NSW GOVERNMENT Sentencing Council
Attorney General & Justice

Sentencing Trends and Practices

Annual Report 2011

NSW Sentencing Council

October 2012

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ISBN 978-0-7347-2679-7

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Acronym	Definition
BOCSAR	NSW Bureau of Crime Statistics and Research
CCMG	The Community Compliance and Monitoring Group (Corrective Services NSW)
CSNSW	Corrective Services NSW
CSPA	*Crimes (Sentencing Procedure) Act 1999* (NSW)
DAGJ	Department of Attorney General and Justice
DPP	Director of Public Prosecutions
HRVO	High Risk Violent Offender
ICO	Intensive Correction Order
PD	Periodic Detention
SNPP	Standard Non-Parole Period
NSW LRC	NSW Law Reform Commission
SPA	State Parole Authority

1. Introduction

Overview

1.1 The NSW Sentencing Council is now in its ninth year of operation. This is its eighth statutory report on sentencing trends and practices,[1] which covers the period from publication of the 2010 report until December 2011. The timing of completion of this report has been delayed in order to obtain sufficient data to complete Part 3 of this report, the first annual review of Intensive Correction Orders (ICOs).

1.2 Part 1 of this report details changes to the membership of the Council and reports on the activities in which the Council has been engaged during the review period.

1.3 Part 2 provides an overview of the references and projects the Council completed in 2011.

1.4 Part 3 provides a review of ICOs since their introduction in October 2010, in accordance with the second reading speech to the *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Bill 2010*.[2]

1.5 Part 4 identifies sentencing trends and issues that have emerged during the review period, examining relevant case law and legislative amendments.

Functions of the Council

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

> (a) to advise and consult with the Minister in relation to offences suitable for standard non-parole periods and their proposed length,
>
> (b) to advise and consult with the Minister in relation to:
>
> (i) matters suitable for guideline judgments under Division 4 of Part 3, and
>
> (ii) the submissions to the Court of Criminal Appeal to be made by the Minister in guideline proceedings,
>
> (c) to monitor, and to report annually to the Minister on, sentencing trends and practices, including the operation of standard non-parole periods and guideline judgments,
>
> (d) at the request of the Minister, to prepare research papers or reports on particular subjects in connection with sentencing,

1. Section 100J(1)(c) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) 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'.
2. NSW, *Parliamentary Debates*, Legislative Council, 22 June 2010, (J Hatzistergos - Attorney General) 24426.

(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).

1.7 In addition, the Council has been given an additional function in relation to the conduct a comprehensive review of the ICO provisions of the CSPA five years after their commencement,[3] and is also required to report annually to the Attorney General on the use of ICOs.[4] The first such annual review in contained in Part 3 of this report.

Council Members

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

- a retired judicial officer (not being a retired Magistrate),
- 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 Attorney General's Department, and
- one member with academic or research expertise or experience of relevance to the functions of the Sentencing Council.

1.9 Details of the Council's constitution during the reporting year are set out below.

3. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 73A.
4. NSW, *Parliamentary Debates*, Legislative Council, 22 June 2010, 24426 (J Hatzistergos - Attorney General) 24426.

Retired Judicial Officer Member

The Hon Jerrold Cripps QC

The Honourable Mr Cripps is the Chairperson of the Sentencing Council.

He commenced his term as Chairperson of the Council on 14 November 2009, having recently completed a five-year term as Commissioner of the Independent Commission Against Corruption (ICAC).

He practised as a barrister in NSW and was appointed Queen's Counsel in 1974. He was appointed to the District Court of NSW in 1977, was Chief Judge of the Land and Environment Court from 1985 to 1992, and was appointed to the Supreme Court and the Court of Appeal in 1992.

The Honourable Mr Cripps has also served as Chairman of the NSW Legal Aid Commission, President of the NSW Anti-Discrimination Board and as a Part-Time Commissioner of the NSW Law Reform Commission.

Retired Magistrate Member

His Honour Acting Judge Paul Cloran (from November 2011)

Acting Judge Cloran was appointed as a magistrate of the Local Court in 1987, and as Deputy Chief Magistrate in 2006 until his retirement from the Local Court in 2010. He was then appointed an Acting Judge of the District Court and Judge of the Drug Court.

He currently presides at the Hunter Drug Court. He is also a judicial member of the State Parole Authority.

Member with expertise/experience in law enforcement

Mr David Hudson APM

Assistant Commissioner Hudson is the Commander of the State Crime Command. He has held this position since February 2008 when he was appointed as the head of the largest investigative arm of the NSW Police.

Having previously performed the roles of Acting Deputy Commissioner, Director of Operations in Professional Standards and as a Local Area Commander and Crime Manager, Assistant Commissioner Hudson brings an extensive knowledge of policing and criminal investigation to his role on the Sentencing Council.

Members with expertise/experience in criminal law or sentencing

The Hon James Wood AO QC (Deputy Chairperson)

The Honourable Mr Wood has been Chairperson of the NSW Law Reform Commission since January 2006 and was Chairperson of the NSW Sentencing

Council from 2006-2009.

In December 2007 he was appointed to conduct the Special Commission of Inquiry into Child Protection Services in New South Wales.

Mr Wood was Chief Judge of the Common Law Division of the Supreme Court, 1998-2005, having been appointed a Supreme Court Judge in 1984. He was also Commissioner of the Royal Commission into Police Corruption, 1994-1997, and a full-time Commissioner with the Law Reform Commission, 1982-1984.

Mr Lloyd Babb SC (from November 2011)

Mr Babb is the Council's member with particular expertise in prosecution.

Mr Babb was appointed as the NSW Director of Public Prosecutions in June 2011.

He has also worked as an adviser to the NSW Government on legal matters, as head of the Criminal Law Division of the Department of Attorney General and Justice and, since 2007, as Crown Advocate. As part of that role, he also conducted matters on behalf of the NSW Director of Public Prosecutions and appeared for the Crown, Attorney General and other government agencies. He was appointed a Senior Counsel in 2007.

Mr Mark Ierace SC

Mr Ierace is the Council's Member with expertise and experience in the area of criminal defence.

Mr Ierace was appointed as Senior Public Defender in 2007. Prior to this appointment, Mr Ierace was a consultant to the NSW Law Reform Commission, and In-house Counsel to the Commonwealth Director of Public Prosecutions.

From 2000 to 2004 he was Senior Prosecuting Trial Attorney with the United Nations International Criminal Tribunal for the former Yugoslavia, The Hague, The Netherlands.

Mr Ierace holds a BA (Syd); Dip Law (BAB); and LLM (International Law) (Syd). He was admitted as a solicitor of the NSW Supreme Court in 1979 and as a barrister in 1981, and was appointed as Senior Counsel in 1999.

Mr Nicholas Cowdery AM QC

Mr Cowdery was the NSW Director of Public Prosecutions from 1994-2011.

He worked as a Public Defender in Papua New Guinea until 1975 and then in private practice at the Sydney Bar until 1994. In 1987 he was appointed one of Her Majesty's Counsel.

He has been President of the International Association of Prosecutors since 1999; is Chairman of the Criminal Law Committee of the Section on Legal Practice of the International Bar Association (IBA) and a member of the Council of the Human Rights Institute of the IBA.

The Hon Roderick Howie QC (to June 2011)

Justice Howie was appointed to the Council in May 2010.

He was appointed as a Judge of the Supreme Court in 2000. Previously he held the following positions: Director of the Criminal Law Review Division of the Attorney General's Department, 1984-1987; Deputy Director of Public Prosecutions 1987-1993; Crown Advocate, 1993-1996 and District Court Judge 1996-2000.

He has co-authored Butterworth's *Criminal Practice and Procedure in New South Wales* and has been a major contributor to the section of Halsbury's Laws of Australia on Sentencing and Criminal Procedure.

Member with expertise/experience in Aboriginal justice matters

Professor Megan Davis

Megan Davis BA (UQ), LLB (UQ), Grad Dip Leg Pract (ANU), LLM (ANU) is an Associate Professor of Law and Director of the Indigenous Law Centre, Faculty of Law, University of New South Wales.

Professor Davis is also an Acting Commissioner of the NSW Land and Environment Court; a United Nations Expert member of the UN Permanent Forum on Indigenous Peoples at UNNY; an Australian member of the International Law Association's Indigenous Rights Committee; and a member of the Expert Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples.

Professor Davis is an admitted Lawyer of the Supreme Court of the ACT although currently not practicing. She also completed a PhD in Law from the Australian National University in 2010.

Community Members

Mr Howard Brown OAM

Mr Brown is a community representative on the NSW Victims Advisory Board and represents the Board on the DNA Review Panel. He is the Deputy President of the Victims of Crime Assistance League.

Ms Martha Jabour

Ms Jabour is the Executive Director of the Homicide Victims Support Group (HVSG) and represents the HVSG on the Victims Advisory Board, the Victims Interagency Committee, and the Homicide Squad Advisory Committee.

She is also a community member on the State Parole Authority of NSW, the Conduct Division of the Judicial Commission and the Domestic Violence Death Review Team.

Mr Ken Marslew AM

Mr Marslew founded the Enough is Enough Anti Violence Movement Inc. in late

1994 and represents Enough is Enough on the NSW Attorney General's Victims Services Advisory Board, the Premier's Council on Crime Prevention and the Corrective Services Restorative Justice Advisory Committee.

Ms Karin Abrams (from November 2011)

Ms Abrams has been a lobbyist for over 25 years, including 10 years as National President of the Women's Action Alliance. She is occupied as a pregnancy counsellor and a pre marriage educator and is currently studying a Social Science degree with Charles Sturt University.

Member with expertise/experience in Juvenile Justice

Ms Jennifer Mason (to May 2011)

Jennifer Mason was appointed Director General of the NSW Department of Community Services in March 2008, having previously held the position of Director General of the NSW Department of Juvenile Justice from October 2005.

She worked for a decade for the Attorney General of NSW and the former Minister of Corrective Services and previously held positions in the Office of the Ombudsman and the Legal Aid Commission.

Ms Mason was appointed to the Sentencing Council in 2007 as a member with expertise in juvenile justice issues.

Mr John Hubby (from November 2011)

John Hubby holds a Master of Public Health from the University of Sydney and a Bachelor of Business Administration from the University of Texas at Austin. He was the Chief Executive of Juvenile Justice from October 2010 to March 2012.

Mr Hubby was the Council's Member with expertise in Juvenile Justice from November 2011 to 30 March 2012.

Representative of the Department of Attorney General and Justice

Ms Penny Musgrave

Penny Musgrave was admitted to practise as a solicitor in 1986. In 1989 she joined the Commonwealth Director of Public Prosecutions. She practised across most areas prosecuted by the Commonwealth and most recently was a Senior Assistant Director managing the General Prosecutions Branch of the Commonwealth DPP Sydney Office.

In January 2008 she took up the role of Director, Criminal Law Review with the NSW Attorney General's Department and represents the Council in this capacity.

Member with relevant academic or research expertise/experience

Professor David Tait

David Tait is Professor of Justice Research at the University of Western Sydney. He leads four national Australian Research Council-funded research projects about jury decision-making, use of video communications with remote witnesses, court safety and security and the democratic aspects of the jury experience.

In the area of sentencing he has done research on the use of imprisonment by magistrates, suspended sentences in Victoria, the impact of penal severity of magistrates on recidivism in NSW local courts, the use of sentencing information systems, and the role of juries in sentencing in France.

Council business

1.10 The Council continues to meet on a monthly basis with Council business being completed at these meetings and out of session.

1.11 The Council has maintained its close working relationship with the NSW Bureau of Crime Statistics and Research (BOCSAR), the Judicial Commission of New South Wales, the NSW Law Reform Commission, and the Department of Justice and Attorney General throughout 2011. The Council's relationship with the above bodies extends to cooperation on specific projects. For example, the Council in August – September worked with BOCSAR and the Judicial Commission to produce an on-line survey of magistrates and judges in relation to suspended sentences. The survey was piloted in September and was conducted from 30 September 2011 until midnight on 23 October 2011. In addition, the Judicial Commission and BOCSAR have provided the Council with extensive data, statistics and general advice, particularly in relation to the Council's references examining the use of good behaviour bonds and non-conviction orders, the operation and use of suspended sentences, and the operation of the standard non-parole period scheme.

1.12 The Council has met regularly with the Criminal Law Review and Legislation and Policy Divisions of the Department of Justice and Attorney General to discuss issues surrounding the Government responses to and implementation of Council recommendations.

1.13 The Council has engaged with other sentencing councils and like bodies, and discussions have been held with them regarding common issues of interest and core activities. For example, in January 2011 the Executive Officer met with representatives from the (former) Queensland Sentencing Advisory Council and the Victorian Sentencing Advisory Council, to discuss issues of closer working arrangements, knowledge exchange and cross-jurisdictional issues.

Profile and educative function

1.14 The Council is committed to strengthening public awareness, understanding and confidence in the sentencing process, and throughout the year has participated in a range of activities in order to raise its profile and educate the public in relation to sentencing issues through various forums.

1.15 The Council in May 2011 was successful in obtaining a law week grant to conduct presentations for students at secondary schools around Sydney. The Council received very positive feedback in relation to its presentations.

1.16 As part of its reference in relation to suspended sentences, the Council conducted and finalised its survey of magistrates and judges of the District and Supreme Courts in relation to the operation and use of suspended sentences, which was useful not only for the purposes of the Council's Suspended Sentences report, but also for raising awareness of the operation and use of suspended sentences as a sentencing option. As a result, the Council produced a detailed analysis of the survey results, which it published as part of the Suspended Sentences report.

1.17 In September, the Council conducted consultations with the Victims of Crime Interagency forum in relation to its references regarding High-Risk Violent Offenders and Suspended Sentences, in order to obtain the views of victims of crime representatives and stakeholders in relation to its work on these references.

Officers of the Council

1.18 The Council operates with a secretariat of two officers – the Executive Officer and the Policy and Research Officer.

1.19 In 2011, the positions were occupied as follows:

- **Executive Officer:** Sarah Waladan
- **Policy and Research Officer:** Bridget O'Keefe (from July 2011)

  Viviane Mouait (to July 2011).

2. Projects completed

2.1 During the reporting period, the Council has completed four reports, as requested by the Attorney General in accordance with s 100J(d) of the CSPA. The content of those reports is summarised below.

2.2 The final two reports, which examined the use of standard non-parole periods and of suspended sentences, were published as background reports to inform the broader review of sentencing currently being undertaken by the NSW Law Reform Commission in conjunction with the Council.

Standard non-parole periods and dangerous driving offences

2.3 In June 2010, the Attorney General asked the Council, as part of its consideration of SNPPs and guideline judgments in accordance with the March 2009 Reference, to also consider the question of introducing Standard Non-Parole Periods (SNPPs) for dangerous driving offences. Specifically, the Council was asked to consider whether SNPPs should apply to such offences, at what level they should be set and any implications for the existing guideline judgment in respect of these offences.

2.1 The Council presented its report, *Standard Non-Parole Periods for Dangerous Driving Offences, A Report of the NSW Sentencing Council*, to the Attorney General in January 2011. The Council, after giving a brief outline of the SNPP scheme and considering the complexity of sentencing for dangerous driving offences, recommended that there be no standard non-parole period fixed for any dangerous driving offences contained in the *Crimes Act*.

Good behaviour bonds and non-conviction orders

2.2 In July 2009 the Attorney General asked the Council to examine the use of non-conviction orders and good behaviour bonds in accordance with the following terms of reference:

- An analysis of the primary types or categories of offences in which non-conviction orders and bonds are utilised significantly or disproportionately when compared with other sanctions;
- The extent to which there is consistency among NSW Local Courts in the use of non-conviction orders and bonds in respect of different offence type and categories of offenders;
- An examination of the use across offence categories of non-conviction orders and bonds, the nature of conditions imposed and their enforcement;
- The identification, and relative frequency, of the reasons behind sentencing decisions by Magistrates in relation to non-conviction orders and bonds;

- The extent of compliance with conditions imposed on bonds and the rates of re-offending following the imposition of non-conviction orders and bonds;
- Whether further limitations should be imposed on the ability of Magistrates to impose non-conviction orders and bonds;
- Whether offences for which there is a high rate of non-conviction orders and bonds can be adequately addressed within the existing sentencing regime or if other sentencing alternatives are necessary or appropriate; and
- Any other relevant matter.

2.3 The Council presented its report, *Good Behaviour Bonds and Non-Conviction Orders, A Report of the NSW Sentencing Council*, to the Attorney General in September 2011. Its report considers detailed statistical analysis of the use of bonds and non-conviction orders in relation to various offences and in the Local and Higher Courts, as well as the range of submissions received by it in response to the Terms of Reference. It consequently made a number of recommendations, including:

- That the Government give further consideration to the outstanding recommendations of the Legislative Council Standing Committee on Law and Justice, made in its report '*Inquiry into community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations*';
- That a good behaviour licence, similar to the licence that currently exists under s 16(8) of the *Road Transport (Driver Licensing) Act 1998* (NSW), be available at the discretion of the sentencing court on conviction for a Prescribed Concentration of Alcohol (PCA) offence as outlined in the report, that its use and availability be reviewed after 12 months of operation, and that the Alcohol Interlock Program be available as an optional condition of such a licence;
- That the Roads and Traffic Authority (RTA),[1] consider providing information on alcohol interlock devices to drivers convicted of PCA offences; and
- That PCA offences, including those which are dealt with by way of s 10, should attract demerit points.

2.4 It also considered a number of other options for reform which were not ultimately recommended, including:

- Mandating the conditions that may be attached to a good behaviour bond by legislation;
- Restricting the use of s 10 of the CSPA based on the subjective circumstances of the offender;
- Placing offence-based or procedural restrictions on the use of s 10 orders;
- Removing or amending the list of factors that may be taken into account for the imposition of s 10 orders;
- Applying for a guideline judgment in relation to low-range and/or mid-range PCA offences;

1. The Roads and Traffic Authority has been replaced by NSW Roads and Maritime Services.

- Providing further guidance to magistrates on the use of s 10 orders;
- Requiring magistrates to state reasons for imposing s 10 orders; and
- Allowing prosecuting bodies to apply for costs where a s 9 or a s 10 order is made.

Standard non-parole periods

2.5 In March 2009, in response to a number of issues identified in Volume 1 of the Council's sexual offences report,[2] the Attorney General announced that the Council had been requested to examine standard non-parole periods in the context of sexual offences in accordance with the following terms of reference:[3]

- Monitor the rates of offending and sentencing patterns for sexual offences not contained in the Table of Standard Non-parole Periods (SNPP), with a view to their possible inclusion in the Table at a later date;
- Give consideration to standardising the SNPPs for sexual (and other) offences within a band of 40–60% of the available maximum penalty, subject to the possibility of individual exceptions, by reference to an assessment of the incidence of offending and special considerations relating thereto;
- Consider potential additions to the SNPP scheme, involving the level or levels at which the SNPP might be appropriately set;
- Give consideration to the establishment of a transparent mechanism by which a decision is made to include a particular offence in the Table, and by which the relevant SNPP is set; and
- Consider the identification of sexual offences that might justify application for a guideline judgment, following its ongoing monitoring of relevant sentencing patterns.

2.6 The Council presented its report, *Standard Non-Parole Periods, A background report by the NSW Sentencing Council,* to the Attorney General in December 2011. Its report considered the application of the SNPP scheme, particularly as a result of the decision of the High Court in *Muldrock v The Queen* [2011] HCA 39, SNPP and non-SNPP Sexual Offences, and issues arising from the scheme.

2.7 Due to the overlap between the Council's reference and the NSWLRC's Sentencing Review, which the Council has been requested to work with the NSWLRC in relation to, it did not make any recommendations in its report for amendments to the existing SNPP scheme, and noted the dangers of considering changes to the scheme in the absence of a broader review of sentencing law.

2. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in NSW*, Volume 1, 2008.
3. The Hon John Hatzistergos MLC, *'Spotlight on Standard Non-parole Periods'* (Media Release, 17 March 2009).

Suspended sentences

2.8 In September 2009, the Attorney General requested the Council to undertake an examination of the use of suspended sentences in accordance with the following terms of reference:

- An analysis of whether the use of suspended sentences has had any direct effect on the use of other sentencing options, including custodial and non-custodial options;
- An examination of the extent to which the imposition of suspended sentences has exposed persons to the risk of imprisonment who would not otherwise have been sentenced to imprisonment;
- An analysis of the primary reasons behind judicial decisions to impose suspended sentences in preference to other sentencing options, including:

  (a) judicial attitudes to alternative sentences;

  (b) availability of other options; and

  (c) increased maximum penalties.
- The identification of current community attitudes and expectations in relation to the use of suspended sentences;
- An examination of recorded breaches; including the nature of the breach and the response;
- An examination of whether the issues identified in relation to the above matters require reform;
- An exploration of any options for reform; and
- Any other relevant matter.

2.9 The Council presented its report, *Suspended Sentences, a background report by the NSW Sentencing Council*, to the Attorney General in December 2011. The report considered:

- Whether suspended sentences in their current form are being used appropriately as a sentencing option;
- If suspended sentences in their current form are not being used appropriately, what options exist to ensure their imposition in appropriate cases; and
- Whether measures are available that could lead to an increase in public confidence in their use.

2.10 Again, due to the overlap between the Council's reference and the NSWLRC's Sentencing Review, it did not make any recommendations in its report for amendments to the way that suspended sentences currently operate but instead referred its report to the NSWLRC in light of that body's broader consideration of alternative community-based sentencing options.

Serious violent offenders

2.11 On 20 December 2010 the Attorney General requested the Council to advise on the most appropriate way of responding to the risks posed by serious violent offenders in accordance with the following terms of reference:

- Advise on options for sentencing serious violent offenders;
- Examine and report on existing treatment options for and risk assessment of serious violent offenders;
- Examine and report on the adequacy of existing post custody management including parole and services available to address the needs of serious violent offenders and to ensure the protection of the community on their release;
- Advise on the options for and the needs for post sentence management of serious violent offenders; and
- Identify the defining characteristics of the cohort of offenders to whom any proposal should apply.

2.12 The Council's report was finalised and released in 2012, prior to the publication of this report.

3. Review of Intensive Correction Orders

Review requirements

3.1 The Council is required to conduct a comprehensive review of the ICO provisions of the CSPA five years after their commencement.[4] That review is due to commence in 2015.

3.2 In the meantime, the Council will 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) Bill 2010*.[5] This is the first such annual report.

3.3 The Council notes that the NSWLRC is currently undertaking a review of the *Crimes (Sentencing Procedure) Act 1999.* In this context the NSWLRC is required to consult the Council. It is the Council's view, that the matters raised in this annual report should be considered in the NSWLRC's inquiry. The Council makes relevant observations to assist the NSWLRC.

Nature of review

3.4 This report covers the period from the introduction of ICOs in October 2010 through to the end of December 2011.

3.5 The limited time-frame during which ICOs have been in operation necessarily limits the scope of this first annual review to the provision of information in relation to the implementation, operation and use of ICOs during the review period, and some preliminary analysis of issues that require further consideration.

3.6 The Council has obtained information for the purposes of this review in the following ways:

- It wrote to stakeholders in December 2011, requesting feedback in relation to the operation and use of ICOs, and received a number of submissions in response. Those submissions are available on the Council's website. In addition, a list of stakeholders who made written submissions is included at Appendix A.
- It obtained feedback from magistrates and judges which was provided in the course of the survey it conducted in late 2011, '*Judicial Perceptions of Suspended Sentences*', which included a number of questions in relation to ICOs.[6]

4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 73A.
5. NSW, *Parliamentary Debates*, Legislative Council, 22 June 2010, (J Hatzistergos - Attorney General) 24426.
6. Information about how the survey of magistrates and judges was conducted, the nature of the survey questions, the response rate and the results, is contained in the Council's report, *Suspended Sentences: A background report by the NSW Sentencing Council*, which is available on the Council's website.

- It obtained statistical and other information about the operation of ICOs from Corrective Services NSW (CSNSW).
- It considered the 2012 BOCSAR report on ICOs which presented data in relation to the first 12 months of ICO operation.[7]

Background

3.7 In its 2007 Review of Periodic Detention,[8] the Council recommended that the sentence of periodic detention be replaced by a new sentencing option, a Community Corrections Order, or CCO, that would take its place within the sentencing hierarchy between a Community Service Order (CSO) and full-time imprisonment. This recommendation was implemented as the ICO.

3.8 In making that recommendation, the Council noted its concern that periodic detention was not available uniformly throughout the State; that additional facilities to enable its expansion would be costly and may be underutilised; and that periodic detention made no provision for case management or rehabilitation of offenders.

3.9 The Council considered that the introduction of CCOs could remove inequalities for those whose place of residence acted as a barrier to periodic detention, as well as providing case management support and addressing criminogenic needs through community work and program participation.[9]

3.10 The Council's recommendation to introduce a CCO was conditional on a number of matters:[10]

- the provision of transitional or similar centres where offenders on parole or subject to CCOs could reside, and participate in programs aimed at reducing their re-offending;
- the existence of a capacity to provide for the supervision, electronic monitoring and surveillance of offenders subject to a CCO, on a State-wide basis;
- the availability of sufficient programs and program providers, and of the specialist staff such as psychologists and counsellors who would deliver the programs, on a State-wide basis;
- the availability of community centres or agencies able to accept offenders for community work, on a State-wide basis;
- the provision of arrangements that would accommodate the need for offenders to travel to the places where they would be required to report in compliance with relevant work and program conditions;
- the provision of stringent pre-sentence suitability assessments;

7. C Ringland, BOCSAR, Intensive Correction Orders vs Other Penalties: Offender Profiles. Crime and Justice bulletin, No 163 June 2012, 8.
8. NSW Sentencing Council, *Review of Periodic Detention* (2007).
9. NSW Sentencing Council, *Review of Periodic Detention* (2007), 204.
10. NSW Sentencing Council, *Review of Periodic Detention* (2007), Part 9, 197-199.

- an enlargement of the resources, and possibly the membership of the Parole Authority, along with the provision of video link capabilities that would enable it to deal with offenders on a State-wide basis;[11] and

- that the rationale for this sentencing option was sufficiently understood by the courts so as to avoid the risk of net-widening and sentence inflation.

3.11 As a result of the Council's recommendations, the NSW Government conducted public consultation on a proposed ICO model, resulting in the model put forward in the *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Bill 2010*, passed on 23 June 2010, with Government assurance that, unlike periodic detention, ICOs would be uniformly available across the State.[12] Periodic detention was abolished at the same time.

Operation of Intensive Correction Orders

Overview

3.12 Provision for the imposition and operation of ICOs is made in the CSPA, the *Crimes (Sentencing Procedure) Regulation 2010*, the *Crimes (Administration of Sentences) Act 1999* (NSW) and the *Crimes (Administration of Sentences) Regulation 2008*. 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 under the supervision of CSNSW, rather than in a correctional facility.[13]

- 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.

- It sits between full-time custody and a suspended sentence in the sentencing hierarchy. This is in contrast with ICOs (as they formerly were) in Victoria, which sat below suspended sentences in the sentencing hierarchy in that jurisdiction.

- The sentence is not available in relation to offenders who are under 18,[14] or who have committed a prescribed sexual offence.[15]

11. NSW Sentencing Council, *Review of Periodic Detention* (2007), 206.
12. NSW, *Parliamentary Debates*, Legislative Council, 22 June 2010, (J Hatzistergos - Attorney General) 24426.
13. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7.
14. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(1)(a).
15. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 66. A prescribed sexual offence is defined under s 66 (2)(a) as 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.

- It is not possible for a court to set a parole period for an ICO;[16] the offender must serve the entire length of the sentence, as outlined in the original order of the court.

- A court can only impose an ICO following a suitability assessment by CSNSW,[17] which occurs prior to sentencing.[18] The court must decide a sentence of 2 years imprisonment or less is appropriate and then refer the offender for assessment by CSNSW before imposing a sentence.

- The Community Compliance & Monitoring Group (CCMG) within CSNSW carries out the assessment.[19]

- The assessment criteria which CCMG are required to consider are set out in Regulation 14 of the *Crimes (Sentencing Procedure) Regulation 2010*, and 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 risks associated with managing the offender in the community.

- An offender must sign an undertaking to comply with the conditions of an ICO before an ICO may be made.

Mandatory and additional conditions

3.13 All ICOs have 17 standard mandatory conditions, which are set out in regulation 175 of the *Crimes (Administration of Sentences) Regulation 2008*. These mandatory conditions include:

- reporting requirements;

- place of residence requirements;

- curfew requirements as directed;

- electronic monitoring requirements as directed;

- work requirements (the completion of a minimum of 32 hours of community service per month);

- submission to drug and/or alcohol testing and searches as directed;

- participation in intervention programs as directed; and

- compliance with all reasonable directions of CSNSW.[20]

3.14 Courts may also impose any of the 6 additional conditions specified in regulation 176 of the *Crimes (Administration of Sentences) Regulation 2008* on an offender as

16. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7.
17. *Crimes (Sentencing Procedure) Act 1999* (NSW) 70.
18. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(4).
19. Corrective Services NSW, *Intensive Community Correction Order*, April 2012.
20. *Crimes (Administration of Sentences) Regulation 2008,* r 175.

appropriate. These conditions relate to employment, association with specified persons and the consumption of alcohol.

3.15 Section 81(4)(b) of the *Crimes (Administration of Sentences) Act 1999* also allows a court to impose any other condition that the court thinks necessary or desirable to reduce the likelihood of re-offending.

Supervision component

3.16 At the time of the initial suitability assessment, offenders are assessed to determine their needs, criminogenic risk factors, LSI-R level,[21] level of supervision that they would require if an ICO were imposed, as well as suitability for the order. That assessment, in addition to informing the court for the purposes of imposing the order, also functions to inform CSNSW in formulating a case management plan, at the commencement of the ICO.

3.17 CSNSW has informed the Council that case management plans involve regular reviews. The first review after commencement occurs within eight weeks of the commencement of the ICO, and subsequent reviews must be undertaken every 1 - 3 months by the offender's case management officer, depending on the length of the offender's order, the progress of the offender and the offender's LSI-R risk level.

3.18 There are five different levels of supervision which may be imposed on an offender during the course of their ICO, with level 1 being the most intensive level of supervision, and level 5 being the least intensive. The level of supervision is determined by reference to the findings of the initial assessment, regular reviews, and compliance with the order (including the work and program components of the order), and offenders can move up and down in terms of the level of supervision that is imposed, depending on these factors. CSNSW advises that offenders start at level 3, unless there are circumstances which indicate that level 1 or 2 is appropriate. Level 3 supervision requires fortnightly contact with the case management officer, and does not require electronic monitoring or a curfew. If the offender progresses to a lower level, the contact may be reduced to monthly (level 4) or 6-weekly contact (level 5). If the offender regresses to a higher level, reviews will be increased to weekly reviews and electronic monitoring or curfews may also be imposed.

Program component

3.19 All offenders subject to an ICO are required to undertake the Offenders Induction Program as soon as possible after commencement of an ICO. Once the order has commenced, this program is the first step of each individual offender's case management plan.[22]

3.20 Following the completion of the induction program, a CSNSW officer discusses suitable options for other programs with the offender and refers the offender to the

21. The LSI-R (Level of Service Inventory - Revised) is an assessment tool which identifies criminogenic needs of an offender by assessing a wide variety of dynamic factors.
22. Corrective Services NSW, *Intensive Community Correction Order*, April 2012.

programs. The CSNSW officer continues to monitor the offender's program attendance and progress throughout the remainder of the order.

3.21 In addition, in accordance with CSNSW policies and procedures, during the assessment period, the Council understands that CSNSW also:

- reviews its internal catalogue of available therapeutic programs (the OIMS Search Catalogue);[23] and
- reviews what kinds of services are available in the offender's local area, which may be provided by community organisations or private providers, that may appropriately target the offending behaviour.

Work component

3.22 Offenders subject to ICOs must complete 32 hours per month of community work.

3.23 The most recent internal practices of CSNSW require it to 'make all efforts' to find appropriate work for offenders so that offenders can be assessed as suitable for ICOs, and to determine the kind of work that may be appropriate. CSNSW officers are required to take into account the offenders particular needs, including:

- the offenders cultural and linguistic background;
- any disabilities the offender may have; and
- any medical conditions the offender may have.[24]

3.24 The Council has become aware that the mandatory nature of this component of ICOs has meant that some offenders, who might otherwise benefit from this type of order, have been assessed as unsuitable. This issue is discussed further at 3.64 – 3.79 below.

Staged implementation of ICOs

3.25 Since their introduction, ICOs have been rolled out gradually across NSW in four stages as follows:[25]

- Stage 1 (October 2010) – Sydney Metropolitan Area (including Picton); and within a 100km radius of Newcastle, Gosford, Wollongong, Nowra , Bathurst and Orange;
- Stage 2 (February 2011): Within a 100km radius of Grafton, Coffs Harbour, Tamworth, Armidale, Wagga Wagga and Albury;
- Stage 3 (May 2011): Within a 100km radius of Dubbo, Wellington, Goulburn, Broken Hill and Wilcannia; and

23. The Council understands that this is not publicly available. It includes a range of programs which address issues such as domestic and other violence, alcohol and drug abuse, and driving programs.
24. Information provided by Corrective Services NSW, September 2012.
25. Corrective Services NSW, *Intensive Community Correction Order*, April 2012.

- Stage 4 (October 2011): the catchment areas for the locations listed in stages 1-3 were extended to within 200kms of those locations, with the exception of Newcastle (which is currently only able to service a 100km radius).

3.26 ICOs are now available within a 200km radius of each of the CCMG office locations (Bathurst, Blacktown, Broken Hill, Campbelltown, Dubbo, Goulburn, Grafton, Tamworth, Wagga and Wollongong) with the exception of Newcastle which is currently only able to service a 100km radius. Within these areas there are some isolated locations where electronic monitoring and/or community service work is not available.[26]

Use of ICOs

3.27 During the period between October 2010 and December 2011, 738 offenders were sentenced to 1229 ICOs.[27]

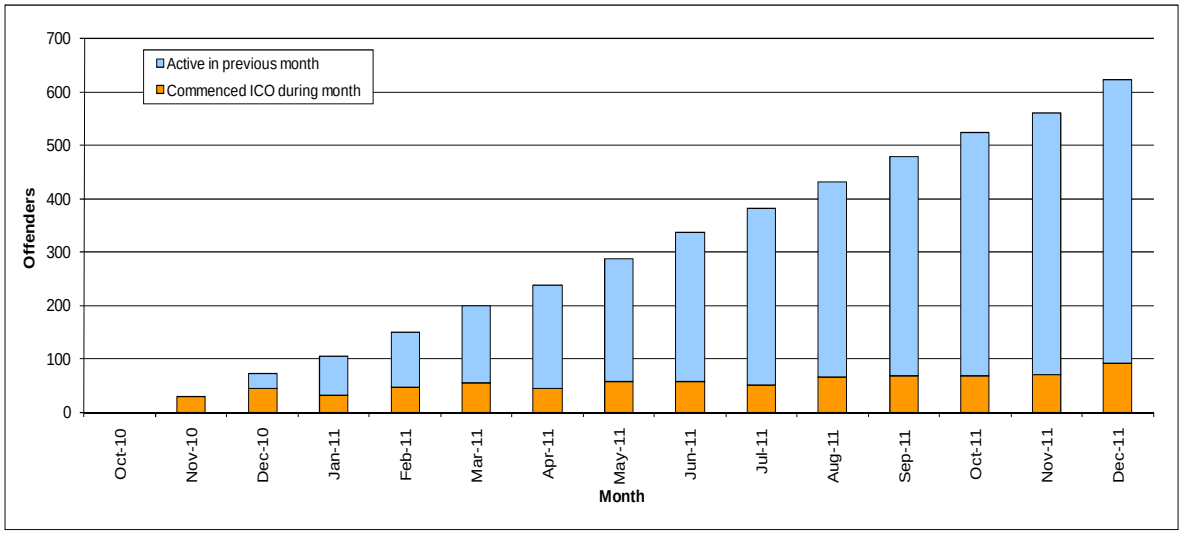
3.28 In its June 2012 Bulletin, BOCSAR, from its analysis of ICOs in its first year of operation, between 1 October 2010 and 30 September 2011, noted that during that time:

> the number of offenders who received ICOs was little more than half the number who received periodic detention in the preceding 12 months. Even the number of offenders living in major cities who received an ICO was less than two-thirds the number of offenders living in a major city who received periodic detention in the 12 months prior.[28]

3.29 However, as can be seen from Figure 1 below, there has been an upwards trend in the number of ICOs being imposed during the period since their introduction up until the end of December 2012, and an accumulation in the number of offenders on ICOs being managed by CSNSW during that time.

26. Information provided by Corrective Services NSW, October 2012.
27. Corrective Services NSW, *Intensive Community Correction Order*, April 2012.
28. C Ringland, BOCSAR, *Intensive correction orders vs other penalties: offender profiles*. Crime and justice bulletin, No 163 June 2012, 9.

Figure 1: Number of offenders supervised on an ICO per month between December 2010 and December 2011[29]

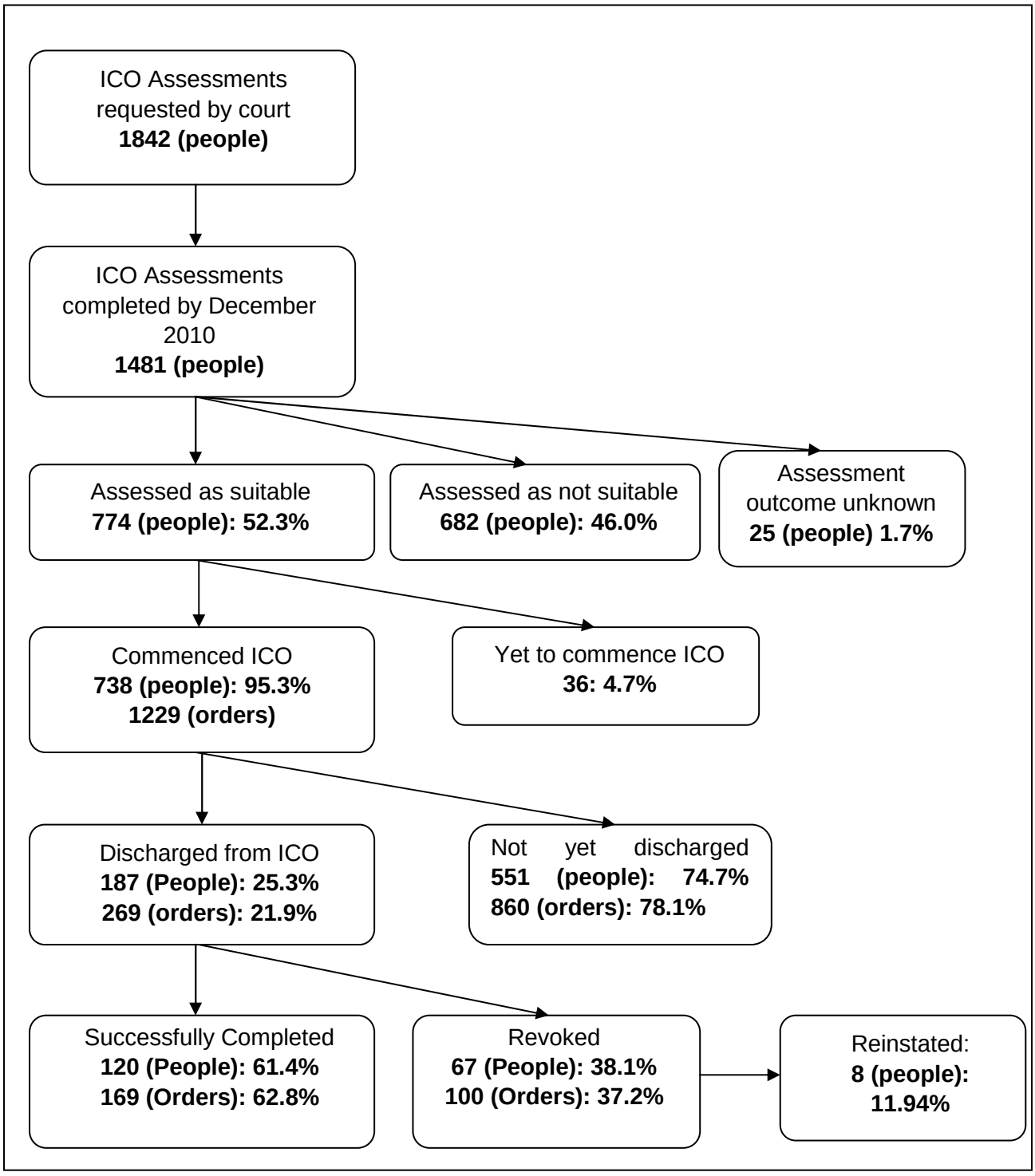


ICO process from initial assessment to completion

3.30 Figure 2 below illustrates the flow of offenders from the initial ICO assessment process through to ICO completion, during the period from October 2010 until December 2011.[30]

29. Data and graph provided by Corrective Services NSW, October 2012.
30. Corrective Services NSW, *Intensive Community Correction Order*, April 2012, 3.

Figure 2: Flow of offenders from ICO assessment request to completion of order



Offence characteristics

3.31 Data provided to the Council by CSNSW indicate that the most common offences for which ICOs were imposed during the period from October 2010 until the end of December 2011, were traffic and vehicle regulatory offences (33.6%), acts intended to cause injury (25.2%), and fraud, deception and related offences (8.4%).[31]

Table 1:The most common offences for which ICOs were imposed, October 2010 – December 2011

Offence classification[32]	Oct 2010 - Dec 2011	
	Offenders	%
1. Homicide and related offences	5	*0.6*
2. Acts intended to cause injury	200	*25.2%*
3. Sexual assault and related offences	6	*0.8%*
4. Dangerous or negligent acts endangering persons	38	*4.8%*
5. Abduction, harassment and other offences against the person	4	*0.5%*
6. Robbery, extortion and related offences	17	*2.1%*
7. Unlawful entry with intent/burglary, break and enter	29	*3.7%*
8. Theft and related offences	25	*3.1%*
9. Fraud, deception and related offences	67	*8.4%*
10. Illicit drug offences	68	*8.6%*
11. Prohibited and regulated weapons and explosives offences	12	*1.5%*
12. Property damage and environmental pollution	17	*2.1%*
13. Public order offences	13	*1.6%*
14. Traffic and vehicle regulatory offences	267	*33.6%*
15. Offences against justice procedures, government security and government operations	25	*3.1%*
16. Miscellaneous offences	2	*0.3%*
Total	**795**	***100***

3.32 The Council notes that there is a discrepancy between CSNSW data and BOCSAR data, presented in its 2012 study, in relation particularly to the percentage of

31. Data provided by Corrective Services NSW, October, 2012. 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 one offence, based on the National Offence Index, which provides an ordinal ranking of offence categories in the Australian Standard Offence categories (ASOC).
32. In accordance with the Australian Standard Offence Classification 2008 Division.

offences against justice procedures. CSNSW data indicates that 3.1% of ICOs imposed between October 2010 and December 2011, were imposed for offences against justice procedures, whereas BOCSAR indicated that 15% of ICOs were imposed for offences against justice procedures between October 2010 and September 2011. CSNSW has advised that the discrepancy in relation to this specific category of offence is a result of the different offence classification systems used by the two bodies. The system used by CSNSW relies on a national system that ranks breach of a justice order lower than the BOCSAR scheme, which relies on its research into penalties. For purposes of consistency, we have adopted the CSNSW approach throughout this report.[33]

Offender characteristics

3.33 BOCSAR in its 2012 report considered the characteristics of offenders who received ICOs in their first year of operation, between 1 October 2010 to 30 September 2011.

3.34 It noted that those who received ICOs were similar to those who received periodic detention in the year preceding the introduction of ICOs. However, compared with PD, offenders who received ICOs were:[34]

- more likely to be female;
- less likely to live outside a major city (particularly in outer regional and remote/very remote areas);
- less likely to have been convicted of theft offences;
- less likely to have breached community-based orders;
- more likely to have a prior offence of exceeding the prescribed concentration of alcohol or other substance limit; and
- more likely to have received a prior prison sentence.

3.35 The fact that BOCSAR data indicate that offenders who receive ICOs are less likely to live outside a major city is noteworthy, given that one reason for introducing ICOs (and abolishing periodic detention) was that ICOs would be more widely available across NSW. The Council notes that, in accordance with CSNSW's advice in relation to the staged rollout of ICOs,[35] and that the current level of coverage has only been in place since October 2011, this may have influenced BOCSAR's findings. The geographic availability of ICOs is considered further below.

Additional conditions

3.36 Of the 738 offenders who had ICOs imposed on them between October 2010 and December 2011, 181 (24.5%) had additional conditions imposed. The most common additional condition related to alcohol abstention (53.9% of additional

33. Data provided by Corrective Services NSW, October 2012.
34. C Ringland, BOCSAR, *Intensive Correction Orders vs Other Penalties: Offender Profiles*. Crime and Justice bulletin, No 163 June 2012, 8.
35. Corrective Services NSW, *Intensive Community Correction Order*, April 2012.

conditions imposed), followed by conditions in relation to activities and other behaviour related conditions (14.8%),[36] and geographically based conditions (7%).[37]

Breach information

Breach process

3.37 CSNSW advises that all breaches require a timely response and can be managed at a number of levels. In the first instance, breaches are managed by case management officers within CCMG. A large number of breaches can be resolved at this level, in accordance with CSNSW's practices, without further referral. Where matters cannot be resolved by the CSNSW officer, breaches are referred to the ICO Management Committee within DCS, which was formed to oversee the administration of ICOs, and to promote consistency in their operational application.[38] Most of the breaches that cannot be resolved at the local level by a CSNSW officer can be resolved at this level. In a small number of cases, where a breach is not able to be resolved by either a CSNSW officer or by the ICO Management Committee, the matter is referred to the State Parole Authority or the Commonwealth DPP, as appropriate. A matter may in some cases, be referred directly to SPA from the CSNSW officer, where a serious breach has occurred.

3.38 CSNSW advises that the following options are available for breach:[39]

- verbal and written warnings;
- case management strategies as relevant to the breach (for example, alcohol or drug use might require referral to drug and alcohol counselling);
- restricting the offender's association with certain people or access to certain places;
- imposing a more stringent application of the ICO conditions;
- ICO level regression;
- a request to the sentencing court to impose or vary additional ICO conditions;
- submission of a breach report to the ICO Management Committee; or
- submission of an urgent breach report to the SPA.

3.39 We are advised that current CSNSW practice provides for a number of factors to be taken into account when determining the most appropriate response including:[40]

- the offender's level of risk of re-offending;

36. CSNSW defines these to include 'activities to address offending behaviour, non-medical counselling/ treatment and other activities as specified'.
37. CSNSW defines these to include 'residential restrictions, localities avoidance and other residential and social conditions'.
38. Information provided by CSNSW, October 2012.
39. Information provided by CSNSW, October 2012.
40. Information provided by CSNSW, October 2012.

- the offender's progress prior to the breach;
- the seriousness of the breach;
- the total number of breaches to date, including the interval between breaches and the combination of breach types;
- the offender's acknowledgement of responsibility; and
- the offender's willingness to accept case management referrals as required.

3.40 CSNSW advises that in accordance with its practices, certain serious breaches are reported to the ICO Management Committee as a matter of course, including:[41]

- where six unauthorised absences from community service work have occurred;
- where the offender has absconded, removed or disabled electronic monitoring equipment;
- where the offender was found to be in possession of firearms or offensive weapons;
- where the offender is in breach of AVO conditions;
- where the offender is arrested or convicted for a new offence;
- where the offender commits a serious breach or repeated breaches;
- where the offender commits breaches which indicate an increased risk of re-offending; or
- where the offender is deemed to be at risk of serious re-offending.

3.41 Once a matter is referred to the ICO Management Committee, CSNSW advises that the following courses of action are available to the Committee:[42]

- take no action;
- adjourn the matter for case management reasons or for additional information;
- regress the offender's ICO level;
- issue an ICO Management Committee warning or arrange for a Commissioner's warning to be issued; or
- refer the breach to the SPA or Commonwealth DPP.

3.42 Once a matter is referred to the SPA, CSNSW advises that the following courses of action may be available to the SPA:[43]

- take no action;
- conduct an inquiry into the breach under s 162 of the *Crimes (Administration of Sentences) Act 1999*;

41. Information provided by CSNSW, October 2012.
42. Information provided by CSNSW, October 2012.
43. Information provided by CSNSW, October 2012.

- adjourn the matter for case management reasons or for additional information;
- issue a warning;
- impose a period of up to 7 days' home detention; or
- revoke the order.

Breach rates

3.43 Of the 269 orders finalised during the period between October 2010 and December 2011, CSNSW have advised that 100, or 37.17%, have been revoked by SPA. CSNSW has advised it cannot provide data about how many breaches have occurred that have been resolved by CCMG or by the ICO Management Committee.

3.44 In relation to the ICOs revoked by SPA, the following breaches of key mandatory conditions lead to revocation of ICOs:[44]

- Breach of condition to be of good behaviour/not offend (27.85% of conditions breached);
- Breach of the work component of the order (23.45% of conditions breached) ;
- Breach of condition to comply with all reasonable directions of a supervisor (13.79% of conditions breached);
- Breach of condition to reside only at premises approved by supervisor (8.96% of conditions breached);
- Breach of condition to engage in programs / activities to address offending behaviour (6.9% of conditions breached); and
- Breach of condition to refrain from using prohibited drugs (5.5% of conditions breached).

Reinstatement process

3.45 In accordance with s 165 of the *Crimes (Administration of Sentences) Act 1999*, the SPA may, on application of the offender, reinstate a revoked ICO. An offender can apply for reinstatement after serving at least one month in full-time custody.[45] In order for the SPA to make an order reinstating the offender, the offender must again be assessed for suitability for an ICO.[46]

3.46 Between 1 October 2010 and 31 December 2011, the SPA reinstated ICOs for 8 offenders. As at 30 December 2011, none of the 8 offenders had completed their new order.

44. Data provided by CSNSW, October 2012.
45. *Crimes (Administration of Sentences) Act 1999* (NSW), S 165 (2).
46. *Crimes (Administration of Sentences) Act 1999* (NSW), S 165 (3).

Operational and policy issues

3.47 The Judicial Survey responses and written submissions provided to the Council have generally indicated that ICOs are as a useful addition to available sentencing options in NSW. For example, the NSW Law Society noted that:[47]

> [An ICO] avoids the contaminatory effects of imprisonment; it is cheaper than full-time imprisonment, and it benefits the community by the performance of community work while retaining a strong element of punishment.

3.48 However, 44 per cent of survey respondents raised operational or policy issues with ICOs. These are set out below together with any additional information from CSNSW. The Council will continue to monitor these issues in subsequent reports, and considers that this information should be used by the NSWLRC in its sentencing review.

Expansion of geographical availability

3.49 As indicated above, the Sentencing Council in its 2007 review of Periodic Detention sought to ensure that ICOs would have wider geographic coverage than periodic detention.[48] In part this was intended to ensure access for Aboriginal people and Torres Strait Islanders.[49] The Council in its conclusions noted that community corrections orders could positively assist in reducing the unduly high rate of Indigenous incarceration and recidivism rates.[50]

3.50 Although the stated intention of Parliament when introducing ICOs was that they should have State-wide coverage, this has not yet occurred in some remote areas of NSW.

3.51 BOCSAR in its June 2012 study that took data from the initial 12 months of ICO operation noted:

> three-quarters of those who received an ICO lived in a major city (compared with, for example, 66 per cent of those who received Periodic Detention and 50 per cent who received a supervised suspended sentence), and only 7 per cent lived in an outer regional, remote or very remote area (compared with 12 per cent of those who received a supervised suspended sentence). This may change over time, although it should be noted that the roll-out plan envisaged that ICOs would be available in all areas of the state within 12 months of their introduction (CSNSW, 2010).[51]

3.52 The Council's Judicial Survey found that, while 80% of respondents from a major city area said that ICOs were practically available to them as a sentencing option, only 28% of respondents from regional and remote areas responded in the same way. Fifty-four per cent of respondents considered that intermediate sentencing options, including ICOs, needed to be available in more locations in NSW. Some

47. Submission ICO02, *The Law Society of NSW*.
48. NSW Sentencing Council, *Review of Periodic Detention*, 203.
49. NSW Sentencing Council, *Review of Periodic Detention*, 49; Submission 8 to that review.
50. NSW Sentencing Council, *Review of Periodic Detention*, 205.
51. C Ringland, BOCSAR, *Intensive correction orders vs other penalties: offender profiles*. Crime and justice bulletin, No 163 June 2012, 9.

survey respondents stated that, even in regional and remote areas covered by the ICO provisions, ICOs may not be able to be imposed because of practical limitations, such as limited places, limited availability of work and transport difficulties.[52]

3.53 The Chief Magistrate, Judge Henson, and the Law Society of NSW in their written submissions to the Council, raised concerns in relation to the geographical limitations of ICOs. The Law Society noted that the lack of rehabilitative programs and community service work in some areas prevents the order being imposed and reduces the value of ICOs as a sentencing option.[53]

3.54 A further concern regarding geographical limitations, raised by Legal Aid NSW, is the ease of access to CCMG offices. They submitted that CCMG offices are difficult to contact and located in areas which may make attendance for assessment and reporting difficult for many clients.[54] There are 11 CCMG offices located at Bathurst, Blacktown, Broken Hill, Campbelltown, Dubbo, Goulburn, Grafton, Newcastle, Tamworth, Wagga Wagga and Wollongong.

3.55 However, as noted earlier in this review, CSNSW has indicated that Stage 4 of the ICO rollout was only completed in October 2011. Therefore, the current position in relation to the availability of ICOs across NSW has changed since the BOCSAR study and the Council's survey were conducted; however the Council is unable to comment, at this stage (without further research and consultation), on the extent to which the expansion has improved access to ICOs across the State.

3.56 The Council also understands that CSNSW is developing strategies to expand the geographical availability of ICOs beyond the 200km radius.[55] CSNSW has indicated to the Council that accessibility to CSNSW offices will substantially increase by CSNSW's policy that, in addition to attending CCMG offices, offenders will also be able to attend one of 60 Community Offender Services District Offices for an initial assessment interview and to undertake the Offender Induction Program.[56]

Extending the maximum sentence duration to three years

3.57 Some submissions and survey responses suggested increasing the maximum term of the ICO to three years, to bring it into line with the maximum term of the abolished sentence of periodic detention and to increase the number of eligible offenders.[57]

3.58 As noted by the former Attorney in the second reading speech:

> The Sentencing Council recommended the cap [of two years] on the basis of statistics confirming that there are very few offenders currently sentenced to

52. NSW Sentencing Council, *Judicial Perceptions of Suspended Sentences Survey* (2011), Respondents 17, 36, 57.
53. Submission ICO02, *The Law Society of NSW*.
54. Submission ICO06, *Legal Aid NSW*.
55. Information provided by CSNSW, October 2012.
56. Information provided by CSNSW, October 2012.
57. NSW Sentencing Council, *Judicial Perceptions of Suspended Sentences Survey* (2011), Respondents 1, 46, 55, 58, 88, 95; Submission ICO02, *The Law Society of NSW*; Submission ICO06, *Legal Aid NSW*; Submission ICO07, *The Public Defenders*.

> periodic detention for periods of between two and three years. The council's report noted that only 6% of the periodic detention population has a sentence length greater than 18 months and 82% of periodic detention orders are for 12 months or less. Furthermore, requiring an offender to remain under intensive supervision for periods of up to three years may increase the potential for breaches during the last portion of the sentence. In this regard, I note that periodic detention orders contain a non-parole period, and ICOs do not. This means that offenders under an ICO remain subject to supervision for the entire length of the order.[58]

3.59 In practice, as the table below shows, ICOs tend to be used far more readily than periodic detention for sentences longer than 12 months. In fact, 9.2% of all ICOs imposed are for the maximum duration of two years.

Table 2: Sentence length for period detention orders imposed in 2006 and ICOs imposed in 2010-11 financial year[59]

Sentence length	Periodic detention %	ICO %
< 6 months	23.0	3.7
6-12 months	59.0	38.4
12-18 months	12.0	34.7
> 18 months	6.0	23.4

3.60 In light of this experience, there may be a case for the NSWLRC to consider whether increasing the maximum length of ICOs would be appropriate.

Introduction of a non-parole period

3.61 The Law Society of NSW has supported an amendment to allow a non-parole period to be set in relation to an ICO. The Law Society suggests that eligibility for ICOs be based on a non-parole period of two years or less, rather than a head sentence of two years or less. This would allow a lifting of the maximum sentence that may be served by way of an ICO to above two years, bringing it more into line with the prior availability of periodic detention.[60]

3.62 The restriction on setting non-parole periods for sentences of imprisonment served by way of ICOs arose out of the Sentencing Council's recommendation that:

58. NSW, *Parliamentary Debates*, Legislative Council, 22 June 2010, (J Hatzistergos - Attorney General) 24426.

59. Data on periodic detention terms taken from: NSW Sentencing Council, *Review of Periodic Detention* (2007) 33. Data on ICOs provided by Corrective Services NSW and relate to the period October 2010-December 2011.

60. The Law Society of NSW, *Correspondence with NSW Law Reform Commission* (27 March 2012). Other stakeholders supported the introduction of a non-parole period: Submission ICO06, *Legal Aid NSW*; NSW Sentencing Council, *Judicial Perceptions of Suspended Sentences Survey* (2011), Respondent 112.

> the offender should be subject to the supervision and conditions of the order for its full term. This will ensure that the rehabilitative focus of the order is maintained from beginning to end.[61]

3.63 The Council supports further consideration of whether or not it would be appropriate to allow courts to set a non-parole period as part of an ICO, particularly if the maximum length of the order is increased to 3 years.

Suitability assessments

Suitability criteria

3.64 Once a court has determined that an offender is eligible for an ICO, the offender must be assessed for suitability by CSNSW. A commonly raised concern about ICOs is that the application of strict suitability assessment criteria by CSNSW, results in a high number of offenders being found unsuitable for the order. Forty per cent of the survey respondents who thought that ICOs needed reform listed relaxation of suitability assessment criteria as an issue to be addressed.[62]

3.65 The Chief Magistrate, Judge Henson, submits that offenders with cognitive or mental health impairment, or a drug or alcohol dependency, are often assessed as unsuitable.[63] The Law Society made the same observation, arguing that this is not appropriate when these offenders could benefit most from intensive interventions.[64] The DPP and Legal Aid NSW also raised unsuitability due to mental health impairments as a concern.[65]

3.66 Instability of housing was also said to result in an offender being assessed as not suitable for an ICO, despite the requirement in the *Crimes (Sentencing Procedure) Regulation 2010* (NSW) r 14(3) that all reasonable efforts be made by the Commissioner of CSNSW to find suitable accommodation prior to finalisation of an assessment report.[66]

3.67 Stakeholders speculated that unsuitable assessments in relation to offenders with substance abuse or with mental health or cognitive impairments might be the result of concern that it would be problematic to ensure adequate supervision of these offenders;[67] or to ensure their compliance with the mandatory work condition.[68] For example, the Council has heard anecdotally that drug and alcohol dependencies would prevent offenders operating certain machinery, or working at sites where being affected by alcohol or other drugs could create an occupational hazard.

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61. Submission ICO07, *The Public Defenders*.
61. NSW, *Parliamentary Debates*, Legislative Council, 22 June 2010, 24426 (J Hatzistergos - Attorney General) 24426.
62. NSW Sentencing Council, *Judicial Perceptions of Suspended Sentences Survey* (2011), Respondents 5, 7, 12, 16, 30, 38, 40, 60, 95, 98, 111, 121, 122, 123, 124, 125, 127.
63. Submission ICO01, *His Honour Judge Graeme Henson, Chief Magistrate, Local Court of NSW.*
64. Submission ICO02, *The Law Society of NSW*.
65. Submission ICO03, *Director of Public Prosecutions, NSW*; Submission ICO06, *Legal Aid NSW.*
66. Submission ICO01, *His Honour Judge Graeme Henson, Chief Magistrate, Local Court of NSW;* Submission ICO02, *The Law Society of NSW*.
67. Submission ICO01, *His Honour Judge Graeme Henson, Chief Magistrate, Local Court of NSW*.
68. Submission ICO07, *The Public Defenders*.

3.68 Legal Aid NSW proposed that offenders should have an opportunity to review the recommendations in the assessment report, so that arrangements can be made to address any issues that have led to their unsuitability.[69] Another suggestion made by a survey respondent was to provide for more flexible ICO conditions, such that the community service work condition could commence later in the sentence, after the offender has completed a treatment or rehabilitation program.

3.69 In recognition of concerns raised about the number of offenders assessed as unsuitable, CSNSW undertook an analysis of assessments in March 2011. As a result of this analysis, its ICO assessment practices were amended, with the aim of removing impediments to suitability.[70] CSNSW now emphasises that the assessor should consider what impact substance use has on an offender's lifestyle and ability to complete an ICO. In relation to mental health impairments, CSNSW advises that it now considers that mental health impairment should only form the basis of an unsuitable assessment if the offender is non-compliant with, or refusing, treatment.[71]

3.70 Some of the stakeholder feedback discussed above was received prior to the changes to CSNSW's practices and, as such, some issues may now have been addressed.

3.71 CSNSW has also advised the Council that, since it has become aware of this issue, it has introduced further flexibility in relation to the implementation of the work component of ICOs, by facilitating the suspension of offenders' community work obligations, in relation to offenders who are residing in rehabilitation facilities. The Council understands that this effectively means that the offender does not have to complete the work component of the ICO, for the period of time that they are not able to as a result of the requirements of the relevant residential rehabilitation program.

3.72 Substance dependence continues to be a basis for assessing an offender as unsuitable, on the basis that individuals who are substance dependent are unlikely to comply with the work requirement, and will pose an occupational hazard on the work site.[72]

3.73 The Council would support exploring further options to enable drug and alcohol dependent offenders to undertake ICOs or a similar sentence. A solution may be to create 'work-ready' programs, whereby offenders could undertake work training, substance abuse treatment programs, residential rehabilitation and/or education programs concurrently with or in place of community service work, for a period of time until they can safely attend a work site. The Council would support the NSWLRC review considering increased flexibility to the mandatory work component of ICO, in order to increase the accessibility of ICOs to a larger number of offenders, and in particular, offenders with rehabilitative needs that would potentially significantly benefit from the order, if it were available to them.

69. Submission ICO06, Legal Aid NSW.
70. Corrective Services NSW, *Correspondence* (9 April 2012).
71. Corrective Services NSW, *Correspondence* (9 April 2012).
72. Corrective Services NSW, *Correspondence* (9 April 2012).

Provision of reasons in assessment reports

3.74 A number of respondents to the Judicial Survey described the reasons provided by CSNSW for assessing offenders as unsuitable as 'difficult to understand' and 'spurious'.[73] It is also a concern that 43.6% of assessments that recommended that an offender was unsuitable for an ICO during the period between October 2010 to December 2011 did not specify a reason for that assessment.[74]

3.75 The Chief Magistrate, Judge Henson submitted that assessors completing the assessment report provided to the court often mark a factor as one that 'may affect suitability' when in fact the factor has not yet been assessed and suggested reports to include a 'not yet assessed' option to allow an opportunity for further assessment.

3.76 CSNSW has advised that since it has changed its practices and assessors now provide reasons for recommending that an offender is unsuitable for an ICO.[75]

Mandatory work condition

3.77 As indicated above, the mandatory condition requiring offenders sentenced to an ICO to complete 32 hours per month of community service work has significantly curtailed the ability of courts to impose an ICO on offenders who are unlikely to be able to comply with the condition, for example, with substance dependencies or mental health or cognitive impairments.

3.78 In addition, the mandatory community service work condition can restrict the availability of ICOs in the following ways:

- by reason of the lack of available community service work placements;[76]
- particularly in the regional and rural areas covered by the rollout, that lack sufficient community service work opportunities;[77]
- offenders with employment commitments may be unable to commit to the number of hours required;[78] and
- health concerns of some offenders may limit their availability to work.[79]

3.79 A number of Survey respondents accordingly supported the removal of community service work as a mandatory condition of an ICO.[80] The Council would support

73. NSW Sentencing Council, *Judicial Perceptions of Suspended Sentences Survey* (2011), Respondents 19, 124.
74. Corrective Services NSW, *ICO Monthly Report* (June 2011 and December 2011).
75. Information provided by CSNSW, October 2012.
76. NSW Sentencing Council, *Judicial Perceptions of Suspended Sentences Survey* (2011), Respondent 36; Submission ICO01, *His Honour Magistrate Graeme Henson, Chief Magistrate, Local Court of NSW*; Submission ICO02, *The Law Society of NSW;* Submission ICO07, *The Public Defenders*.
77. NSW Sentencing Council, *Judicial Perceptions of Suspended Sentences Survey* (2011), Respondent 90.
78. Submission ICO02, *The Law Society of NSW;* NSW Sentencing Council, *Judicial Perceptions of Suspended Sentences Survey* (2011), Respondent 130.
79. NSW Sentencing Council, *Judicial Perceptions of Suspended Sentences Survey* (2011), Respondent 7.
80. NSW Sentencing Council, *Judicial Perceptions of Suspended Sentences Survey* (2011), Respondents 90, 101, 130.

further consideration of ways to enhance the availability of community work and increase flexibility in relation to the work component of ICOs.

Delays in proceedings

3.80 The Chief Magistrate Judge Henson and the DPP raised concerns about the unsatisfactory duration of adjournments associated with the assessment process. It was reported that proceedings are typically adjourned twice to allow for the assessment process, with the DPP noting that an offender may be in custody for an inappropriate amount of time pending the assessment.[81]

3.81 Legal Aid NSW noted that offenders may request a home detention order in circumstances where an ICO is more beneficial, because the assessment process for home detention is quicker and can result in a release from custody two weeks earlier.[82]

Limitations on power of the court

3.82 There was some support among stakeholders for empowering the court to make an order even if an offender is assessed as unsuitable.[83]

3.83 It is noted that this concern was considered by the former Attorney General when ICOs were introduced. He considered that CSNSW was best placed to determine which offenders it could adequately supervise in the community and that ignoring this assessment could place the community and offender at risk.[84]

Removal of exclusions

3.84 In formulating the proposed model for the ICO (CCO at that time), the Council did not anticipate automatic eligibility exclusions, stating that matters such as previous offending and the nature of the current offence 'should [instead] be matters to be taken into account in the suitability assessment'.

3.85 The need for removal of arbitrary offence related restrictions on alternatives to full-time prison was a strongly held view among Survey respondents.[85]

3.86 Some judicial officers also supported the removal of the exclusion for children, or for young people over 16 but under 18.[86]

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81. Submission ICO01, *His Honour Graeme Henson, Chief Magistrate, Local Court of NSW*; Submission ICO03, *Director of Public Prosecutions, NSW.*
82. Submission ICO06, *Legal Aid NSW.*
83. Submission ICO02, *The Law Society of NSW*; NSW Sentencing Council, *Judicial Perceptions of Suspended Sentences Survey* (2011), Respondent 14.
84. NSW, *Parliamentary Debates*, Legislative Council, 22 June 2010, (J Hatzistergos - Attorney General) 24426.
85. NSW Sentencing Council, *Judicial Perceptions of Suspended Sentences Survey* (2011), Respondents 1, 2, 4, 7, 12, 17, 21, 22, 29, 30, 31, 38, 45, 57, 68, 84, 85, 88, 90, 95, 98, 118, 125, 127, 129.
86. NSW Sentencing Council, *Judicial Perceptions of Suspended Sentences Survey* (2011), Respondents 68, 104, 130.

3.87 The Council considers that the current offence related restrictions on the imposition of ICOs should be reviewed.

Time for determining the term of the sentence

3.88 The Chief Magistrate Judge Henson submitted that it is strongly desirable for the term of the sentence to be set before an offender is referred for assessment of suitability for an ICO. He noted that the existing requirement to refer an offender for assessment prior to making a final determination as to sentence lacks transparency and may create the appearance that the form of imprisonment is determined prior to, and may affect, the term.[87]

3.89 CSNSW also raised this concern noting data that suggest that, while most offenders who are assessed as unsuitable for ICOs subsequently received another form of imprisonment as a penalty, in some instances, offenders are receiving penalties which are lower down in the sentencing hierarchy. CSNSW has informed the Council that it has requested BOCSAR to conduct some research in relation to whether or not net-widening is an issue in relation to the use of ICOs.

3.90 A further issue with determining the term after assessment, raised by Legal Aid NSW, is that the duration of the order may be relevant to assessment factors, such as accommodation and rehabilitation requirements, and can ultimately impact the outcome of an assessment.[88]

3.91 The Chief Magistrate, Judge Henson, submitted that the process for imposing *any* custodial sentence should be to determine:

> (1). That a sentence of imprisonment is the only appropriate outcome; then
>
> (2). The length of the sentence to be imposed; then
>
> (3). The manner of custody to be imposed, with a referral for a single assessment report covering any alternatives being contemplated in order to prevent unnecessary adjournments for the purpose of obtaining multiple reports.[89]

Response to breaches

3.92 Legal Aid NSW raised concerns both about the number of orders being revoked and the procedures for revocation.[90] In their experience, orders have been revoked for relatively minor breaches, commonly a failure to comply with the work condition, notwithstanding the availability of a reasonable explanation.

3.93 Legal Aid submits that procedural improvements could be made by ensuring offenders are provided with notice of a revocation hearing and the right to reply to CCMG's request for revocation.

87. Submission ICO01, *His Honour Graeme Henson, Chief Magistrate, Local Court of NSW.*
88. Submission ICO06, *Legal Aid NSW.*
89. Submission ICO01, *His Honour Graeme Henson, Chief Magistrate, Local Court of NSW.*
90. Submission ICO06, *Legal Aid NSW.*

3.94 A number of survey respondents supported the transfer of power to deal with breaches to the sentencing court.[91] The Council notes however that this would introduce potential delays in dealing with revocation hearings.

3.95 There appears to be a general lack of knowledge among lawyers and offenders about the procedures for breach. The provisions of better information about breach procedures may allay some of the concerns raised.

Other issues

3.96 A number of other issues were raised in submissions and in the survey. The Council would support further consideration of these issues by the NSWLRC in the context of the Sentencing Review. These issues include:

Synchronisation of sentencing options

3.97 The Chief Magistrate Judge Henson submitted that there should be standardisation of requirements and procedures for home detention and ICOs.[92] This suggestion was also made by a number of Survey respondents.[93]

Reduce complexity

3.98 A number of Survey responses indicated that the procedures for imposing ICOs are too complex and require simplification.[94]

Clarify jurisdictional limit of the Local Court

3.99 The Chief Magistrate Judge Henson submitted that the ability for CSNSW to seek an extension of an ICO of up to six months conceivably contemplates that the Local Court could exceed its jurisdictional limit of two years imprisonment, by imposing an ICO of two years and later extending it by up to six months. He argues that this highlights an ambiguity as to whether the intention of these provisions was to enable the Local Court to exceed its jurisdictional limit, and that this requires clarification.[95]

Increase availability of extension

3.100 CSNSW state that the requirement to seek an extension before an order has expired is problematic because it is difficult to predict whether the work requirement

91. NSW Sentencing Council, *Judicial Perceptions of Suspended Sentences Survey* (2011), Respondents 49, 112, 120, 131
92. Submission ICO01, *His Honour Magistrate Graeme Henson, Chief Magistrate, Local Court of NSW.*
93. NSW Sentencing Council, *Judicial Perceptions of Suspended Sentences Survey* (2011), Respondents 110, 122.
94. NSW Sentencing Council, *Judicial Perceptions of Suspended Sentences Survey* (2011), Respondents 45, 79, 95.
95. Submission ICO01, *His Honour Magistrate Graeme Henson, Chief Magistrate, Local Court of NSW.*

will be fulfilled before expiration of the order. It submits that an extension request should be allowed for up to a month after the expiry of the order.[96]

Clarify backdating of orders

3.101 The DPP submits that clarity is required as to whether an ICO can be backdated to take into account time spent in custody.[97] While the operation of s 47(3) would ordinarily mean that terms of imprisonment can be backdated; clarification may be required in relation to whether s 71 of the CSPA precludes the operation of s 47(3) in relation to ICOs.

3.102 The DPP submitted that the intention of Parliament in drafting s 71 was that backdating of sentences should not be applicable to ICOs, and that this is evident from the administrative implications that arise if s 71 is interpreted not to preclude the backdating of ICOs, including that:

- Courts would not be able to notify CSNSW of the beginning of the ICO (in accordance with s 73 of the CSPA), and CSNSW supervision of the offender would not apply during the backdated period;
- The offender would not be able to comply with any conditions or requirements of the ICO in accordance with s 82 of the *Crimes (Administration of Sentences) Act 1999* during the backdated period; and
- S 85(1)-(3), which ordinarily allows CSNSW to grant approval for an offender not to comply with a work or reporting requirement for various reasons, if such approval is sought in advance of the time that the requirement is due to be complied with, would not be applicable unless time previously spent in custody is interpreted as an exceptional circumstance in accordance with s 85(8) of that Act.[98]

3.103 On one view however, it may be seen as anomalous if ICOs were not able to be backdated, in accordance with s 47(3), given that, in accordance with s 7 of the CSPA, ICOs are a form of imprisonment.

Clarify availability of suspended sentence

3.104 The Chief Magistrate Judge Henson submitted that there should be express provision as to whether or not the court may suspend a sentence of imprisonment after an offender has been assessed as unsuitable for an ICO, analogous to s 12(4) of the CSPA.[99]

96. Corrective Services NSW, *Correspondence* (9 April 2012).
97. Submission ICO03, *Director of Public Prosecutions, NSW*.
98. Submission ICO03, *Director of Public Prosecutions, NSW*.
99. Submission ICO01, *His Honour Graeme Henson, Chief Magistrate, Local Court of NSW.*

The availability of ICOs to offenders with limited or no rehabilitation requirements

3.105 There has been some uncertainty around whether or not ICOs are available to offenders with limited or no rehabilitation requirements. This uncertainty appears to have been settled by the recent decision of *R v Pogson; R v Lapham; R v Martin.*[100]

3.106 In that case the Court considered the statutory construction of the ICO provisions in the CSPA and in particular the question of whether that construction could lead to the conclusion that ICOs are unavailable in respect of any offence or offender, as a matter of law. The Court held that it could not:

> A conclusion that a particular form of sentence is not available in respect of an offence or an offender, as a matter of law, can be reached only by way of clear words in the relevant statute or by necessary implication. To reach such a conclusion, it would be necessary to construe a penal statute, the *Sentencing Procedure Act*, in a manner which excluded a form of penalty with a likely (if not inevitable) consequence that offenders so excluded would be required to serve a sentence of full-time imprisonment.

3.107 In relation to the emphasis of the legislative scheme for ICOs on the rehabilitation of offenders, it noted that:

> It is apparent that the legislative scheme for ICOs emphasises the availability of this option to assist in the rehabilitation of an offender. To this end, provision is made for the imposition of conditions by the sentencing court which are designed to meet the particular need for rehabilitation of an individual offender. However, there is no statutory provision which confines the use of an ICO to a person expressly in need of measures of this type. The mandatory conditions provided by the legislation will operate to impose significant restrictions on the liberty of an individual including an obligation to perform community service: [68].

3.108 The decision of *R v Pogson; R v Lapham; R v Martin* therefore clarifies the legal position following the case of *R v Boughen; R v Cameron* that a term of imprisonment may be served by way of ICO, even where rehabilitation is not required. In this regard it alleviates some of the concerns raised in written submission to the Council in relation to the implications of that decision.[101]

3.109 The Council notes that clarification of the role and nature of ICOs will be further considered in the NSWLRC review, in the context of a consideration of the overall sentencing framework.

Conclusion

3.110 This first annual review of ICOs indicates that ICOs are generally working well and that they are being increasingly used. The main teething problems and stakeholder concerns relate to the availability of ICOs in terms of location, suitability and eligibility. CSNSW has progressively rolled out ICOs to increase their geographical reach and made a number of changes to operational practices in light of its

100. *R v Pogson; R v Lapham; R v Martin* [2012] NSWCCA 225.

101. The Law Society of NSW, *Correspondence with NSW Law Reform Commission* (27 March 2012).

experience. Further consideration should be given however, by the NSWLRC in the context of its sentencing review, to issues such as:

- CSNSW assessment procedures and alternative approaches to dealing with offenders with substance dependencies;
- the addition of a 'work-ready' program as a way for offenders with substance dependencies or mental health impairments to meet the community service work requirement;
- reconsideration of community service work as a mandatory condition;
- extending the maximum term of ICOs to 3 years;
- allowing the imposition of a non-parole period; and
- the desirability of narrowing the kinds of offenders that ICOs may be suitable for and/or the desirability of alternative custodial sentences that may be served in the community.

4. Monitoring and reporting

Developments in relation to the standard non-parole period scheme

4.1 As noted above, in 2011 the Council completed a background report on the standard non-parole period scheme. That report summarised the operation of the scheme, and analysed offending rates and sentencing patterns for sexual offences (those within the scheme and others).

4.2 The SNPP scheme was introduced in the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW) and took effect on 1 February 2003. The scheme provides statutory guidance to sentencing courts in relation to appropriate non-parole periods for certain serious indictable offences, as set out in the Table to Division 1A of Part 4 of the CSPA.

4.3 The approach to implementing the SNPP scheme changed significantly in October 2011 with the decision of the High Court in *Muldrock v The Queen*,[102] discussed below.

The decision in Muldrock

4.4 In October 2011, the High Court handed down its decision in *Muldrock v The Queen*,[103] in which it held that the decision in *R v Way* had been wrongly decided.[104]

4.5 The Council has analysed both decisions in its report *Standard Non-Parole Periods: A Background Report by the NSW Sentencing Council*.

4.6 As the Council noted in its report, the Court in *Muldrock* rejected the appellant's submission that the SNPP has no role in sentencing for an offence in the low (or high) range of objective seriousness. It accepted the respondent's submission that the effect of s 54B(2) of the CSPA is not to "mandate a particular non-parole period for a particular category of offence rather it preserves the full scope of the judicial discretion to impose a non-parole period longer or shorter than the [standard non-parole period]".[105]

4.7 The Court in Muldrock observed:

> It follows from that acceptance that *Way* was wrongly decided. As will appear, it was an error to characterise s 54B(2) as framed in mandatory terms. The court is not required when sentencing for a Div 1A offence to commence by asking whether there are reasons for not imposing the standard non-parole period nor to proceed to an assessment of whether the offence is within the midrange of objective seriousness.[106]

4.8 Importantly, the Court observed:

102. [2011] HCA 39, (2011) 281 ALR 652.
103. *Muldrock v The Queen* [2011] HCA 39, (2011) 281 ALR 652.
104. *R v Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168.
105. *Muldrock v The Queen* [2011] HCA 39, (2011) 281 ALR 652, [24].
106. *Muldrock v The Queen* [2011] HCA 39, (2011) 281 ALR 652, [25].

> Section 54B applies whenever a court imposes a sentence of imprisonment for a Div 1A offence. The provision must be read as a whole. It is a mistake to give primary, let alone determinative, significance to so much of s 54B(2) as appears before the word "unless". Section 54B(2), read with ss 54B(3) and 21A, requires an approach to sentencing for Div 1A offences that is consistent with the approach to sentencing described by McHugh J in *Markarian v The Queen*:
>
> "[T]he judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case." (emphasis added)
>
> Section 54B(2) and s 54B(3) oblige the court to take into account the full range of factors in determining the appropriate sentence for the offence. In so doing, the court is mindful of two legislative guideposts: the maximum sentence and the standard non-parole period. The latter requires that content be given to its specification as "the non-parole period for an offence in the middle of the range of objective seriousness". Meaningful content cannot be given to the concept by taking into account characteristics of the offender. The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. It is to be determined wholly by reference to the nature of the offending.
>
> Nothing in the amendments introduced by the amending Act requires or permits the court to engage in a two-stage approach to the sentencing of offenders for Div 1A offences, commencing with an assessment of whether the offence falls within the middle range of objective seriousness by comparison with an hypothesized offence answering that description and, in the event that it does, by inquiring if there are matters justifying a longer or shorter period.[107]

4.9 In relation to the requirement that sentencing judges state fully the reasons for arriving at the sentence imposed, the Court stated:

> The reference in s 54B(4) to "mak[ing] a record of its reasons for increasing or reducing the standard non-parole period" is not to be understood as suggesting either the need to attribute particular mathematical values to matters regarded as significant to the formation of a sentence that differs from the standard non-parole period, or the need to classify the objective seriousness of the offending. It does require the judge to identify fully the facts, matters and circumstances which the judge concludes bear upon the judgment that is reached about the appropriate sentence to be imposed. The obligation applies in sentencing for all Div 1A offences regardless of whether the offender has been convicted after trial or whether the offence might be characterised as falling in the low, middle or high range of objective seriousness for such offences.[108]

4.10 A number of 2011 cases considered the principles put forward in *Muldrock* and the manner in which those principles should apply in sentencing for offences to which SNPPs apply. Those cases are summarised below.

Application of Muldrock

R v Koloamatangi [2011] NSWCCA 288

The respondent was sentenced in the District Court to a cumulative sentence for seven offences to an 11 year non-parole period with an additional 4 year balance of

107. *Muldrock v The Queen* [2011] HCA 39, (2011) 281 ALR 652, [25]–[28].

108. *Muldrock v The Queen* [2011] HCA 39, (2011) 281 ALR 652, [29]

term. The DPP appealed on a number of grounds, including that the trial judge erred in her approach to standard non-parole periods.

Appeal allowed.

The standard non-parole period cannot have determinative significance, but the sentencing judge needs to bear it in mind as a marker, whether or not there are reasons why it should not be applied: [19]-[21].

The court is not required to classify an offence by reference to a low, middle or high range of objective seriousness. It would be wrong to adopt a two-stage approach which commenced with such an assessment and then sought reasons for departure.

However, the sentencing judge is required to maintain awareness of the SNPP as an additional consideration bearing on the appropriate sentence.

There may be reasons for non-application of the SNPP, for example, a plea of guilty entitling the offender to a discount.

Beveridge v R [2011] NSWCCA 249

The applicant was sentenced to a non-parole period of 3 years 6 months and a balance of term of 2 years 6 months for cultivating a commercial quantity of cannabis plants contrary to s 23(2) of the *Drug Misuse and Trafficking Act 1985*. As the appellant was sentenced prior to the decision in *Muldrock,* the court applied the law as it had been stated in *Way* and subsequent NSW cases based on *Way*, and used the SNPP as a guide, even though the applicant had pleaded guilty; and made a finding that the present case fell below the mid-range of objective seriousness.

One of the grounds for appeal was that the sentencing judge erred in failing to properly identify where, on any given scale of objective seriousness, the offence fell and erred in imposing a sentence which reflected a degree of objective seriousness greater than that which was in evidence, as required by *Way*.

Appeal dismissed.

The first ground of appeal could not succeed if the law as stated in *Muldrock* is applied. The whole basis on which the first ground of appeal was founded has been undermined by *Muldrock*. There is no suggestion in *Muldrock* that a sentencing judge is required to specify the degree to which the objective seriousness of a particular offence departs from the objective seriousness of a notional mid-range offence: [18].

Ayshow v R [2011] NSWCCA 240

The applicant was given a total effective sentence of 8 years non-parole period with a balance of term of 6 years for offences including supplying a commercial quantity of a prohibited drug contrary to s 25(2) of the *Drug Misuse and Trafficking Act 1985*, which carries a maximum term of imprisonment of 20 years and a standard non-parole period of 10 years, and for supplying a prohibited drug under s 25(1) of that Act, which carries a maximum term of imprisonment of 15 years.

The applicant appealed against sentence on several grounds, including that the sentencing judge erred in characterising count 1 (the SNPP offence), as falling around the middle of the range of objective seriousness for offences under that provision.

Appeal dismissed.

The decision in *Muldrock* changed the law in several respects where sentence is to be passed for an offence carrying an SNPP.

"To the extent that a question arises whether the Applicant's mental state at the time of the offence may bear upon objective seriousness (*Muldrock* at 1162-1163 [27], 1163 [29]), it remains a relevant factor on sentence in an assessment of moral culpability. Accordingly, if there is evidence to support a finding that an offender's moral culpability is reduced by a relevant mental condition, the offender is entitled to have it called in aid on sentence": [39].

MDZ v R [2011] NSWCCA 243

The applicant was sentenced to an overall term of 11 years imprisonment with a non-parole period of 4 years and balance of term of 3 years, for two counts of aggravated sexual intercourse without consent contrary to s 61J of the *Crimes Act 1900*, which carries a SNPP of 10 years. The applicant appealed on a number of grounds including that the trial judge erred in failing to take into account a number of relevant considerations, in particular, the applicant's state of mind and capacity to reason at the time of the commission of the offences.

Appeal allowed.

Following the decision in *Muldrock*, it is not necessary for the sentencing judge to commence by asking whether there are reasons for not imposing the SNPP nor to proceed to an assessment of whether the offence was within the mid-range of objective seriousness: [34].

It was an error on the part of the sentencing judge to assess the objective seriousness of the offence by reference only to the 'physical aspects' of the offence.

Mental health and intoxication are relevant to an assessment of objective seriousness: '…if there was a causal link between the applicant's mental condition and the commission of the offence, then that was a relevant matter to take into account in assessing the objective seriousness of the offence..': [72].

The extent to which the combination of the offender's underlying personality disorder, low intellect, cannabis dependence and drug intoxication operated on his ability to engage in rational thinking was held to have been relevant to the assessment of objective seriousness: [74]

Position following *Muldrock*

4.11 In effect, Muldrock has removed the mandatory element of the SNPP scheme that Way interpreted as the Parliament's intention in drafting the scheme, so that:

- it is not necessary for the sentencing judge to commence by asking whether there are reasons for not imposing the SNPP nor to proceed to an assessment of whether the offence is within the mid-range of objective seriousness;
- the standard non-parole period cannot have determinative significance, but the sentencing judge needs to bear it in mind as a marker, whether or not there are reasons why it should not be applied;
- the sentencing judge is required to maintain awareness of the SNPP as an additional consideration bearing on the appropriate sentence; and
- the sentencing judge, in determining the objective seriousness of an offence, can take into account both objective and subjective factors surrounding the offending.

Response to *Muldrock*

Standard Non-Parole Period Review Team

4.12 The Council notes that Legal Aid NSW and the Public Defenders' Office have initiated a review of over 1000 cases of offenders who were sentenced for SNPP offences prior to the decision in *Muldrock,* to identify cases which are able to be appealed or in which a reduction of sentence may be sought.

4.13 The Council understands that prisoners will be automatically notified if their cases are identified as having grounds for review. Cases will be reviewed in order of priority, with cases of prisoners who will be eligible for release within the next two years and juvenile offenders to be reviewed first, followed by the cases of prisoners who will be eligible for release after 2015.

Issues following *Muldrock*

4.14 As the Council identified in its report, following the decision in *Muldrock*, a number of issues remained for consideration, including whether the SNPP scheme should be repealed; whether it should be amended (and if so, how); or whether it should be repealed and replaced by an alternative scheme.

4.15 The NSWLRC in consultation with the Council has considered these issues further in the context of its sentencing reference, of which the interim report in relation to standard minimum non-parole periods has now been published.[109]

109. NSW Law Reform Commission, *Sentencing: Interim Report on Standard Minimum Non-Parole Periods*, Report 134, May 2012.

Sentencing practices—judicial consideration

Sentencing Procedure—Procedural fairness

Weir v R [2011] NSWCCA 123

The applicant had pleaded guilty to recklessly causing grievous bodily harm (*Crimes Act 1900* s 35(2)) and intentionally or recklessly destroying property (*Crimes Act 1900* s 195(1)(a)).

During sentencing proceedings, the sentencing judge had given a tentative indication that he would sentence the applicant to imprisonment for a period of 3 years, with a non-parole period of 18 months and invited submissions from the applicant if that figure was not accepted, stating that otherwise the matter would be put over and judgment given.

When judgment was delivered, the Court imposed a sentence of imprisonment for 4 years with a non-parole period of 1 year, 6 months in relation to the first count.

Appeal allowed.

Departing from the indicated sentence without inviting further submissions in relation to the higher sentence resulted in procedural unfairness.

Govindaraju v R [2011] NSWCCA 255

The applicant was sentenced to a period of imprisonment of 9 years, with a non-parole period of 5 years, 4 months, 24 days for importing a marketable quantity of heroin (*Criminal Code 1995* (Cth) s 307.2(1)).

The sentencing judge proceeded on the basis that the applicant was more than 'a mere courier', where the Crown had not sought such a finding and where the agreed statement of facts did not indicate the role played by the applicant.

Appeal allowed.

Where the agreed facts did not establish the applicant was more than a mere courier, and the Crown had made no such submission, procedural fairness required the sentencing judge to give notice to the applicant of her intention to consider whether the evidence supported such a finding.

Ng v R [2011] NSWCCA 227

The applicant was convicted of murder and aggravated armed robbery (*Crimes Act 1900* ss 19A, 97(2)) and sentenced to a total effective term of imprisonment of 37 years with a non-parole period of 27 years, 9 months. His co-offender, Lo, was sentenced to a term of imprisonment for 18 years with a non-parole period of 13 years, 6 months.

During sentencing proceedings, the sentencing judge had made numerous statements indicating that the two co-offenders were equally responsible for the murder and indicated that a starting point of 30 years imprisonment would be appropriate. Notwithstanding this, in sentencing the applicant, the judge made an adverse finding that the applicant was 'a markedly more dangerous man' than Lo. The Crown had made no submission to that effect.

Appeal allowed.

Imposing a sentence longer than that identified during submissions, and making an adverse finding as to dangerousness, without providing an opportunity for submissions on those matters resulted in unfairness.

Sentencing Principle—Parity

***Green v The Queen; Quinn v The Queen* [2011] HCA 49, (2011) 283 ALR 1**

The Appellants were both convicted of cultivating a large commercial quantity of cannabis (*Drug Misuse and Trafficking Act 1985* s 23(2)). Green was sentenced to imprisonment for 4 years, with a non-parole period of 2 years. Quinn was sentenced to imprisonment for 6 years, with a non-parole period of 3 years. A third person involved in the enterprise, Taylor, was convicted of the lesser offence of supply of a commercial quantity of a prohibited drug and sentenced to 3 years imprisonment with a non-parole period of 18 months.

The Crown appealed against the sentences imposed on Quinn and Green, but did not appeal in respect of Taylor.

The NSWCCA allowed the appeal and imposed sentences of 8 years imprisonment with a non-parole period of 5 years for Quinn, and 5 years imprisonment with a non-parole period of 3 years for Green.

The NSWCCA acknowledged that resentencing Quinn and Green would result in disparity with the sentence imposed on Taylor, but found that the sentence imposed on Taylor was so obviously manifestly inadequate that it would not be appropriate to use it as basis for resentencing Quinn and Green.

Quinn and Green appealed to the High Court on the ground that the NSWCCA had created disparity between their sentences and the sentence imposed on Taylor.

Appeal allowed.

The parity principle applies differently in Crown appeals than it does in offender appeals. The purpose of Crown appeals is "to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons". If a Crown appeal would result in unjustified disparity, its value as an instrument of guidance to lower courts may be limited. An appeal in such circumstances may be justified if the inadequacy of the sentence appealed is so striking that it amounts to 'an affront to the administration of justice', but that was not the case here.

In the absence of any submission that Taylor's sentence was manifestly inadequate, and of notice by the Court that it intended to take that view, it was not open to the Court to dispose of the appeal on that basis.

***Dwayhi v R; Bechara v R* [2011] NSWCCA 67, (2011) 205 A Crim R 274**

The case involved a number of offenders, including the applicants and the offender Kertebani, who dishonestly obtained benefits by deception through the lodgement of false BAS statements with the ATO.

Each defendant came before a different sentencing judge. Dwayhi was sentenced to an aggregate term of imprisonment of 5 years, with a non-parole period of 3 years.

Bechara was sentenced to an aggregate term of imprisonment of 4 years, 9 months, with a non-parole period of 3 years. Kertebani was sentenced to 2 years imprisonment with a non-parole period of 14 months.

Held:

"It is necessary for sentencing courts and prosecutorial bodies to take steps to ensure, so far as it is reasonably possible, that related offenders are sentenced by the same judge, and preferably at the same time following a single sentencing hearing…

It ought be appropriate, as well, for sentencing and appellate courts to enquire of counsel for an offender, who seek to rely upon the parity principle, as to the steps taken by that offender or his legal representatives to ensure that he or she was sentenced by the same judge, and at the same time, as any related offender, if the case is one where there were different sentencing judges.

… procedures of this type will serve the public interest in consistent and transparent sentencing of related offenders which forms, after all, part of the rationale for the parity principle itself": [44]-[46].

Rae v R [2011] NSWCCA 211

The applicant was sentenced to a term of imprisonment of 5 years, 6 months with a non-parole period of 3 years, 6 months, for supply of a prohibited drug. Her co-offender, who supplied her with the prohibited drug for the transaction, was sentenced by a different judge to 3 years with a non-parole period of 18 months.

The sentencing remarks regarding the applicant had been placed before the judge sentencing her co-offender, for the purposes of distinguishing the two offenders. In sentencing the co-offender, the judge noted that no question of parity arose between the two offenders.

The applicant appealed on the ground of parity.

Appeal dismissed.

There was very different evidence before the two sentencing judges, which accounted for the substantial difference in the sentences imposed. However, the case was a vivid illustration of the problems that can arise where co-offenders are sentenced before different judges, that is, "there may be different evidence and submissions, leading to different conclusions being expressed by the sentencing judges concerning criminal conduct of persons involved in the same criminal enterprise": [56].

Factors relevant to sentencing

Objective seriousness of the offence

Turner v R [2011] NSWCCA 189

The applicant was sentenced in the District Court to imprisonment for 4 years 6 months with a non-parole period of 2 years 9 months in relation to a single count of armed robbery with an offensive weapon. He had pointed a syringe at hospital

medical staff and then taken drugs from a cupboard. Seven years prior to the offence, the applicant had developed an addiction to medication as a result of a serious accident.

The applicant appealed on grounds including that the sentence was manifestly excessive, and that the trial judge had failed to take into account as a subjective factor, his prescription drug addiction.

Appeal allowed.

The applicant's addiction fell squarely within the principles outlined in *R v Henry* (1999) 46 NSWLR 346. It was the result of an event for which he was not primarily responsible and it was not a matter of personal choice. It was an error not to take into account as a mitigating factor, an addiction to prescription drugs that did not arise out of personal choice. Basten JA noted a distinction between illicit drugs and prescription drugs. Prescription drug addiction may diminish the level of moral responsibility: [5].

***Jodeh v R* [2011] NSWCCA 194**

The applicant was sentenced to a total effective sentence of 16 years imprisonment with a total effective non-parole period of 11 years, for 3 armed robberies. The applicant had in the year prior to the offending, been in a motorbike accident which caused him to suffer from depression, anxiety and mental and physical pain, which he said had led to the use of marijuana, cocaine and ice, and a path of crime.

While the appeal was allowed, the total effective sentence was not significantly reduced. The court in its decision noted that the applicant did not give evidence in person and that the judge could not assess the extent to which the applicant was troubled by pain on a regular basis in the period leading up to the offences. In addition, there was no evidence that he made any attempt to address the issues of pain and depression with professional assistance and legally-prescribed drugs.

Principles in relation to sexual assault offences

PWB v R [2011] NSWCCA 84

The applicant was convicted of two child sexual assault offences under s 61E(1) of the *Crimes Act 1900*, which were committed in 1987 and 1991, and sentenced to a cumulative term of imprisonment for 3 years 4 months and 24 days with a non-parole period of 1 year.

The applicant appealed against sentence, on a number of grounds including that the overall sentence was manifestly excessive.

Appeal allowed.

An error arose relating to the principle that, given the extent of the time between his offending and sentence, the applicant was entitled to be sentenced in accordance with sentencing standards current at the time of his

offending: *R v MJR* [2002] NSWCCA 129; (2002) NSWLR 368; 130 A Crim R 481; AJB v R [2007] NSWCCA 51; 169 A Crim R 32 at [39]: [55].

The judge erred in saying that "heavy custodial sentences are essential if the courts are to play their proper role in protecting young people from sexual assaults by adults". RS Hulme J held that: "The tone of these remarks is such that, despite her Honour's recognition of the principle, it is impossible to conclude otherwise than that her Honour allowed herself to be influenced by this shift in penalties for which she was thankful. Such an approach was erroneous": [57].

Beazley JA also noted that, while courts must avoid double counting, a sentencing judge may take into account the age of a child within the range of ages specified in the offence, in order to recognise the particular vulnerability of a child of young years; and that recourse to journal articles to assist in understanding matters which the court may not necessarily be qualified to comment on, is appropriate.

R v NJK [2011] NSWCCA 151

The respondent received a wholly suspended sentence of 22 months and 15 days for indecent assault and the use for pornographic purposes of his five year old step daughter. The offence carries a maximum penalty of 10 years imprisonment and a standard non-parole period of 8 years imprisonment. The Crown appealed on a number of grounds, including that the sentence was manifestly inadequate.

Appeal dismissed.

A suspended sentence was within the permissible range. The judge had appropriately balanced all relevant factors, including that the assault was of a less serious kind, that it constituted a brief period of aberrant behaviour with no apparent adverse effect on the victim, that the respondent had reported the mater to police and entered an immediate plea of guilty, that he posed a "very minimal" risk of reoffending and had demonstrated rehabilitation through his extensive participation in psychological counselling and treatment post-arrest and that he had continued to support the victim in a way that allowed him to remain in the home. The Court noted that the SNPP for the offence was, on its face, out of step with the maximum available penalty (and ratio of 80%). It was held in all the circumstances of the case that the interests of general deterrence did not require an actual period of custody: [43], [47].

Mokhaiber v R [2011] NSWCCA 10

The applicant was sentenced to 6 years imprisonment with a non-parole period of 4 years, for 10 counts of child sexual assault offences contrary to ss 61M(1) and 66C(3) of the *Crimes Act 1900*. The applicant appealed on the basis that there was fresh evidence which was not heard in the original sentencing proceedings. The fresh evidence related to family hardship due to the applicant's youngest child being diagnosed with a severe genetic condition. The applicant's wife was the full-time carer of the child and of the applicant's two other children.

Appeal allowed.

The sentence was reduced to an effective sentence of 5 years 6 months with a non-parole period of 3 years 6 months. While the total effective sentence was not inappropriate on the material available to the sentencing judge, this is a highly exceptional case (in accordance with *R v Edwards* (1996) 90 A Crim R 510 at 516-517), where the imposition of a sentence less than what would otherwise be appropriate is justified.

The applicant's wife will suffer overwhelming hardship because of the applicant's imprisonment such that the circumstances may be regarded as highly exceptional.

The applicant's distress at being unable to assist his wife with his daughter's care makes the experience of imprisonment more onerous: *Markovic v R; Pantelic v R* [2010] VSCA 105 at [20].

Restitution

***Job v R* [2011]NSWCCA 267**

The applicant was sentenced to a period of imprisonment of 5 years, with a non-parole period of 3 years, for fraud-related offences arising from his employment at the Roads and Traffic Authority.

The applicant sought leave to appeal against the sentence on a number of grounds, including that the sentencing judge failed to take into account the applicant's offer to make restitution by selling his family home and an investment property, finding that "it is not a matter of mitigation that reparation is paid. It is an aggravating factor if it is not".

Appeal allowed.

The sentencing judge fell into error in rejecting the willingness of the applicant to make reparation as a relevant factor. The sale of a family home has previously been found to occasion considerable sacrifice and this case was comparable. The applicant's undertaking was entitled to some weight in his favour. The Court observed that the observations in *R v Phelan* (1993) 66 A Crim R 446, that failure to provide reparation is "more a matter of aggravation when an offence has caused a loss which is effectively irretrievable" should be treated with caution.

CSPA—Sentencing procedure

Aggravating factors (s 21A)

***Ta and Nguyen v R* [2011] NSWCCA 32**

Each of the appellants was sentenced to a head sentence of 7 years consisting of a non-parole period of 4 years and a balance of the term of 3 years for an offence of being knowingly concerned in the cultivation of a large quantity of cannabis plants. Each appealed against sentence on the basis that the judge erred in finding that the offence was aggravated by reason of being committed: (a) in company; (b) without regard for public safety; and (c) as part of planned and organised criminal activity.

Appeal allowed.

The court allowed the appeal against sentence on the basis that the trial judge erred in taking each of these matters into account. It held that a factor should not be taken into account as an aggravating factor to which additional regard can be had in sentencing if it is either an element of the offence for which the offender is being sentenced, or an inherent characteristic of that kind of offence, unless its nature or extent in the particular case is unusual.

Mitigating factors (s 21A)

Tiknius v R [2011] NSWCCA 215

The applicant pleaded guilty to serious drug offences and was sentenced to an effective term of imprisonment of 11 years, with a non-parole period of 6 years, 6 months. The applicant gave evidence before the sentencing judge, which was accepted, that he had committed the offences under duress (a gun had been held to his head and threats of rape and murder had been made against his girlfriend).

The applicant appealed against the sentence on a number of grounds, including that the sentencing judge failed to take duress into account in assessing the objective seriousness of the offence; and failed to make an appropriate reduction in the sentence to reflect the duress.

Appeal allowed.

Where an offender satisfies the court that he or she acted under duress, but the defence of duress is not available, the court must determine what weight should be given to that factor on sentence. This involves consideration of, amongst other things, "the form and duration of the offender's criminal conduct, the nature of the threats made and consideration of opportunities which were available to the offender to report the matter to the relevant authorities": [49].

The sentencing judge failed to make an assessment of the impact of the duress on the objective gravity of the offences. The circumstances called for a finding that the objective seriousness of the applicant's offences was significantly reduced. Such a finding will always depend on the facts in a particular case and there is no general principle for reduction of a sentence on the grounds of non-exculpatory duress.

Mitigating factors (s 21A)—Remorse

Alvares and Farache v R [2011] NSWCCA 33, (2011) 209 A Crim R 297

The applicants pleaded guilty to various drug offences contrary to the *Criminal Code Act 1995* (Cth). Both applicants appealed, including on grounds that the trial judge gave minimal weight to the evidence of remorse, and/or failed to consider the evidence of remorse.

Appeal dismissed.

While the matter was properly considered by the trial judge in this case, there is no authority for the proposition that an offender will only be entitled to a finding of remorse where he or she gives sworn evidence. This is because an offender may demonstrate remorse by words or conduct without giving sworn evidence, for example, during a confession, by voluntary disclosure, by financial reparation or by post-ameliorative conduct such as calling the police or ambulance to the crime scene: [66]-[67].

Setting terms of imprisonment (s 44)

Fajloun and Fajloun v R [2011] NSWCCA 41

The applicant was sentenced for "aggravated breaking and entering a dwelling house and committing a serious indictable offence", namely kidnapping. The offence involved domestic violence.

The offence carries a maximum penalty of 20 years and a SNPP of 5 years. A sentence of 6 years non-parole period with a head sentence of 12 years was imposed. The applicant appealed against the severity of the sentence.

Appeal allowed.

The Court found that the trial judge's conclusion that the offence was in the "upper echelons of the middle range of objective seriousness" was reflected in a non-parole period of 6 years. However, this non-parole period failed to reflect the finding of special circumstances made by the trial judge. The Court instead imposed a non-parole period of 5 years. It noted the disconformity between the SNPP and the maximum available sentence.

The Court also found that, even taking into account the finding of special circumstances, the imbalance between the non-parole period and the head sentence raised the question of whether the head sentence was excessive. The Court instead imposed a head sentence of 8 years: [38]-[39].

McCarthy v R [2011] NSWCCA 64

The applicant pleaded guilty to 7 counts of robbery or attempts to commit robbery and 3 counts of breaking, entering and stealing. A head sentence of 18 years was imposed with a non-parole period of 10 years and 6 months. The trial judge stated that a sentence of 36 years would have been imposed with a non-parole period of 22 years, but a 50% discount was given for a plea of guilty and other assistance to the authorities.

The applicant appealed on the grounds that the sentence was manifestly excessive.

Appeal allowed.

The Court noted that statistics can be useful in determining a sentence, particularly in armed robbery cases: [42]. Although the High Court was critical in *Hili v R; Jones v R* [2010] HCA 45 of the use of Judicial Commission

statistics, that case concerned federal offences for which there were a very small number of cases and the very varied circumstances: [41].

The Court stated that, by contrast, armed robberies can demonstrate markedly similar characteristics and there are substantial numbers of such cases: [42]. The Court used a consideration of relevant sentencing statistics and of similar cases to decide that the original sentence imposed in this case was a "huge and idiosyncratic departure" from the sentencing range established for multiple charges of armed robbery. However, the Court did note that sentencing judges are not required to have regard to sentencing statistics.

The Court found that the excessive sentence in this case was a result of manifestly excessive starting sentences for each offence rather than any miscarriage of the process of accumulation. A new head sentence of 7 years and 6 months was instead imposed, with a non-parole period of 5 years and 6 months.

R v AB [2011] NSWCCA 229, (2011) 59 MVR 356

The respondent pleaded guilty to 3 counts of culpable driving in the Local Court, and to one count of take and drive vehicle without consent. A total effective sentence of imprisonment for 3 years 7 months was imposed, with a non-parole period of 2 years 1 month. The Crown appealed on the basis that the sentence was manifestly inadequate. The proceedings were delayed because of the factual dispute that was raised by the respondent, resulting in the need for adjournments to receive evidence, and hearings before three District Court judges, over 6 sitting days. The sentencing judge gave a discount of 25% for the respondents guilty plea.

Appeal allowed.

Where a court must undertake a lengthy sentence hearing due to an unsuccessful application for leave to withdraw a guilty plea, or where there are disputed questions of fact which are resolved adversely to an offender; a sentencing court is entitled, if not required, to have regard to these practical events in assessing the utilitarian value flowing from the pleas of guilty: [27], [32].

Totality

Kalache v R [2011] NSWCCA 210

The applicant was sentenced in such a way that the ratio of his non-parole period to head sentence was 93%. He appealed on the basis that he was subject to an overall term of imprisonment that had an inappropriate emphasis on the non-parole period, contrary to s 44 of the CSPA, which effectively provides that, in the absence of special circumstances, the non-parole period should not be less than 75% of the total sentence.

Appeal allowed.

While the head sentence of 6 years 2 months was retained, the effective non-parole period was reduced to 5 years (from 5 years 9 months).

Buddin J, with whom Allsop P agreed (Simpson J contra), held that the ratio of non-parole period to head sentence should be varied, although it should still be in excess of 75% in the circumstances of this case.

Buddin J at [31] noted:

The sentencing of offenders for multiple offences produces particular challenges. In *Mill v The Queen* [1988] HCA 70; (1988) 166 CLR 59 the High Court said:

"The totality principle is a recognised principle of sentencing formulated to assist a court when sentencing an offender for a number of offences. It is described succinctly in Thomas, *Principles of Sentencing*, 2nd ed (1979), pp 56-7 as follows (omitting references):

The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms: 'when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong'; 'when…cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences'."

Remorse and plea

***Windle v R [2011]* NSWCCA 277**

The applicant appealed on the basis that, contrary to the sentencing judge's finding, he had given evidence which demonstrated remorse in that he said he was sorry he had committed the offence, he knew he was taking wages from people, he realised it was wrong, he would not have liked someone else to do it to him, and he did not realise that the victim had cancer and was sorry about that.

The applicant also submitted that the sentencing judge should have given greater weight to the fact that he had entered a plea of guilty at an early point in time as indicative of remorse, and that the sentencing judge had erred in taking into account as a relevant consideration that the plea had been entered some 6 months after the charge was laid.

Appeal dismissed.

A plea of guilty itself does not necessarily indicate either remorse or contrition.

The sentencing judge was not obliged to accept what was said as evidence of genuine remorse. While it was open to his Honour to accept the evidence, he was not obliged to do so.

Operation of guideline judgments

4.16 Cases which considered promulgated guideline judgments during 2011 are listed below.

Subject	Guideline judgment	Consideration
High-range PCA	*Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Content of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* [2004] NSWCCA 303, (2004) 61 NSWLR 305.	*Meakin v DPP* [2011] NSWCA 373, at [86]: Howie J's remarks that, in an ordinary case, 'the automatic disqualification period will be appropriate unless there is good reason to reduce the period of disqualification' would be relevant to a mid-range PCA..
Form 1	*Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* [2002] NSWCCA 518, (2002) 56 NSWLR 146.	*Doumit v R* [2011] NSWCCA 134
Guilty plea	*R v Thomson & Houlton* (2000) 49 NSWLR 383	
Break, enter and steal	*R v Ponfield* [1999] NSWCCA 435, (1999) 48 NSWLR 327	
Armed robbery	*R v Henry* (1999) 46 NSWLR 346	
Dangerous driving	*R v Jurisic* (1998) 45 NSWLR 209 reformulated in *R v Whyte* (2002) 55 NSWLR 252	*Hedges v R* [2011] NSWCCA 263, (2011) 60 MVR 159

Cases which considered guideline judgements

Hedges v R [2011] NSWCCA 263, (2011) 60 MVR 159

The applicant was convicted of one count of dangerous driving occasioning death and sentenced to 3 years and 7 months imprisonment, with a non-parole period of 2 years. The applicant was also disqualified from driving for 5 years.

The applicant appealed his conviction, and also his sentence on the basis that the trial judge's sentencing discretion had miscarried due to a misapplication of the guideline judgment in *Whyte*.

Appeal allowed.

The Court found that the trial judge misapplied *Whyte* in two respects: [64].

The trial judge made a finding that the applicant fit the common case outline in *Whyte* except that he had not pleaded guilty. The trial judge concluded that *Whyte* set a term of 3 years for the common case. The trial judge then added 20% to this to reflect the fact that the applicant did not plead guilty and arrived at a head sentence of 3 years and 7 months. The Court found that *Whyte* actually set 3 years as appropriate in a case where the offender's moral culpability is high and there is at least one aggravating factor.

The Court also found that the trial judge approached the guideline judgment in an overly prescriptive way, as indicated by his addition of 7 months to the sentence because the applicant did not plead guilty. The Court stated that the

trial judge appeared to have failed to independently exercise his sentencing discretion and failed to adequately assess the moral culpability of the offender.

The applicant was resentenced to 2 years and 6 months imprisonment with a non-parole period of 1 year and 3 months.

5. Legislative developments

Mandatory life sentence for murder of police officers

(Crimes Amendment (Murder of Police Officers) Act 2011 (NSW))

5.1 The Act amends the *Crimes Act 1900* (NSW) by inserting new s 19B into that Act, which provides for mandatory natural life sentences to be imposed on offenders who are convicted of the murder of a police officer either while the officer was on duty or as a consequence of, or in retaliation for, actions undertaken by any police officer in the execution of their duty, where the offender knew or ought to have known that the person murdered was a police officer.[110]

5.2 Section 19B overrides s 21A of the CSPA and does not allow a court to impose any alternative or lesser sentence, regardless of any other provision of the CSPA.

5.3 The amendment does not apply to convicted persons under the age of 18 or to persons suffering from significant cognitive impairments at the time the murder was committed.

Addition of aggravating factor for prescribed traffic offences

(Crimes (Sentencing Procedure) Amendment (Children in Vehicles) Act 2011 (NSW))

5.4 The Act amends s 21A of the CSPA to make it an aggravating factor in sentencing, for certain prescribed traffic offences, to have a child under the age of 16 present in the offender's vehicle.[111] The prescribed traffic offences include drink driving, drug driving, driving dangerously and not stopping in a police pursuit, dangerous driving occasioning death or grievous bodily harm while under the influence of alcohol or drugs and failing to undergo a test for alcohol or drugs.[112]

5.5 The Act also provides that certain prescribed traffic offences which may occur away from the vehicle, such as refusal to provide a sample of blood or urine at the hospital,[113] are taken to have been committed in the presence of a child, provided that the offence was part of a series of events that involved the driving of the vehicle while the child was a passenger in the vehicle.[114]

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110. Explanatory Notes, *Crimes Amendment (Murder of Police Officers) Bill 2011* (NSW), Judicial Information Research System (online), *Crimes Amendment (Murder of Police Officers) Act 2011* (Announcement, 24 June 2011).

111. Explanatory Notes, *Crimes (Sentencing Procedure) Amendment (Children in Cars) Bill 2011* (NSW), referring to *Crimes (Sentencing Procedure) Amendment (Children in Cars) Bill 2011* (NSW) sch 1 [1]; Judicial Information Research System (online), *Crimes (Sentencing Procedure) Amendment (Children in Cars) Act 2011* (Announcement, 17 November 2011).

112. Explanatory Notes, *Crimes (Sentencing Procedure) Amendment (Children in Cars) Bill 2011* (NSW), referring to *Crimes (Sentencing Procedure) Amendment (Children in Cars) Bill 2011* (NSW) sch 1 [3]; Judicial Information Research System (online), *Crimes (Sentencing Procedure) Amendment (Children in Cars) Act 2011* (Announcement, 17 November 2011).

113. *Road Transport (Safety and Traffic Management) Act 1999* (NSW), s 24D.

114. Explanatory Notes, *Crimes (Sentencing Procedure) Amendment (Children in Cars) Bill 2011* (NSW), referring to *Crimes (Sentencing Procedure) Amendment (Children in Cars) Bill 2011*

Extension of work and development orders

(Fines Amendment (Work and Development Orders) Act 2011 (NSW))

5.6 The Act changes aspects of the operation of work and development orders. It amends the *Fines Act 1996* (NSW) by:

- extending the categories of persons who are eligible to be the subject of a work and development order, to include persons who have a serious addiction to drugs, alcohol or volatile substances;
- enabling the State Debt Recovery Office to rely on the assessment of an approved organization or a health practitioner when determining whether a person meets certain eligibility criteria for a work and development order;
- removing the requirement that an application for a work and development order must always be accompanied by supporting evidence; and
- empowering the State Debt Recovery Office to vary or revoke a work and development order if it takes the view that false or misleading information has been given in connection with the application for the order or when a report of an approved person states that the person subject to the work and development order does not meet, or no longer meets, the eligibility criteria specified in the application.

Exclusion of certain offences from application of victims compensation levy

(Victims Support and Rehabilitation Amendment (Compensation Levy) Regulation 2011 (NSW))[115]

5.7 The Regulation amends the *Victims Support and Rehabilitation Regulation 2006* (NSW) by inserting clause 5(c), which extends the classes of offences to which the compensation levy does not apply. Under the new clause, persons who are convicted of offences relating to the parking, standing or waiting of a vehicle are not required to pay a compensation levy under the principal Act, namely the *Victims Support and Rehabilitation Act 1996* (NSW).

Amendments to the Children (Criminal Proceedings) Regulation 2005 (NSW)

(Children (Criminal Proceedings) Regulation 2011 (NSW))[116]

5.8 The Regulation remakes, with minor amendments, the provisions of the *Children (Criminal Proceedings) Regulation 2005* (NSW), following its repeal in accordance with s 10 of the *Subordinate Legislation Act 1989* (NSW). The 2011 Regulation makes provision for:

(NSW) sch 1 [2]; Judicial Information Research System (online), *Crimes (Sentencing Procedure) Amendment (Children in Cars) Act 2011* (Announcement, 17 November 2011).

115. Operational on 24 March 2011: *Victims Support and Rehabilitation Amendment (Compensation Levy) Regulation 2011* (NSW).

116. Operational on 1 September 2011: *Children (Criminal Proceedings) Regulation 2011* (NSW).

- the youth conduct orders scheme, including the eligibility criteria and suitability assessments for participation in the scheme, preparation of conduct plans, applications for interim and final youth conduct orders, and the procedure and functions of Case Coordination Senior Officers Groups;
- the contents of the background report to be prepared for the purposes of sentencing a child;
- the conditions that may be imposed under good behaviour bonds and probation orders, such as conditions requiring the child to attend school regularly;
- the officers employed in Juvenile Justice and Corrective Services in the Department of Attorney General and Justice who are authorized officers for the purposes of certain provisions of the Act relating to good behaviour bonds and probation orders; and
- formal matters relating to parole orders and warrants of commitments.

Aggregate sentencing, and reductions in penalties

(Crimes (Sentencing Procedure) Amendment Act 2010 (NSW))

5.9 Amendments to the CSPA made by the *Crimes (Sentencing Procedure) Amendment Act 2010* (NSW), introducing aggregate sentencing and making provision in relation to discounts for guilty pleas, assistance to the authorities and extra-curial punishment, and reported on in the Council's 2010 Annual Report, commenced on 14 March 2012.

Appendix A: Submissions

Submission number	Stakeholder
ICO01	His Honour Magistrate Graeme Henson, Chief Magistrate, Local Court of NSW
ICO02	The Law Society of NSW
ICO03	Director of Public Prosecutions and Office of the Director of Public Prosecutions, NSW
ICO04	NSW Bar Association
ICO05	Commonwealth Director of Public Prosecutions
ICO06	Legal Aid NSW
ICO07	Public Defenders