NSW GOVERNMENT Sentencing Council
Attorney General & Justice

Good Behaviour Bonds and Non-Conviction Orders

A report of the NSW Sentencing Council

September 2011

NSW Sentencing Council
www.lawlink.nsw.gov.au/sentencingcouncil
Phone: 02 8061 9333
Email: sentencingcouncil@agd.nsw.gov.au
GPO Box 6
SYDNEY NSW 2001

Copyright permissions
© New South Wales Sentencing Council, Sydney, 2011
You may copy, distribute, display, download and otherwise freely deal with this work for any purpose, provided that you attribute the owner. However, you must obtain permission if you wish to (a) charge others for access to the work (other than at cost), (b) include the work in advertising or a product for sale, or (c) modify the work.

Disclaimers
The views expressed in this report do not necessarily reflect the private or professional views of individual Council members or the views of their individual organisations. A decision of the majority is a decision of the Council – Schedule 1A, clause 12 *Crimes (Sentencing Procedure) Act 1999* (NSW).
This document has been prepared by the NSW Sentencing Council for general information purposes and while every care has been taken in relation to its accuracy, no warranty is given or implied. Recipients should obtain their own independent advice before making any decisions that rely on this information.
This publication deals with the law at the time it was first published and may not necessarily represent the current law.

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

For alternative formats (audio tape, electronic or Braille versions) of this publication contact the NSW Sentencing Council or Diversity Services:
email: diversityservices@agd.nsw.gov.au,
phone: 02 8688 7507
fax: 02 8688 9626
TTY: 02 8688 7733 for people who have a speech or hearing impairment.

ISBN 978-1-921590-67-2 (Print)
978-1-921590-74-0 (Online)

CONTRIBUTORS

The Council

Hon Jerrold Cripps QC, Chairperson

Hon James Wood AO QC, Deputy Chairperson

Mr David Hudson APM, NSW Police

Professor David Tait, Justice Research Group, University of Western Sydney

Mr Howard Brown OAM, Victims of Crime Assistance League

Mr Ken Marslew AM, Enough is Enough Anti-Violence Movement

Mr Nicholas Cowdery AM QC

Mr Mark Ierace SC, Public Defenders Office

Ms Martha Jabour, Homicide Victims Support Group

Ms Megan Davis, Indigenous Law Centre, University of NSW

Ms Penny Musgrave, NSW Department of Attorney General and Justice

Mr Ronald Woodham PSM, Corrective Services NSW

Observers

The Council acknowledges the contribution of Mr Luke Grant, Corrective Services NSW.

Officers of the Council

Executive Officer	Anna Butler (until September 2010) Sarah Waladan (from September 2010)
Policy and Research Officers	Huette Lam (until September 2010) Bridget O'Keefe (from July 2011)
Legal Intern	Jacqueline Au (from July 2011)

TABLE OF CONTENTS

1. INTRODUCTION

Terms of Reference

1.1 In July 2009, the former Attorney General requested that the Council examine the use of non-conviction orders and good behaviour bonds under the *Crimes (Sentencing Procedure) Act 1999* (NSW), ('the Act') in accordance with the below terms of reference:

1. 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;

2. 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 types and categories of offenders;

3. An examination of the use across offence categories of non-conviction orders and bonds, the nature of conditions imposed and their enforcement;

4. The identification, and relative frequency, of the reasons behind sentencing decisions by Magistrates in relation to non-conviction orders and bonds;

5. What is the extent of compliance with conditions imposed on bonds and the rates of re-offending following the imposition of non-conviction orders and bonds;

6. Whether further limitations should be imposed on the ability of Magistrates to impose non-conviction orders and bonds;

7. 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;

8. Any other relevant matter.

1.2 The Council understands the terms of reference to require consideration of the circumstances in which, and the extent to which, courts are dealing with offenders under s 10(1) of the Act.

Background

1.3 In early 2004, the NSW Bureau of Crime Statistics and Research (BOCSAR) conducted a study that showed a significant increase in the use of s 10 orders between 1993 and 2002, across each category of Prescribed Concentration of Alcohol (PCA) offences (that is, low, middle and high-range PCA offences), as well as significant variations between court locations in the use of such orders. It was noted that s 10 orders did not result in licence disqualification, despite the proven effectiveness of disqualification in reducing recidivism by drink drivers. The study concluded that the increase in the use of s 10 orders was unjustified; and that the disparity between court locations in the use of s 10 orders was likely to be due to their assessment of the seriousness of the offences, as well as of the fairness of automatic licence disqualification in particular circumstances. It was suggested that magistrates should be provided with greater guidance on the appropriate use of s 10 orders.[1]

1.4 Partly as a result of the 2004 BOCSAR study, the NSW Court of Criminal Appeal (NSWCCA), upon the application of the Attorney General, issued a guideline judgment on high-range PCA offences (the Guideline Judgment). As discussed in Chapter 2, the Court held that cases in which it would be appropriate to apply s 10 orders to high-range PCA offences would be rare, and 'exceedingly rare' for second or subsequent offenders.[2]

1.5 In 2005, the Judicial Commission of NSW released a study of the impact of the Guideline Judgment on sentencing NSW drink drivers.[3] It was found that after the issue of the Guideline Judgment, there was a dramatic reduction in the use of s 10 orders, an increase in licence disqualification, as well as lengthier disqualification periods. The study also showed that there was more consistent sentencing for

1. NSW Bureau of Crime Statistics and Research, *Sentencing Drink-drivers: The use of Dismissals and Conditional Discharges,* Crime and Justice Bulletin 81 (2004). See also NSW Bureau of Crime Statistics and Research, *The Impact of Increased Drink-driving Penalties on Recidivism Rates in NSW,* Alcohol Studies Bulletin 5 (2004), where it was found that a 1998 increase in penalties for drink driving offences had resulted in a significant reduction in recidivism, but also a modest increase in s 10 dismissals, which allowed 20% of drink drivers to escape licence disqualification. It was noted that the effectiveness of the increase in statutory penalties would have been improved if almost all offenders had been disqualified from holding a drivers licence for a period of time.
2. *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 Concentration of Alcohol under section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* [2004] NSWCCA 303.
3. Judicial Commission of NSW, *Impact of the High Range PCA Guideline Judgment on Sentencing Drink Drivers in NSW*, Sentencing Trends & Issues 35 (2005).

high-range PCA offences between court locations following the Guideline Judgment—including more consistent use of s 10 orders, more uniform length of disqualification, and a clearer distinction in sentencing outcomes between first offenders, subsequent offenders, and subsequent offenders whose previous offence was a high-range PCA offence.[4]

1.6 The study revealed that after the issue of the Guideline Judgment, there had been a slight increase in appeals to the District Court against the severity of the sentence, with a success rate of around 80%. However, successful appeals were less likely to lead to a change in the type of sanction imposed and more likely to result in a decrease in the amount or duration of the penalty. The study also found that the application of the Guideline Judgment had a flow-on effect to low and mid-range PCA offences, including a further decrease in the use of s 10 orders, an increase in licence disqualification, and lengthier disqualification periods. It was concluded that the Local Court seemed to have followed and applied the Guideline Judgment; and increased the severity of the sentences for high-range PCA offences.[5]

1.7 BOCSAR also examined the impact of the Guideline Judgment in a 2008 study, building on the Judicial Commission's findings by examining longer-term trends.[6] As with the Judicial Commission, BOCSAR found that the Guideline Judgment resulted in more severe sentences and fewer s 10 orders for high-range PCA matters; greater consistency in the use of s 10 orders across court locations; and a flow-on reduction in the use of s 10 orders for mid-range PCA matters.[7]

Scope of the Inquiry

1.8 The power of the Court to make an order requiring a person to enter into a good behaviour bond, or to enter into an intervention program, without proceeding to a conviction arises under s 10(1) of the Act, which states:

> (1) Without proceeding to conviction, a court that finds a person guilty of an offence may make any one of the following orders:
>
> (a) an order directing that the relevant charge be dismissed,
>
> (b) an order discharging the person on condition that the person enter into a good behaviour bond for a term not exceeding 2 years,
>
> (c) an order discharging the person on condition that the person enter into an agreement to participate in an intervention program and to comply with any intervention plan arising out of the program.

4. Ibid.
5. Ibid.
6. NSW Bureau of Crime Statistics and Research, *The impact of the high range PCA guideline judgment on sentencing for PCA offences in NSW,* Crime and Justice Bulletin 123 (2008).
7. Ibid, 8–9.

1.9 The Act provides the following direction in relation to the exercise of the discretion to make an order under s 10(1):

> (2) An order referred to in subsection (1)(b) may be made if the court is satisfied:
>
> (a) that it is inexpedient to inflict any punishment (other than nominal punishment) on the person, or
>
> (b) that it is expedient to release the person on a good behaviour bond.
>
> (2A) An order referred to in subsection (1)(c) may be made if the court is satisfied that it would reduce the likelihood of the person committing further offences by promoting the treatment or rehabilitation of the person.
>
> (3) In deciding whether to make an order referred to in subsection (1), the court is to have regard to the following factors:
>
> (a) the person's character, antecedents, age, health and mental condition,
>
> (b) the trivial nature of the offence,
>
> (c) the extenuating circumstances in which the offence was committed,
>
> (d) any other matter that the court thinks proper to consider.

1.10 The Council notes that s 10 takes its place alongside:

- section 9, which permits a court, following conviction, to make an order directing an offender to enter into a good behaviour bond (for a term not exceeding 5 years) instead of imposing a sentence of imprisonment;[8]
- section 10A, which permits a court, following conviction, to dispose of the proceedings without imposing any other penalty; and
- section 12(1), which permits a court, following conviction, to impose a sentence of imprisonment (for a term not exceeding two years) and to suspend execution of that sentence conditional upon the offender entering into a bond to be of good behaviour during its term.

1.11 Although this reference is primarily concerned with s 10 orders, some reference is made in this report to judicial decisions and trends relating to the use of good behaviour bonds in the wider context noted. This course has been taken because of the overlapping discretion which sentencing officers are required to exercise when imposing a sentence, which may require, in particular, that consideration be given to the s 9 and s 10A options.

8. This section is subject to the provisions of Part 8 of the Act.

1.12 The Council is examining the use of suspended sentences of imprisonment as part of a separate reference, and as a consequence suspended sentences and good behaviour bonds imposed under s 12 of the Act will not be dealt with in this report.

2. GOOD BEHAVIOUR BONDS AND NON-CONVICTION ORDERS

Good Behaviour Bonds

Bond conditions and restrictions

2.1 Part 8 (ss 94–100) of the Act deals with sentencing procedures for good behaviour bonds, whether imposed under s 9, s 10 or s 12 of the Act.

2.2 Section 95 of the Act requires that a good behaviour bond contain conditions that the person will appear before the court if required to do so during the term of the bond; and that he or she will be of good behaviour during that term.[1] The bond may contain other conditions, for example, conditions requiring the offender to: participate in an intervention program and to comply with any intervention plan

1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95(a)–(b).

arising out of the program;[2] be supervised by a probation officer; attend drug or alcohol counselling; or reside at a particular rehabilitation centre.[3]

2.3 It has been contended that s 9 bonds cannot be ordered in relation to offences that are punishable only by way of a fine, although there is not unanimity in that respect.[4] The statistics summarised in Chapter 3 do suggest that, in practice, s 9 bonds have in fact been imposed in the Local Court in relation to some offences for which the maximum penalty is a fine.[5]

2.4 A court cannot make both a community service order and impose a good behaviour bond for the same offence,[6] and such a bond may not contain a condition requiring the person to perform community service work.[7] Additionally the bond may not contain a condition requiring the offender to make payments, whether by way of a fine, compensation or otherwise.[8] A fine may, however, be imposed *in addition to* a good behaviour bond, provided that the offender was convicted and the offence is one for which the penalty that may be imposed includes a fine.[9] The court may also, in addition to a bond, direct a convicted person to pay compensation, not exceeding $50,000, to any aggrieved person for injury sustained through or by reason of the

---

2. Ibid s 95A(1). This condition may not be imposed unless the court is satisfied: '(a) that the offender is eligible to participate in the intervention program in accordance with the terms of the program, and (b) that the offender is a suitable person to participate in the intervention program, and (c) that the intervention program is available in the area in which the offender resides or intends to reside, and (d) that participation by the offender would reduce the likelihood of the offender committing further offences by promoting the treatment or rehabilitation of the offender': s 95A(2). Before imposing such a condition, the court may refer the offender for assessment as to his or her suitability to participate in an intervention program under s 95B. After the imposition of a bond containing such a condition, the offender may decide not to participate, or not to continue to participate, in the intervention program or the intervention plan, in which case, the sentencing court (or any court of like jurisdiction) may call on the offender to appear before it: s 99A(1), (3). Failure to appear in those circumstances may result in the issue of a warrant for the offender's arrest: s 99A(4). When the offender appears before the court, the court may vary the conditions of, or impose further conditions, on the bond, or it may revoke the bond and re-sentence the offender for the offence for which the bond was imposed: s 99A(5)–(6).
3. Judicial Commission of NSW, *Sentencing Bench Book* (online edition, 2009) [4-740].
4. Section 9 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that good behaviour bonds may be used 'instead of imposing a sentence of imprisonment', which suggests that s 9 bonds can be used only in relation to offences that carry a penalty of imprisonment. This construction has been favoured by some commentators. Justice Rod Howie, writing extra-curially, has been critical of this construction: R Howie, 'Amendments to the Law of Sentencing' (2000) 7 *Criminal Law News* 1135, while George Zdenkowski has offered a contrary view: G Zdenkowski, 'Non-financial Non-custodial Sentencing Options in the Crimes (Sentencing Procedure) Act 1999' (2003) 6 *Judicial Review* 198.
5. See Chapter 3, paragraph 3.4. The 2007 NSW Local Court statistics indicate that in relation to the offence of low-range PCA, 1.3% of penalties imposed were s 9 bonds; in relation to driving an unregistered vehicle 0.1% of penalties imposed were s 9 bonds, and in relation to negligent driving not causing death or grievous bodily harm 0.7% of penalties were s 9 bonds.
6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 13.
7. Ibid s 95(c)(i).
8. Ibid s 95(c)(ii).
9. Ibid s 14.

offence.[10] Non-association orders[11] and restriction orders[12] can be made in addition to, but not instead of, a s 9 bond.[13]

2.5 While there is a broad discretion to impose conditions attaching to a good behaviour bond, that discretion is not unlimited. In *R v Bugmy*,[14] Kirby J summarised the principles that apply to the fixing of bond conditions as follows:

- First, the discretion as to conditions that may be attached to a bond is broad but not unlimited. The conditions must reasonably relate to the purpose of imposing a bond, that is, the punishment of a particular crime. They must therefore relate either to the character of that crime or the purposes of punishment for that crime, including deterrence and rehabilitation.
- Secondly, the conditions must each be certain, defining with reasonable precision the conduct that is proscribed.
- Thirdly, the conditions should not in their operation be unduly harsh or unreasonable or needlessly onerous.[15]

2.6 Earlier, in *R v Harvey*,[16] it was held by the NSWCCA that a condition requiring the offender to report to the police periodically for the term of the recognisance of five years, in addition to a condition requiring the offender to accept the supervision of the Probation and Parole Service for the entire term, was needlessly onerous. Although it was accepted that a reporting condition could provide a possible deterrent against further criminal activity, error was found to have occurred in the requirement that the condition operate for the whole term of the recognisance, since the offender was also to be subject to probationary and parole supervision for that period.

2.7 In *R v Bugmy*,[17] it was held by the NSWCCA that a bond condition that the offender was 'to remain away from Wilcannia during the term of the sentence unless he has,

---

10. *Victims Support and Rehabilitation Act 1996* (NSW) s 71(1). An 'aggrieved person' is defined in s 70 as: '(a) in relation to an offence other than an offence in respect of the death of a person, a person who has sustained injury through or by reason of: (i) an offence for which the offender has been convicted, or (ii) an offence taken into account (under Division 3 of Part 3 of the *Crimes (Sentencing Procedure) Act 1999*) when sentence was passed on the offender for that offence, or (b) in relation to an offence in respect of the death of a person, a member of the immediate family of the person'.
11. Non-association orders are orders 'prohibiting the offender from associating with a specified person for a specified term': *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17A(2)(a).
12. Place restriction orders are orders 'prohibiting the offender from frequenting or visiting a specified place or district for a specified term': Ibid s 17A(2)(b).
13. Ibid s 17A(4), which also provides that such orders cannot be made if the only other penalty for the offence is an order under s 10 or s 11 of the Act.
14. *R v Bugmy* [2004] NSWCCA 258.
15. Ibid, at [61].
16. *R v Harvey* (1989) 40 A Crim R 102 applied in a similar factual context where the period of supervision applied or the full term of the bond and see *Philp v the Queen* (1999) 108 A Crim R 336.
17. *R v Bugmy* [2004] NSWCCA 258.

upon prior application to [the judge], been permitted to do so' was too uncertain, as well as unduly harsh. It was noted that s 95 of the Act did not authorise the kind of supervision contemplated by the condition, and that the exception to the exclusion was administrative, rather than judicial, in nature, and failed to provide any defined procedure for making an application, including the right for the Crown to be present during such an application, or for any obvious right of appeal. The exception, it was held, was a matter for the Probation and Parole Service, as it was responsible for the offender's day-to-day supervision. The condition was also held to be unduly harsh and unreasonable on the basis that two years was a long time to exclude a person from normal physical contact with his family.[18]

2.8 In *R v JJS*,[19] a bond condition that the offender was 'not to have unsupervised contact with children under the age of twelve years', was also held by the NSWCCA to be uncertain. Noting that the offender was only 16 years old and resided with his nine-year-old sister, the bond condition was considered to be too imprecise because 'contact', and what constituted 'supervision' were not defined. In addition, the five-year period of the bond was held to be unnecessarily burdensome, particularly since the offender had been subject to, and compliant with, stringent bail conditions for 20 months prior to the bond being imposed.[20]

Failure to enter into a bond and breach of bond conditions

2.9 If the offender fails to enter into a good behaviour bond pursuant to a court order, the court may sentence, or convict and sentence, the offender as if the order had not been made.[21]

2.10 Where the offender is suspected of failing to comply with a condition of a good behaviour bond, he or she may be called upon to appear before a court.[22] Any failure to appear may result in the issue of a warrant for the offender's arrest.[23] If the court is satisfied the offender has failed to comply with a condition of the bond, it may decide to take no action, vary the conditions of the bond, impose further conditions on the bond, or revoke the bond.[24]

---

18. Ibid, at [64], [65], [68], [71]. Kirby J expressed the view that it would have been open to the sentencing judge to require the exclusion of the offender from Wilcannia for a short period of time, say six months, in the interests of the offender's rehabilitation.
19. *R v JJS* [2005] NSWCCA 225.
20. Ibid, at [18]–[21], [24].
21. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 97.
22. Only certain courts may call on the offender to appear before it in this regard—namely, '(a) the court with which the offender has entered into the bond, or (b) any other court of like jurisdiction, or (c) with the offender's consent, any other court of superior jurisdiction': Ibid s 98(1). In this context, a court of superior jurisdiction is 'a court to which the offender has (or has had) a right of appeal with respect to the conviction or sentence from which the bond arises': s 98(1C).
23. Ibid s 98(1A)–(1B).
24. Ibid s 98(2).

2.11 If the court revokes a bond imposed under s 9, it can re-sentence the offender for the offence to which the bond relates.[25] In the case of a s 10 bond, the Court can convict and sentence the offender for the offence to which the bond relates.[26] In the case of a s 12 bond, the order suspending the execution of the sentence ceases to have effect and the provisions of Part 4 of the Act relating to the procedure for imprisonment apply, as if the sentence were being imposed following revocation of the bond.[27]

2.12 The NSWCCA has emphasised the importance of closely monitoring an offender's adherence to bond conditions, and of promptly bringing breaches to the attention of the court. Breaches are dealt with seriously since failure to do so will potentially discredit the system of non-custodial sentencing options, and may result in reluctance by the courts to extend those options to offenders. Unless a breach is technical, trivial, or can be readily excused in the light of the offender's circumstances or circumstances beyond his or her control, it should result in revocation of the bond and imposition of an appropriate sentence. While that sentence should not exceed the appropriate range for the offence and what is appropriate to the objective circumstances, it should reflect the fact that the offender has rejected the trust placed in him or her by the previous sentencing court, shown a lack of remorse and cast doubt upon his or her prospects of rehabilitation.[28]

2.13 An offender who is called upon to appear before the court for a breach of a bond is to be punished for his or her original offence, rather than for the breach.[29] In determining the appropriate punishment for the original offence, the court must take into account the fact that the offender has been the subject of a good behaviour bond, as well as anything that he or she has done in compliance with it.[30] It must not ignore the penalty that may have been imposed by it, or by another court, in respect of the conduct constituting the breach.[31] The principle of totality applies to the sentence to be imposed in respect of the offence giving rise to the breach and thereafter in respect of the original offence.[32]

2.14 If the court decides to revoke a good behaviour bond following a breach, it must make that order before determining what further orders are to be made and what penalty, if any, should be imposed for the conduct constituting the breach. This is to ensure that the revocation is a 'demarked and separate sentencing exercise';[33] and

---

25. Ibid s 99(1)(a).
26. Ibid s 99(1)(b).
27. Ibid s 99(1)(c).
28. *R v Morris* (Unreported, NSW Court of Criminal Appeal, 14 July 1995), quoted with approval in *R v Doyle* (1996) 84 A Crim R 287, 289–291; *R v Kerr* (Unreported, NSW Court of Criminal Appeal, 12 November 1993).
29. *R v Morris* (Unreported, NSW Court of Criminal Appeal, 14 July 1995); *Ho v DPP (NSW)* (1995) NSWLR 393; *Champion v The Queen* (1992) 64 A Crim R 244, 253–4.
30. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 24(b).
31. *R v Morris* (Unreported, NSW Court of Criminal Appeal, 14 July 1995).
32. Ibid.
33. *R v Cooke*; *Cooke v The Queen* [2007] NSWCCA 184, [18].

to allow the totality principle to operate in the event that both the breach and the conduct giving rise to it are punished by a term of imprisonment. Failure to revoke the bond, however, does not constitute an error that would invalidate any orders made consequent upon revocation.[34]

Non-Conviction Orders

Non-conviction orders generally

2.15 In considering whether to make a non conviction order under s 10(1) of the Act, and to dismiss the charge,[35] or to order a conditional discharge,[36] the court must take into account a number of factors—namely, the person's character, antecedents, age, health and mental condition; the trivial nature and extenuating circumstances of the offence; and any other matter that the court thinks proper to consider.[37]

2.16 While the court has a 'wide-ranging' discretion to make an order under s 10,[38] it is 'a judicial discretion, to be exercised consistently with the scheme and purpose of the section as a whole'.[39] The scope and purpose of s 10 will vary between offences, and it extends beyond the elements of the 'relevant charge'.[40] A factor that is irrelevant on sentencing can be a proper matter to be considered when exercising the discretion under s 10.[41]

2.17 Although none of the factors set out in s 10(3) are conclusive, all of them must be taken into account in applying s 10.[42] The NSWCCA has expressed conflicting opinions on whether the trivial nature of the offence is a pre-requisite for the exercise of the discretion under s 10. The Court in *R v Paris* held that since the factors listed in s 10(3) are disjunctive and non-exhaustive, the offence need not be trivial for the application of s 10;[43] while the majority of the Court in *R v Piccin (No 2)*

34. Ibid, [18]–[19].
35. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(1)(a).
36. Ibid s 10(1)(b)–(c).
37. Ibid s 10(3).
38. *Thorneloe v Filipowski* [2001] NSWCCA 213, [151].
39. *R v Ingrassia* (1997) 41 NSWLR 447, 449.
40. *Thorneloe v Filipowski* [2001] NSWCCA 213, [154]–[155].
41. Ibid, at [155]–[156]. For example, the risk of potential harm to society was held to be a relevant and proper consideration to be taken into account in deciding whether to dismiss charges, even in the context of a strict liability offence for which potential harm was not a sentencing consideration. The Court also noted that an additional consideration in applying s 10 in cases of strict liability offences is what the accused could have done to avert the adverse consequences of the conduct: at [171], [178], [204]–[205].
42. *R v Paris* [2001] NSWCCA 83, [48].
43. Ibid, at [42].

held that the offence must be trivial for s 10 to apply.[44] However, as is clear from the decision in *R v KNL,*[45] the scope for the making of a s 10 order will decrease depending on the objective seriousness of the offence.

2.18 The scope for the operation of s 10 necessarily decreases in cases where the offence is objectively serious and where general deterrence and denunciation are important sentencing factors.[46] While it is rarely appropriate to make a s 10 order in relation to an objectively serious offence, there can be extenuating circumstances that justify such an order—for example, where the offending is technical instead of trivial and the conduct posed no real risk of damage or injury;[47] or where a person is compelled to drive a motor vehicle with a high-range PCA in an emergency situation.[48] A s 10 order may also be appropriate for first offenders in certain circumstances. The capacity of the court to impose a s 10 order, it has been observed, reflects 'the willingness of the legislature and the community to provide certain first offenders with a second chance to maintain a reputation of good character'.[49] It is impossible, however, and inappropriate, to set out all the situations that might warrant a s 10 order despite the objective seriousness of the offence.[50]

---

44. *R v Piccin (No 2)* [2001] NSWCCA 323, [22]. While Hulme J agreed with the Majority decision, he expressly disagreed that it was a necessary precondition of a s 10 order that the offence be trivial (at [25]). The better view would seem to be that the approach in *Paris* is correct.
45. *R v KNL* [2005] NSWCCA 260, [46]–[48].
46. *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 Concentration of Alcohol under section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* [2004] NSWCCA 303, [133]. See, eg, *R v Lord* [2001] NSWCCA 533, in which the NSWCCA held that in the circumstances of the case, it was wrong to apply s 10 to a charge of aggravated break and enter with intent to commit a serious indictable offence, due to the objective seriousness of the offence, the lack of extenuating circumstances and the need for deterrence (at [18], [30]). Compare with *R v Goh* [2002] NSWCCA 234, where the NSWCCA held that the sentencing judge did not err in applying s 10 to a charge of affray, despite the fact that a s 10 order is uncommon for an offence tried on indictment, that the location of the affray had 'an unfortunate history of violence' and that there are strong policy reasons for the sentence to reflect general deterrence (at [15]). The Court held that, having regard to the youth and antecedents of the respondent, the characterisation of the offence as being at the bottom of the scale of seriousness, and the existence of extenuating circumstances, the sentence was not manifestly inadequate. (at [14]).
47. *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 Concentration of Alcohol under section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* [2004] NSWCCA 303, [130].
48. Ibid, [133].
49. *R v Nguyen* [2002] NSWCCA 183, [50]. In this case, the NSWCCA held that the sentencing judge did not fall into error in considering the respondent 'a person of good character with no relevant criminal history', notwithstanding the fact that the respondent's criminal record included charges of assaulting police officers and using offensive language, which were dismissed under the predecessor of s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).
50. *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 Concentration of Alcohol under section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* [2004] NSWCCA 303, [131].

2.19 Whether an offence is trivial is determined by considering the conduct that constitutes the offence and the circumstances in which the offence is committed, rather than by looking at the prescribed maximum penalty.[51] Although a s 10 order is rarely appropriate for strict liability offences, it remains a permissible sentencing option, within the sentencing officer's discretion.[52]

2.20 The court may make a s 10 order even where the jury has returned a verdict of guilty but a conviction has not been formally recorded, since conviction is a matter for the court rather than the jury.[53] Accordingly it is important that a sentencing judge expressly state whether a person is to be convicted and whether the discretion to make a s 10 order is to be exercised.[54]

2.21 It has been held that where the objective criminality of the offence warrants a conviction, the matter should not be disposed of without conviction, for the sole purpose of avoiding some legislative consequence or restriction that would otherwise be applicable,[55] for example, where a conviction would result in the accused:

- being disqualified from managing a corporation;[56]
- being disqualified from holding a drivers licence;[57] or
- being subject to registration requirements under the *Child Protection (Offenders Registration) Act 2000* (NSW).[58]

2.22 In the 2004 Guideline Judgment, the NSWCCA stated that s 10 orders have been over-used in dealing with such offences.[59] The Court held that, although there will be circumstances where it is appropriate to apply s 10 to high-range PCA offences,

---

51. *Walden v Hensler* (1987) 163 CLR 561, 577.
52. *DPP (NSW) v Roslyndale Shipping Pty Ltd* [2003] NSWCCA 356, [23].
53. *R v Reinsch* [1978] 1 NSWLR 483, 486–7.
54. *R v Gillan* (1991) 54 A Crim R 475, 478.
55. *Fing v The Queen* (Unreported, NSW Court of Criminal Appeal, 4 October 1994).
56. Ibid.
57. *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 Concentration of Alcohol under section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* [2004] NSWCCA 303, [132]–[133].
58. *R v KNL* [2005] NSWCCA 260, [48]–[51]. Latham J observed that although there might be cases where the requirements of the *Child Protection (Offenders Registration) Act 2000* (NSW) would constitute extra-curial punishment, this case fell far short of that characterisation, notwithstanding the registration requirements and the potential restriction on employment (at [50]). The very least sentence that could reflect the objective gravity of the offence is a conviction (at [52]).
59. *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 Concentration of Alcohol under section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* [2004] NSWCCA 303, [133].

those cases must be rare, and 'exceedingly rare' for a second or subsequent offence.[60]

Discharge on condition of entering into a good behaviour bond

2.23 An order under s 10(1)(b) discharging a person, on condition that he or she enters a good behaviour bond, may be made only if the court is satisfied that:

- it is inexpedient to inflict any punishment, (other than nominal punishment), on the person; or that
- it is expedient to release the person on a good behaviour bond.[61]

2.24 As noted above, Part 8 of the Act, which deals with sentencing procedures for good behaviour bonds, applies to a bond imposed under s 10(1)(b). The conditions attached to a bond imposed under s 10(1)(b) cannot be in the nature of 'punishment for an offence of which, by hypothesis, the offender has not been convicted', even if it involves a 'donation' to the State Treasury, charities or victims.[62]

2.25 It has been held that, where the Court considers that the appropriate penalty is a fine (other than a nominal fine), then the court should convict the accused and impose a fine, rather than make a s 10 order.[63]

2.26 If the court revokes a bond imposed under s 10, it may convict and sentence the offender for the offence to which the bond relates.[64]

Discharge on condition of entering into an agreement to participate in an intervention program and to comply with an intervention plan

2.27 An intervention program order under s 10(1)(c) of the Act may be made if the court is satisfied that:

- the order would reduce the likelihood of the person committing further offences by promoting his or her treatment or rehabilitation;[65]
- the offender is eligible, and is a suitable person, to participate in the intervention program;[66] and

60. Ibid, [130].
61. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(2).
62. *R v Ingrassia* (1997) 41 NSWLR 447, 450–1.
63. *Fing v The Queen* (Unreported, NSW Court of Criminal Appeal, 4 October 1994).
64. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 99(1)(b).
65. Ibid s 10(2A).

- the program is available in the area in which the offender resides or intends to reside.[67]

2.28 An 'intervention program' means a program of measures declared to be an intervention program under s 347 of the *Criminal Procedure Act 1986* (NSW).[68] The purposes of such a program may include:

(a) promoting the treatment or rehabilitation of offenders or accused persons,

(b) promoting respect for the law and the maintenance of a just and safe community,

(c) encouraging and facilitating the provision by offenders of appropriate forms of remedial actions to victims and the community,

(d) promoting the acceptance by offenders of accountability and responsibility for their behaviour,

(e) promoting the reintegration of offenders into the community.[69]

2.29 At present, programs declared to be intervention programs include the circle sentencing intervention program, the forum sentencing intervention program and the traffic offender intervention program.[70]

2.30 Before sentencing, a court may refer the offender for assessment as to his or her suitability to participate in an intervention program.[71]

2.31 If an offender fails to enter into an agreement to participate in an intervention program in accordance with an intervention program order, the court that made the order may sentence, or convict and sentence, the offender, as if the order had not been made.[72]

2.32 An offender may be called upon to appear in the court that made the order (or a court of like jurisdiction) for any suspected breach of the intervention program order.[73] Where the court is satisfied that there was a breach of the order, it may decide to take no action, or it may revoke the order.[74] If a court revokes an

---

66. Ibid s 100N(a)–(b).
67. Ibid s 100N(c).
68. Ibid s 3(1).
69. *Criminal Procedure Act 1986* (NSW) s 347(2).
70. *Criminal Procedure Regulation 2010* (NSW) Pt 6–8.
71. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100O.
72. Ibid s 100Q.
73. Ibid (NSW) s 100R(1).
74. Ibid (NSW) s 100R(3).

intervention program order, it may convict and sentence the offender for the offence in respect of which the order was imposed.[75]

2.33 At any time after entering into an agreement to participate in an intervention program, an offender may decide not to participate, or to not continue to participate, in the intervention program or relevant intervention plan.[76] Following such a decision, the sentencing court (or any court of like jurisdiction) may call upon the offender to appear before it;[77] and may revoke the intervention program order and either make another s 10 order (other than an intervention program order), or convict and sentence the offender for the offence in respect of which the intervention program order was imposed.[78]

Restriction on the use of s 10 orders

2.34 Non-association and place restriction orders cannot be made if the only other penalty for the offence is a s 10 order.[79]

2.35 As with s 9 bonds, good behaviour bonds attached to s 10 orders cannot include a condition that the accused make any payment, whether in the nature of a fine, compensation or otherwise.[80] However, the court may, in addition to making an order under s 10, direct a person to pay compensation, not exceeding $50,000, to any aggrieved person for injury sustained through or by reason of the offence.[81]

2.36 Section 187 of the *Road Transport (General) Act 2005* (NSW) provides that s 10 of the Act does not apply to a person who is charged with a certain class of traffic offence, if he or she has received a s 10 order for any such offence at the time of, or in the five years immediately before, the court's determination of the present charge.[82] The relevant offences under s 187 are those which relate to:

- negligent, furious or reckless driving;[83]
- driving or attempted use of a vehicle while intoxicated;[84]

---

75. Ibid (NSW) s 100S(1).
76. Ibid (NSW) s 100T(1).
77. Ibid s 100T(3). Failure to appear may result in the issue of a warrant for the offender's arrest: s 100T(4).
78. Ibid s 100T(5).
79. Ibid s 17A(4).
80. Ibid s 95(c)(ii).
81. *Victims Support and Rehabilitation Act 1996* (NSW) s 71(1). The definition of 'conviction' for the purposes of this Act includes an order under s 10: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(4)(b).
82. *Road Transport (General) Act 2005* (NSW) s 187(6)(a)–(f).
83. That is, an offence under s 42 of the *Road Transport (Safety and Traffic Management) Act 1999* (NSW).
84. That is, an offence under s 9, 11B or 12(1) of the *Road Transport (Safety and Traffic Management) Act 1999* (NSW).

- refusal or failure to submit to testing or sampling for alcohol or certain drugs in certain circumstances;[85]
- wilfully altering the alcohol concentration or the amount of drugs present in the person's blood, oral fluid or urine following request for testing, analysis or sampling;[86]
- driving in a manner that menaces another person, either with the intention of menacing that person or where the driver ought to have known that such person might be menaced;[87]
- failure to stop and assist after impact occasioning death, grievous bodily harm or injury to another person;[88]
- severe risk breaches of a mass, dimension or load restraint requirement by use of a heavy vehicle and/or a combination that includes a heavy vehicle;[89] and
- aiding, abetting, counselling or procuring the commission of any such offence.[90]

2.37 In addition, s 10 of the Act does not apply to or in respect of a person charged with an 'alcohol or drug offence' under s 24 or 28 of the *Marine Safety Act 1998* (NSW), or an offence of aiding, abetting, counselling or procuring the commission of such an offence if, within the preceding 5 years, the offender has received a s 10 order in relation to another alcohol or driving offence.[91]

Consequences of s 10 orders

2.38 Despite the fact that no conviction is recorded pursuant to an order under s 10, such orders are treated as a 'conviction' for a range of legislative purposes.[92]

---

85. That is, an offence under s 15(4) 18D(2), 18E(9) or 24D(1)(a) of the *Road Transport (Safety and Traffic Management) Act 1999* (NSW).
86. That is, an offence under s 16, 18G(1) or 24D(1)(b) of the *Road Transport (Safety and Traffic Management) Act 1999* (NSW).
87. That is, an offence under s 43 of the *Road Transport (Safety and Traffic Management) Act 1999* (NSW).
88. That is, an offence under s 70 of the *Road Transport (Safety and Traffic Management) Act 1999* (NSW) or s 52AB of the Crimes Act 1900 (NSW).
89. As set out in Pt 3.3 of the *Road Transport (General) Act 2005* (NSW).
90. The specified traffic offences also include offences referred to in s 10(5) of the *Traffic Act 1909* (NSW) (which are in similar terms to s 187(6) of the *Road Transport (General) Act 2005* (NSW)) committed before that Act was repealed: s 187(6)(f).
91. *Marine Safety Act 1998* (NSW) s 28B(1). An 'alcohol or drug offence' under the Marine Safety Act means the offence of:

    - Operating a vessel in any waters while there is present in the person's breath or blood one or other of the ranges of concentration of alcohol prescribed under the Act;

    - Operating a vessel in any waters while under the influence of alcohol or any other drug; or

    - Permitting a person to operate in any waters a vessel in the charge of the master of a vessel if the master is aware, or has reasonable cause to believe, that the person is under the influence of alcohol or any other drug.
92. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 10. See also footnotes 103–121.

2.39 For example s 10 orders are treated as a 'conviction' for the purposes of:

- bail applications;[93]
- the recording of domestic violence offences on a person's criminal record;[94]
- the making of an apprehended violence order following a guilty plea or a finding of guilt in respect of a domestic violence offence or an offence of stalking or intimidation with intent to cause fear of physical or mental harm;[95]
- the declaration of a person as an habitual traffic offender,[96] or for the making of a supervisory intervention order where a court considers an offender to be a systematic or persistent offender against the *Dangerous Goods (Road and Rail Transport) Act 2008* (NSW) or the regulations under that Act;[97]
- the confiscation of proceeds of crime;[98]
- the making of orders for payment of compensation, restitution or a compensation levy, as well as restraining orders relating to the disposal of property, under the *Victims Support and Rehabilitation Act 1996* (NSW);[99]
- the making of court orders for compensation;[100] restoration and prevention;[101] repayment of monetary benefits received from the commission of the offence;[102]

---

93. *Bail Act 1978* (NSW) s 4 (definition of 'conviction'). In addition, *Criminal Records Regulation 2004* (NSW) cl 12 expressly provides that conviction (including a finding of guilt only) for a serious personal violence offence is not spent for the purposes of refusing bail to a repeat offender in respect of a serious personal violence offence unless there are exceptional circumstances pursuant to s 9D of the *Bail Act*.
94. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 3(4), 12.
95. Ibid, ss 3(4), 39.
96. *Road Transport (General) Act 2005* (NSW) s 198.
97. *Dangerous Goods (Road and Rail Transport) Act 2008* (NSW) ss 49(2)(b), 53 (a supervisory intervention order may require the offender to: do specified things (eg, train or supervise staff, obtain expert advice); conduct specified monitoring, compliance, managerial or operational practices, systems or procedures; furnish compliance reports; and/or appoint a person with responsibilities for assisting the offender in improving compliance, monitoring the offender's compliance and furnishing compliance reports.
98. *Confiscation of Proceeds of Crime Act 1989* (NSW) s 5(1)(b). See also *Travel Agents Act 1986* (NSW) s 38(3) (if a person is convicted by the Supreme Court of the offence of carrying on business as a travel agent: (a) otherwise than in accordance with his or her authority under a travel agent's licence, or (b) in partnership with a person who does not hold a travel agent's licence; the Court may order the offender to pay the Crown an amount not exceeding the proceeds derived by the person from the commission of the offence).
99. *Victims Support and Rehabilitation Act 1996* (NSW) Dictionary (definition of 'conviction'), ss 44, 46, 49 (orders for restitution); pt 2 div 9 (restraining orders and orders relating to disposal of property by offenders); s 71 (directions for compensation for injury), s 77B (directions for compensation for loss), s 79 (compensation levy).
100. For example, under: *Travel Agents Act 1986* (NSW) s 38; *Motor Dealers Act 1974* (NSW) s 55B; *Crown Lands Act 1989* (NSW) ss 155, 156, 157; *Anzac Memorial (Building) Act 1923* (NSW) s 11; *Forestry Act 1916* (NSW) s 48; *Parramatta Park Trust Act 2001* (NSW) s 34; *Summary Offences Act 1988* (NSW) s 30A(1), (4); *Dangerous Goods (Road and Rail Transport) Act 2008* (NSW) ss 49(2)(b), 56(1); *Mining Amendment Act 2008,* sch 1 item [258] (ss 378Y(2)(b), 378ZA); *Pesticides Act 1999* (NSW) ss 92(2)(b), 95(1); *Protection of the Environment Operations Act 1997* (NSW) ss 243(2)(b), 246(1). See also *Workers Compensation Act 1987* (NSW) ss 156, 175.

costs and expenses incurred by a person by reason of the commission of the offence;[103] and other additional orders (eg, orders to take certain specified remedial actions);[104]

- the making of court orders relating to the removal of obstructions blocking the passage of fish;[105] the mitigation of damage to, or restoration of, the critical habitat;[106] the forfeiture of shares in a share management fishery;[107] and the forfeiture or disposal of property seized or delivered up;[108]
- the recovery of debt by a co-operative from a person who knowingly provided false or misleading information or statements in relation a loan application, request or demand;[109] and
- the payment of the prosecutor's professional costs and court costs.[110]

2.40 Where a s 10 order is imposed in respect of a sexual assault offence, the order is considered a 'conviction' under the *Commission for Children and Young People Act 1998* (NSW).[111] This provision addresses the concern raised by the Victims

---

101. *Occupational Health and Safety Act 2000* (NSW) ss 111(2)(b), 113(1); *Pesticides Act 1999* (NSW) ss 92(2)(b), 94; *Protection of the Environment Operations Act 1997* (NSW) ss 243(2)(b), 245.
102. *Dangerous Goods (Road and Rail Transport) Act 2008* (NSW) ss 49(2)(b), 51; *Mining Amendment Act 2008,* sch 1 item [258] (ss 378Y(2)(b), 378ZD(1)); *Pesticides Act 1999* (NSW) ss 92(2)(b), 98(1); *Protection of the Environment Operations Act 1997* (NSW) ss 243(2)(b), 249(1).
103. *Coal Mine Health and Safety Act 2002* (NSW) s 123(6),(7); *Dangerous Goods (Road and Rail Transport) Act 2008* (NSW) ss 49(2)(b), 56(1); *Mining Amendment Act 2008*, sch 1 item [258] (ss 378Y(2)(b), 378ZA, 378ZC); *Occupational Health and Safety Act 2000* (NSW) ss 111(2)(b), 114; Pesticides Act 1999 (NSW) ss 92(2)(b), 95, 97(1); *Protection of the Environment Operations Act 1997* (NSW) ss 243(2)(b), 246(1), 248(1).
104. *Motor Dealers Act 1974* (NSW) s 55B; *Mining Amendment Act 2008,* sch 1 item [258] (ss 378Y(2)(b), 378ZE); *Occupational Health and Safety Act 2000* (NSW) ss 111(2)(b), 115, 116; Pesticides Act 1999 (NSW) ss 92(2)(b), 99(1); *Protection of the Environment Operations Act 1997* (NSW) ss 243(2)(b), 250(1).
105. *Fisheries Management Act 1994* (NSW) s 219.
106. Ibid s 220ZG. Critical habitats refers to critical habitats of endangered species, populations and ecological communities and critically endangered species and ecological communities as declared by the Minister or under regulations: ss 220P, 220T;
107. Ibid s 75; *Fisheries Management (Abalone Share Management Plan) Regulation 2000* (NSW) cl 35(4).
108. *Fisheries Management Act 1994* (NSW) s 269 (forfeiture of boats, motor vehicles or other things seized from a person in connection with certain fisheries offence); *National Parks and Wildlife Act 1974* (NSW) ss 5, 168 (orders for the disposal of property seized or delivered up in relation to an offence under the Act or the regulations may be made upon conviction).
109. *Co-operatives Act 1992* (NSW) s 401(4). A co-operative may exercise its rights under a mortgage or other security given by the person who received s 10 order for this offence: s 401(2).
110. *Criminal Procedure Act 1986* (NSW) s 215(4) (court costs and prosecutor's professional costs at the end of summary proceedings); s 257B (prosecutor's costs in proceedings before the Supreme Court in its summary jurisdiction).
111. For the purpose of prohibiting certain persons from being employed in child-related employment, the term 'conviction' is defined to include 'a finding that the charge for an offence is proven, or that a person is guilty of an offence, even though the court does not proceed to a conviction': *Commission for Children and Young People Act 1998* (NSW) s 33(1).

Advisory Board, in its submission, that a sexual offender would be able to pass the 'Working with Children Check' if a s 10 order was made in relation to an index offence.[112]

2.41 Section 3(4) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) expressly provides that a reference, in that Act, to a 'finding of guilt' includes a reference to the making of an order under s 10 of the Act. This addresses another concern raised by the Victims Advisory Board, that a s 10 order would not be recorded under s 12 of the *Crimes (Domestic and Personal Violence) Act,* and would hamper the capacity of police and the courts to monitor and prevent future domestic violence by an offender.[113]

2.42 A finding of guilt is also expressly stated to include an order under s 10 for the purposes of s 218 of the *Road Transport (General) Act 2005* (NSW), with the result that the Roads and Traffic Authority (RTA) may suspend, for up to three months, the registration of a registrable vehicle suspected of being used to commit certain offences.[114]

2.43 Section 10 orders can also result in a prohibition from, or restrictions on, carrying on certain business activities, or being involved in certain forms of employment; and can preclude the holding of the licence that is required for certain activities. For example it can result in:

- a prohibition from being involved in child-related employment[115] or in employment within the legal profession;[116]

---

112. Submission 1: Victims Advisory Board, 1. Before recruiting for child-related employment, employers are required to conduct Working With Children background checks for preferred applicants: NSW Commission for Children & Young People, *Guideline 1.1* <http://kids.nsw.gov.au/uploads/documents/WWCC_Guidelines_Feb2010_full.pdf > at 2 August 2011. A 'prohibited person' is excluded from working in child-related employment: *Commission for Children and Young People Act 1998* (NSW) s 33C(1). 'Prohibited person' is defined as: a person convicted of a serious sex offence, the murder of a child or a child-related personal violence offence; or a 'registrable person' within the meaning of the Child Protection (Offenders Registration) Act 2000 (NSW): *Commission for Children and Young People Act 1998* (NSW) s 33B(1).
113. Submission 1: Victims Advisory Board, 1.
114. *Road Transport (General) Act 2005* (NSW) s 218(8). The power to suspend the registration arises upon a finding of guilt under s 218(7), which provides that it is an offence to fail to remove or produce a vehicle pursuant to a production notice issued by a police officer. A production notice may be issued where a police officer reasonably believes a vehicle to have been operated so as to commit an offence under s 40 or 41 of the *Road Transport (Safety and Traffic Management Act 1999* (NSW), or to have been clamped, impounded, or the subject of forfeiture: s 218(1).
115. *Commission for Children and Young People Act 1998* (NSW) ss 33 (definition of 'conviction'), 33B (definition of 'prohibited person'). It is an offence for a prohibited person to try to obtain child-related employment: 33C–33E.
116. See, eg, *Legal Profession Act 2004* (NSW) ss 11, 17–18 (prohibition on employment as lay associate of a law practice), 19 (prohibition on partnerships with certain non-legal partners), 206(4)–(5) (domestic registration authority may refuse to grant or renew registration as a foreign lawyer).

- the refusal, suspension or cancellation of registration, or the imposition of conditions on registration, to practise certain other professions;[117]
- a prohibition from carrying on certain businesses,[118] for example, selling tobacco and non-tobacco smoking products;[119]
- a prohibition from being a member of certain committees;[120]
- the suspension or cancellation of a licence for selling, supplying or manufacturing poisons or restricted substances;[121] and a prohibition or restriction from doing anything authorised by the *Poisons and Therapeutic Goods Regulation 2008* (NSW);[122]
- the making of a court order directing the holder of a mining authority or petroleum title to retire biodiversity credits;[123]
- the refusal of a licence to carry on security activities,[124] or operate a tow truck;[125]

---

117. Ibid ss 11, 25 (suitability for admission as a lawyer), s 42 (suitability to hold a local practising certificate), s 48 (grant or renewal of practising certificate), s 208(1)(e) (ground for amending, suspending or cancelling local registration as a foreign lawyer);*Health Practitioner Regulation (Adoption of National Law) Act* 2009 (NSW) s 5 (definition of 'criminal history'), s 55, s 74, s 138 (definition of 'criminal finding'), 144, 149C.
118. *Assisted Reproductive Technology Act 2007* (NSW) s 61 (prohibition of persons convicted of offences related to assisted reproductive technology (ART) or human cloning for reproduction from carrying on businesses providing ART services); *Health Practitioner Regulation (Adoption of National Law) Act 2009* (NSW) s 139C (matters that constitute unsatisfactory professional conduct generally).
119. *Public Health (Tobacco) Act 2008* (NSW) s 32.
120. See, for example, *Commission for Children and Young People Act 1998* (NSW) ss 33B (definition of 'conviction'), 45G.
121. *Poisons and Therapeutic Goods Regulation 2008* (NSW) cl 172(2)(c).
122. Ibid, cl 175(2)(b).
123. *Threatened Species Conservation Act 1995* (NSW) ss 127S(10), 127ZI(9), s 127ZR(7). The order may be made against a person convicted of failing, without reasonable excuse, to comply with a ministerial direction or order to retire biodiversity credits pursuant to s 127S(2), 127ZI(1) or 127ZR(1) of that Act.
124. *Security Industry Act 1997* (NSW) s 16(1)(b) (the Commissioner of Police must refuse to grant an application for a licence to carry on security activities if he is satisfied the applicant has been found guilty of prescribed offences within five years before the application). Prescribed offences include those relating to: firearms or weapons; prohibited plant or prohibited drugs; assault; fraud, dishonesty or stealing; robbery; industrial relations matters; riot; affray; stalking or intimidation; reckless conduct causing death at workplace; offences related to terrorism, and organised criminal groups and recruitment: *Security Industry Regulation 2007* (NSW) cl 18.
125. *Tow Truck Industry Act 1998* (NSW) s 18(2)(b)(ii), (3)(i)(ii) (the RTA must not grant an application for a tow truck operators licence if the applicant has been found guilty of a prescribed offence within 10 years before the application was made, and may refuse to do so if a close associate of the applicant has been found guilty of a prescribed offence within the last 10 years); s 26(2)(b)(ii) (the RTA must not grant an application for a tow truck drivers certificate if the applicant has been found guilty of a prescribed offence within the last 10 years). Prescribed offences include any offence involving: assault; possession or use of a firearm, imitation firearm or other weapon; supply or possession of a prohibited drug, or the cultivation (for a commercial purpose), supply or possession of a prohibited plant; fraud, dishonesty or stealing; robbery; recruitment of another person to carry out or assist in carrying out a criminal activity; and participation in a criminal group, or participation in any criminal activity of a criminal group—and only if the penalty

- the imposition of restrictions on a licence to transport dangerous goods by road or rail;[126] and
- disqualification from standing as a candidate in an election for a position of industry member on a Management Advisory Committee for a fishery for a period of five years.[127]

2.44 In addition, s 10 orders can result in disciplinary or remedial action against certain employees (usually for a serious offence punishable by at least 12 months imprisonment) or professionals;[128] and in the investigation of certain employees by the Ombudsman.[129]

2.45 Under the *Criminal Records Act 1991* (NSW), a s 10(1)(a) dismissal order is spent immediately after the finding of guilt is made;[130] while a conditional discharge order under s 10(1)(b) or (c) is spent upon satisfactory completion of the good behaviour

---

imposed was imprisonment, a community service order involving 100 or more hours of community service work; and/or a monetary penalty of $1,000 or more: *Tow Truck Industry Regulation 2008* (NSW) cl 16.

126. *Dangerous Goods (Road and Rail Transport) Act 2008* (NSW) ss 49(2)(b), 52 (if a court finds a driver guilty of an offence under the Act or the regulations, it may cancel, modify or suspend a licence to transport dangerous goods by road or rail and/or disqualify the driver from obtaining or holding such a licence for a specified period).
127. *Fisheries Management (General) Regulation 2010* (NSW) cl 309.
128. *Ambulance Services Regulation 2005* (NSW) cl 21 (Ambulance Service employees); *Education (School Administrative and Support Staff) Act 1987* (NSW) s 32C (permanent school administrative and support staff of the Department of Education and Training); *Fire Brigades Regulation 2008* (NSW) cl 35 (fire-fighters); *Public Sector Employment and Management Act 2002* (NSW) s 48 (persons employed in chief or senior executive positions or other staff positions in the relevant Department); *Teaching Service Act 1980* (NSW) s 93K (persons employed in the Teaching Service other than as temporary employees); *Technical and Further Education Commission Act 1990* (NSW) s 22K (persons employed in the TAFE Commission Division of the Government Service); *Tow Truck Industry Act 1998* (NSW) s 42 (tow truck operator licensees or certified drivers); *Legal Profession Act 2004* (NSW) s 498 (conviction of a local legal practitioner for a serious offence, a tax offence or an offence involving dishonesty is capable of being unsatisfactory professional conduct or professional misconduct and can be subject to complaint and disciplinary action under Ch 4 of that Act).
129. A s 10 order is a 'reportable conviction' under s 25A of the *Ombudsman Act 1974* (NSW). The head of a designated government or non-government agency must notify the Ombudsman of a reportable conviction against an agency employee, and of whether the agency intends to take disciplinary or other action against the employee: s 25C. The Ombudsman may monitor the progress of the agency's investigation into the reportable conviction and/or conduct an investigation itself: ss 25E, 25G. Designated government agencies under s 25A and clause 4 of the regulations include: (a) the Departments of Education and Training (including a government school); Community Services; Health; Sport and Recreation; Juvenile Justice; and Corrective Services; (b) area health services within the meaning of the *Health Services Act 1997* (NSW); and (c) prescribed public authorities—namely, the statutory health corporations within the meaning of *the Health Services Act 1997* (NSW); the Ambulance Service of NSW; the TAFE Commission; and the Department of Ageing, Disability and Home Care. Designated non-government agencies under s 25A and clause 5 of the regulations include: (a) non-governments school within the meaning of the Education Act 1990 (NSW); (b) a designated agency within the meaning of the Children and Young Persons (Care and Protection) Act 1998 (NSW) or a licensed children's service within the meaning of that Act; (c) an agency providing substitute residential care for children; and (d) affiliated health organisations within the meaning of the Health Services Act.
130. *Criminal Records Act 1991* (NSW) s 8(2).

bond or satisfactory compliance with the intervention program (including any intervention plan arising out of the program) or conditions.[131] However, a finding of guilt is not spent where the order is imposed:

- for sexual offences;
- against bodies corporate; or
- for offences prescribed by the regulations.[132]

2.46 If a finding of guilt is spent, a person is not required to disclose the finding for any purpose, and the finding does not form part of his or her criminal history.[133] However, a s 10 order may have to be disclosed under certain circumstances, namely, for the purposes of:

- child-related conduct declarations for the purposes of nomination as a candidate for election to the Legislative Assembly or the Legislative Council;[134]
- applications for appointment or employment in certain occupations;[135]
- applications to be registered to practise certain professions; disclosures in annual returns, and notification by the court, to professional boards or councils;[136]
- disclosure by the Criminal Records Section of the NSW Police Force to the Department of Corrective Services, BOCSAR, the Office of the Sheriff, or the Office of Fair Trading for certain purposes; as well as to the Casino Control Authority and the Director of Liquor and Gaming;[137]

---

131. Ibid s 8(4).
132. Ibid s7; Pursuant to s 5(a) a finding that an offence has been proved, or that a person is guilty of an offence, without proceeding to a conviction, is treated as a conviction for the purposes of this Act.
133. Ibid s 12.
134. *Parliamentary Electorates and Elections Act 1912* (NSW) s 81K(1) (definition of 'conviction'), 81L(1) (child-related conduct declarations are to state whether or not the candidate: has ever been convicted of the murder of a child or a child sexual offence; has had criminal proceedings for the murder of a child or a child sexual offence commenced against him or her; and has had an apprehended violence order made against him or her).
135. *Criminal Records Act 1991* (NSW) s 15 (judge, magistrate, justice of the peace, police officer, prison officer, teacher, teachers aide or a provider of child care services), 15(1A) (employment in child-related employment), 15(2) (in relation to a conviction for arson or attempted arson, employment in fire fighting or fire prevention); *Criminal Records Regulation 2004* (NSW) cls 6 (an Officer of the NSW Office of the Director of Public Prosecutions), 7 (an officer of the Independent Commission against Corruption (ICAC) or of the ICAC Inspector), 8 (Commissioner or Assistant Commissioner for the Police Integrity Commission), 9 (Commissioner or Assistant Commissioner for, or staff of, the NSW Crime Commission), 10 (Crown Prosecutor), 11 (admission as a legal practitioner); *Legal Profession Act 2004* (NSW) s 203.
136. *Health Practitioner Regulation (Adoption of National Law) Act 2009* (NSW) ss5 (definition of 'criminal history'), 77, 79, 135, 109.
137. *Criminal Records Regulation 2004* (NSW) cls 13–16.

- proceedings before a court, including the giving of evidence, or the making of a decision by a court;[138] and
- the publicly available register kept by the Food Authority of persons convicted of offences under the *Food Act 2003* (NSW) or regulations relating to the handling or sale of food.[139]

2.47 Other consequences of a s 10 order may include exclusion from a park by a park authority,[140] disqualification from owning or being in charge of a dog in a public place,[141] and court orders that a dog be destroyed.[142]

2.48 It is apparent from the foregoing, although it may not be well recognised or understood by the general community, that the disposal of a matter under s 10 of Act, does have potentially serious consequences for an offender, notwithstanding the fact that the matter is dealt with without the recording of a conviction.

Advantages and Disadvantages of Good Behaviour Bonds and Non-Conviction Orders

2.49 As with other non-custodial sentencing options, the perceived advantages of bonds and non-conviction orders under ss 9 and 10 of the Act concern:

- their role in reducing the prison population;
- their cost effectiveness compared with other sanctions, especially imprisonment;
- their capacity to increase the offenders' prospects of rehabilitation, and to reduce re-offending;
- in the case of offenders who have never been incarcerated—avoiding contact with those already within the prison population; and
- their capacity to increase the opportunity for access to services and programs that address health issues and related criminogenic concerns.[143]

---

138. *Criminal Records Act 1991* (NSW) s 16(1), subject to the exceptions noted in s 16(3).
139. *Food Act 2003* (NSW) s 133. The register must be made available for public inspection on the Food Authority's website; and may be provided to members of the public in any other manner approved by the Authority, or published in the Gazette or in a newspaper circulating in NSW: s 133B.
140. *National Parks and Wildlife Regulation 2009* (NSW) cl 34(2) (a person who commits or is guilty of a second or subsequent offence against Part 2 of this Regulation is liable to be excluded from a park by the park authority for any period of time determined by the authority).
141. *Companion Animals Act 1998* (NSW) s 23(5).
142. Ibid s 48.
143. See Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations*, Report 30 (2006) [2.60]–[2.65], [2.72]–[2.75]; Australian Law Reform Commission, *Sentencing*, Report 44 (1988) [121].

- their deterrent value;
- their flexibility as a sentencing option, given the range of conditions that can be attached to a bond.[144]

2.50 In the context of the sentencing of federal offenders, the ALRC considered that dismissals and conditional discharges should continue to be available under federal sentencing legislation, on the basis that: these sentencing options are important to allow courts to impose lenient sentences where appropriate; and that given the availability of these sentencing options in all states and territories, their retention would promote consistency between federal and state and territory sentencing legislation.[145]

2.51 The perceived disadvantages of orders relate to:

- the community perception of excessive leniency;[146]
- the risk that they will not deter the offender from re-offending; and
- the inadequacy of appropriate services and programs, thus making it more difficult for offenders to comply with the conditions of the orders, which in turn lessens their credibility within the general community.[147]

2.52 It has also been argued that, even though non-custodial measures appear more 'humane' than imprisonment, they can result in an expanded net of social control, involving an unnecessarily high level of intervention or intrusion into the lives of the offender, and those with whom he or she resides.[148]

2.53 In addition, the condition that an offender be 'of good behaviour' has been said to be too vague.[149] It was argued that since, in practice, the condition is considered to be breached upon the commission of a further offence (and not necessarily by other forms of inappropriate or 'bad behaviour' falling short of an offence), the condition should be reworded to make it clear that what is contemplated is that the recipient

144. Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations*, Report 30 (2006) [5.27]–[5.41].
145. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [7.28].
146. See Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations*, Report 30 (2006) [2.86]–[2.96].
147. Ibid, at [2.97]–[2.101].
148. N Morgan, 'Business as Usual or a New Utopia—Non-Custodial Sentences under Western Australia's New Sentencing Laws' (1996) 26 *University of Western Australia Law Review* 360, 380–1.
149. N Morgan, 'Imprisonment as a Last Resort: Section 19A of the Criminal Code and Non-pecuniary Alternatives to Imprisonment' (1993) 23 *University of Western Australia Law Review* 299, 316; G Zdenkowski, 'Non-financial Non-custodial Sentencing Options in the Crimes (Sentencing Procedure) Act 1999'' (2003) 6(2) *Judicial Review* 189, 191.

of the bond is to not commit any 'further offence'.[150] Arguably, however, this may unduly narrow the reach of the condition.

2.54 Non-conviction orders have been criticised in the literature on the following grounds:

- they can be subject to onerous conditions leading to oppressive results following breach;[151]
- although the moral justification of such orders is consent, rather than conviction and coercion, the unequal bargaining power of the parties means that the orders are not truly consensual in nature;[152]
- even though such orders are aimed at the avoidance of recording a conviction, with its discriminatory social and legal consequences, the criminal record of the offender is not entirely expunged.[153] Such orders, it has been suggested, have created uncertainty as to what is regarded as a prior conviction for other important areas of the law, including the entry of a plea of autrefois convict, the application of higher penalties for subsequent offences, the availability of fines as an additional or alternative penalty, and the availability of ancillary orders (eg, reparation orders and disqualification);[154]
- such orders circumvent the legitimising function of a conviction and its role as legal and philosophical justification for the state's right to intervene in the life and property of its citizens through sentencing.[155]

2.55 In addition, it has been argued that the avoidance of a conviction can be achieved in a more efficient, less convoluted way—for example by the making of spent conviction orders, the granting of pardons, or legislative provisions allowing convictions to be set aside.[156]

150. N Morgan, 'Imprisonment as a Last Resort: Section 19A of the Criminal Code and Non-pecuniary Alternatives to Imprisonment' (1993) 23 *University of Western Australia Law Review* 299, 316.
151. R Fox and A Freiberg, 'Sentences Without Conviction: From Status to Contract in Sentencing' (1989) 13(5) *Criminal Law Journal* 297, 298.
152. Ibid, 298, 320–1.
153. Ibid, 298.
154. Ibid, 299.
155. Ibid, 299, 304, 319.
156. Ibid, 322. See also N Morgan, 'Business as Usual or a New Utopia—Non-Custodial Sentences under Western Australia's New Sentencing Laws' (1996) 26 *University of Western Australia Law Review* 360, 375.

3. STATISTICAL ANALYSIS OF THE USE OF BONDS AND NON-CONVICTION ORDERS

Introduction

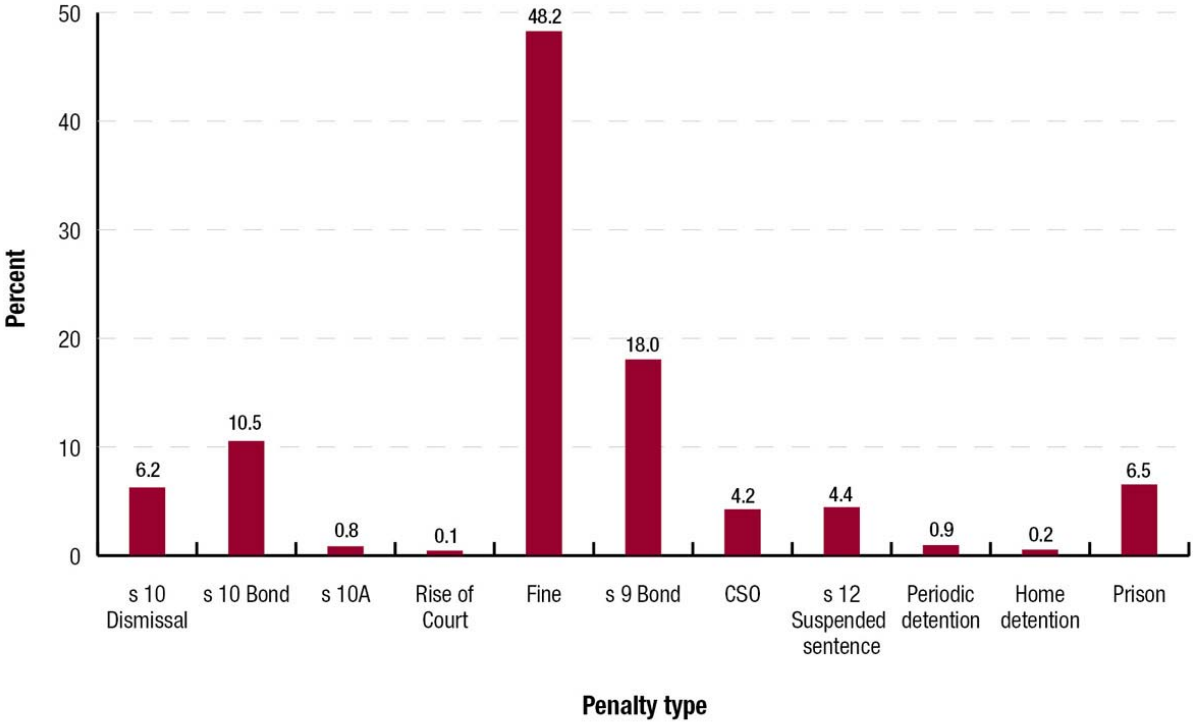
3.1 In this Chapter the Council considers the categories of offences for which non-conviction orders and bonds are utilised significantly or disproportionately when compared with other sanctions, the extent to which there is consistency among Local Court locations in the use of these orders, and the rates of re-offending following imposition of these orders.

Summary of the Use of Bonds and Non-Conviction Orders in NSW Local Court

3.2 A study by the Judicial Commission of NSW of all recorded sentences imposed by the NSW Local Court in 2007 shows the distribution of penalty types for all

offenders sentenced in the Local Court in 2007.[1] Figure 1 from that study is replicated below:

Figure 1: Distribution of penalty types for offenders sentenced in the NSW Local Court in 2007



3.3 As can be seen from Figure 1, fines were the most common penalty imposed in the Local court in 2007, accounting for almost half of all penalties imposed (48.2%). Section 10 orders accounted for 16.7% of the sentences imposed, with s 10 unconditional dismissals accounting for 6.2% and s 10 conditional bonds accounting for 10.5%. Section 9 good behaviour bonds accounted for 18% of penalties imposed. Although the use of s 9 bonds was shown to have increased since 2002 (from 14.5% to 18%), the use of unconditional dismissal orders was shown to have declined (from 7.4% to 6.2%).

3.4 The table below, also replicated from the Judicial Commission's 2007 study, shows a detailed distribution of penalty types for the twenty most common proven statutory offences in the NSW Local Court in 2007.[2]

1. Figure 1 is reproduced with permission from Judicial Commission of NSW, *Common offences in the NSW Local Court: 2007*, Sentencing Trends & Issues 37 (2008), p 5.
2. Reproduced with permission. Ibid, p 7, Table 2.

Table 1: Distribution of penalty types for the most common proven statutory offences in the NSW Local Court in 2007

		Penalty type (%)										
Rank	Offence description	s 10 Dism	s 10 Bond	s 10A	ROC	Fine	s 9 Bond	CSO	s 12 Susp	PD	HD	Prison
1	Mid-range PCA	1.5	15.9	0.2	0.0	63.7	12.8	3.1	1.3	0.5	0.2	0.9
2	Common assault	4.7	17.5	0.6	0.1	19.7	40.8	3.4	5.4	0.7	0.0	7.2
3	Low-range PCA	6.8	32.5	0.5	0.0	58.9	1.3	0.1	No term of imprisonment available			
4	Drive whilst disqualified	0.7	3.5	0.2	0.0†	20.1	19.7	18.4	15.0	4.6	1.5	16.3
5	Larceny	7.2	12.1	0.8	0.2	39.8	20.2	2.2	4.8	0.6	0.1	11.9
6	Possess prohibited drug	5.5	9.8	1.6	0.3	66.8	11.6	0.5	1.2	0.1	0.0†	2.5
7	Drive whilst suspended	8.9	19.5	0.4	0.0	58.1	9.9	1.9	0.9	0.1	0.0†	0.3
8	Maliciously destroy/ damage property	7.1	13.6	1.1	0.4	39.6	27.5	2.9	2.5	0.4	0.0	4.9
9	Never licensed person drive on road	7.2	5.5	0.8	0.0	77.3	6.8	1.2	0.7	0.2	0.0†	0.3
10	Assault occasioning actual bodily harm	1.2	8.3	0.2	0.1	11.2	44.6	7.5	10.4	2.1	0.0	14.5
11	High-range PCA	0.1	2.6	0.1	0.0†	40.4	28.0	11.6	9.1	2.1	0.8	5.2
12	Drive without being licensed	10.9	3.3	1.3	0.0	81.2	2.7	0.2	No term of imprisonment available			
13	Knowingly contravene AVO	4.5	6.3	1.8	0.8	20.6	33.5	4.3	10.3	1.4	0.0†	16.4
14	Offensive conduct	17.6	8.1	1.5	0.0†	65.8	5.7	0.5	0.0	0.0	0.0	0.9
15	Assault with intent on certain officers	2.3	7.9	0.2	0.2	30.8	35.4	5.9	6.6	0.8	0.1	9.7
16	Drive unregistered vehicle	18.6	0.5	2.4	0.0	78.2	0.1	0.0	No term of imprisonment available			
17	Negligent driving (not causing death or GBH)	16.4	2.8	1.0	0.0	78.9	0.7	0.0†	No term of imprisonment available			
18	Offensive language	11.0	5.6	1.6	0.1	81.1	0.4	0.2	No term of imprisonment available			
19	Goods in custody	2.4	6.4	0.7	0.3	38.9	23.7	3.2	5.7	0.6	0.1	18.0
20	Drive recklessly/furiously or dangerous speed/ manner	0.3	3.0	0.2	0.0	47.9	21.2	10.3	5.2	2.1	0.4	9.5
	All remaining offences	7.4	6.4	1.0	0.2	46.5	17.0	4.8	5.6	1.0	0.3	9.8
	Total	6.2	10.5	0.8	0.1	48.2	18.0	4.2	4.4	0.9	0.2	6.5
	Total number of cases	6765	11580	882	148	52965	19752	4593	4864	958	231	7194

† The number of cases recorded was < 0.1%

3.5 For the purposes of this report, the Judicial Commission recently produced a similar table, replicated below, showing the distribution of penalty types for the most common proven statutory offences in the NSW Local Court in 2010. The Judicial Commission has also produced a table that shows the number and percentage of cases that constitute the 20 most proven common statutory offences, which is replicated in Appendix A.

Table 2: Distibution of penalty types for the most common proven statutory offences in NSW Local Court in 2010[3]

		Penalty type (%)											
Rank	Offence description	s 10 Dism	s 10 Bond	s 10A	ROC	Fine	s 9 Bond	CSO	s 12 Susp	ICO*	PD	HD	Prison
1	Mid-range PCA	0.9	13.5	0.5	0.0	67.6	12.7	2.5	1.3	<0.05	0.2	0.1	0.7
2	Common assault	4.4	22.5	0.9	0.1	18.9	39.9	2.5	4.2	<0.05	0.3	<0.05	6.2
3	Low range PCA	7.5	34.8	0.7	0.0	56.4	0.6	<0.05	No term of imprisonment available				
4	Possess prohibited drug	8.8	17.2	3.7	0.1	58.7	8.7	0.4	0.6	0.0	<0.05	0.0	1.7
5	Drive whilst disqualified	1.4	4.2	0.4	0.0	21.1	23.2	16.3	16.1	0.3	2.1	0.9	14.0
6	Assault occasioning actual bodily harm	0.9	9.8	0.2	0.0	8.4	46.3	7.1	10.9	0.1	0.7	0.0	15.6
7	Drive whilst suspended	6.8	19.8	1.2	0.0	58.5	10.1	1.7	1.0	0.0	0.2	0.1	0.5
8	Knowingly contravene AVO	4.5	7.9	4.8	0.3	19.3	35.5	4.0	8.8	<0.05	0.4	<0.05	14.5
9	Larceny	3.9	9.3	2.0	0.2	35.6	22.7	2.7	6.2	0.2	0.1	0.2	16.8
10	Malicious destruction/damage	7.2	16.5	2.7	0.1	39.6	24.3	2.9	2.2	0.1	0.2	<0.05	4.1
11	High range PCA	0.1	1.5	0.1	0.0	43.3	27.8	10.7	9.8	0.1	1.3	0.8	4.7
12	Never licensed person drive on road	10.7	8.4	3.0	0.0	71.3	5.2	0.8	0.3	0.0	<0.05	0.0	0.3
13	Stalk or intimidate w/i to cause fear	1.1	10.9	0.4	0.2	8.8	53.3	4.1	8.0	0.0	0.4	0.0	12.8
14	Assault with intent on certain officers	2.8	10.8	1.1	0.1	29.8	36.1	3.2	6.5	0.1	0.3	0.0	9.0
15	Drive without being licensed	15.3	5.9	2.9	0.0	74.5	1.3	0.2	No term of imprisonment available				
16	Negligent driving (not causing death or GBH)	17.3	2.5	2.7	0.0	76.9	0.4	0.2	No term of imprisonment available				
17	Drive unregistered vehicle	26.9	0.6	6.6	0.0	65.9	0.1	0.1	No term of imprisonment available				
18	Drive whilst suspended under s 66 Fines Act	22.2	21.9	1.8	0.0	51.0	2.8	0.2	0.1	0.0	0.0	0.0	0.0
19	Goods in custody	2.3	7.1	1.8	0.2	34.9	31.2	2.9	5.3	0.1	0.2	0.1	14.1
20	Special range PCA	3.9	24.6	1.2	0.0	69.8	0.6	0.0	No term of imprisonment available				
	All remaining offences	7.2	7.4	1.9	0.1	41.6	19.4	4.9	6.2	0.1	0.5	0.3	10.6
	Total	6.1	12.5	1.7	0.1	43.7	19.8	3.9	4.8	0.1	0.4	0.2	6.9
	Total number of cases	6334	12913	1774	54	45229	20550	4005	4926	57	431	170	7164

* Intensive Correction Orders commenced on 1 October 2010

What types of offences are section 10 dismissals and bonds primarily used for?

3.6 Table 1 indicates that, in the Local Court in 2007, the offences for which s 10 dismissals were used to a greater extent compared with other sanctions are; drive unregistered vehicle (18.6%) and negligent driving (not causing death or GBH) (16.4%) and offensive conduct (17.6%). In addition, the offence for which s 10

3. Judicial Commission of NSW, *Unpublished statistics* (2011).

bonds were used to a greater extent compared with other sanctions is: low-range PCA (32.5%).

3.7 Table 2 indicates that the offences for which s 10 dismissals were used to a greater extent compared with other sanctions continue to be: drive unregistered vehicle (26.9%) and negligent driving (not causing death or GBH) (17.3%). The new offence of drive whilst suspended under s 66 of the *Fines Act* was also commonly dealt with by way of s 10 dismissals (22.2%).

3.8 Similarly, Table 2 reflects that the high use of s 10 bonds for low range PCA has continued since 2007 (with 34.8% of all low-range PCA matters in 2010 being dealt with by a s 10 bond). There were a number of other offences for which s 10 bonds were used to a greater extent compared with other sanctions. These were special range PCA (24.6%), common assault (22.5%), and drive whilst suspended (under s 66 of the *Fines Act*) (21.9%).

3.9 The Council also notes that s 10 dismissals are commonly used for regulatory offences (25.5%), however, fines are a much more common disposition for these offences (71.9%).[4]

Are section 10 dismissals and bonds used disproportionately, compared to other types of penalties?

3.10 The above analysis highlights that, in 2007 and 2010, s 10 has been primarily used for the following offences:

- low-range PCA;
- drive unregistered vehicle;
- negligent driving (not causing death or GBH);
- special range PCA;
- offensive conduct;
- common assault;
- drive whilst suspended under s 66 of the *Fines Act*.

3.11 In relation to each of the offences of low-range PCA, drive unregistered vehicle, negligent driving (not causing death or GBH) and special range PCA, the maximum penalty available is a fine.[5] The imposition of a fine accounted for 58.9% of

4. Judicial Commission of NSW, *Common Offences in the NSW Local Court: 2007,* Sentencing Trends & Issues 37 (2008).
5. *Road Transport (Safety and Traffic Management) Act* 1999, s 9(2); *Road Transport (Vehicle Registration) Act* 1997, s 18(1); *Road Transport (Safety and Traffic Management) Act* 1999, s 42(1)(c).

low-range PCA offences in 2007 (56.4% in 2010), 78.2% of drive unregistered vehicle offences (65.9% in 2010), 78.9% of negligent driving offences (not causing death or GBH) (76.9% in 2010). In 2010, 69.8% of special range PCA offences were dealt with by the imposition of a fine.[6]

3.12 Given that the maximum penalty was imposed significantly more frequently in relation to these offences compared with s 10 orders, the Council does not consider that s 10 orders have been used disproportionately.

3.13 The offences of offensive conduct, common assault and drive whilst suspended under s 66 of the *Fines Act* attract maximum terms of between 3 months and 2 years imprisonment.

3.14 Fines accounted for 65.8% of the penalties types imposed for offensive conduct[7] and 51% for drive whilst suspended under s 66 of the *Fines Act*. Again, given the high use of fines as penalties for these offences, the Council does not consider the use of s 10 orders, as indicated by the statistics, to be disproportionate compared with other available penalty types.

3.15 Penalties imposed for common assault were distributed amongst the available penalty types in both 2007 and 2010, with approximately 19% of matters being dealt with by way of a fine, 40% by way of a s 9 bond, between 4.2–5.4% by way of a suspended sentence and between 6.2 and 7.2% by way of a prison sentence. The Council considers this reflective of the broad range of circumstances potentially encapsulated by the offence of common assault and the resultant use of sentencing discretion. The figures do not demonstrate that the use of s 10 orders is disproportionate when compared with other available penalty types.

Use of section 10 bonds for offenders with prior convictions

3.16 The table contained in Appendix B shows the percentage of offenders who received s 10 bonds in 2008 who had received convictions for other offences in the two years prior to receiving the bond. This shows that only a very small percentage of offenders (3.4%) with priors for any other offence received s 10 bonds in that year.

What types of offences are section 9 bonds primarily used for?

3.17 Table 1 shows that the offences for which s 9 bonds were used to a greater extent compared with other sanctions in 2007 were; common assault (40.8%), assault occasioning actual bodily harm (44.6%), knowingly contravene AVO (33.5%) and assault with intent on certain officers (35.4%).

---

6. Figures are only available for 2010 in relation to this offence.
7. In 2007 (figures for 2010 are unavailable).

3.18 The Council notes that the statistics suggest, despite the different views noted in Chapter 2,[8] that s 9 bonds are being given in relation to some offences that only attract a fine. For example, in 2007, s 9 bonds were imposed in relation to the offences of low-range PCA (1.3% of penalties imposed), driving an unregistered vehicle (0.1% of penalties imposed) and negligent driving not causing death or grievous bodily harm (0.7% of penalties imposed).

3.19 In 2010, as in 2007, the offences for which s 9 bonds were used to a greater extent compared with other sanctions were; common assault (39.9%), assault occasioning actual bodily harm (46.3%), knowingly contravene AVO (35.5%) and assault with intent on certain officers (36.1%). The new offence of stalk or intimidate with intention to cause fear, introduced in 2008, was also commonly dealt with by a s 9 bond (53.5%).

Are section 9 bonds used disproportionately, compared to other types of penalties?

3.20 The above analysis highlights that s 9 has been primarily used for the following offences:

- common assault;
- assault occasioning actual bodily harm;
- knowingly contravene AVO;
- assault with intent on certain officers;
- stalk or intimidate with intention to cause fear.

3.21 Table 3, below, contains extracts of data from Tables 1 and 2, and shows the prevalence of common penalty types in relation to these offences.

8. See Chapter 2, paragraph 2.3.

Table 3: Common penalties for offences for which section 9 is frequently used

Penalty type (%)												
Offence description	S 10 order		S 9 bond		Fine		CSO		Suspended sentence		Prison	
	2007	2010	2007	2010	2007	2010	2007	2010	2007	2010	2007	2010
Common assault	22.2	26.9	**40.8**	**39.9**	19.7	18.9	3.4	2.5	5.4	4.2	7.2	6.2
Assault occasioning actual bodily harm	9.5	10.7	**44.6**	**46.3**	11.2	8.4	7.5	7.1	10.4	10.9	14.5	15.6
Knowingly contravene AVO	10.8	12.4	**33.5**	**35.5**	20.6	19.3	4.3	4	10.3	8.8	16.4	14.5
Assault with intent on certain officers	10.2	13.6	**35.4**	**36.1**	30.8	29.8	5.9	3.2	6.6	6.5	9.7	9
Stalk or intimidate with intention to cause fear	N/A	12	N/A	**53.3**	N/A	8.8	N/A	4.1	N/A	8	N/A	12.8

3.22 Section 9 bonds are the most commonly imposed penalty type for each of the above offences, however, a significant proportion of these offences are dealt with other than by way of a s 9 bond.

3.23 In this regard, the Council notes, and concurs with, the submission of the Chief Magistrate, who observed that orders under s 9 (as with orders under s 10) are used over a wide category of offences and in reasonable proportion when compared to other sanctions.[9]

Use of Bonds and Non-Conviction Orders in Relation to PCA Matters

3.24 Table 4 shows the numbers and percentages of s 9 and s 10 orders for all drink driving (PCA) cases finalised in the NSW Local Court between 2004 and 2008.[10]

9. Submission 21: His Honour G Henson, Chief Magistrate of the Local Court of NSW, 2.
10. NSW Bureau of Crime Statistics and Research, *Unpublished Statistics* (2009), with analysis carried out by the Council.

Table 4: Use of bonds and non-conviction orders in relation to PCA matters

Section	Offence under the *Road Transport (Safety and Traffic Management) Act 1999*	s 9		s 10		All cases
		Number	%	Number	%	Number
9(1)(a)	Special category driver drive with special range PCA	124	2.1	1609	27.6	5836
9(1A)(a)	Learner/provisional drive with novice range PCA	14	0.8	735	43.2	1702
9(2)(a)	Drive with low range PCA	492	1.4	14219	41.4	34310
9(3)(a)	Drive with middle range PCA	6889	12.2	10758	19.1	56325
9(4)(a)	Drive with high range PCA	5270	26.0	693	3.4	20279
11B(1)(a)	Drive vehicle with illicit drug present in blood etc	13	3.2	90	22.3	403
12(1)(a)	Drive while under the influence of alcohol or other drugs	806	22.3	347	9.6	3615

3.25 As indicated by Table 4 above, the majority of s 10 orders during 2004-2008 were imposed for novice range and low range PCA offences—43% and 41% of all penalties respectively. The higher the level of PCA, the smaller the proportion of s 10 orders imposed—28% for special range PCA cases, and only 3% for high-range PCA cases.

3.26 The Chief Magistrate has made a number of observations in relation to low-range PCA matters:

- that s 10 may be an appropriate sentencing option where an offender has a previously exemplary driving record;[11]
- that the offence may be considered comparatively minor in nature when its objective seriousness is measured by reference to the maximum legislative penalty of a fine of $1,100;[12] and
- that between 66% and 72% of severity appeals to the District Court for PCA offences between 2005 and 2009 were successful, while appeals against the inadequacy of sentence for PCA offences were almost inconsequential, ranging from 1 to 8 per year.[13]

3.27 The Council notes the submission of the RTA in relation to the separate issue that demerit points are not currently recorded in relation to cases where a court imposes a s 10(1) dismissal. This issue is considered further in Chapters 4 and 5.

11. Submission 21: His Honour G Henson, Chief Magistrate of the Local Court of NSW, 3.
12. Ibid.
13. Ibid.

Trends in the use of s 10 orders in relation to PCA matters

3.28 In its 2008 Bulletin, '*The impact of the high range PCA guideline judgment of sentencing for PCA offences in NSW*' BOCSAR reported a marked decline in the use of s 10 orders in relation to PCA offences following the NSWCCA's Guideline Judgment in 2004. That report found:

- High range PCA offences – a 71% fall in the use of s 10, from 9.3% to 2.7%;[14]
- Mid-range PCA offences – a 30% fall in the use of s 10, from 25.5% of cases to 17.9% of cases;[15]
- Low-range PCA offences – a slight (and non-significant) decline in the use of s 10, a very slight decline in the standard deviation between court locations in the use of s 10.[16]

The use of s 10 orders for PCA offenders with prior or multiple offences

3.29 The two figures below show the relative use of s 10 orders for high-range, mid-range and low-range PCA offences. Figure 2 shows the use of s 10 for PCA offences during 2000–2009, for offenders with a single count of a PCA offence, and with no prior convictions in the previous two years ('Figure 2 Offenders'). Figure 3 shows the same information in relation to offenders who have more than one count/offence proven and/or who had a prior conviction in the previous two years ('Figure 3 Offenders').[17]

14. NSW Bureau of Crime Statistics and Research, *The impact of the high range PCA guideline judgment on sentencing for PCA offences in NSW*, Crime and Justice Bulletin 123 (2008), 2, 4.
15. Ibid, 5.
16. Ibid, 6.
17. NSW Bureau of Crime Statistics and Research, *Unpublished statistics* (2009), with analysis carried out by the Council. Penalties are those recorded by the Local Court and do not take account of changes made on appeal. Information is provided for a ten-year period until the end of 2009.

Figure 2: PCA offenders with a single count and no prior record: % receiving section 10 order in NSW Local Court (2000–2009)

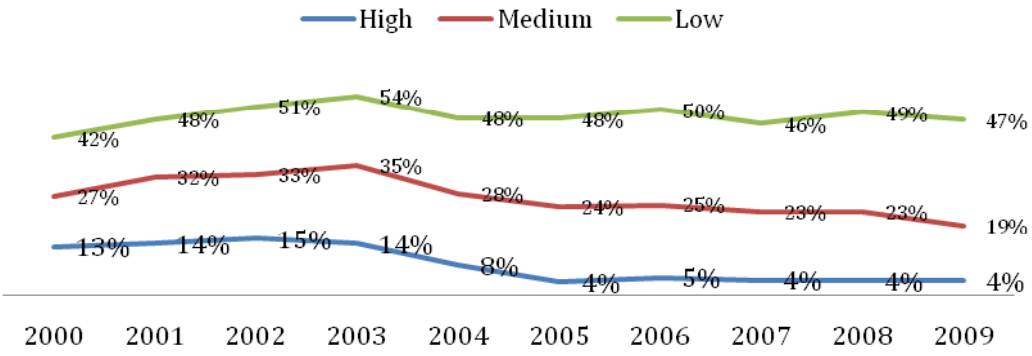
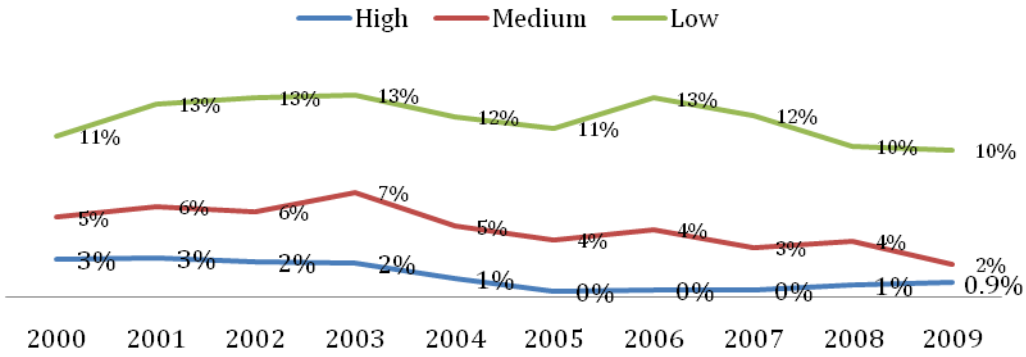


Figure 3: PCA offenders with more than one count/offence and/or a prior record: % receiving section 10 order in NSW Local Court (2000–2009)



3.30 The figures illustrate a fall in the use of s 10 orders for PCA offences following the NSWCCA's Guideline Judgment in 2004. Non-conviction orders have increasingly been reserved for low-level PCA offenders, particularly those with a single charge and no prior record. At the beginning of the decade approximately a third of s 10 orders for PCA offences were given to this group; by 2009 this proportion increased to almost two-thirds.

3.31 Further, Figure 3 illustrates the limited use of s 10 orders in relation to offenders with multiple or prior offences.[18] Approximately 30% of Figure 2 Offenders received a s 10 order, compared with approximately 5% of Figure 3 Offenders.

18. See also paragraph 3.16.

Use of Bonds and Non-Conviction Orders in Relation to Other Matters

Use of Bonds and Non-Conviction Orders in relation to parking matters

3.32 In relation to parking offences, Judicial Information Sentencing System (JIRS) statistics compiled by the Judicial Commission of NSW for the period between July 2008 and June 2009 show that in contested cases, a large number of the offences were dealt with by a fine, and that the majority of s 10 orders were imposed on first offenders.[19]

Table 5: JIRS statistics—sentences for certain parking offences in the NSW Local Court from July 2008 to June 2009

Offence under the *Road Rules 2008 (NSW)*	Maximum penalty	Total number of cases	Fine only imposed		s 10 order imposed[20]		First offenders who received s 10 orders[21]	
			Number of cases	% of total cases	Number of cases	% of total cases	Number	% of s 10 orders
Disobey no stopping/no standing signs (r 167)	20 penalty units	643	408	64	227	35	176	78
Disobey no stopping/no standing signs—school zone (r 167)	20 penalty units	116	75	65	39	34	31	79
Disobey no parking signs (r 168)	20 penalty units	96	47	49	47	49	37	79
Disobey no parking signs—school zone (r 168)	20 penalty units	24	10	42	14	58	13	93

3.33 As shown in Table 5,[22] for the offence of disobeying no stopping/no standing signs (including in school zones),[23] the majority of contested matters (64–65%) were disposed of by way of a fine. Of those who received a s 10 order, most (78–79%) were first offenders with no prior records for any offence. For the offence of disobeying no parking signs (including in school zones),[24] over 40% of offenders

19. JIRS Local Court Statistics.
20. Includes s 10 dismissal and s 10 with bond.
21. Includes s 10 dismissal and s 10 with bond.
22. JIRS Local Court Statistics.
23. *Road Rules 1998* (NSW) r 167.
24. Ibid r 168.

contesting a matter received a fine; and of those who received a s 10 order, the majority (79–93%) were first offenders.[25]

Use of Bonds and Non-Conviction Orders in relation to companion animal offences

3.34 The Council has also reviewed JIRS statistics for offences under the *Companion Animals Act 1998* (NSW) that had 50 or more cases in the NSW Local Court between July 2005 and June 2009. As illustrated in Table 6 below, the majority of contested cases resulted in the imposition of a fine, and the proportion of s 10 orders imposed ranges from 8% to 37% of the total number of cases involving the selected offences. In addition, the vast majority of s 10 orders in these cases were imposed on first offenders.

Table 6: JIRS statistics—sentences for companion animal offences in the NSW Local Court with 50 or more cases between July 2005 and June 2009[26]

Offence under the *Companion Animals Act* 1998 *(NSW)*	Maximum penalty	Total number of cases	Fine only imposed		s 10 order imposed[27]		First offenders who received s 10 orders[28]	
			Number	% of total cases	Number	% of total cases	Number	% of s 10 orders
Fail to register companion animal by 6 months old—not dangerous dog (s 9(1))	50 penalty units	167	115	68.9	49	29.3	34	69.4
Fail to comply with notice to register animal—not dangerous dog (s 10B)	3 penalty units	57	40	70.2	15	26.3	11	73.3
Own/in charge dog uncontrolled in public place— not dangerous dog (s 13(2))	10 penalty units	435	273	62.8	159	36.6	124	78
Own/in charge dog which attacked person or animal—not dangerous dog (s 16(1))	50 penalty units	466	373	80	76	16.3	64	84.2
Own/in charge dog which attacked person or animal—dangerous dog (s 16(1))	300 penalty units	133	118	88.7	14	10.5	12	85.7
Owner fail to comply with dangerous dog control requirements—unspecified (s 51(2))	150 penalty units	61	54	88.5	5	8.2	2	40

25. It should be noted that JIRS statistics only capture *contested* cases and exclude all offenders who paid the fine without contesting an infringement notice—therefore the number of offenders who received a fine is significantly greater than that shown in the JIRS statistics.
26. JIRS Local Court statistics.
27. Includes s 10 dismissal and s 10 with bond.
28. Includes s 10 dismissal and s 10 with bond.

Consistency Among NSW Local Court Locations in the Use of Non-Conviction Orders and Bonds

3.35 Table 10 at Appendix C shows the number of bonds and non-conviction orders imposed by individual Local Court locations between 2004 and 2008.[29]

3.36 BOCSAR's report on the impact of the Guideline Judgment notes that, prior to the promulgation of the Guideline Judgment, there were substantial differences between Sydney and non-Sydney court locations in the use of s 10 orders for PCA offences.[30]

3.37 For high-range PCA matters, this disparity declined dramatically following the Guideline Judgment, however, for mid-range and low-range PCA offences, the change was not as drastic.[31] For all three levels of PCA offences, offenders in non-Sydney court locations were still more likely to receive a non-conviction order in the two years following the Guideline Judgment than their counterparts in Sydney court locations.[32]

3.38 It was suggested that one reason for this difference in outcome may be the absence of viable alternative transport options in many NSW country and regional areas, which may lead to a high use of non-conviction orders in an attempt to avoid mandatory licence disqualification. The Guideline Judgment specifically provides that the absence of viable alternative transport may provide a good reason for reducing the automatic period of disqualification.[33]

3.39 Although BOCSAR's report indicates that non-Sydney based court locations are more likely to use non-conviction orders for PCA offences, this is not the case across all offences.

3.40 For example, Figures 4 and 5 below show that for the offence of 'Drive whilst disqualified', s 10 orders constituted 8% of total penalties imposed in Sydney locations, but only 4% in non-Sydney locations.[34]

29. NSW Bureau of Crime Statistics and Research, *Unpublished statistics* (2009).
30. Ibid, 4, 7–8.
31. Ibid.
32. Ibid, 5.
33. *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 Concentration of Alcohol Under Section 9(4) of the Roads Transport (Safety and Traffic Management) Act 1999 (No. 3 of 2002)* [2004] NSWCCA 303.
34. NSW Bureau of Crime Statistics and Research, *Unpublished statistics* (2009), with analysis carried out by the Council.

Figure 4: Selected penalties for Drive whilst disqualified: NSW Local Court, Sydney locations (2000–2009)

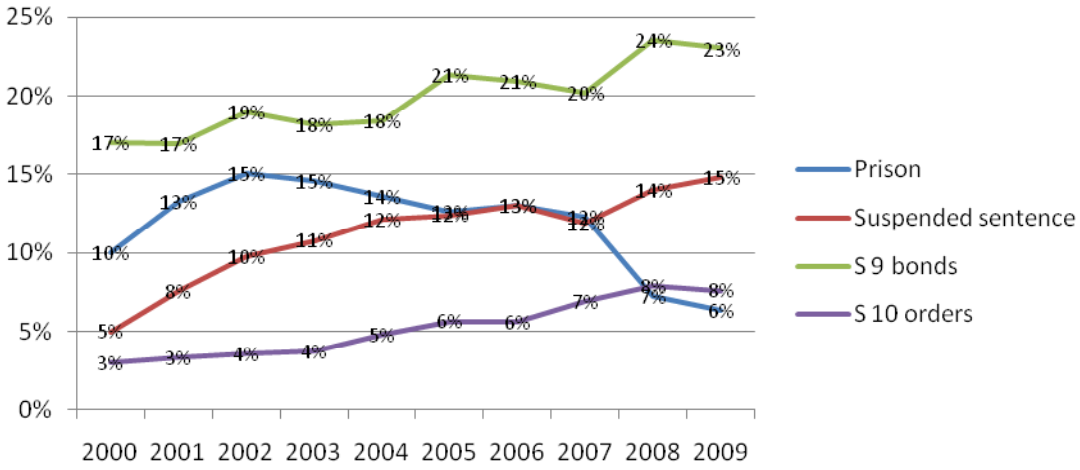
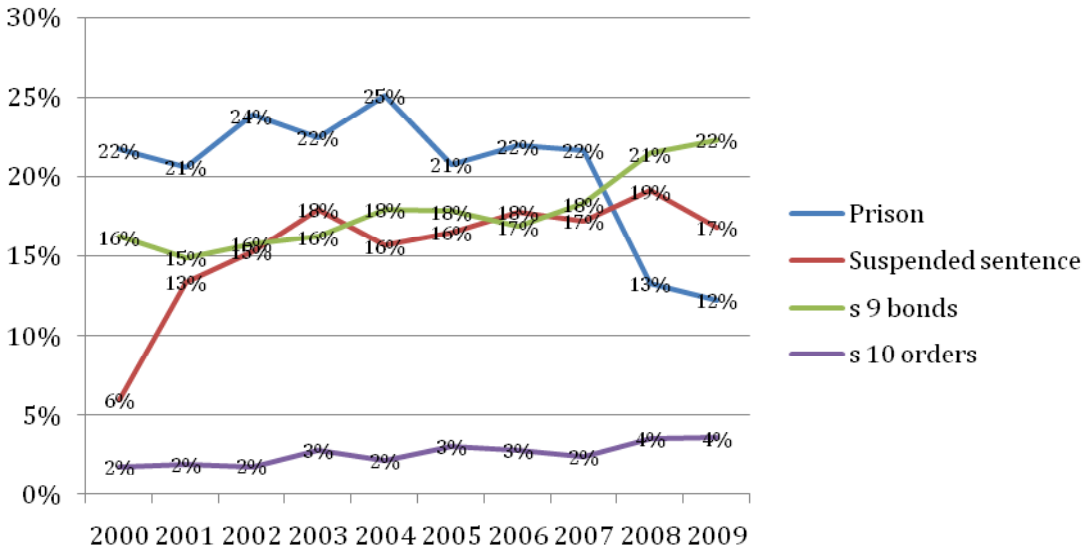


Figure 5: Selected penalties for Drive whilst disqualified: NSW Local Court, Non-Sydney locations (2000–2009)



3.41 BOCSAR's 2008 Bulletin, '*Does a lack of alternatives to custody increase the risk of a prison sentence?'* noted the concern that magistrates and judges in remote areas may be constrained to more severe sentencing options, due to a lack of the services and programs necessary to support community-based sentencing options.[35]

35. NSW Bureau of Crimes Statistics and Research, *Does a lack of alternatives to custody increase the risk of a prison sentence?*, Crime and Justice Bulletin 111 (2008).

3.42 BOCSAR's analysis showed that, in absolute terms, offenders in remote areas were more likely to receive a prison sentence than those in metropolitan areas. However, when controlling for other factors which may contribute to a more severe sentence,[36] BOCSAR found that defendants in remote areas are not treated more harshly and that, in fact, offenders in remote and regional areas were less likely to receive a prison sentence.[37]

3.43 The variations between NSW Local Court locations in the use of s 10 orders are evident from Appendix C. As noted by the Law Society of NSW, further research and statistical analysis would be required in order to determine whether these differences are systemic, or whether they are a result of variations in the circumstances of individual cases.[38]

Consistency in relation to conditions imposed

3.44 The Council was unable to obtain statistics in relation to the specific conditions imposed on orders.

3.45 However, the Council notes the submission of the Chief Magistrate, which includes a table outlining the availability of intervention and diversionary programs at NSW Local Court locations. This table is attached at Appendix D.

3.46 It is evident from this table that there is a large discrepancy between Local Court locations in relation to the availability of diversionary and rehabilitative programs, which may impact on the ability of Magistrates in those locations to attach a condition requiring participation in an intervention program or other rehabilitation program, to a bond under ss 9 or 10.[39]

Reasons for Magistrate decisions

3.47 As discussed in Chapter 5,[40] decisions in the Local Court are typically given on an ex tempore basis. In such matters, reasons for sentencing decisions are evident from the transcript, which is available on request.

---

36. Ibid, 2. For example, age, sex, number of prior court appearances, whether the offender had been previous sentenced to prison, etc.
37. NSW Bureau of Crime Statistics and Research, *Does a lack of alternatives to custody increase the risk of a prison sentence?*, Contemporary Issues in Crime and Justice Bulletin 111 (January 2008).
38. Submission 16: Law Society of NSW, 3.
39. This was confirmed by Magistrate Evans of Kempsey Local Court, who advised the Council that lack of available programs and services in the Kempsey area to support a conditional s 10 order has limited the Court's ability to make such an order.
40. Chapter 5, [5.55].

3.48 In the absence of evidence that the use of ss 9 and 10 orders is disproportionate compared to other sentencing options, the Council did not embark on a large-scale review of court transcripts.

3.49 Such a review may be warranted in the future if the research foreshadowed in paragraph 3.43 above is conducted and if it indicates that variations amongst court locations in the use of ss 9 and 10 orders cannot be explained by variations in the circumstances of particular cases.

Compliance with Bond Conditions

3.50 In 2008–09, Corrective Services NSW supervised 455 offenders on supervised good behaviour bonds under s 10. Applications for breach were made in respect of 37 offenders and the s 10 order was revoked for 20 offenders (4.2% of supervised offenders on s 10 bonds).[41]

3.51 In relation to s 9 bonds, 9,721 offenders were supervised under a s 9 bond during 2008/09. Applications for breach were made in respect of 1,957 offenders and 1,435 offenders had the s 9 order revoked (14.8% of supervised offenders on s 9 bonds).[42]

3.52 Of those offenders who received a s 9 bond in 2008, 22.1% had re-offended before the expiry of the bond.[43]

3.53 Only 7.7% of offenders receiving a s 10 bond in 2008 had re-offended before the expiry of the bond.[44]

Re-Offending Rates Following the Imposition of Non-Conviction Orders and Bonds

3.54 Of those offenders who received either a s 9 or a s 10 penalty for their principal offence in 2008, 23.1% had re-offended within two years of receiving the penalty.[45]

3.55 The Council notes that this is below the rate of re-offending (within two years) for all adult offenders convicted in 2008, which was 26.3%.[46]

---

41. Revocations data provided by Corrective Services NSW.
42. Ibid.
43. NSW Bureau of Crime Statistics and Research, *Unpublished statistics* (2011). This figure only includes those bonds that had expired as at March 2011.
44. Ibid.
45. Ibid.
46. NSW Bureau of Crime Statistics and Research, *Adult and juvenile offenders who reoffended within 24 months of a previous conviction* (2000-2010).

3.56 Re-offending rates differed according to the type of order made. For those receiving s 9 bonds, the percentage of offenders re-offending within 2 years was 30.8%. For s 10 bonds, the rate was 13.6% and for s 10 dismissal, it was 21.4%.

Summary of the Use of Bonds and Non-Conviction Orders in NSW Higher Courts

3.57 Table 12 at Appendix E shows the number and percentage of cases where a s 9 bond or a s 10 order was imposed as a penalty in the higher courts in 2008.

3.58 As can be expected, the incidence of these penalties being imposed in the higher courts was low.

3.59 The offences for which s 10 orders were imposed in the higher courts include; property damage (8.7% of penalties imposed), public order offences (4.7%), sexual assault offences (1.9%), sexual offences against children (2.7%), theft and related offences (2.4%), weapons and explosive offences (2%), illicit drug offences (0.7%), assault offences (0.5%) and homicide related offences (0.9%).

3.60 The offences for which s 9 bonds were imposed include; public order offences (21.9% of penalties imposed), property damage (13%), assault (11.4%), theft and related offences (10.8%), sexual assault and related offences (9%), sexual offences against children (9.9%), illicit drug offences (7.6%), deception and related offences (6.5%), burglary and related offences (5.1%), robbery (2.4%) and homicide related offences (0.9%).

4. SUMMARY OF SUBMISSIONS

Introduction

4.1 In this chapter we summarise the submissions received concerning the use of good behaviour bonds and non-conviction orders as sentencing options in the Local Court.

4.2 The majority of submissions did not suggest that either good behaviour bonds or non-conviction orders are being used disproportionately or inappropriately, and considered that both of these sentencing options are necessary to deal with the range of matters that come before the courts.[1] The key submissions that considered that non-conviction orders were *not* being used appropriately were received from six NSW Local Councils, the Pedestrian Council of Australia and the Australian Institute of Local Government Rangers, and were mainly concerned with parking offences, or companion animal offences.

4.3 Some stakeholders cited recent statistics[2] that suggested that bonds and non-conviction orders have not been used disproportionately,[3] and principally were used for offences at the lower end of the scale of seriousness.[4]

4.4 The Chief Magistrate of the Local Court observed that any misperceptions as to the frequency of the use of ss 9 and 10 orders derived from the fact that:

- sentencing involves a complex combination of competing considerations;

1. Submission 2: Community Relations Commission; Submission 3: Director of Public Prosecutions of NSW; Submission 8: Illawarra Legal Centre Inc.; Submission 9: The Shopfront Youth Legal Centre; Submission 11: Public Interest Advocacy Centre; Submission 13: His Honour G. Henson, Chief Magistrate of the Local Court of NSW; Submission 13A: His Honour G. Henson, Chief Magistrate of the Local Court of NSW (supplementary submission); Submission 16: Law Society of NSW; Submission 17: Department of Ageing, Disability and Home Care.
2. Judicial Commission of NSW, *Common Offences in the NSW Local Court: 2007,* Sentencing Trends & Issues 37 (2008).
3. Submission 3: Director of Public Prosecutions NSW, [2], [4]; Submission 11: Public Interest Advocacy Centre, 3, 6–7; Submission 16: Law Society of NSW, 1, 6.
4. Submission 3: Director of Public Prosecutions NSW, [2], [4].

- legislative and policy initiatives are added to the sentencing exercise, which further entrench the risk of the community perception being distorted;
- the Local Court deals with a great volume of criminal cases; and
- there is a skewed view of the relative seriousness of particular offences for which s9 and s10 orders may be made.[5]

4.5 The Chief Magistrate of the Local Court advised that in his experience, breach of the conditions attached to a bond imposed pursuant to s 10(1)(b) of the Act has been relatively infrequent. He noted that this was unsurprising because the vast majority of people dealt with under s 10 were first offenders who have been assessed as unlikely to re-offend.[6]

4.6 The NSW Director of Public Prosecutions (DPP) acknowledged that there are criticisms of the process in relation to ss 9 and 10 orders, and that there might be a perception among victims, and among, some members of the public, that such orders are too lenient.[7] However, it was submitted that ss 9 and 10 orders are beneficial to both the offenders and the community because they are cost effective, and appropriate for a range of offences, especially for offenders with good prospects of rehabilitation.[8]

4.7 The Law Society of NSW submitted that the number of appeals, compared to the number of s 10 orders imposed, indicated that s 10 orders are being used appropriately.[9]

Need for Judicial Discretion

4.8 Several stakeholders submitted that the existence of a judicial discretion to impose ss 9 and 10 orders was essential and should not be fettered, because:

- magistrates are very experienced in sentencing and deal with a very large volume of criminal work;[10]
- sentences are imposed in accordance with legislative requirements, and the instinctive synthesis approach ensures that the sentencers discretion is preserved and is utilised;[11] and

5. Submission 13: His Honour G. Henson, Chief Magistrate of the Local Court of NSW, 4.
6. Ibid, 3.
7. Submission 3: Director of Public Prosecutions NSW, [7].
8. Ibid, [5].
9. Submission 16: Law Society of NSW, 2.
10. Submission 3: Director of the Public Prosecutions NSW, [7].
11. Ibid, [7].

- any unwarranted exercise of discretion can be adequately addressed by the appeal mechanism under part 3 of the *Crimes (Appeal and Review) Act 2001* (NSW),[12] or by an application for a guideline judgment under s 37 of the Act.[13]

4.9 Additionally, some stakeholders specifically addressed the need for judicial discretion to impose non-conviction orders,[14] on the basis that:

- criminal records have far reaching consequences on a person's career and employment opportunities,[15] as well as his or her capacity to travel overseas;[16]
- disqualification from holding a drivers licence in a rural area, where there is no access to public transport, is a significant social consequence of a conviction;[17] and
- such orders are sometimes necessary to ensure a just result in individual cases.[18]

4.10 The DPP asserted that the existing legislative criteria for the imposition of bonds and non-conviction orders, based on the nature of the offence and the offender's background, provided 'a sensible and appropriate framework'; and that in the interest of flexibility, there should not be any additional criteria specified.[19]

12. Part 3 of the *Crimes (Appeal and Review) Act 2001* (NSW) deals with appeal from the Local Court to the District Court.
13. Submission 13: His Honour G. Henson, Chief Magistrate of the Local Court of NSW, 4. Under s 13 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), the NSW Court of Criminal Appeal may give a guideline judgment on the application of the Attorney General.
14. Submission 3: Director of Public Prosecutions NSW, [7]; Submission 8: Illawarra Legal Centre Inc, 1; Submission 9: The Shopfront Youth Legal Centre, 1–2; Submission 13: His Honour G. Henson, Chief Magistrate of the Local Court of NSW, 4; Submission 16: Law Society of NSW, 2, 6.
15. Submission 8: Illawarra Legal Centre Inc, 1; Submission 13: His Honour G. Henson, Chief Magistrate of the Local Court of NSW, 2. The Illawarra Legal Centre provided examples showing that the discretion to impose a s 10 order is necessary in appropriate circumstances. One example involved a person suffering from a mental illness who had recently started on new medication. Despite his mental illness and the fact that he had no criminal record, he was issued with a substantial on-the-spot fine for throwing an apple at a train. The matter was dismissed under s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) on appeal. Another case study involved a public housing tenant who suffered from various illnesses and had been charged with possession of marijuana, a conviction for which would have resulted in his eviction from the property. He received a non-conviction order on a good behaviour bond, which allowed him to successfully fight off the landlord's attempted eviction: Submission 8: Illawarra Legal Centre Inc, 1.
16. Submission 13: His Honour G. Henson, Chief Magistrate of the Local Court of NSW, 2.
17. Ibid, 2.
18. Submission 9: The Shopfront Youth Legal Centre, 1; Submission 16: Law Society of NSW, 2.
19. Submission 3: Director of Public Prosecutions NSW, [6]. The Law Society of NSW also noted that the main advantage of bonds are their flexibility, as well as their deterrent and rehabilitative value: Submission 16: Law Society of NSW, 4.

4.11 There was significant support otherwise for the view that judicial discretion plays an important role in sentencing,[20] as well as opposition to the creation of further restrictions on the discretion to impose non-conviction orders.[21]

Offenders with Complex Needs

4.12 Some stakeholders emphasised the benefits of using bonds and non-conviction orders to deal with vulnerable and disadvantaged groups. The Law Society of NSW submitted that such sentencing options are useful for dealing with young people, disadvantaged people, people with an intellectual disability and people with mental health problems, on the basis that:

- bonds recognise the seriousness of the offence while providing the offender with an opportunity, by demonstrated good behaviour, to avoid more serious sentencing options;
- bonds are flexible as they allow the courts to impose a wide range of conditions that are designed to address the offending behaviour; and
- non-conviction orders help to achieve a just outcome when judicial discretion is unduly constrained, for example, where a conviction would have resulted in a mandatory licence disqualification that would have serious adverse consequences for an offender, in terms of his or her employment and personal responsibilities.[22]

4.13 The Department of Ageing, Disability and Home Care (DADHC) noted that people with a disability are at an increased risk of further contact with the criminal justice system due to the lack of:

- early intervention or prevention programs;
- adequate access to support mechanisms;
- appropriate responses to their specific needs;
- systematic approaches to assessment; and
- provision of community support services.

20. Submission 3: Director of Public Prosecutions NSW, [7]; Submission 8: Illawarra Legal Centre Inc, 1; Submission 9: The Shopfront Youth Legal Centre, 1; Submission 13: His Honour G. Henson, Chief Magistrate of the Local Court of NSW, 4; Submission 14: City of Sydney Council, 1; Submission 16: Law Society of NSW, 2.
21. Submission 3: Director of Public Prosecutions NSW, [7]; Submission 8: Illawarra Legal Centre Inc, 1; Submission 9: The Shopfront Youth Legal Centre, 1–2; Submission 13: His Honour G. Henson, Chief Magistrate of the Local Court of NSW, 4; Submission 16: Law Society of NSW, 2, 6.
22. Submission 16: Law Society of NSW, 5.

4.14 DADHC submitted, accordingly, that people with a disability may benefit from the use of ss 9 and 10 orders because such mechanisms help to:

- address the offending behaviour;
- minimise their future contact with the criminal justice system; and
- avoid the risk of offenders with a disability being victimised in prison, since they are not as well equipped as other inmates to apply successfully for early release and parole.[23]

Particular Offences Option

4.15 It was suggested that s 10 orders are particularly appropriate for certain types of offences, including:

- inherently trivial offences—for example, possession of a small amount of prohibited drug for personal use,[24] especially if committed by first offenders;[25] minor traffic offences (eg., low range PCA),[26] and shoplifting by first offenders of property with little intrinsic value;[27]
- offences that are disproportionately committed by disadvantaged people, or for which disadvantaged people are disproportionately apprehended and charged, such as offensive language and goods in custody;[28] and
- offences for which there is an excessive legislative constraint on judicial discretion— for example, traffic offences that have lengthy mandatory disqualification periods, a conviction for which would have serious adverse consequences for the offender in terms of his or her employment and personal responsibilities.[29] It was submitted that in cases where young people were charged with driving while unlicensed or suspended, usually due to fine default—which was mostly a direct consequence of poverty—a s 10 order would be in the interests of justice, in encouraging the rehabilitation of young offenders, and ultimately, promoting road safety.[30]

4.16 It was suggested in some submissions that s 10 orders might not be appropriate for certain offences, including offences related to drink driving,[31] sexual assault,[32] domestic violence,[33] dog attacks on humans and dogs chasing children.[34]

---

23. Submission 17: Department of Ageing, Disability and Home Care, 2.
24. Submission 9: The Shopfront Youth Legal Centre, 1.
25. Submission 13: His Honour G. Henson, Chief Magistrate of the Local Court of NSW, 1.
26. Ibid.
27. Ibid, 2.
28. Submission 9: The Shopfront Youth Legal Centre, 1.
29. Submission 16: Law Society of NSW, 5; Submission 9: The Shopfront Youth Legal Centre, 2.
30. Submission 9: The Shopfront Youth Legal Centre, 2.
31. Submission 1: Victims Advisory Board, 1.

4.17 The RTA raised a number of concerns in relation to non-conviction orders as a sentencing option in relation to traffic offences.[35] In particular, the RTA noted that:

- the removal of the mandatory application of demerit points in cases where a s 10 dismissal had been ordered, allows offenders to escape punishment for the offence;
- consideration should be given to the possible introduction of alternative sanctions such as a 'good behaviour licence' for a 12 month period; and
- consideration should be given to mandating the Alcohol Interlock Program for all persons found guilty of serious drink driving offences.[36]

Longer Term Consequences

4.18 PIAC submitted that the benefits of s 10 orders are being seriously undermined by legislative provisions (of the kind noted in the previous chapter), that treat non-conviction orders as convictions for a range of purposes.[37] In particular, PIAC was concerned that under s 17 of the *Legal Profession Act 2004* (NSW), a person who received a s 10 order for a serious offence cannot be an associate of a legal practice without permission from the relevant authority, which:[38]

- imposes a significant burden on the individual and the legal practitioners to go through a lengthy hearing process to obtain permission;
- creates difficulty for the individual because he or she may not recall the precise nature of the orders, that may have been imposed some time ago, and that do not appear on the individual's criminal record;
- constitutes a discrimination on the basis of the prior criminal record, which is against the principle of rehabilitation of offenders; and
- undermines the purpose of s 10, which is to give offenders a second chance.[39]

32. Ibid.
33. Ibid.
34. Submission 12: The Australian Institute of Local Government Rangers (inc.), 1.
35. Submission 22: NSW Roads and Traffic Authority, 2.
36. The Alcohol Interlock Program is a program that enables drivers convicted of certain major alcohol-related offences to continue driving after a reduced disqualification period if they obtain an interlock driver licence and participate in the program. The alcohol interlock only allows the car's ignition to start if the driver passes a breath test.
37. Submission 11: Public Interest Advocacy Centre, 7–11.
38. Ibid, 7.
39. Submission 11: Public Interest Advocacy Centre, 8.

Local Council Concerns

4.19 Several local councils, the Australian Institute of Local Government Rangers (inc.) and the Pedestrian Council of Australia submitted that s 10 orders have been overused,[40] particularly for minor offences[41]—including parking offences[42] and matters under the *Companion Animals Act 1998* (NSW).[43] Concerns were expressed that multiple s 10 orders may be issued to the same person at the same time,[44] or on numerous occasions for the same offence,[45] even where the offender fails to attend court.[46]

4.20 In relation to parking offences (and in particular, parking in a school no-stopping zone),[47] it was submitted that some magistrates regarded these offences as trivial in themselves, rather than considering, objectively, whether the offence was 'trivial in nature', as is required under s 10(3)(b) of the Act.[48] Concern was expressed that s 10 orders were being imposed despite the fact that some drivers had previous parking issues,[49] or had re-offended on numerous occasions; [50] and even in cases where it could be seen that there was strong evidence against the offender.[51] Several submissions noted that some magistrates have expressly indicated their contempt for parking matters prior to a hearing—by stating that all parking matters would be dismissed without hearing.[52]

4.21 Local councils argued that the frequent use of s 10 orders, particularly in relation to parking offences:

- devalues the punishment for the offence;[53]

40. Submission 4: Wingecarribee Shire Council, 1; Submission 12: The Australian Institute of Local Government Rangers (inc.), 1.
41. Submission 15: North Sydney Council, 1.
42. Submission 6: Camden Council, 1; Submission 10: Kogarah City Council 1–2, Submission 12: The Australian Institute of Local Government Rangers (inc.), 1; Submission 18: Pedestrian Council of Australia, 1.
43. Submission 6: Camden Council, 1.
44. Submission 5: Ballina Shire Council, 1; Submission 6: Camden Council, 2; Submission 12: The Australian Institute of Local Government Rangers (inc.), 1; Submission 15: North Sydney Council, 2.
45. Submission 12: The Australian Institute of Local Government Rangers (inc.), 1.
46. Submission 18: Pedestrian Council of Australia, 1.
47. Submission 6: Camden Council, 1–2, Submission 10: Kogarah City Council, 1; Submission 12: The Australian Institute of Local Government Rangers (inc.), 1.
48. Submission 7: Leichhardt Council, 2.
49. Submission 10: Kogarah City Council 2.
50. Submission 15: North Sydney Council, 2; Submission 12: The Australian Institute of Local Government Rangers (inc.), 1.
51. Submission 6: Camden Council, 2; Submission 10: Kogarah City Council, 1.
52. Submission 10: Kogarah City Council, 1; Submission 12: The Australian Institute of Local Government Rangers (inc.), 1; Submission 14: City of Sydney Council, 1.
53. Submission 15: North Sydney Council, 1.

- encourages people to elect to contest matters with the expectation that they are highly likely to receive a s 10 order;[54]
- sends a strong message to community that there is no need to comply with the legislation;[55]
- discourages local councils from defending most parking-related matters[56] or pursuing fines where the person elects to go to court;[57]
- perpetuates the cycle of offending, followed by court contest and charge dismissal (especially in relation to those matters that do not result in demerit points);[58]
- undermines the credibility of the criminal justice system;[59]
- increases the workload of the courts;[60] and
- imposes a significant burden on the public purse in terms of staff costs and legal costs and expenses,[61] since it is usual to make no order as to court costs, or professional costs, when a s 10 order is imposed.[62]

4.22 In addition, it was submitted that, in cases where s 10 orders might be imposed, there was no opportunity for the magistrate to verify the defendant's explanation for the offence,[63] because of the large number of cases in the Local Court.[64] One local council noted that magistrates often used the reason that the offender was not aware of the legislation and had made an honest mistake, to justify a s 10 disposal.[65] It was submitted that, where there has been any change in legislation, local councils would need to undertake numerous community education programs to inform the community of the changes, and to issue warnings prior to authorising the issue of infringement notices.[66]

4.23 One local council suggested that there is a degree of inconsistency between magistrates in applying s 10, with some magistrates being more lenient than others.[67] It was argued that there have been instances where the judicial discretion

54. Submission 4: Wingecarribee Shire Council, 1; Submission 6: Camden Council, 3.
55. Submission 6: Camden Council, 1.
56. Submission 10: Kogarah City Council, 1.
57. Submission 15: North Sydney Council, 1.
58. Ibid, 2.
59. Submission 12: The Australian Institute of Local Government Rangers (inc.), 1.
60. Ibid, 2; Submission 15: North Sydney Council, 2.
61. Submission 5: Ballina Shire Council, 1–2; Submission 6: Camden Council, 1; Submission 7: Leichhardt Council, 2; Submission 15: North Sydney Council, 1.
62. Submission 7: Leichhardt Council, 2.
63. Submission 6: Camden Council, 2; Submission 7: Leichhardt Council, 2.
64. Submission 7: Leichhardt Council, 2.
65. Submission 10: Kogarah City Council, 1.
66. Submission 12: The Australian Institute of Local Government Rangers (inc.), 2.
67. Submission 10: Kogarah City Council, 1.

to impose a s 10 order has not been exercised appropriately because there was no consideration of the facts and circumstances of the case.[68] For example, it was submitted that some magistrates have indicated that they would take a blanket approach to the issue of s 10 dismissals for particular types of offences, such as parking offences committed by taxi drivers.[69]

Other Comments

4.24 The Public Interest Advocacy Centre (PIAC) submitted that ss 9 and 10 should be used more often, and that existing diversionary programs should be extended to include other offences and appropriate programs should be established to address the needs of specific offender groups.[70] In particular, it submitted that:

- the Cannabis Cautioning Scheme, which currently only deals with the possession of cannabis, should be extended to include other minor drug possession matters;
- the Magistrates Early Referral into Treatment (MERIT) program, which is currently restricted to adults with a drug problem, should be extended to include treatment for people with other addictive problems, including alcohol or gambling problems; and
- effective diversionary options suitable and accessible to female offenders should be established and maintained, in order to reduce the incidence of short term incarceration of women and its disruptive effect on them and their families.[71]

4.25 The Chief Magistrate of the Local Court submitted that the Youth Justice Conferencing programme should be extended to include young adult offenders, on the basis that:

- the age of 18 is an arbitrary cut-off point for assessing a person's maturity;
- the programme is particularly capable of applying to and improving outcomes within Aboriginal communities and within country communities generally; and that
- the use of diversionary programmes may reduce the frequency of the use of s 10 orders.[72]

4.26 The NSW Police Force, however, submitted that there are already sufficient sentencing options available to judicial officers, including diversionary options. It

68. Submission 14: City of Sydney Council, 1.
69. Ibid.
70. Submission 11: Public Interest Advocacy Centre, 3. The Public Interest Advocacy Centre submitted that there was no evidence that ss 9 and 10 have been used disproportionately and there should not be further restrictions on their use.
71. Ibid, 3–6.
72. Submission 13: His Honour G. Henson, Chief Magistrate of the Local Court of NSW, 5.

suggested that the provision of further sentencing options might unnecessarily add to the complexity of the sentencing task.[73]

4.27 On a separate issue, the NSW Police Force submitted that a short (for example, 3 or 6 month) sentence of imprisonment, that has been suspended, might not provide sufficient time for a good behaviour bond to take effect, and that a s 9 bond would be a more effective order in such cases.[74] The NSW Police Force further submitted that, in such circumstances, the court should be able to impose a good behaviour bond that exceeds the length of the suspended sentence.[75]

4.28 The Council is however of the view, at this point, that a s12 suspended sentence involves a significantly more severe penalty than a s 9 bond within the sentencing hierarchy, and should not be considered as an alternative to a s 9 bond. The use of suspended sentences will be considered by the Council in a separate report.

4.29 In summary, while a significant number of stakeholders are supportive of the use of ss 9 and 10 orders, several options for reform were identified which are considered in Chapter 5.

73. Submission 19: NSW Police Force, 3.
74. Ibid.
75. Ibid.

5. OPTIONS FOR REFORM

Good Behaviour Bonds

5.1 In this chapter we identify the options that arise for consideration, based on the literature and the submissions that the Council has received.

Option 1: Mandate or specify the conditions that may be attached to a good behaviour bond by legislation

5.2 As discussed above, a mandatory condition to be of 'good behaviour' attaches to s 9 bonds, and to conditional discharges under the Act. In addition, the court may also attach a condition under s 10(1)(c) of the Act requiring the offender to agree to participate in an intervention program and to comply with any intervention plan arising from it. However, the Act does not contain examples of other conditions. An option for reform is to amend the Act to insert examples of conditions that may be attached to bonds, as recommended by the ALRC in the context of sentencing federal offenders. If this was to occur then, as noted earlier, none of these conditions could amount to punishment such as the payment of a sum of money,[1] or a requirement that the offender perform community service work.[2]

5.3 In its 2006 report on the sentencing of federal offenders, the Australian Law Reform Commission (ALRC) considered whether federal sentencing legislation should continue to require an offender, who is subject to a conditional release order, to be

1. For the reasons identified in *R v Ingrassia* (1997) 41 NSWLR 447.
2. *Crimes Sentencing Procedure Act 1999* (NSW) s 95.

of 'good behaviour'. Noting the criticism that the concept of 'good behaviour' is ill defined, the ALRC nevertheless considered that it is always appropriate to impose such a condition when an offender is released back into the community. It considered that there should not be any other mandatory conditions, attaching to a conditional release order, as no other condition is likely to be universally appropriate or applicable.[3]

5.4 The ALRC was of the view, instead, that the legislation could usefully provide some guidance, without restricting judicial discretion, by providing examples of the types of conditions that could be attached to conditional release orders, and of the circumstances in which they could be attached.[4] It therefore recommended that:

> Federal sentencing legislation should grant a court a broad discretion to determine the conditions that may be imposed on a federal offender when it discharges an offender without recording a conviction, releases an offender after recording a conviction, or wholly or partially suspends a sentence of imprisonment. In addition to the mandatory condition that the offender be of good behaviour for a specified period of time, a court should be able to impose any of the following conditions:
>
> (a) that the offender undertake a rehabilitation program;
>
> (b) that the offender undergo specified medical or psychiatric treatment; or
>
> (c) that the offender be subject to the supervision of a probation officer and obey all reasonable directions of that officer.[5]

5.5 The Council is of the view that s 9 bonds and s10 discharge orders constitute important sentencing options. It is not satisfied from the statistics, the submissions received, or from its review of the case law, that there is any need to specify any additional conditions that should be imposed, or might be imposed in addition to those for which the Act currently provides or permits. The Council notes that, as outlined in Chapter 2 above[6], Part 8 of the Act currently allows a court to impose the kinds of conditions envisaged by the ALRC, as part of a s 9 bond or as part of a s 10 discharge order.

Option 2: Improve the availability and operation of bonds in rural and remote areas

5.6 If the continuation of s9 bonds and s10 orders, as sentencing options is supported, then an issue arises as to their availability in rural and remote locations in NSW. While bonds are generally available in all NSW courts, *supervised* bonds or

3. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC Report 103 (2006) [7.90]–[7.91], [7.95].
4. Ibid, at [7.96].
5. Ibid, Recommendation 7–10.
6. See Chapter 2 at [2.2], [2.23]-[2.33].

intervention discharge conditions made under s 10(1)(c) of the Act may not be accessible in some remote areas due to insufficient resources,[7] including:

- probation and Parole staffing needs;
- the range, frequency, appropriateness and accessibility of programs provided by government agencies as well as non-government organisations;
- the availability of transport to allow offenders to attend programs and services, particularly those incorporating cultural aspects to address the needs of Aboriginal offenders; and
- the availability of support for disadvantaged groups.[8]

5.7 In its report on community based sentencing options for rural and remote areas and disadvantaged populations, the Legislative Council Standing Committee on Law and Justice expressed concern that supervised bonds were not uniformly available throughout NSW, and that there was an insufficient range of programs to meet the needs of young offenders, Aboriginal offenders and offenders with an intellectual disability or mental illness.[9] The Committee recommended:

> That the Department of Corrective Services:
>
> - identify the areas of New South Wales where supervised bonds are unavailable due to a lack of Probation and Parole Service resources.
> - take steps to extend supervision, or a modified form of supervision, to all areas of New South Wales.
> - work with government and non-government agencies to extend the availability of appropriate and accessible programs to meet offenders' needs in rural and remote areas. In particular, consideration should be given to programs addressing domestic violence, drug and alcohol and driving related offending behaviour.
> - work with both government and non-government agencies in the disability services field to identify and develop ways to improve support services to assist offenders with an intellectual disability or a mental illness to comply with the conditions of supervised bonds.[10]

5.8 In the Government's response to the report, it noted that, while there are no areas where supervised bonds are unavailable, not all programs are available from all Community Offender Services District Offices. This may result in a situation where

---

7. Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Inquiry into Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations*, Report 30 (2006) [5.51]–[5.54]. See also NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less* (2004) 64.
8. Ibid.
9. Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Inquiry into Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations*, Report 30 (2006) [5.70].
10. Ibid, Recommendation 23.

an offender may not receive a supervised bond because a particular program essential to the supervision of that offender is unavailable. Additionally, it noted that the availability of supervision may be reduced due to time, distance, workload and scattered population, and that resource limitations prevent the provision of all programs at all District Offices and all clients to an equal level.[11]

5.9 The Council understands that, since 2007, Corrective Services NSW has also provided additional resources to Community Offender Services through the creation of additional Probation and Parole Officer positions, and the redeployment of resources from correctional centres to offenders in the community.[12]

5.10 The Committee also expressed concern about the impact of intensive policing in rural and remote areas on the ability of offenders to comply with bond conditions. The Committee noted that in such areas:

- there is a higher police to residents ratio;
- offenders are more likely to be known to the police; and
- Aboriginal people are even more likely to come into contact with the police;

than in metropolitan areas, because they form a significant proportion of rural and remote communities, and have a cultural tendency to use public space.[13]

5.11 It therefore recommended that the Government undertake research to determine the outcomes for families and communities subject to intensive policing in the context of bond supervision in rural and remote areas of NSW.[14] In the Government's response to the report, it noted its intention to await the outcome of the review of suspended sentences.[15] The Council notes that this review is currently before it.

5.12 It is worth noting that BOCSAR in its 2008 study '*Community supervision and rehabilitation: Two studies of offenders on supervised bonds*',[16] concluded firstly that offenders placed on supervised bonds are no less likely to re-offend than

---

11. Government Response to the Legislative Council Inquiry "Community based sentencing options for rural and remote areas and disadvantaged populations", 21 February 2007, 13. The Government Response is available at: http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/B09BA359E47F0703CA25714100013DF1?open&refnavid=CO4_1
12. Information provided by Corrective Services NSW, 2011. Corrective Services NSW has indicated that this is particularly evidenced in the creation of Community Psychologists and Program Facilitators; both roles are located across the state.
13. Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Inquiry into Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations*, Report 30 (2006) [5.416].
14. Ibid, Recommendation 25.
15. Government Response to the Legislative Council Inquiry "Community based sentencing options for rural and remote areas and disadvantaged populations", 21 February 2007, 14.
16. NSW Bureau of Crime Statistics and Research, *Community supervision and rehabilitation: Two studies of offenders on supervised bonds*, Crime and Justice Bulletin 112 (2008).

comparable offenders placed on bonds that do not require supervision; secondly that a large number of offenders placed on supervised bonds are not receiving the services, support and supervision required for effective rehabilitation; and thirdly that these two factors are most likely linked (that is, that the reason that offenders on supervised bonds are no less likely to re-offend than comparable offenders placed on un-supervised bonds, is because the supervision provided is not addressing the rehabilitative needs of the offenders).[17] It considered that 'there is scope for considerable improvement in the level of support and treatment provided to offenders', noting in particular the lack of services such as mental health services, drug and alcohol rehabilitation services and domestic violence services, available in rural and remote areas.

5.13 The Legislative Council Standing Committee was concerned about the difficulty some offenders experienced in understanding the meaning of the bond, to which they may become subject under ss 9, 10(1)(b) or 12, and its conditions, with the result that they may fall into unintentional breach. Despite the existence of the legislative requirement, and other processes that ensure that the courts, the Probation and Parole Service, solicitors and others explain the bond and its conditions to the offenders,[18] evidence was presented to the Committee that many offenders did not fully understand the terms of their bond. This may be due to low levels of literacy, the use of legal terminology by solicitors and court staff in explaining bond conditions, the stress of being in court, and high levels of emotion after receiving a non-custodial sentence. In relation to offenders from non-English speaking background, there was no translated information available for offenders to explain their bond conditions.[19]

5.14 Accordingly, the Committee recommended that the Attorney General and the Minister for Justice review, and undertake improvements (where necessary), to the process, within their areas of responsibility, concerning the provision of information to offenders about their obligations under a bond, including information in plain English and community languages. It also recommended that consideration be given to the feasibility of requiring offenders to attend court or a Probation and Parole Office, for a follow-up explanation of the bond requirements a week after sentencing.[20]

5.15 In its response, the Government noted the suggestion, presented in evidence to the Committee, that where the Probation and Parole Service is involved in imparting details of an offender's obligations to them at their first appointment, their

17. BOCSAR did note a number of possible reasons why these two factors may not be linked, for example BOCSAR considered that it could be argued that the benefits of supervision are hidden by the fact that those being placed on supervised orders are at higher risk of re-offending; however BOCSAR concluded that it did not consider this to be the case.
18. In accordance with s 96(1) of the *Crimes Sentencing Procedure Act 1999* (NSW).
19. Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Inquiry into Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations*, Report 30 (2006) [5.151]–[5.165].
20. Ibid, Recommendation 26.

obligations are properly impressed upon them, and that, there is an argument that it may be beneficial for all offenders sentenced to a community based sentence other than a fine to be required to attend the Probation and Parole Service several days after their court attendance for a compulsory briefing on their obligations under the sentence. The Government in its 2007 response did not provide a definitive answer to this recommendation. It noted that that creating an obligation to report for those offenders who would not otherwise have to do so, may unnecessarily increase the rates of breaching such a requirement, and that this recommendation requires further consideration.[21]

5.16 The Council understands from Corrective Services NSW that, while such compulsory attendance at the Probation and Parole Service occurs in all instances where community based orders are managed by Corrective Services NSW, there are a far greater number of unsupervised bonds (not managed by Corrective Services NSW) issued by courts than supervised bonds, and that, requiring the Probation and Parole Service to brief these offenders on their obligations, would present a considerable drain on current limited resources.[22]

Recommendations:

(1) 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*'.

Non-Conviction Orders

Option 3: Restrict the use of s 10 based on subjective circumstances of the offender

5.17 Submissions from local councils, the Australian Institute of Local Government Rangers (inc.) and the Pedestrian Council of Australia expressed concern about the imposition of s 10 orders on the same person on multiple occasions,[23] sometimes for the same kind of offence.[24] Accordingly, it was suggested that there should be a

21. *Government Response to Legislative Council Standing Committee on Law and Justice Inquiry into Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations,* 21 February 2007, 14-15. Available at: <http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/B09BA359E47F0703CA25714100013DF1?open&refnavid=CO4_1>.
22. Information provided by Corrective Services NSW, 2011.
23. Submission 5: Ballina Shire Council, 1; Submission 6: Camden Council, 2; Submission 12: The Australian Institute of Local Government Rangers (inc.), 1; Submission 15: North Sydney Council, 1; Submission 18: Pedestrian Council of Australia, 1.
24. Submission 12: The Australian Institute of Local Government Rangers (inc.), 1.

limited number of times any one person can be given a s 10 order.[25] Ballina Shire Council suggested that a person should only be given a s 10 order if he or she has not received a s 10 order before;[26] while the Pedestrian Council of Australia suggested that a s 10 order should only be available for a person who has not received such an order within the preceding five years.[27] Otherwise, it was suggested that the use of s 10 orders should be limited to first offenders,[28] or to trivial offences which did not involve potential harm to any person;[29] or to offences for which the maximum penalty is a relatively short term of imprisonment.

5.18 One commentator has however argued that any such restrictions would be problematic and would lead to the s 10 power being progressively exercised in relation to fewer and fewer offences, by reason of the trend which has seen an increase in the available maximum sentences for many offences over the years.[30] In addition, it is contended that such restrictions would offend the principle of proportionality, in that:

- the offences may be trivial despite a high prescribed maximum penalty; and
- a person should not be ineligible for charge dismissal based on his or her criminal record alone.[31]

5.19 In Chapter 2, the Council has noted various offences for which the use of s 10 orders is already either restricted or unavailable. The Council does not consider that this list should be expanded or that the use of s 10 orders should be further restricted, as suggested by several Local Councils. As discussed in Chapter 3, the statistics in relation to the use of s 10 orders do not support the suggestion that either s 10 dismissals or s 10 bonds are currently being used disproportionately or inappropriately in relation to any offences, compared with other penalty types.

5.20 The Council notes that a court may not always be aware of s 10 orders previously imposed on a particular offender. As with any other penalty type, courts are made aware of any previous s 10 orders imposed in relation to an offender by the relevant prosecuting authority at the time of the hearing of the fresh offence. Where the prosecuting authority does not inform the court of the offender's criminal antecedents, the court will not have access to that information and will therefore be unable to take that matter into account. It is therefore important for prosecuting agencies other than NSW Police, to ensure that they have processes in place to

25. Submission 5: Ballina Shire Council, 1; Submission 6: Camden Council, 2; Submission 19: NSW Police Force, 3.
26. Submission 5: Ballina Shire Council, 1.
27. Submission 18: Pedestrian Council of Australia, 3.
28. Ibid.
29. Ibid.
30. N Morgan, 'Business as Usual or a New Utopia—Non-Custodial Sentences under Western Australia's New Sentencing Laws' (1996) 26 *University of Western Australia Law Review* 360, 373.
31. Ibid.

report court penalties imposed to NSW Police, so that this information is recorded on the person's criminal history; and so that a copy of the offender's criminal antecedents can be obtained and tendered by the relevant prosecutor in relation to fresh matters. This will ensure that all the relevant information can be made available to the court.

5.21 In relation to the submission of the Pedestrian Council of Australia that s 10 orders should be limited to trivial offences, the Council notes that, in accordance with the decision of *R v KNL,*[32] it is already the case that the scope for making s 10 orders necessarily decreases in cases where the offence is objectively serious and where general deterrence and denunciation are important sentencing factors. As noted in Chapter 2, it is rarely appropriate to issue a s 10 order in relation to an objectively serious offence.[33]

Recommendations:
(2) The Council does not recommend implementation of this option.

Option 4: Further restrict the use of s 10 orders for drink driving offences

5.22 Under s 188 of the *Road Transport (General) Act 1999* (NSW), a person *convicted* of a PCA offence[34] is automatically disqualified from holding a drivers licence for a specified period of time.[35] Since the application of the automatic disqualification provision is contingent upon a conviction, it does not apply where the court imposes a s 10 order.

5.23 In its submission, the Victims Advisory Board expressed concern about the appropriateness of s 10 orders in relation to drink driving offences. The Board was concerned that, where a s10 order is made in such cases, the motorist does not receive any demerit points and is not disqualified from continuing to hold a drivers licence. It argued that merely placing the offender on a bond fails to recognise the serious breach of the road rules that is involved.[36]

5.24 As discussed in Chapter 2, there are already limitations on the repeated use of s 10 orders for drink driving offences. A person who is charged with drink driving

32. *R v KNL* [2005] NSWCCA 260, [46]–[48]. See Chapter 2, at [2.17].
33. See Chapter 2, [2.15] – [2.23].
34. *Road Transport (Safety and Traffic Management) Act 1999* (NSW) s 9(1A) (novice range PCA), s 9(1) (special range PCA), s 9(2) (low range PCA), s 9(3) (middle range PCA), s 9(4) (high range PCA).
35. The automatic disqualification periods vary between categories of PCA offences, as well as according to whether the person was a first offender, an offender who has previously been convicted of certain major traffic or violence offences, or an offender who has been convicted of multiple offences out of the same incident: *Road Transport (General) Act 1999* (NSW) s 188(2)–(4).
36. Submission 1: Victims Advisory Board, 1.

offences cannot receive a s 10 order, if he or she has received a s 10 order for certain traffic offences (including drink driving offences) at the time of the charge, or within the preceding five years. In addition, the Council's statistical analysis in Chapter 3 shows that an offender with a prior criminal record (including s 10 orders) is significantly less likely to receive a s 10 order than an offender with no criminal record. Therefore, the Council is of the view that it is not necessary to exclude the use of s 10 orders for drink driving offences.

5.25 The Council does however note the significant involvement of alcohol in both fatal and injury motor accident cases in NSW,[37] and shares the concerns expressed by the Victims Advisory Board in consultations with a representative of the RTA and by the former Minister for Roads,[38] that the seriousness of drink driving offences, and in particular low-range PCA offences, and their impact on road safety, are not adequately addressed by existing legislation.

5.26 As discussed in Chapter 4, the RTA in its submission suggested the following options to address this issue:

1. a mandatory 'good behaviour licence' for a 12 month period for all persons receiving s 10 orders for a drink driving offence; or

2. the introduction of a 12 month 'driving bond' as a sentencing option under the Act or a sanction under relevant road transport law; and

3. that the NSW Alcohol Interlock Program, which is currently voluntary in NSW, be made mandatory.

Good Behaviour Licence or driving bond

5.27 When a person appears before a court in relation to a PCA offence, licence disqualification flows automatically upon the recording of a conviction. This means that a licence is disqualified if a person is dealt with by way of a bond under s 9 of the Act but not if a person is dealt with under s 10.

5.28 The RTA proposes that a court be required to order, when dealing with a matter under s 10, that a person's licence be subject to 'good behaviour' for a period of 12 months.

5.29 A form of 'good behaviour licence' is currently available under s 16(8) of the *Road Transport (Driver Licensing) Act 1998* (NSW). Under that provision, a good behaviour licence is available as an alternative to licence suspension under s 16(2), and gives unrestricted licence holders who receive a notice of licence suspension due to the accumulation of 13 or more demerit points, the option of applying for a 12

37. Submission 22: Letter from David Borger MP, former Minister for Roads, to the former Attorney General, the Hon. John Hatzistergos. In NSW during 2009 alcohol was involved in 20.8% of fatal crashes and in 5.3% of injury crashes.

38. Ibid.

month good behaviour period during which certain restrictions are imposed on their licences, instead of serving the suspension. A breach of the good behaviour licence, by way of accrual of 2 or more demerit points during the period of the licence, then results in suspension of all driver licences held by the person, for twice the period that would have applied to the person if the person had not made the election.

5.30 A good behaviour licence is not presently available to be imposed by a court in respect of PCA offences. The Council is of the view that there would be significant advantages in making one available where an offender is convicted of such an offence. At present, the only sentencing option, where there are concerns about the compulsory disqualification that follows from conviction, is the imposition of a s 10 order. A good behaviour licence would allow a court to have access to an additional penalty, which would effectively sit between a s 10 bond and a s 9 bond, for more serious forms of driving offences, where a conviction would be imposed but where the driver would not need to be automatically disqualified and therefore would be able to keep driving, subject to the more stringent conditions of the good behaviour licence. The Council considers that the availability of such an additional penalty would be likely to result in fewer s 10 orders being imposed for more serious driving offences.

5.31 The Council notes that the good behaviour licence could potentially form part of a s 9 bond. However, as discussed in Chapter 2[39], it is not clear whether s 9 bonds can be ordered in relation to offences that are punishable by way of a fine only. If this approach were preferred, such clarification would first be required.

5.32 The Council does not support the availability of a good behaviour licence for a person who is dealt with under s 10. As set out elsewhere in this report, s 10 generally applies to offending which is not objectively serious, where extenuating circumstances apply, or where general deterrence and denunciation are not key sentencing factors.[40] The Council considers that providing the option of a good behaviour licence upon conviction will assist in ensuring that s 10 orders are only made in appropriate cases.

5.33 In summary, the Council considers that it would be most appropriate for the good behaviour licence to be available as an alternative to licence disqualification for PCA offences, similar to the s 16(8) good behaviour licence, and apply in the following circumstances:

- Upon conviction of the person;
- For the duration of the automatic disqualification period;
- At the discretion of the court;

---

39. Chapter 2, at [2.3].
40. See Chapter 2, at [2.18].

- Subject to the person electing to have the good behaviour licence imposed instead of licence disqualification; and
- On the condition that, if the driver breaches the good behaviour licence, the driver will be disqualified for twice the period that would have applied to the person if the person had not made the election.

On conviction, with the offender's consent, the court would direct that a good behaviour licence be issued by the RTA for the length of the disqualification period.

5.34 Given the frequency of this offending it is recommended that the use of this alternative for PCA cases dealt with on conviction should be reviewed in 12 months.

Alcohol Interlock Program

5.35 The Alcohol Interlock Program is a court-ordered penalty for drink drivers, which enables drivers convicted of certain major alcohol-related offences to continue driving after a reduced disqualification period, if they obtain an interlock driver licence and participate in the Alcohol Interlock Program. The conditions of the program require the driver's vehicle to be installed with an alcohol interlock device, an electronic breath-testing device connected to the ignition of the vehicle. The vehicle will not start unless the driver passes a breath test. The driver is also subject to certain licence conditions during the interlock participation period. The conditions of the program require the driver to pay for the associated costs of the program, including costs of installation, service and removal of the device, and to not tamper with the device or remove it without RTA approval.

5.36 The Council supports the availability of the Alcohol Interlock Program in relation to all PCA offenders and notes that the program may currently be imposed as a condition of a s 9 or a s 10 bond in accordance with s 95A(3) of the Act. The Council does not however, support the mandatory application of the program. It is concerned that, if the program was mandatory, offenders who cannot or do not wish to participate in the program, would be excluded from the application of s 9 or s 10 to their case. The Council does not support any option which would effectively exclude offenders from such sentencing options or which would further narrow the discretion of the court.

5.37 Mandatory application could give rise to an issue in relation to the costs associated with the program and whether offenders who cannot afford the Interlock would be excluded from the application of s 9 or s 10 as a result. The Council notes that, while in accordance with s 21D of the *Road Transport (Driver Licensing) Act 1998* (NSW), a scheme exists that enables the RTA to provide a financial assistance to persons participating in the Alcohol Interlock Program, that assistance is limited, does not apply to all costs associated with the device, and is means tested.

5.38 Additionally, the Council considers that, consistent with ss 99A and 100T, which applies to offenders' participation in intervention programs after entering a good

behaviour bond or an agreement under s 10(1)(c), offenders should have the right to decide not to participate in the Alcohol Interlock Program and should be made aware of the consequences of making such a decision. The Council notes that the requirements of the program are particularly onerous and may therefore not be suitable for all offenders.[41]

5.39 Mandatory application of the program could also give rise to practical issues arising out of the fact that households or families may share cars between 2 or more drivers. Given that the interlock device attaches to a vehicle rather than a person, all drivers of the vehicle fitted with the device would be subject to the application of the device.

5.40 Whilst the Council does not support the introduction of a mandatory Alcohol Interlock Program, it does recognise the significant benefits of having the device installed as a preventative measure. The Council has been informed that such devices are now being installed as additional equipment in European cars at a significantly lower cost than that for installing the device in Australia. Any steps that would support the installation of this device by the manufacturer, for new cars sold in Australia, should be supported.

5.41 In the interim, awareness of the device should be promoted. The RTA should consider providing information on the device to all persons convicted of PCA offences. Persons placed on a good behaviour licence in particular may be willing to install the device if it will assist them in abiding by its terms.

PCA Offences and demerit points

5.42 The *Road Transport (Driver Licensing) Act 1998* (NSW) (RTDLA) provides for the establishment of a driver licensing system, in accordance with the agreements scheduled in the *National Road Transport Commission Act 1991* (Cth). It is aimed at achieving a number of administrative objectives related to driver licensing and the regulation of drivers of motor vehicles.[42]

5.43 In accordance with this driver licensing system, the RTDLA provides that certain offences will attract demerit points, and that the accumulation of a certain number of demerit points may lead to licence suspension or cancellation.[43] The road transport offences that attract demerit points are those listed in the National Schedule of Demerit Point Offences and the schedule of Additional Demerit Point Offences.[44] However, the Council notes that, while its report was being prepared, the RTDLA

---

41. These obligations include a compulsory medical consultation with a medical practitioner at the cost of the applicant.
42. *Road Transport (Driver Licensing) Act 1998*, s 3.
43. Ibid, Division 2. Licence cancellation applies only to provisional licence holders under Subdivision 3. The relevant number of demerit points is; thirteen demerit points in the case of unrestricted licence holders, 14 in the case of professional drivers and 7 in the case of learner or provisional licence holders.
44. *Road Transport (Driver Licensing) Regulation 2008*, Schedules 1 and 2.

was amended to exclude the recording of demerit points against a person in respect of an offence dealt with under s 10.[45]

5.44 PCA offences are not addressed in the RTDLA.[46] Rather, PCA offences are dealt with under s 188 of the *Road Transport (General) Act 2005* (NSW), which provides penalties that a court may impose in relation to serious road transport offences and offences under the *Crimes Act 1900* (NSW), which are regarded as 'major offences', for which automatic disqualification periods apply upon conviction.[47] Table 7 below outlines the disqualification periods for PCA offences.

Table 7: Disqualification periods for PCA offences[48]

Offence	Automatic Disqualification Period	Minimum Disqualification Period[49]
Low range – first offence	6 months	3 months
Low range – second or subsequent offence	12 months	6 months
Mid-range – first offence	12 months	6 months
Mid-range – second or subsequent offence	3 years	12 months
High-range – first offence	3 years	12 months
High-range – second or subsequent offence	5 years	2 years

5.45 In the course of the Council's discussions, it considered the issue of whether PCA offences should attract demerit points. There was support for this view on the basis that currently, where a PCA offence is dealt with by way of a s 10 order, without conviction or any period of disqualification, in the absence of demerit points, the licence will not reflect the fact that the offender has been found to have committed a serious driving offence. However, in the course of the Council's deliberations a number of issues were raised in relation to the feasibility of imposing demerit points for PCA offences, which would first need to be considered, in consultation with the RTA and the magistracy, including the following:

- There are currently two offences listed in the National Schedule of Demerit Point offences, which specifically attract automatic disqualification periods.[50] These

45. *Road Transport (Driver Licensing) Act 1998* (NSW) s 14(3A). This provision came into effect on 31 January 2011.
46. *Road Transport (Driver Licensing) Regulation 2008*, Schedule 1.
47. *Road Transport (General) Act 2005* (NSW), s 188 (1)(c)(iv).
48. Ibid, s 188.
49. The Court has discretion to diverge from the automatic disqualification period: Ibid.
50. The Council notes however that the courts have a general power to impose discretionary disqualification periods in respect of any traffic offences under section 187 of the *Road Transport (General) Act 2005.*

offences relate to driving at a speed in excess of the applicable speed limit, by 30kph or 45kph.[51] As a result, these offences attract both the administrative penalty of demerit points in addition to the penalty of automatic disqualification, if the matter is dealt with by a court. The background to this anomaly is that these offences were originally dealt with administratively under the demerit points system. However, in the course of the policy review that culminated in the *Traffic Amendment (Penalties and Disqualifications) Bill 1998* (NSW), they were 'upgraded' on the basis that they relate to particularly serious misconduct and require a more serious penalty than demerit points to reflect that seriousness.[52] In order to maintain national consistency however, these offences were not removed from the demerit point schedule. The Council understands that this has resulted in administrative complications in relation to these offences and this may need to be reviewed before further offences that currently attract automatic disqualification periods are included in the demerit point schedule. In particular, there is a discrepancy between having such a matter dealt with by way of a penalty notice compared with having the matter dealt with by a court.[53]

- There are other offences that could be regarded as involving an equivalent degree of seriousness as PCA offences, for which demerit points do not apply, in addition to automatic disqualification periods. If consideration is given to applying demerit points to PCA offences, it would be desirable to first conduct a general review in relation to the possible extension of the demerit points system to those other offences. For example, the Council considers that, in the interests of consistency, if demerit points are to be applied to PCA offences, they should also be applied to the equivalent offences that relate to driving under the influence of illicit drugs.

- If demerit points are applied to PCA and drug offences, this may effectively remove the discretion of a court to impose a more lenient penalty in respect of certain offences or offenders. For example, this could have consequences for holders of provisional and learner licences by reason of the lesser number of

---

51. These offences are:

    -Exceeding speed by >45 kph – it carries a maximum penalty of 20 penalty units and an automatic disqualification period of 6 months (Rule 10-2 *Australian Road Rules*) as well as 6 demerit points (or 7 if committed in a school zone) (Schedule 1 to *Road Transport (General Regulation 2005*);

    -Exceeding speed by >30 kph – it carries a maximum penalty of 20 penalty units and an automatic disqualification period of 3 months (Rule 10-2 *Australian Road Rules*) as well as 5 demerit points (or 6 if committed in a school zone) (Schedule 1 to *Road Transport (General) Regulation 2005*.

52. *Traffic Amendment (Penalties and Disqualifications) Bill 1998*, Explanatory Note and Second Reading.

53. If the driver is issued with a penalty notice, a fine and automatic suspension period applies, after the expiry of which the driver's licence is automatically returned. If the driver disputes the offences (i.e. elects to take the matter to court), or is issued with a court attendance notice rather than a penalty notice, the court cannot impose a period of suspension, only a period of disqualification, so that at the expiry of the period the driver must re-apply for his or her licence. If the driver receives a penalty notice, he or she may pay the fine and dispute the period of suspension at court, in which case the court may reduce the period of suspension.

points that such drivers can accumulate before being suspended under the RTDLA.[54]

Recommendations:	
(3)	**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 PCA offence, that it operate as outlined at 5.30 – 5.32 above, and that its use and availability be reviewed after 12 months of operation.**
(4)	**If a good behaviour licence is introduced in accordance with Recommendation 3, that the Alcohol Interlock Program be available as an optional condition of such a licence.**
(5)	**That the RTA consider providing information on alcohol interlock devices to drivers convicted of PCA offences.**
(6)	**That there be a review of offences which attract demerit points, particularly in relation to PCA offences dealt with by conviction either under s 9 or s 10.**

Option 5: Offence-based or procedural restriction on the use of s 10 orders

5.46 Some other restrictions on the use of s 10 orders were suggested in the submissions.

5.47 One suggestion was to limit the application of s 10 orders to strict liability offences, although this needs to be considered in light of the further submission that would place limits on their use, in order to overcome their perceived overuse for minor matters, such as parking offences,[55] in particular school zone parking infringements;[56] and also for matters under the *Companion Animals Act*.[57]

5.48 As a consequence, one local council suggested that the use of s 10 orders for strict liability offences of this kind should be restricted.[58] The Pedestrian Council of Australia suggested that for parking offences, s 10 orders should only be imposed

54. For the holder of a learner licence of a provisional P1 licence, the threshold, after which licence suspension or cancellation may occur, is 4 or more demerit points, and for the holder of a provisional P2 licence, 7 or more demerit points.
55. Submission 4: Wingecarribee Shire Council, 1; Submission 6: Camden Council, 1; submission 10: Kograh City Council, 1;Submission 12: the Australian Institute of Loyal Government Rangers (inc.); Submission 14: City of Sydney Council, 1; Submission 15: North Sydney Council, 1.
56. Submission 6: Camden Council, attachments; Submission 12: The Australian Institute of Local Government Rangers (inc.), 1.
57. Submission 4: Wingecarribee Shire Council, 1; Submission 6: Camden Council, 1, attachments; Submission 12: The Australian Institute of Local Government Rangers (inc.), 1.
58. Submission 15: North Sydney Council, 1.

on a first offender who has not received a s 10 order within the past five years, and where no potential harm was involved in the offence.[59]

5.49 Although the principle concern of local councils and local government rangers concerned the extent to which s 10 orders were used for parking offences,[60] the Council notes the recent statistics compiled by the Judicial Commission of NSW, which suggest that the majority of offenders sentenced for regulatory offences (of which 90.6% were road traffic and motor vehicle regulatory offences) in the Local Court in 2007 were dealt with by a fine (71.9%), compared to unconditional dismissals (25.5%).[61]

5.50 The statistics for parking and *Companion Animals Act* offences show that the majority of cases were dealt with by way of a fine, and that s 10 orders (where made) were most frequently imposed on first offenders.

5.51 These statistics do not bear out the assertion that s10 orders have been used, in any systemic or significantly inappropriate manner, in relation to offences of the kind considered, or that their use should be confined to statutory offences. As discussed at paragraph 5.19 above, the Council understands that courts are not always made aware by the relevant prosecuting authority, of offenders' criminal antecedents, and that this may result to some extent, in inconsistency in sentencing as a result of the court not being made aware of previous s 10 orders imposed on a particular offender. To the extent that this is the case, the Council considers that prosecuting authorities may need to review their practices in relation to bringing this information before the courts. However, the council does not consider that the issue of judges not being made aware of previous s 10 or other penalties imposed would be rectified by any amendment of s 10.

5.52 Accordingly, the Council does not consider it necessary to limit the use of s10 to statutory or regulatory offences, or to further limit the discretion which has to be exercised that includes reference to the objective seriousness of the offence. It draws attention, in this respect, to the following passage in the judgment of Howie J in Re Attorney General Application (no 3):[62]

> But where the offence committed is objectively a serious one and where general deterrence and denunciation are important factors in sentencing for that offence, the scope for the operation of the section decreases. The section must operate

---

59. Submission 18: Pedestrian Council of Australia, 3.
60. Submission 6: Camden Council, 1–2; Submission 7: Leichhardt Council, 2; Submission 10: Kogarah City Council 1–2; Submission 15: North Sydney Council, 2; Submission 12: The Australian Institute of Local Government Rangers (inc.), 1; Submission 14: City of Sydney Council, 1.
61. Judicial Commission of NSW, *Common Offences in the NSW Local Court: 2007,* Sentencing Trends & Issues 37 (2008), 16.
62. *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 Concentration of Alcohol Under Section 9(4) of the Roads Transport (Safety and Traffic Management) Act 1999 (No. 3 of 2002)* [2004] NSWCCA 303, [132] cited with approval in *R v KNL* [2005] NSWCCA 260.

> in the context of the general principle that the penalty imposed for any offence should reflect the objective seriousness of the offence committed. To recognise this fact is not to impose an undue restriction upon the section or to change the criteria for its operation on an offence-by-offence basis. Such an approach would clearly be erroneous. It is simply to apply normal sentencing principles to the offence under consideration. However, just as the discretion inherent in the section cannot be limited by the application of some overreaching general principle, neither can it be broadened simply because a court does not agree with Parliament's view of the seriousness of a particular offence or believes that in general the penalties imposed under the scheme of the legislation are unduly harsh or unpalatable.

5.53 As we note later, the seriousness of the offence is a matter to be taken into account, but it is not the only matter.

5.54 Another suggested restriction on the use of s 10 orders is to prohibit its use where the defendant does not satisfy certain procedural requirements. Camden Council submitted that the increased use of s 10 has resulted in more people electing to have a matter heard in court, which is contrary to the Government's intention of expediting regulatory matters. It suggested that restrictions should be placed on the use of non-conviction orders, for example that:

- non-conviction orders should not be available unless the defendant has legal representation, the matter goes to hearing (that is, the order should not be available on the date of the mention hearing), and the defendant attends court on the day of mention and the day of the hearing; and that
- defendants should have the burden of proving the criteria under s 10(3)(a) and (c) of the Act—that is, that the person's character, antecedents, age, health and mental condition, and the extenuating circumstances in which the offence was committed, justify the imposition of a non-conviction order.[63]

5.55 Camden Council also emphasised that magistrates should not disregard s 37 of the *Fines Act 1996* (NSW), which provides that where a person who has been issued a penalty notice or penalty reminder notice elects to have the matter dealt with by a court, proceedings against the person may be taken as if a penalty notice or penalty reminder notice had not been issued.[64]

5.56 The Council does not consider it desirable that there should be legislatively introduced provisions of the kind raised by the Camden Council. In particular it considers that they would unduly limit the judicial discretion, and the summary procedures that are of importance for the prompt and inexpensive disposal of proceedings in the Local Court. In addition, it does not have any evidence before it to suggest that magistrates are unaware of the appropriate procedures for the hearing of contested penalty notices.

---

63. Submission 6: Camden Council, 2.
64. Ibid, 3.

Recommendation:
(7) The Council does not recommend implementation of this option.

Option 6: Remove or amend the list of factors to be taken into account for the imposition of non-conviction orders

5.57 Similarly to s 10(3) of the Act, but with some minor differences, s 19B of the *Crimes Act 1914* (Cth) specifies the factors that are to be taken into account when considering whether to make a non-conviction order. The section provides that the court may dismiss charges or conditionally discharge a federal offender if:

> (b) the court is satisfied, in respect of that charge or more than one of those charges, that the charge is proved, but is of the opinion, having regard to:
>
> (i) the character, antecedents, age, health or mental condition of the person;
>
> (ii) the extent (if any) to which the offence is of a trivial nature; or
>
> (iii) the extent (if any) to which the offence was committed under extenuating circumstances;
>
> that it is inexpedient to inflict any punishment, or to inflict any punishment other than a nominal punishment, or that it is expedient to release the offender on probation;[65]

5.58 Although the ALRC supported the retention of non-conviction orders under federal sentencing legislation, it recommended that the list of factors under s 19B(1)(b) of the *Crimes Act* be repealed, because the list only created 'unnecessary confusion and complexity' in sentencing for limited or no benefit.[66] In the ALRC's view, the three listed factors were redundant because a court would have regard to these factors, even without the legislative requirement, in the course of normal sentencing practices.[67] The ALRC recommended that when dismissing a charge or discharging a federal offender without conviction, the court must have regard to the purposes, principles and factors relevant to sentencing, and to the factors relevant to the administration of the criminal justice system.[68]

5.59 The ALRC noted that data concerning the sentencing of federal offenders showed that the inclusion of this list of factors had not prevented inconsistency in the use of non-conviction orders. It suggested that consistency would be enhanced by the

65. *Crimes Act 1914* (Cth) s 19B(1)(b).
66. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [7.29], Recommendation 7–4.
67. Ibid, at [7.30].
68. Ibid, Recommendation 7–4.

further development of a federal sentencing database and by appropriate guidance in case law.[69]

5.60 None of the submissions received supported the existence of any such concern in relation to the application of the Act. The Council does not consider it necessary or helpful to remove the list of factors currently specified by s 10(2)–(3). They provide, in its view, sufficient guidance and preserve a suitable sentencing discretion.

Recommendation:	
(8)	**The Council does not recommend implementation of this option.**

Option 7: Application for a guideline judgment in relation to low-range and/or mid-range PCA offences, and other offences

5.61 The Pedestrian Council of Australia submitted that drink driving offences cannot be considered trivial, and that the issue of a s 10 order for such offences sends a strong message to the community that drink driving has no adverse legal consequences.[70] In addition, it expressed concern that drink drivers who receive a s 10 order are not required to notify their insurers of this event and are not required to pay a higher premium for the insurance cover, despite being proven to present a risk to other road users and to themselves.[71] It was submitted accordingly that the Attorney General should apply for a guideline judgment prohibiting the use of s 10 orders for low-range and mid-range PCA offences.[72]

5.62 The NSW Police Force expressed concern that certain driving offences—namely, driving with a cancelled licence, driving with a suspended licence, and negligent driving occasioning grievous bodily harm—resulted in a non-conviction order in around one-third of the cases finalised in the Local Court in 2008, despite that fact that they carry significant maximum penalties.[73] It was similarly concerned about the level of use of s 10 orders for mid-range PCA offences, on the basis that driving with the blood alcohol reading for this offence (between 0.08 and 0.15) reflects an actual and substantial risk to the community. It therefore supported the application for a guideline judgment for mid-range PCA offences, as well as for serious driving licence offences and personal violence offences.[74]

---

69. Ibid, at [7.31].
70. Submission 18: Pedestrian Council of Australia, 2–3.
71. Ibid, 3.
72. Submission 18: Pedestrian Council of Australia, 3, 6.
73. Submission 19: NSW Police Force, 2.
74. Ibid, 3. NSW Police has informed the Council that, while it considers that guideline judgements would assist in achieving better consistency in relation to all personal violence offences, two offences for which it considers a guideline judgement would be particularly useful are common assault (domestic violence) and breach AVO (domestic).

5.63 The Law Society of NSW, while noting the non-significant decline in the use of s 10 orders for low-range PCA offences in 2007 (in contrast to the significant decline in use of the order for high-range and mid-range PCA offences), opposed the issue of a guideline judgment for the use of s 10s for low range PCA.[75]

5.64 As discussed in Chapter 3, statistics shows that the proportion of offenders who received a s10 order for novice-range and low-range PCA offences is only significant for first time offenders, and that proportion who receive such an order drops to below 10% for offenders with a prior record.

5.65 The Council does not consider that it is inappropriate to use s 10 for first time low-level PCA offenders, in particular for those who have not committed any significant traffic offences for the past five years.

5.66 As for mid-range PCA offences, the incidence of s 10 orders for low-range PCA offences as shown in the statistics is low. As indicated in Chapter 3, in 2010, a s 10 bond was used for 34.8% of low-range PCA offences, and 13.5% of mid-range PCA offences. In that same year, only 7.5% of low-range PCA offences and 0.9% of mid-range PCA offences attracted a s10 dismissal.[76] Additionally, BOCSAR statistics presenting the numbers and percentages of s 10 orders for all PCA cases finalised in the Local Court between 2004 and 2008 show that the majority of s 10 orders were made for novice and low-range PCA offences—43% and 41% of all penalties respectively.[77]

5.67 As indicated above and in Chapter 3, the Council does not consider, on the basis of the statistics outlined in Chapter 3, that there is inappropriate or disproportionate use of bonds or non-conviction orders in either the Local Court or higher courts, which necessitates a guideline judgement in relation to low-range PCA or mid-range PCA offences, or other offences.

5.68 The Council notes two important points in this respect. Firstly, as noted by the Chief Magistrate in his submission, the offence of low-range PCA may be considered to be relatively minor in nature when its objective seriousness is measured by reference to the maximum legislative penalty of a fine of $1,100 for a first offence and $2,200 for a second or subsequent offence.[78] Secondly, the Council notes the research conducted by BOCSAR,[79] indicating the flow-on effects of the Guideline Judgement for high-range PCA offences to mid-range PCA offences, which found that the use of s 10 orders for mid-range PCA offences declined by almost eight percent, from 25.5% to 17.9% in the post-guideline period

75. Submission 16: Law Society of NSW, 6.
76. Judicial Commission of NSW, *Unpublished statistics* (2010).
77. NSW Bureau of Crime Statistics and Research, *Unpublished statistics* (2010).
78. Submissions 13A and 21: Chief Magistrate of the Local Court.
79. Bureau of Crime Statistics and Research, Crime and Justice Bulletin 123 '*The impact of the high range PCA guideline judgement on sentencing for PCA offences in NSW*' (2008).

considered.[80] As noted by BOCSAR, the decline in the use of s 10 orders for mid range PCA offences is similar to that observed in relation to high range PCA offences.

5.69 Therefore, in the absence of any statistical data indicating inappropriate or disproportionate use of s 10 orders, the Council considers that a guideline judgement is unnecessary. The Council does however note that, in the course of its annual review of sentencing trends, it does look for aspects of sentencing that might justify further consideration of the desirability of applying for a guideline judgment.

Recommendation:
(9) The Council does not recommend any application for a guideline judgment.

Option 8: Provide guidance to magistrates

5.70 It has been suggested that further guidance should be provided to magistrates on the use of s 10 orders,[81] in a manner that supports enforcement agencies, with a view to reducing the asserted overuse of such orders.[82] One local council suggested in this respect that guidance be provided to magistrates as to the importance of public safety matters when sentencing.[83] It was argued that this would reflect the Parliament's intention, for example in increasing fines and demerit points for school zone offences to indicate that parking in such places gives rise to significant safety concerns, especially for children and pedestrians.[84]

5.71 The Council however notes that there is no evidence of any significant or systemic misuse of s 10 orders or any reason to suppose that magistrates are unaware of the relevance of community protection as a sentencing objective in accordance with s 3A of the Act.

5.72 One submission did, however, attach a transcript which recorded a particular magistrate as having indicated an intention to apply a blanket approach to the use of s 10 orders for minor parking offences that would involve their use in all such cases.[85] While the adoption of a blanket approach to a particular type of offence would be inappropriate, the Council notes that as far as it is aware, this was one case out of a very significant volume of cases dealt with by the Local Court each

80. 8 September 2004 – 8 September 2006; Ibid, 2.
81. Submission 12: The Australian Institute of Local Government Rangers (inc.), 1; Submission 14: City of Sydney Council, 2. See also Submission 18: Pedestrian Council of Australia, 1, which supported the development of strict guidelines on the use of s 10 orders.
82. Submission 12: The Australian Institute of Local Government Rangers (inc.), 1.
83. Submission 14: City of Sydney Council, 2.
84. Ibid.
85. Ibid, attachment.

year,[86] and it cannot be taken to indicate a significant or systemic problem. Accordingly, the Council does not see a need to provide guidance to magistrates on the use of s 10, beyond expecting them to refer to relevant appellate decisions, to the terms of the section and to the Sentencing Bench Book.

5.73 In general terms the Council considers that it would be undesirable if a sentencing practice were adopted in the Local Court that failed to reflect the legislative intent that parking infringements attract a fine by reason of the need for deterrence. It would similarly be undesirable to send a message that the fine could be avoided by having the matter dealt with by a court having regard to the possible impact on its caseload.

Recommendation:
(10) The Council does not recommend implementation of this option.

Option 9: State reasons for issuing s 10 dismissals

5.74 The City of Sydney Council suggested that, in the interest of transparency, magistrates should be required to state their reasons for disposing of a case pursuant to s10, since this would demonstrate that the judicial discretion has been exercised appropriately in the circumstances of the case.[87]

5.75 The Council notes that courts are already required by legislation to record its reasons for imposing a non-custodial sentence for Table offences—ie, certain serious offences listed in the Table to Part 4 Division 1A of the Act.[88] At common law, the obligation to give reasons is considered a normal incident of the judicial process.[89] The Council understands that, while decisions in the Local Court are typically given on an ex tempore basis, reasons are provided for decisions handed down in that Court, including decisions where s 10 orders are imposed, and transcripts in relation to such decisions are available on request.

5.76 Given the lack of evidence to show any misuse of s 10 orders, the Council does not consider it necessary to impose a legislative requirement on magistrates to record additional or more detailed reasons for any decision to impose a s 10 order.

---

86. The latest NSW criminal courts statistics shows that in 2008, 138,872 persons were charged and 246,196 charges were determined in the NSW Local Court: NSW Bureau of Crime Research and Statistics, *NSW Criminal Court Statistics 2008* (2009) 20.
87. Submission 14: City of Sydney Council, 2.
88. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54C(1). The court must also give reasons where it: sentences an offender to imprisonment for 6 months or less; does not impose a lesser penalty despite the offender's guilty plea; decides that there are special circumstances for fixing a balance of the term of the sentence that exceeds one-third of the non-parole period; or declines to set a non-parole period for a sentence of imprisonment: *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 5(2), 22(2), 44(2), 45(2).
89. *Pettitt v Dunkley* [1971] 1 NSWLR 376, 387; *Public Service Board of NSW v Osmond* (1986) 159 CLR 656, 667.

Recommendation:
(11) The Council does not recommend implementation of this option.

Option 10: Limit the adverse effects of s 10 orders in certain circumstances

5.77 As concerns have been raised in submissions that s 10 orders are treated as a conviction for various purposes,[90] a possible option for reform considered by the Council is to limit the range of matters for which a s 10 order is treated as a conviction.

5.78 The Illawarra Legal Centre Inc expressed concern that a non-conviction order, discharging a person on condition that he or she enters a good behaviour bond, can adversely affect a person's employment opportunities because that order will remain on a person's criminal record for the duration of the bond. No other submissions were received that identified any similar concern.

5.79 As discussed in Chapter 2, under the *Criminal Records Act 1991* (NSW), while a s 10(1)(a) dismissal order is spent immediately after the finding of guilt is made, a conditional discharge order under s 10(1)(b) or (c) is spent upon satisfactory completion of the good behaviour bond or satisfactory compliance with the intervention program or conditions. Additionally, despite the fact that a person is not required to disclose a finding of guilt which is spent, a s 10 order may have to be disclosed under certain circumstances, for example, as indicated by the Illawarra Legal Centre, in relation to positions subject to the requirements of ss 33D and 33E of the *Commission for Children and Young People Act 1998* (NSW).

5.80 The Council is aware that the Legislative Council Standing Committee on Law and Justice has considered the issue raised by Illawarra Legal Centre in its report 'Spent Convictions for Juvenile Offenders', and recommended,

> That the Attorney General ensure that the NSW legislation to implement the Model Spent Convictions Bill provides that where a court finds a person guilty of an offence without proceeding to conviction under section 10 of the Crimes (Sentencing Procedure) Act 1999, including for a sexual offence, the finding is spent immediately after it is made.[91]

5.81 The Council understands that the Government will be providing a response to the Committee's report in due course.

90. Submission 11: Public Interest Advocacy Centre, 7–11.

91. Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Spent Convictions for Juvenile Offenders*, Report 42 (2010), Recommendation 3.

Option 11: Allow prosecuting bodies to apply for costs where a s 9 or s 10 order is made

5.82 Several local councils raised concerns about the costs of prosecuting cases where the offender ultimately receives a s 9 or s 10 order.[92] Ballina Shire Council submitted that, while the making of ss 9 and 10 orders in appropriate cases was not its major concern because it is not highly litigious,[93] in most cases, local councils would engage legal counsel to conduct matters before a court, the cost of which would ultimately be funded by ratepayers.[94] The Council submitted that where a s 9 or s 10 order is imposed, prosecuting bodies (including local councils and the NSW Police Force) should be allowed to make an application to the court for professional costs, to be heard and determined by the presiding magistrate in accordance with appropriate guidelines.[95]

5.83 The Council does not see any need for further legislative action in this respect. Provision is already made in s 215 of the *Criminal Procedure Act 1986* (NSW) whereby costs can be ordered against a defendant, including cases where a s10 order has been made, dependent on an exercise of the Court's discretion.[96] While Police and the DPP do not ordinarily apply for costs orders, that is not necessarily the case for informants such as Councils and other statutory agencies. Where costs are awarded, that occurs on a compensatory basis and not by way of punishment.[97]

Recommendation:	
(12)	**The Council does not recommend any further legislative change to implement this option.**

92. Submission 5: Ballina Shire Council, 1–2. In relation to s 10 orders specifically, see Submission 6: Camden Council, 1, attachments; Submission 7: Leichhardt Municipal Council, 2; Submission 15: North Sydney Council, 1.
93. Submission 5: Ballina Shire Council, 1.
94. Ibid, 1–2.
95. Ibid.
96. *Criminal Procedure Act 1986* (NSW) s 215(4).
97. *Latoudis v Casey* (1990) 170 CLR 534, 543.

6. APPENDIX A: TWENTY MOST COMMON PROVEN STATUTORY OFFENCES

Table 8: Most common proven statutory offences in NSW Local Court in 2010

Rank	Offence	Legislation	Number of cases	% of cases
1	Mid range PCA	*Road Transport (Safety and Traffic Management) Act 1999*, s 9(3)	9,872	9.5
2	Common assault	*Crimes Act 1900*, s 61	7,491	7.2
3	Low range PCA	*Road Transport (Safety and Traffic Management) Act 1999*, s 9(2)	6,769	6.5
4	Possess prohibited drug	*Drug Misuse and Trafficking Act 1985*, s 10(1)	6,516	6.3
5	Drive whilst disqualified	*Road Transport (Driver Licensing) Act 1999*, s 25A(1)	5,123	4.9
6	Assault occasioning actual bodily harm	*Crimes Act 1900*, s 59(1)	4,333	4.2
7	Drive whilst suspended	*Road Transport (Driver Licensing) Act 1999*, s 25A(2)	3,834	3.7
8	Knowingly contravene AVO	*Crimes (Domestic and Personal Violence) Act 2007*, s 14(1) [a]	3,782	3.7
9	Larceny	*Crimes Act 1900*, s 117	3,713	3.6
10	Malicious destruction/damage	*Crimes Act 1900*, s 195(1)(a)	3,695	3.6
11	High range PCA	*Road Transport (Safety and Traffic Management) Act 1999*, s 9(4)	3,517	3.4
12	Never licensed person drive on road	*Road Transport (Driver Licensing) Act 1999*, s 25(2)	3,444	3.3
13	Stalk or intimidate w/i to cause fear of physical or mental harm	Crimes (Domestic and Personal Violence) Act 2007, s 13(1) [b]	2,249	2.2
14	Assault with intent on certain officers	Crimes Act 1900, s 58	2,141	2.1
15	Drive without being licensed	Road Transport (Driver Licensing) Act 1999, s 25(1)	2,102	2.0
16	Negligent driving (not causing death or GBH)	Road Transport (Safety and Traffic Management) Act 1999, s 42(1)(c)	1,621	1.6
17	Drive unregistered vehicle	Road Transport (Vehicle Registration) Act 1997, s 18(1)	1,617	1.6
18	Drive whilst licence suspended under s 66 Fines Act 1996	Road Transport (Driver Licensing) Act 1999, s 25A(3A)(a)	1,481	1.4
19	Goods in custody	Crimes Act 1900, s 527C(1)	1,314	1.3
20	Special range PCA	Road Transport (Safety and Traffic Management) Act 1999, s 9(1)	1,184	1.1
	Total for top twenty offences		75,798	73.2
	All remaining offences		27,809	26.8
	Total		103,607	100

[a] includes a small number of cases dealt with under repealed ss 562ZG(1) and 562I(1) of the Crimes Act 1900

[b] includes a small number of cases dealt with under repealed ss 545AB(1) and 562AB(1) of the Crimes Act 1900

Source: Judicial Commission of NSW, Unpublished Statistics (2011)

7. APPENDIX B: USE OF s 10 BONDS FOR OFFENDERS WITH PRIOR CONVICTIONS

Table 9: Persons sentenced by NSW magistrates, 2008

Offence type and prior convictions† in previous 2 years			
Offence description	Number of people found guilty	% receiving a s 10 bond with no prior conviction	% receiving a s 10 bond with prior conviction
Assault	14068	20.2	2.8
Sexual assault	276	4.1	1.2
Driving under the influence of alcohol	761	9.8	3.8
Dangerous or negligent operation of a vehicle	3617	4.5	2.0
Robbery/burglary	1248	4.3	0.5
Motor vehicle theft and related offences	57	0.0	0.0
Illegal use of motor vehicle	504	8.4	0.6
Theft (except motor vehicles)	2087	16.1	1.5
Theft from retail premises	2258	21.2	1.3
Receiving or handling proceeds of crime	1604	11.1	1.2
Obtain benefit/credit card fraud	448	7.5	0.6
Fraud etc.	1870	9.7	1.4
Dishonest conversion/Bribery	442	15.7	4.2
Other deception offences	227	11.4	2.1
Deal, traffic, import or export illicit drugs	533	3.3	1.2
Manufacture or cultivate illicit drugs	597	9.8	1.4
Possess illicit drugs	5758	20.5	2.9
Use illicit drugs	78	4.8	2.8
Other illicit drug offences	118	13.6	0.0
Weapons charges	758	21.6	5.2
Property damage by fire	86	5.9	0.0
Other miscellaneous offences	624	13.4	2.2
Property damage other	4321	21.9	3.2
Environmental pollution/speeding/other driving	237	1.6	0.0
Trespass	932	18.6	3.7
Offensive language	1130	10.5	2.9
Offensive behaviour	2927	15.0	1.7
Criminal intent	356	5.9	0.5
Other public order offences	971	9.1	2.1
Driving with cancelled licence	11662	22.1	7.0
Driving without licence	7431	5.8	5.2
Road vehicle registration and roadworthiness offences	2200	0.8	0.2
Exceeding alcohol limit	24938	22.6	5.9
Regulatory driving offences	2891	4.4	1.6
Escape custody/Breach prison regs	242	7.8	0.0

Breach bail	365	3.9	0.4
Breach domestic violence order	2961	14.6	3.2
Other breach justice order	2592	3.1	0.4
Offences vs justice procedures nec	264	7.7	1.1
Resist or hinder police	2828	14.0	2.8
Offences against government security or operations	808	3.9	0.7
Harassment and related offences	1252	14.6	1.7
Threatening behaviour	559	15.1	0.8
Public health,safety,financial offences	1348	3.0	0.6
Total	111985	16.5	3.4

† Priors refer to any offence, not necessarily a prior offence of the same nature as the current offence.

Source: NSW Bureau of Crime Statistics and Research, Unpublished Statistics (2010)

8. APPENDIX C: USE OF s 9 AND 10 ORDERS IN NSW LOCAL COURT LOCATIONS

Table 10: Number of persons receiving a section 9 or 10† order for their principal offence, by court location*

	2004—2008				
Location	s 10 orders	% of total penalties	S 9 orders	% of total penalties	Total number of penalties
Albion Park	145	15.9	101	11.1	910
Albury	887	14.0	1329	20.9	6346
Armidale	360	13.0	694	25.1	2765
Ballina	404	14.8	407	14.9	2737
Balmain	578	17.1	458	13.5	3389
Balranald	135	22.7	78	13.1	594
Bankstown	1946	23.0	1251	14.8	8472
Batemans Bay	404	17.7	352	15.4	2281
Bathurst	642	15.9	432	10.7	4042
Bega	445	21.2	374	17.8	2100
Bellingen	126	19.8	76	11.9	636
Belmont	1483	30.4	738	15.1	4874
Bidura CC	1	100.0	0	0.0	1
Blacktown	2851	19.4	2683	18.2	14710
Blayney	56	17.8	34	10.8	314
Boggabilla	126	18.7	172	25.5	674
Bombala	43	20.7	34	16.3	208
Bourke	155	14.6	224	21.1	1062
Bowral	9	25.0	3	8.3	36
Brewarrina	77	12.6	163	26.7	611
Broken Hill	614	19.1	479	14.9	3214
Burwood	5562	21.3	4532	17.3	26169
Byron Bay	969	24.5	468	11.8	3951
Camden	743	26.1	490	17.2	2844
Campbelltown	2473	15.3	3865	23.9	16155
Casino	275	10.8	602	23.7	2540
Central	134	2.3	457	7.7	5898
Cessnock	625	18.2	856	25.0	3427
Cobar	210	33.4	120	19.1	629
Coffs Harbour	1115	16.2	946	13.8	6864
Condobolin	94	16.9	128	23.0	556
Cooma	416	26.3	150	9.5	1579
Coonabarabran	117	19.0	103	16.7	616
Coonamble	107	15.9	156	23.2	671
Cootamundra	134	10.7	134	10.7	1254
Corowa	108	18.5	125	21.4	584
Cowra	192	11.0	210	12.0	1751

Crookwell	30	24.8	37	30.6	121
Deniliquin	188	12.2	214	13.9	1537
Dubbo	521	11.5	868	19.1	4549
Dunedoo	20	18.0	17	15.3	111
Dungog	34	18.5	26	14.1	184
East Maitland	1	16.7	0	0.0	6
Eden	120	22.6	95	17.9	532
Fairfield	1675	13.6	1773	14.4	12287
Finley	200	19.2	142	13.6	1041
Forbes	216	21.8	221	22.3	989
Forster	300	11.2	405	15.1	2677
Gilgandra	98	20.6	114	23.9	476
Glen Innes	103	10.7	269	28.0	962
Gloucester	58	22.4	70	27.0	259
Gosford	2564	19.0	1937	14.4	13498
Goulburn	1218	19.9	831	13.6	6117
Grafton	323	9.9	505	15.4	3275
Grenfell	37	12.1	29	9.5	305
Griffith	436	11.3	608	15.8	3854
Gulgong	44	20.2	23	10.6	218
Gundagai	89	17.8	101	20.2	501
Gunnedah	233	18.5	269	21.4	1258
Hay	63	8.2	101	13.2	766
Hillston	35	17.2	29	14.2	204
Holbrook	61	16.8	31	8.5	363
Hornsby	1807	18.7	1269	13.1	9689
Inverell	458	22.5	505	24.8	2035
Junee	67	14.8	87	19.2	454
Katoomba	246	16.2	373	24.6	1514
Kempsey	296	7.5	664	16.8	3950
Kiama	100	19.4	58	11.3	515
Kogarah	880	16.5	817	15.3	5346
Kurri Kurri	239	21.6	285	25.7	1109
Kyogle	70	12.8	136	24.8	548
Lake Cargelligo	58	14.8	87	22.2	392
Leeton	149	10.2	208	14.2	1462
Lightning Ridge	101	20.6	113	23.0	491
Lismore	701	10.3	1498	22.0	6815
Lithgow	251	14.4	377	21.6	1744
Liverpool	3261	13.2	3831	15.5	24640
Lockhart	8	40.0	3	15.0	20
Macksville	214	15.6	215	15.7	1373
Maclean	206	14.0	245	16.6	1473
Maitland	630	10.5	1257	20.9	6024
Manly	2605	23.5	1551	14.0	11097
Milton	169	10.7	143	9.1	1579
Moama	64	12.2	51	9.8	523

Moree	506	18.0	624	22.2	2806
Moruya	146	17.1	161	18.8	855
Moss Vale	530	16.8	416	13.2	3160
Moulamein	23	50.0	5	10.9	46
Mudgee	282	17.8	205	12.9	1585
Mullumbimby	239	25.8	182	19.7	926
Mungindi	30	19.7	37	24.3	152
Murwillumbah	342	23.1	301	20.3	1480
Muswellbrook	399	21.2	542	28.8	1880
Narooma	109	17.8	89	14.6	611
Narrabri	147	15.4	250	26.2	955
Narrandera	89	9.6	131	14.2	923
Narromine	138	22.9	134	22.3	602
Newcastle	3941	22.2	2553	14.4	17774
Newtown	1216	17.9	1163	17.1	6797
North Sydney	1018	26.6	492	12.8	3832
Nowra	476	7.3	665	10.2	6522
Nyngan	88	23.3	91	24.1	377
Oberon	49	19.8	19	7.7	247
Orange	966	21.9	1292	29.3	4409
Parkes	360	27.5	283	21.6	1309
Parramatta	2912	14.3	2700	13.3	20316
Peak Hill	41	24.7	37	22.3	166
Penrith	1998	9.5	3674	17.4	21099
Downing Centre	7391	18.8	5478	14.0	39236
Picton	189	15.4	182	14.8	1226
Port Kembla	489	15.9	473	15.4	3067
Port Macquarie	444	8.1	829	15.0	5513
Queanbeyan	1213	21.9	723	13.1	5540
Quirindi	200	38.2	70	13.4	524
Raymond Terrace	1146	22.2	1321	25.6	5159
Redfern	136	13.8	149	15.2	983
Ryde	1372	26.7	810	15.7	5145
Rylstone	43	17.8	35	14.5	241
Scone	177	24.8	150	21.0	714
Singleton	182	10.8	360	21.4	1686
Sutherland	3336	15.9	3295	15.7	20955
Tamworth	1202	22.2	1142	21.1	5413
Taree	404	8.7	754	16.2	4649
Temora	65	12.5	69	13.2	521
Tenterfield	86	12.6	189	27.8	680
Toronto	1618	23.0	1341	19.1	7034
Tumbarumba	21	14.2	25	16.9	148
Tumut	167	14.1	176	14.9	1181
Tweed Heads	1431	21.3	1164	17.3	6734
Wagga Wagga	1622	20.4	1561	19.7	7937
Walcha	47	27.8	46	27.2	169

Walgett	228	18.2	347	27.6	1255
Warialda	33	27.3	39	32.2	121
Warren	107	25.7	103	24.7	417
Wauchope	40	11.8	68	20.1	339
Waverley	3329	22.7	2681	18.3	14670
Wee Waa	118	22.7	130	25.0	519
Wellington	190	22.2	248	29.0	855
Wenthworth	307	22.4	262	19.1	1369
West Wyalong	138	21.2	70	10.8	651
Wilcannia	47	11.8	98	24.6	398
Windsor	704	16.1	689	15.8	4373
Wollongong	2210	13.4	2769	16.8	16491
Woy Woy	593	21.1	553	19.7	2811
Wyong	2073	18.4	2391	21.2	11277
Yass	291	25.5	212	18.6	1140
Young	179	10.9	209	12.7	1649
Licensing Court	230	16.2	9	0.6	1422
Mount Druitt	896	13.8	1242	19.1	6495
All Local Courts	96747	17.1	94420	16.7	563885

*Where a person has been found guilty of more than one offence, the offence that received the most serious penalty is the principal offence

† A section 10 order includes a penalty imposed under section 10(1)(a) 'No conviction', 10(1)(b) 'Bond no conviction recorded', and 10A 'Conviction with no other penalty' of the *Crimes (Sentencing Procedure) Act1999* (NSW)

Source: NSW Bureau of Crime Statistics and Research, Unpublished Statistics (2009)

9. APPENDIX D: PROGRAM AVAILABILITY IN NSW LOCAL COURT LOCATIONS

Table 11: Courts at which intervention and diversionary programs operate

	Program					
Location	MERIT	Alcohol MERIT	Circle Sentencing	Forum Sentencing	Traffic Offender Programs*	CREDIT
Albion Park	✓				✓	
Albury					✓	
Armidale			✓		✓	
Ballina	✓					
Balmain				✓		
Balranald						
Bankstown	✓				✓	
Batemans Bay						
Bathurst	✓	✓			✓	
Bega						
Bellingen						
Belmont				✓	✓	
Blacktown	✓				✓	
Blayney	✓					
Boggabilla						
Bombala						
Bourke			✓			
Brewarrina			✓		✓	
Broken Hill	✓	✓			✓	
Burwood	✓			✓	✓	✓
Byron Bay	✓			✓		
Camden	✓			✓		
Campbelltown	✓			✓	✓	
Campbelltown CC						
Casino	✓					
Central	✓					
Cessnock	✓				✓	
Cobar						
Coffs Harbour					✓	
Condobolin						
Cooma	✓					
Coonabarabran						
Coonamble						
Cootamundra						
Corowa						
Cowra						
Crookwell						

Deniliquin						
Downing Centre	✓					
Dubbo	✓	✓	✓		✓	
Dunedoo						
Dungog						
Eden						
Fairfield	✓			✓	✓	
Finley						
Forbes	✓					
Forster						
Gilgandra						
Glen Innes						
Gloucester						
Gosford	✓			✓	✓	
Goulburn					✓	
Grafton	✓					
Grenfell						
Griffith						
Gulgong						
Gundagai						
Gunnedah					✓	
Hay						
Hillston						
Holbrook						
Hornsby	✓				✓	
Inverell						
Junee	✓					
Katoomba	✓					
Kempsey	✓		✓		✓	
Kiama	✓					
Kogarah	✓					
Kurri Kurri						
Kyogle	✓					
Lake Cargelligo						
Leeton						
Lidcombe						
Lightning Ridge						
Lismore	✓		✓		✓	
Lithgow					✓	
Liverpool	✓			✓	✓	
Lockhart						
Macksville						
Maclean	✓					
Maitland	✓				✓	
Manly	✓	✓				
Milton	✓					

Moama						
Moree			✓		✓	
Moruya						
Moss Vale				✓		
Moulamein						
Mt Druitt	✓		✓		✓	
Mudgee					✓	
Mullumbimby	✓			✓		
Mungindi						
Murwillumbah	✓			✓		
Muswellbrook	✓				✓	
Narooma						
Narrabri						
Narrandera						
Narromine						
Newcastle	✓			✓	✓	
Newtown	✓			✓	✓	
North Sydney	✓				✓	
Nowra	✓		✓		✓	
Nyngan						
Oberon	✓					
Orange	✓	✓			✓	
Parkes	✓				✓	
Parramatta	✓				✓	
Peak Hill						
Penrith	✓				✓	
Picton				✓		
Port Kembla	✓					
Port Macquarie	✓				✓	
Queanbeyan	✓					
Quirindi						
Raymond Terrace	✓				✓	
Ryde						
Rylstone						
Scone						
Singleton	✓				✓	
Sutherland	✓				✓	
Tamworth	✓				✓	✓
Taree					✓	
Temora						
Tenterfield						
Toronto	✓			✓		
Tumbarumba						
Tumut						
Tweed Heads	✓			✓	✓	
Wagga Wagga	✓				✓	
Walcha						

Walgett			✓			
Warialda						
Warren						
Wauchope	✓					
Waverley	✓				✓	
Wee Waa						
Wellington	✓	✓			✓	
Wenthworth						
West Wyalong						
Wilcannia	✓	✓				
Windsor						
Wollongong	✓	✓			✓	
Woy Woy				✓	✓	
Wyong	✓			✓		
Yass						
Young					✓	

* Courts listed as having Traffic Offender Programs available are those with an authorised course provider in the locality.

Source: Submission 21, His Honour G Henson, Chief Magistrate of the Local Court.of NSW

10. APPENDIX E: USE OF NON-CONVICTION ORDERS AND BONDS IN HIGHER COURTS

Table 12: Criminal cases finalised under section 9 or 10 in NSW Local, District and Supreme Courts in 2008

	Local Court			Higher Courts		
Offence category	Total number of cases	Section 9 penalties (%)	Section 10 penalties (%)	Total number of cases	Section 9 penalty (%)	Section 10 penalty (%)
Homicide and related offences	33	15 (45.5)	5 (15.2)	116	1 (0.9)	1 (0.9)
Acts intended to cause injury	14,238	5,630 (39.5)	2,391 (16.8)	374	42 (11.2)	2 (0.5)
Sexual assault and related offences	279	100 (35.8)	13 (4.7)	266	24 (9.0)	5 (1.9)
Dangerous and negligent acts endangering persons	4,459	537 (12.0)	567 (12.7)	24	0 (0.0)	0 (0.0)
Robbery, extortion and related offences	53	10 (18.9)	0 (0.0)	541	13 (2.4)	0 (0.0)
Unlawful entry with intent/burglary, break & enter	1,222	260 (21.3)	24 (2.0)	391	20 (5.1)	0 (0.0)
Theft and related offences	6,627	1,572 (23.7)	716 (10.8)	83	9 (10.8)	2 (2.4)
Deception and related offences	3,066	899 (29.3)	346 (11.3)	92	6 (6.5)	0 (0.0)
Illicit drug offences	7,137	1,009 (14.1)	1,262 (17.7)	707	54 (7.6)	5 (0.7)
Weapons and explosives offences	774	122 (15.8)	228 (29.5)	50	0 (0.0)	1 (2.0)
Property damage and environmental pollution	4,719	1,178 (25.0)	988 (20.9)	23	3 (13.0)	2 (8.7)
Public order offences	6,340	791 (12.5)	1,152 (18.2)	64	14 (21.9)	3 (4.7)
Road traffic and motor vehicle regulatory offences	50,838	4,979 (9.8)	10,333 (20.3)	2	1 (50.0)	0 (0.0)
Offences against justice procedures, government security and government operations	11,266	2,622 (23.3)	1,162 (10.3)	34	7 (20.6)	3 (8.8)
All remaining offences	3,949	961 (24.3)	532 (13.5)	73	4 (5.5)	0 (0.0)
Total	115,000	20,685 (18.0)	19,719 (17.1)	2,840	198 (7.0)	24 (0.85)

Source: NSW Bureau of Crime Research and Statistics, NSW Criminal Court Statistics 2008 (2009), pp25–27, 85–87.