, the LRC recommended that, if implemented, breach of a CDO should be dealt with more flexibly than is currently the case for breach of a suspended sentence. Further, it recommended that if a CDO is revoked, only the remainder of the offender's term should have to be served in full-time custody.[93]

R v Bugmy

3.77 In the 2013 Annual Report we noted the High Court's decision in *Bugmy v The Queen.*[94] The decision endorsed Justice Wood's principles enunciated by Justice Wood in *Fernando*[95] that the fact that an offender, including an Aboriginal offender, has been raised in a community surrounded by alcohol abuse and violence may mitigate a sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been so marred.[96]

3.78 The joint judgment also accepted the Crown's concession that the effects of profound deprivation do not diminish over time and should be given full weight in the determination of an appropriate sentence in every case.[97]

3.79 The High Court remitted the matter to the NSW Court of Criminal Appeal for redetermination.

3.80 The NSW Court of Criminal Appeal, in separate judgments, dismissed the Crown appeal against the sentence, exercising its residual discretion because of delay.

3.81 The NSW Court of Criminal Appeal did not add further to the principles endorsed by the High Court. Chief Justice Bathurst found that while the respondent's deprived background should be taken into account, his inability to control his reaction to frustration reduced his diminished moral culpability. He also emphasised the need to take into account community protection and personal deterrence factors.[98]

3.82 Justice Rothman dismissed the respondent's submission that Indigenous Australia's history of dispossession, by itself, was a matter relevant to sentencing.[99] His Honour reemphasised that it is the effect of any issues or disadvantage on the offender that is relevant, not its uniqueness. His Honour held that dispossession, in itself, had not had any effect on the respondent's offending.[100]

---

92. NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [10.35].
93. NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [10.36].
94. *Bugmy v The Queen* [2013] HCA 37.
95. *R v Fernando* (1992) 76 A Crim R 58.
96. *Bugmy v The Queen* [2013] HCA 37 [36].
97. *Bugmy v The Queen* [2013] HCA 37 [42].
98. *R v Bugmy (No 2)* [2014] NSWCCA 322, [16] (Bathurst CJ).
99. *R v Bugmy (No 2)* [2014] NSWCCA 322, [94] (Rothman J).
100. *R v Bugmy (No 2)* [2014] NSWCCA 322, [96] (Rothman J).

Operation of guideline judgments

3.83 The table below indicates the consideration that the promulgated guideline judgments received during 2014 in reported cases in NSW.

Subject	Guideline judgment	Consideration
High-range PCA	*Attorney General's application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 3 of 2002)* [2004] NSWCCA 303; 61 NSWLR 305.	Considered in 1 case.
Form 1	*Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 1 of 2002)* [2002] NSWCCA 518; 56 NSWLR 146.	Applied in 2 cases. Considered in 3 cases. Cited in 7 cases. *R v Lamella* [2014] NSWCCA 122 held that the Form 1 guideline judgement applies to Federal offences; [48] per Price J.
Guilty plea	*R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383	Applied in 1 case. Considered in 6 cases. Cited in 21 cases.
Break, enter and steal	*R v Ponfield* [1999] NSWCCA 435; 48 NSWLR 327	No consideration.
Armed robbery	*R v Henry* [1999] NSWCCA 111; 46 NSWLR 346	Applied in 2 cases. Considered in 7 cases. Cited in 4 cases. Distinguished in 1 case.
Dangerous driving	*R v Jurisic* (1998) 45 NSWLR 209 reformulated in *R v Whyte* [2002] NSWCCA 343; 55 NSWLR 252	Applied in 2 cases. Considered in 1 case. Distinguished in 1 case.

Milat v R; Klein v R

3.84 The case of *Milat v R; Klein v R*[101] concerned appeals against sentences for murder. One of the grounds of appeal of the offender Milat was that no discount had been given for a plea of guilty, despite the overall penalty falling short of the maximum. The court considered the guideline judgment of *R v Thomson.*[102]

Background

3.85 The appellants had been convicted of murder, and the first was sentenced to 43 years imprisonment, with a non-parole period of 30 years, and the second to 32 years, with a non-parole period of 22 years.

3.86 The first appellant had a number of grounds of appeal, one of which was that the sentencing judge had erred in not allowing the applicant any discount for his early guilty plea.

3.87 The appellant argued that the case of *R v El-Andouri*[103] was a correct statement of a principle outlined by Chief Justice Spigelman in *Thomson* about the circumstances where a plea would not be appropriate. The appellant argued that the principle stated that such cases are *generally confined* to those "where the protection of the public requires a long sentence or which so offend the public that

101. *Milat v R* [2014] NSWCCA 29.
102. *R v Thomson* [2000] NSWCCA 309.
103. *R v El-Andouri* [2004] NSWCCA 178.

the maximum sentence without any discount for any purpose is appropriate, such as where a life sentence can be, and is, imposed notwithstanding a plea."[104]

3.88 This argument would mean that where anything less than the maximum penalty is imposed, there can be no logical reason not to apply a discount for a plea of guilty.

CCA decision

3.89 Justice Hulme (with whom Chief Justice Bathurst and Justice Hall agreed) noted that the statement in *El-Andouri* has the potential to misrepresent what Chief Justice Spigelman said in *Thomson*.

3.90 Justice Hulme observed that while Chief Justice Spigelman did state in *Thomson* that cases where the maximum penalty is imposed are examples of when a discount is not appropriate, he did not limit the category to such cases.[105]

3.91 In sentencing the appellant, Acting Justice Mathews had declined to apply a discount because of the extreme gravity of the crime and the danger that the offender posed to the public. Justice Hulme accepted that withholding a discount for the plea of guilty was within the bounds of the sentencing judge's discretion.[106]

3.92 This makes it clear that, in certain exceptional circumstances, a discount will not be appropriate despite a plea of guilty, and this will extend to cases where a penalty less than the maximum is imposed.

104. *R v El-Andouri* [2004] NSWCCA 178 [34].
105. *Milat v R* [2014] NSWCCA 29 [84].
106. *Milat v R* [2014] NSWCCA 29 [92].

4. Review of intensive correction orders

4.1 We are required to conduct a comprehensive review of the intensive correction order (ICO) provisions of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* (CSPA) 5 years after their commencement.[107] That review is due to commence in October 2015.

4.2 In the meantime, we report annually to the Attorney General on the operation and use of ICOs, in accordance with the intention outlined in the second reading speech to the *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010* (NSW).[108] This is the fourth such annual report.

4.3 This report covers the period from 1 October 2010, when ICOs first became available as a sentencing option in NSW, through to the end of December 2014. We have obtained statistical information on ICOs from Corrective Services NSW (CSNSW).

Background

4.4 In our 2007 *Review of Periodic Detention*,[109] we recommended that the sentence of periodic detention be replaced by a new sentencing option, a community corrections order, which would take its place within the sentencing hierarchy between a community service order (CSO) and full-time imprisonment. This recommendation was implemented in 2010 as the ICO.

4.5 We considered that Community Corrections Orders could remove inequalities for those whose location acted as a barrier to periodic detention, as well as providing case management support and addressing criminogenic needs through community work and program participation.[110]

Overview of ICOs

4.6 In summary, the ICO is characterised as follows:

- It is a sentence of imprisonment, of up to 2 years, which is served by way of intensive correction in the community, rather than in a correctional facility.[111]
- It has 3 key components:
  - supervision in the community by CSNSW;
  - participation in tailored rehabilitation programs, as directed by CSNSW; and
  - completion of 32 hours per month of community service work.

107. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 73A.
108. NSW, *Parliamentary Debates*, Legislative Council, 22 June 2010, 24426.
109. NSW Sentencing Council, *Review of Periodic Detention* (2007).
110. NSW Sentencing Council, *Review of Periodic Detention* (2007) [9.3].
111. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7.

- The sentence is not available for offenders who are under 18 years,[112] or who have committed a prescribed sexual offence.[113]
- A court cannot set a parole period for an ICO;[114] the offender must serve the entire length of the sentence, as outlined in the original court order.
- The court must decide a sentence of 2 years imprisonment or less is appropriate and then refer the offender for suitability assessment by CSNSW before imposing an ICO.[115]
- The assessment criteria include criteria such as the offender's mental and physical health, substance abuse issues and housing, so far as such matters impact on the ability of the offender to comply with the obligations of the order, as well any risk associated with managing the offender in the community.[116]

Use of ICOs

4.7 In the period from 1 October 2010 to 31 December 2014, 4143 offenders were sentenced to 7265 ICOs.[117] The number of offenders sentenced to ICOs has steadily increased since their introduction, although they still represent a small proportion of all offenders. In 2014, 1.2% of all NSW offenders (1,283) were sentenced in the Local, District or Supreme Courts to an ICO as their principal penalty.[118] This increased from 0.9% in 2012 and 1.1% in 2013.[119]

4.8 Although infrequently used, ICOs tend to be used more readily than periodic detention orders were used for sentences longer than 12 months. See Table 1 below. 5% of all ICOs imposed from 1 October 2010 to 31 December 2014 were for the maximum term of 2 years.[120]

112. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(1)(a).
113. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 66. A prescribed sexual offence is defined under s 66 (2)(a) as an offence under Division 10 or 10A of Part 3 of the *Crimes Act 1900*, where the victim is a person under the age of 16 years or where the elements include sexual intercourse as defined by s 61H of the *Crimes Act 1900*. Under s 66, the definition of prescribed sexual offence also includes attempting, conspiracy and incitement, to commit such an offence.
114. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7(2).
115. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 70.
116. *Crimes (Sentencing Procedure) Regulation 2010* (NSW) cl 14.
117. Information provided by Corrective Services NSW, 2015.
118. NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics* (2014) Tables 1.7, 3.8.
119. NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics* (2012) Tables 1.7, 3.8 and NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics* (2013) Tables 1.7, 3.8.
120. 5% being 378 out of 7265 orders. Data provided by Corrective Services NSW, 2015.

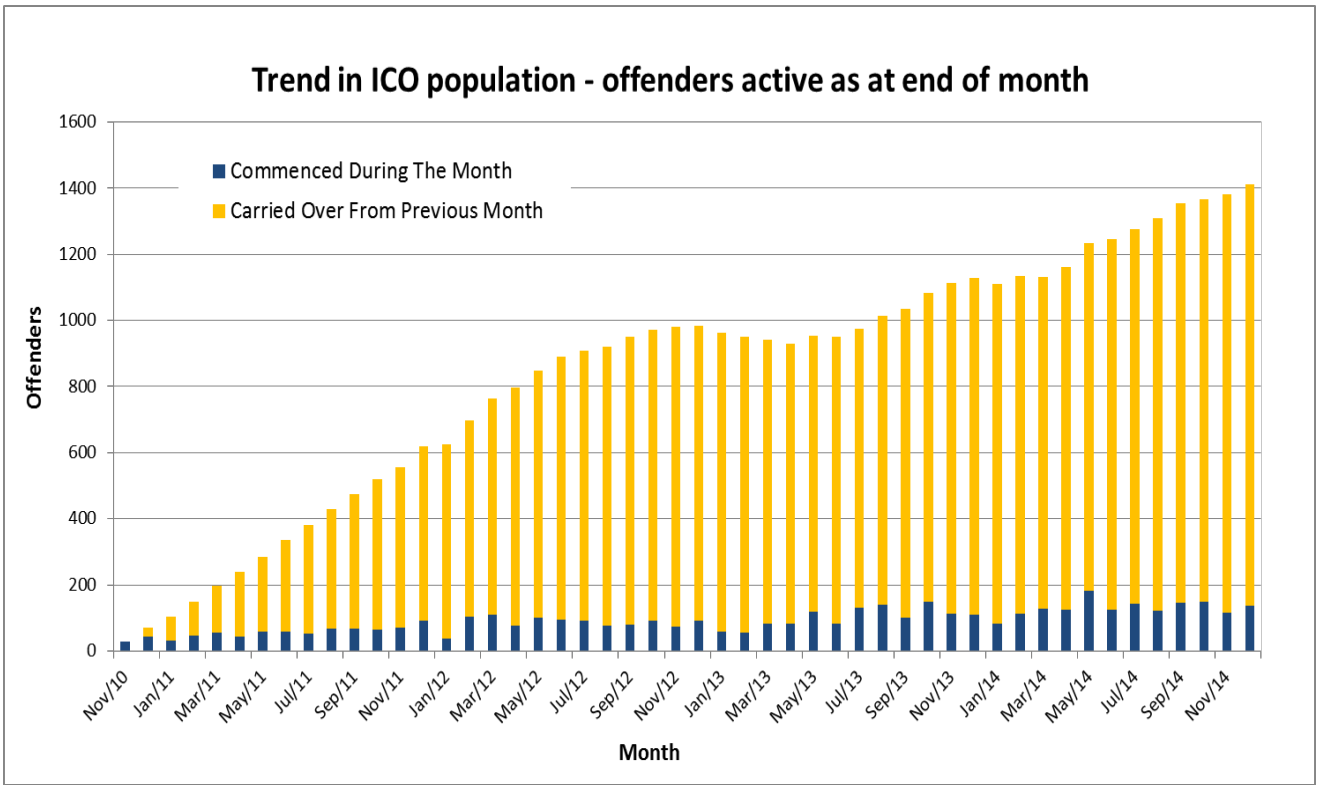
Table 1: Sentence length for periodic detention orders imposed in 2006 and ICOs imposed October 2010 — December 2014

Sentence length	Periodic detention %	ICO %
< 6 months	23.0	14.9
6-12 months	59.0	40.4
12-18 months	12.0	28.8
> 18 months	6.0	15.9

Source: Data on periodic detention terms taken from: NSW Sentencing Council, Review of Periodic Detention (2007) [3.3] Table 2. Data on ICOs provided by Corrective Services NSW, 2015, and relate to the period October 2010 - December 2014.

4.9 The initial upward trend in the total ICO offender population ended in December 2012 (just over 2 years after the commencement of ICOs). After initial downward trends at the start of 2013 and 2014, the total population has increased to a new high of 1412 offenders in December 2014. The peak of new offenders being registered occurred in May 2014, with 183.

Figure 1: Number of offenders supervised on an ICO per month between November 2010 and December 2014



Source: Corrective Services NSW, 2015

ICO assessment outcome

4.10 Table 2 below illustrates ICO assessment outcomes from 1 January 2014 to 31 December 2014.

Table 2: ICO assessment outcomes 2014

Result	Number	%
Suitable	1574	*59.6*
Unsuitable	1037	*39.3*
Other*	22	*0.8*
Unknown	6	*0.2*
Total	**2639**	***100***

Source: Corrective Services NSW, 2015. The category "Other" includes: resources not available, report rescinded, offender deceased and offender ineligible for ICO.

ICO discharges

4.11 Of the 2177 ICOs that were discharged in 2014, 1587 (73%) were discharged as the result of successfully completing the ICO, and 590 (27%) were revoked.[121]

Offence characteristics

4.12 The most common offences for which ICOs were imposed during the period from October 2010 to December 2014 were acts intended to cause injury (28.7%), traffic and vehicle regulatory offences (28.5%), and illicit drug offences (9.1%), as seen in Table 3 below.[122] The Table shows that these were also the most common offences for which ICOs were imposed during 2014.

121. Data provided by Corrective Services NSW, 2015.

122. This data was collated with reference to the most serious offence for which an ICO was imposed, where the offender was sentenced for more than 1 offence, based on the National Offence Index, which provides an ordinal ranking of offence categories in the Australian Standard Offence categories (ASOC). Note that the offence type data recorded by Corrective Services NSW differs from the offence type data recorded by BOSCAR due to their different counting rules.

Table 3: The most common offences for which ICOs were imposed 2014, and October 2010 – December 2014

Offence classification[123]	Jan 2014 – Dec 2014		Oct 2010 - Dec 2014	
	Offenders	%	Offenders	%
Homicide and related offences	2	*0.1*	10	*0.2*
Acts intended to cause injury	456	*30.2*	1260	*28.7*
Sexual assault and related offences	22	*1.5*	61	*1.4*
Dangerous or negligent acts endangering persons	77	*5.1*	260	*5.9*
Abduction, harassment and other offences against the person	8	*0.5*	25	*0.6*
Robbery, extortion and related offences	40	*2.7*	117	*2.7*
Unlawful entry with intent/burglary, break and enter	82	*5.4*	224	*5.1*
Theft and related offences	65	*4.3*	200	*4.6*
Fraud, deception and related offences	98	*6.5*	278	*6.3*
Illicit drug offences	157	*10.4*	401	*9.1*
Prohibited and regulated weapons and explosives offences	23	*1.5*	68	*1.5*
Property damage and environmental pollution	16	*1.1*	57	*1.3*
Public order offences	27	*1.8*	63	*1.4*
Traffic and vehicle regulatory offences	396	*26.2*	1253	*28.5*
Offences against justice procedures, government security and government operations	34	*2.3*	106	*2.4*
Miscellaneous offences	6	*0.4*	11	*0.3*
Total	**1509**	***100***	**4394**	***100***

Source: Corrective Services NSW, 2015.

Breach information

Breach process

4.13 It is CSNSW policy that all breaches of an offender's obligations under an ICO require a response within 5 working days of the breach's discovery. The response can be managed at a number of levels. Where a Community Corrections Officer determines that a breach can be managed locally, the breach will be managed by such means as verbal and written warnings, imposing a more stringent application

123. In accordance with the Australian Standard Offence Classification 2008 Division.

of the ICO conditions, restricting an offender's association with certain people or access to certain places, and importantly, case management strategies relevant to the breach (for example, referral to drug intervention strategies if drug use is detected).

4.14 More serious breaches will be referred to the State Parole Authority (SPA), and in the case of offenders who have been sentenced for a federal offence, to the Commonwealth Director of Public Prosecutions (CDPP). In some circumstances, it is mandatory to submit a breach report to the SPA or the CDPP. These circumstances include when an offender has absconded or removed his/her electronic monitoring device, is found to be in possession of firearms or offensive weapons, has been arrested for, or convicted of, a new offence, or is deemed to be at risk of re-offending.

4.15 The SPA can take a number of courses of action in response to a serious breach. For example, the SPA can issue a warning, impose a period of home detention for up to 7 days, or revoke the ICO.[124]

4.16 When a breach report is submitted to the CDPP, the CDPP will determine whether it is in the public interest to commence breach action. If so, the offender will be required to appear before a Magistrate, who can impose a fine, revoke the ICO and re-sentence the offender, or take no action.

4.17 After a breach report is submitted, the Community Corrections Officer continues to manage the offender according to his or her order conditions until advice is received from the SPA or the CDPP.

Breach rates

4.18 Of the 5173 ICOs finalised from October 2010 to December 2014, CSNSW has advised that the SPA revoked 1215 ICOs (23%). CSNSW has advised it cannot provide data about how many other breaches occurred that were resolved locally within this period.

4.19 In relation to the ICOs revoked by SPA, the following breaches of key mandatory conditions led to revocation:[125]

- Breach of the work component (23.4% of conditions breached – down from 25.6% as at December 2013)
- Breach of condition to be of good behaviour/not offend (22.8% of conditions breached – up from 21.7% as at December 2013)
- Breach of condition to comply with all reasonable directions of a supervisor (20.2% of conditions breached – up from 18.4% as at December 2013)
- Breach of condition to reside only at premises approved by supervisor (10.8% of conditions breached – down from 11.6% as at December 2013)

124. *Crimes (Administration of Sentences) Act 1999* (NSW) s 90.

125. Data provided by Corrective Services NSW, 2015.

- Breach of condition to engage in programs/activities to address offending behaviour (10.4% of conditions breached – up from 8.6% as at December 2013) and
- Breach of condition to refrain from using prohibited drugs (6.1% of conditions breached – up from 5.9% as at December 2013).

Reinstatement process

4.20 In accordance with s 165 of the *Crimes (Administration of Sentences) Act 1999* (NSW), the SPA may, on the offender's application, reinstate a revoked ICO. An offender can apply for reinstatement after serving at least 1 month in full-time custody.[126] In order for SPA to make such an order, the offender must again be assessed for suitability for an ICO.[127]

4.21 In the period from 1 October 2010 to 31 December 2014, SPA reinstated ICOs for 191 offenders. As at 1 January 2015, 47 of these offenders had had their orders revoked and 88 offenders had successfully completed their ICOs. The remainder (56) were ongoing.[128]

Conclusion

4.22 Patterns of operation do not appear to have changed significantly over the last year, although the total number of ICOs imposed continues to increase.

4.23 Minor trends observed in 2014 include:

- an increase in the proportion of offenders assessed as suitable for an ICO
- an increase in the proportion of revoked ICOs
- increases in the proportion of ICOs imposed for offences of causing injury, and drug offences
- a decrease in the proportion of ICOs imposed for traffic violations
- increases in the proportion of ICOs being revoked for failing to be of good behaviour, failing to comply with reasonable directions, engaging in activities to address offending behaviour and using prohibited drugs
- decreases in the proportion of ICOs being revoked for breaches of work components and not residing at approved premises.

4.24 We note the Law Reform Commission *Sentencing* report analysed the strengths and weaknesses of ICOs, and proposed changes to strengthen the orders, or introduce more flexible community detention orders.[129]

126. *Crimes (Administration of Sentences) Act 1999* (NSW) s 165(2).
127. *Crimes (Administration of Sentences) Act 1999* (NSW) s 165(3).
128. Data provided by Corrective Services NSW, 2015.
129. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) Recommendations 9.6 and 11.1-6.

5. Functions and membership of the Council

Functions of the Council

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

> (1) (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.
>
> (2) Any advice given to the Minister by the Sentencing Council may be given either at the request of the Minister or without any such request.
>
> (3) The Sentencing Council has such other functions as are conferred or imposed on it by or under this or any other Act.
>
> (4) In the exercise of its functions, the Sentencing Council may consult with, and may receive and consider information and advice from, the Judicial Commission of New South Wales and the Bureau of Crime Statistics and Research of the Attorney General's Department (or any like agency that may replace either of those agencies).

5.2 In addition, we must conduct a comprehensive review of the ICO provisions of the CSPA 5 years after their commencement,[1] and the Government has also asked us to report annually to the Attorney General on the use of ICOs.[2]

Council Members

5.3 The CSPA provides that the Sentencing Council is to consist of the following members:

- a retired judicial officer (not being a retired Magistrate),

1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 73A.
2. NSW, *Parliamentary Debates*, Legislative Council, 22 June 2010, 24426. The then Attorney General, J Hatzistergos, in his second reading speech to the *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Bill 2010* stated the Sentencing Council "will report annually on the use of the new orders and will review their operation after five years".

- a retired Magistrate,
- a member with expertise or experience in law enforcement,
- four members with expertise or experience in criminal law or sentencing (of whom one is to have expertise or experience in the area of prosecution and one is to have expertise or experience in the area of defence),
- one member with expertise or experience in Aboriginal justice matters,
- four members representing the general community, of whom two are to have expertise or experience in matters associated with victims of crime,
- one member with expertise or experience in corrective services,
- one member with expertise or experience in juvenile justice,
- one representative of the Department of Justice, and
- one member with academic or research expertise or experience of relevance to the functions of the Council.[3]

5.4 The Council's members during the reporting year are set out below.

Chairperson

The Hon James Wood AO QC	Retired judicial officer Chair, NSW Law Reform Commission

Members

The Hon Anthony Whealy QC Deputy Chairperson	Retired judicial officer/ Member with expertise or experience in criminal law or sentencing
His Honour Acting Judge Paul Cloran	Retired magistrate
Mr Mark Jenkins APM	Member with expertise or experience in law enforcement
Mr Lloyd Babb SC	Member with expertise or experience in criminal law or sentencing –prosecution
Mr Mark Ierace SC	Member with expertise or experience in criminal law or sentencing – defence
Mr Nicholas Cowdery AM QC	Member with expertise or experience in criminal law or sentencing
Professor Megan Davis	Member with expertise or experience in Aboriginal justice matters

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

Mr Howard Brown OAM	Community member - experience in matters associated with victims of crime
Mr Ken Marslew AM	Community member - experience in matters associated with victims of crime
Ms Tracey Booth (from 24 November 2014)	Community member
Ms Moira Magrath (from 24 November 2014)	Community member
Mr Peter Severin	Member with expertise or experience in corrective services
Mr Wayne Gleeson (from 24 November 2014)	Member with expertise or experience in juvenile justice
Ms Penny Musgrave	Representative of the Department of Justice
Professor David Tait	Member with relevant academic or research expertise or experience

Appointment of new members in 2014

5.5 The Council Secretariat undertook a public selection exercise to recruit three new members to the Council in 2014. Advertisements were placed across a range of media inviting applications, and formal interviews were held. Two community representatives and a member with expertise or experience in juvenile justice were appointed following a merit selection process.

Council business

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

5.7 We have maintained our close working relationship with the Bureau of Crime Statistics and Research, the Judicial Commission of New South Wales, the NSW Law Reform Commission (LRC), and the Department of Justice.

Internships

5.8 Over the 2014-15 summer the Secretariat hosted two interns as part of the Law Reform Commission's internship program. Mr Chiraag Shah and Ms Kate Tennikoff under took a range of research tasks, and provided valuable assistance on a range of tasks, including the Council's reference on bail and in the production of this report.