



**Justice**  
Sentencing Council

# Sentencing trends and practices

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Annual Report 2015



### NSW Sentencing Council

July 2016

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## Executive summary

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### The Council's projects (Chapter 1)

- 0.1 We worked on four projects in 2015:
- **bail – additional show cause offences:** reference received September 2014; report transmitted May 2015
  - **alcohol and drug fuelled violence:** reference received March 2015; report transmitted August 2015
  - **child sexual assault sentencing:** reference received June 2015, report transmitted November 2015, and
  - **domestic violence sentencing:** reference received July 2015.

### Trends, issues and developments (Chapter 2)

#### *Sentencing related research*

- 0.2 Sentencing related research conducted in NSW in 2015 included:
- **Does the first prison sentence reduce the risk of further offending?** Bureau of Crime Statistics and Research, Crime and Justice Bulletin, No 187 (October 2015).
  - **Prison penalties for serious domestic and non-domestic assault:** Bureau of Crime Statistics and Research, Bureau Brief No 110 (October 2015).
  - **Public confidence in the NSW criminal justice system: 2014 update:** Bureau of Crime Statistics and Research, Crime and Justice Bulletin, No 182 (February 2015).
  - **Have NSW criminal courts become more lenient in the past 20 years?** Bureau of Crime Statistics and Research, Bureau Brief No 101 (March 2015).
  - **Sentencing in NSW: A cross-jurisdictional comparison of full time imprisonment:** Judicial Commission of NSW, Research Monograph No 39 (March 2015).
  - **Sentencing for the offence of sexual intercourse with a child under 10:** Judicial Commission of NSW, Sentencing Trends and Issues No 44 (July 2015).

#### *Operation of guideline judgments*

- 0.3 The five guideline judgments were cited or considered by the higher courts in 43 matters.

### *Cases of interest*

0.4 In 2015, the appellate courts delivered judgments of interest on the following sentencing topics:

- The Court of Criminal Appeal’s residual discretion in a Crown appeal against sentence and the approach to leniency for previously undisclosed offences: *CMB v Attorney General for NSW* [2015] HCA 9.
- The obligation to refer to sentencing principles for mentally ill offenders: *Cowan v R* [2015] NSWCCA 118.
- Using victim impact statements to show substantial harm: *R v Tuala* [2015] NSWCCA 8.
- Re-opening proceedings to correct a sentencing error: *Bungie v R* [2015] NSWCCA 9.
- The approach to indicative sentences when imposing an aggregate sentence: *McIntosh v R* [2015] NSWCCA 184.
- Sentencing for child pornography offences: *R v Porte* [2015] NSWCCA 174.
- Appeal where the sentencing judge compared sentences that had subsequently been set aside: *KB v R* [2015] NSWCCA 220.
- Taking aggravating factors into account for an aggravated offence: *McDonald v R* [2015] NSWCCA 280.
- The two stage approach to sentencing under the mandatory life imprisonment provisions: *Dean v R* [2015] NSWCCA 307.
- The community interest in deterring single punch assaults: *Field v R* [2015] NSWCCA 332.

### *Legislative implementation of Sentencing Council recommendations*

0.5 The NSW parliament implemented recommendations in Sentencing Council reports in the following Acts:

- *Crimes (Sentencing Procedure) Amendment (Firearms Offences) Act 2015* (NSW): *Standard Non-parole Periods: Final Report* (2013).
- *Bail Amendment Act 2015* (NSW): *Bail – Additional Show Cause Offences* (2015)
- *Crimes Legislation Amendment (Child Sex Offences) Act 2015* (NSW): *Standard Non-parole Periods: Final Report* (2013)

### *Review of intensive correction orders (Chapter 3)*

0.6 Since 2011 there has been moderate growth each year in the number of offenders sentenced to an intensive correction order (ICO). In 2015:

- 1695 offenders were sentenced to ICOs
- 1.1% of all NSW offenders were sentenced to an ICO for their principal offence.

As a proportion of penalties imposed, ICOs are imposed most frequently in major cities and least frequently in very remote regions.

- 0.7 Patterns of operation do not appear to have changed significantly over the last year. Minor trends observed in 2015 include:
- a decrease in the number of Indigenous offenders receiving an ICO as their principal sentence
  - an increase in the proportion of offenders assessed as suitable for an ICO
  - an increase in the proportion of revoked ICOs
  - increases in the proportion of ICOs imposed for offences causing injury, illicit drug offences, and traffic and vehicle regulatory offences, and
  - increases in the proportion of ICOs being revoked for failure to comply with the: mandatory 32 hour work requirement; the good behaviour requirement; reasonable directions of a supervisor; engaging in activities to address offending behaviour; residing only at premises approved by supervisor; and using prohibited drugs.

#### Functions and membership of the Council (Chapter 4)

- 0.8 The Council continues to carry out its statutory functions and Council meetings are scheduled on a monthly basis with business being completed at these meetings and out of session.
- 0.9 We have maintained close working relationships with the Bureau of Crime Statistics and Research, the NSW Law Reform Commission, and other parts of the Department of Justice, including: the State Parole Authority; Corrective Services NSW – Sentence Administration; NSW Courts and Tribunal Services – Reporting Services Branch; and the NSW Police Force.
- 0.10 Following a restructure of the Department of Justice, the staff of the Law Reform and Sentencing Council Secretariat (a division of the Strategy and Policy Branch of the Department of Justice) now support the work of the Council.





# 1. The Council's projects

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## In brief

We worked on four projects in 2015:

- bail – additional show cause offences
- alcohol and drug fuelled violence
- child sexual assault sentencing, and
- domestic violence sentencing.

We also released reports on the first three of these projects.

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## Bail – additional show cause offences

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- 1.1 On 10 September 2014, the Attorney General referred to us the NSW Police Association's proposal to expand the 'show cause' category of offences in the *Bail Act 2013* (NSW).
- 1.2 We were asked to consider suggested additions to the categories of offences for which the accused must "show cause" before bail can be granted, specifically, where an accused person is charged with a serious indictable offence committed:
  - while subject to a good behaviour bond, intervention program order, intensive correction order, or
  - while serving a sentence in the community, or
  - while in custody.
- 1.3 The Attorney General also asked us to consider the breadth of the show cause requirement applying to all serious indictable offences committed while on bail.
- 1.4 We provided a report to the Attorney General on 22 May 2015. It was released on 28 August 2015.
- 1.5 We concluded that the proposed 'on sentence' category was too broad, and risked capturing those convicted of minor offences who do not pose a significant risk to the community.
- 1.6 After considering possible alternatives, we recommended that, if introduced, any 'on sentence' show cause category in the *Bail Act 2013* (NSW) should apply to strictly indictable offences committed by a person while serving a 'custodial sentence'.

Custodial sentences should be defined for this purpose as meaning full time imprisonment, home detention orders, intensive correction orders or suspended sentences.

- 1.7 We expressed a number of concerns about the breadth of the existing ‘on bail’ show cause category, as it raises similar concerns to those applying to the proposed ‘on sentence’ category. However, given the limited operation of the existing provisions, we recommend that they remain in place until we have had further opportunity to consider its impact and report to the Attorney General.
- 1.8 We recommended that the *Bail Act 2013* (NSW) be amended to expand the definition of ‘serious personal violence offence’ to include offences under the law of the Commonwealth, another State or Territory or of another country that are similar to the defined serious personal violence offences in NSW.

### Monitoring and reviewing show cause categories

- 1.9 On 14 January 2015, the Attorney General requested that we take an ongoing role in monitoring and reviewing the show cause categories. In particular, we were to consider two issues that had arisen since the original reference:
  - The Office of the Director of Public Prosecutions (ODPP) had suggested that the “show cause category for repeat serious violent offenders should be more closely aligned with the similar category of offences which had a presumption against bail under the *Bail Act 1978*”.
  - There had also been significant stakeholder concern regarding the breadth of the show cause requirement applying to all serious indictable offences committed while on bail.
- 1.10 The Attorney General asked for an interim report on the two new issues by 31 May 2015. We responded to these issues in the report provided on 22 May 2015.

### Alcohol and drug fuelled violence

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- 1.11 In 2014, the issue of alcohol related violence, and the Government’s response to it, received attention in the media and public discourse. Following a number of alcohol related assaults, which resulted in deaths, a range of responses were developed. These responses included changes to liquor licensing laws, and the creation of a new offence with a mandatory minimum penalty.
- 1.12 On 5 March 2015, the NSW Attorney General asked us to consider a number of proposals from the Thomas Kelly Foundation to amend the *Crimes (Sentencing Procedure) Act 1999* (NSW) to deter alcohol and drug fuelled violence. The Attorney General also asked us to undertake a general examination of possible sentencing measures to achieve deterrence and behaviour change in relation to alcohol and drug fuelled violence, including measures taken by other jurisdictions, the success of such measures and their possible suitability for NSW.
- 1.13 We provided a report to the Attorney General on 26 August 2015. The proposals considered were:
  1. Introduce a mandatory aggravating factor to s 21A of the *Crimes (Sentencing Procedure) Act 1999* that applies where “the offence involved

violence because the offender was taking, inhaling or being affected by a narcotic drug, alcohol or any other intoxicating substance”.

2. Define the concept of “conditional liberty” in s 21A(2)(j) of the *Crimes (Sentencing Procedure) Act 1999*.
3. Expand the concept of “vulnerability” in s 21A(2)(l) of the *Crimes (Sentencing Procedure) Act 1999* to include “the victim being unable or unlikely to defend themselves because of youth, age, sex, disability, physical constraints, inability to escape, lack of knowledge of attack, abused trust or emotional impediment as well as because of the victim’s occupational vulnerability (such as a taxi driver, a bus driver, a public transport worker, a bank teller, a service station attendant or cashier) or because of the victim being homeless”.

1.14 We formed the view that the three proposals should not be supported, for the following reasons:

- Given the frequently spontaneous nature of alcohol and drug fuelled violence, we were not convinced that the first proposal would have a significant impact on deterring such violence, and may have a number of negative unintended consequences. In particular, we considered it would be difficult for the prosecution to prove the defendant was intoxicated or drug affected, and would add to the complexity of sentencing hearings. The proposal’s potential to reduce guilty pleas and distort agreed facts would also have significant negative consequences for the criminal justice system.
- The operation of s 21A(2)(j) has been problematic, but the law has satisfactorily evolved over time to encompass new forms of conditional liberty since its enactment. Defining conditional liberty carries with it risks of freezing the definition, which could inadvertently exclude future forms of conditional liberty that, where breached, should be counted as an aggravating factor.
- Adding to the existing provision on vulnerability in s 21A(2)(l) may add to the complexity of sentencing and increase the possibility of error through double counting or failing to mention a relevant factor.

1.15 Following the review of sentencing and non-sentencing measures in other jurisdictions, we recommended that the NSW Government consider the following initiatives to help deter alcohol and drug fuelled violence and rehabilitate offenders:

- education and treatment programs addressing both problematic alcohol consumption and underlying attitudes to violence, particularly directed at those who might have substance abuse problems
- continuing and expanding diversion programs such as MERIT (including Alcohol MERIT) and the Drug Court, and
- continuing to evaluate restrictions on access to alcohol through licensing measures.

## Child sexual assault sentencing

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1.16 The 2014 report of the NSW Parliament’s Joint Select Committee on Sentencing Child Sexual Assault Offenders noted that community perceptions of sentencing decisions are influenced by limited available information, which may not reflect the

complex considerations and sentencing principles that guide sentencing decisions in this area.

- 1.17 On 3 June 2015, the Attorney General requested that we:
- conduct a review of sentencing in child sexual assault matters in New South Wales that:
- provides sentencing statistics for child sexual assault convictions over a two year period (2012 and 2013), with a focus on serious child sexual assault offences,
  - provides information on the characteristics of the offenders, sentence type and length, and
  - provides background information, including: the key sentencing principles and reasoning employed by sentencing judges; the mitigating subjective features of the offender; and any other significant factors considered in the sentencing decision that explains how courts come to their final decision on sentence. This may be done using case-studies or collation of predominate themes across cases.
- 1.18 We provided a report to the Attorney General on 13 November 2015. This report highlighted the complexity and multi-faceted nature of sentencing for child sexual offences, in particular the range of circumstances in which such offending occurs. This report did not develop any policy responses to the trends identified.
- 1.19 We noted that the Government was currently reviewing child sexual offences and that this was likely to result in changes to the offences and the ways that the maximum penalties relate across the field. We expected that the information and data set out in our report would be used to inform the review.
- 1.20 We considered that there should be regular reviews of sentencing for child sexual offences. We also supported future reviews of sentencing trends for serious child sexual offences to build on work already undertaken for this report and help to identify trends over time.

### Domestic violence sentencing

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- 1.21 In July 2015, the Attorney General asked us to undertake an analysis of sentencing in domestic violence (DV) offences. Periodically, questions are raised as to whether sentences imposed for personal violence offences committed in domestic relationships are consistent with, or vary from, sentences imposed for personal violence offences in other settings. Comparisons are also made between the approach to breaches of apprehended domestic violence orders (ADVOs) in NSW and in other jurisdictions.
- 1.22 We undertook an analysis of sentencing for DV offences with a focus on:
- considering the principles the courts apply when sentencing DV offences and advising on how the courts apply those principles
  - comparing sentences imposed and sentences actually served for Domestic Violence Offences with those imposed for the same personal violence offences (not classified as Domestic Violence Offences) for key offence types where we

considered that undertaking a comparison could demonstrate sentencing patterns between the two categories of offences

- comparing the available sentences, sentencing outcomes and sentences served for the NSW offence of contravening an ADVO (s 14 of the Crimes (*Domestic and Personal Violence*) Act 2007 (NSW)) with the comparable offences in other Australian jurisdictions, and
- comparing the reoffending rates for people convicted of Domestic Violence Offences with the reoffending rates for the same personal violence offences (not classified as Domestic Violence Offences) for key offence types where a comparison is possible and where comparison may demonstrate difference between the two categories of offences.



## 2. Trends, issues and developments

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### In brief

This chapter summarises:

- relevant sentencing related research conducted by the Bureau of Crime Statistics and Research and Judicial Commission
- the operation of guideline judgments by setting out the record of judicial consideration in higher courts
- cases of interest delivered by the High Court and the NSW Court of Criminal Appeal that relate to sentencing
- legislative implementation of Sentencing Council reports.

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## Sentencing related research

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### Does the first prison sentence reduce the risk of further offending?

Bureau of Crime Statistics and Research, Crime and Justice Bulletin, No 187 (October 2015)

- 2.1 The NSW Bureau of Crime Statistics and Research (BOCSAR) examined the question of whether short prison sentences (up to 12 months) exert a special deterrent effect. The study compared the re-offending time for matched groups of offenders who received either a prison sentence or a suspended sentence. The study found that the subsequent time to re-offending did not depend on the type of sentence received. This suggests that there is no particular deterrent effect in receiving a prison sentence for people who had not previously been sentenced to prison.
- 2.2 BOCSAR noted that the international research literature on the effectiveness of prison as a special deterrent casts doubt on the assumption that imprisonment acts as a deterrent. Overseas and Australian studies have found little evidence that offenders given a prison sentence are any less likely to re-offend than comparable offenders given a non-custodial sanction. In fact, a prison sentence may increase the likelihood of re-offending, perhaps by providing opportunities to learn criminal behaviour and attitudes from others while in custody, or because the stigma of being labelled reduces opportunities to pursue a non-criminal way of life on release.
- 2.3 There remains a need for further rigorous research into the effects and effectiveness of prison in Australia.

### Prison penalties for serious domestic and non-domestic assault

Bureau of Crime Statistics and Research, Bureau Brief No 110 (October 2015)

- 2.4 The aim of this study was to determine whether:
  - adult offenders found guilty of a serious non-domestic violence (non-DV) assault offence are more likely to be imprisoned or given longer prison sentences than adult offenders found guilty of a serious domestic violence (DV) assault offence, and
  - Indigenous offenders who commit DV assaults are treated more harshly than non-Indigenous offenders who commit DV assaults.
- 2.5 Data from BOCSAR's Reoffending Database was used to examine sentencing outcomes for adult offenders found guilty of serious assault in the Local Court between 2009 and 2014. Serious assault offences committed in a domestic setting were identified using DV specific lawpart codes. Multivariable regression models were developed to examine differences in imprisonment likelihood and length between DV and non-DV matters.
- 2.6 There is no evidence that courts treat people who commit DV assaults more leniently than those who commit non-DV assaults. No significant differences in penalty length were found for DV and non-DV serious assault offenders who were



imprisoned. In fact, in some cases, those who commit DV assaults are treated more harshly than those who commit non-DV assaults.

- 2.7 Indigenous offenders found guilty of serious DV assault, for example, are more likely to be sentenced to prison than Indigenous offenders who commit serious non-DV assaults.
- 2.8 A study published by Bond and Jeffries in the *British Journal of Criminology* in 2014 suggested that non-DV related offences received harsher penalties than DV related offences in NSW Local Courts. That study was limited in the accuracy of its findings because the analysis aggregated a diverse range of disparate offences, ranging from serious assaults and robbery to less serious common assaults, which attract equally diverse penalties.
- 2.9 BOSCAR undertook the current study to address the limitations of Bond and Jeffries' work by restricting the analysis of sentencing outcomes to include only matters that involve serious assault resulting in injury and by controlling the data to take into account factors known to influence sentencing outcomes.

### Public confidence in the NSW criminal justice system: 2014 update

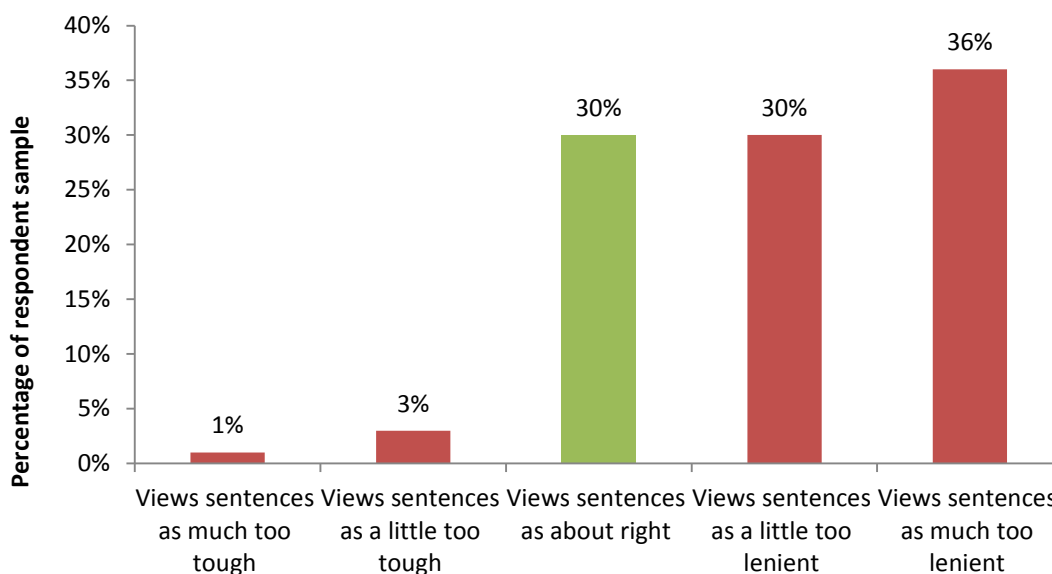
Bureau of Crime Statistics and Research, *Crime and Justice Bulletin*, No 182 (February 2015)

- 2.10 In 2014, BOSCAR undertook a study<sup>1</sup> to report the third wave of BOSCAR's 'Confidence in the CJS' survey. The overall aim of the study was to assess the level of public confidence in the NSW criminal justice system.
- 2.11 The overwhelming majority of those surveyed in 2014 expressed confidence that the criminal justice system respects the rights of the accused (81%) and treats accused people fairly (81%).
- 2.12 Figure 2 presents a disaggregation of respondents' opinions on the appropriateness of sentences handed down by the courts. Highlighted in the centre are the one-third of respondents (30%) who consider sentences handed down to be 'about right'. Most respondents (66%) believe sentences are either a little too lenient or much too lenient. Less than 5% consider sentences to be too tough.

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1. I Halstead, *Public confidence in the New South Wales criminal justice system: 2014 update*, *Crime and Justice Bulletin* No 182 (NSW Bureau of Crime Statistics and Research, 2015).

Figure 2.1: Punitiveness (views on sentencing), 2014



- 2.13 Improving community confidence in the justice system is one of the stated goals of the NSW Government’s NSW 2021 plan and reflects the NSW Department of Justice’s overarching vision “to create a safe and just place for the people of NSW”. The NSW government has pursued several measures to improve community confidence in the justice system under the 2021 plan. Although identifying the impact of these various policy measures would be a challenge, BOCSAR suggests it would be helpful to monitor changes in confidence across the areas that these policy measures are intended to impact. More generally, public confidence in the justice system is critical to its effective functioning since confidence affects the way individuals engage with the system.
- 2.14 In May 2009, we released a monograph, *Public Confidence in the New South Wales Criminal Justice System*, to complement the joint Council-BOCSAR survey published in August 2008. The monograph reviewed the key findings of the survey in the context of the literature and examined existing public confidence initiatives. The purpose of the monograph was to help develop a co-ordinated strategy to improve public confidence in the NSW criminal justice system.
- 2.15 The current BOCSAR study also builds on previous BOCSAR survey analyses in exploring the relationship between confidence levels and perceptions of crime and justice outcomes.

### Have NSW criminal courts become more lenient in the past 20 years?

Bureau of Crime Statistics and Research, Bureau Brief No 101 (March 2015)

- 2.16 BOSCAR undertook a study to investigate whether the NSW Higher and Local Courts have become more lenient across a range of offence categories. The study examined sentencing trends from 1994 to 2013 that included bail outcomes, the use of imprisonment as a sanction for convicted offenders, and average length of prison sentence imposed for convicted offenders.

- 2.17 The study showed that there is no evidence that the NSW criminal courts have become more lenient overall in the past two decades; on the contrary, sentencing has become more severe in many offence categories.
- 2.18 In the NSW Local Courts, the percentage of defendants refused bail almost doubled; increasing from 4.7% in 1994 to 8.8% in 2013. Prison sentence lengths imposed by the Local Court also increased for many offences, including acts intended to cause injury (up 42.9%), sexual assault and related offences (up 62.7%), dangerous or negligent driving (up 42%), prohibited and regulated weapons and explosives offences (up 46.8%); and traffic and vehicle regulatory offences (up 59.5%).
- 2.19 The move toward tougher bail and sentencing decisions is also evident in the NSW Higher Criminal Courts (which deal with the most serious offences). The percentage of defendants refused bail by the Higher Courts increased from 26.1% in 1994 to 47.7% in 2013.
- 2.20 Previous research from BOSCAR indicated that the NSW public generally underestimates the severity of sentences imposed by NSW courts. The same research suggests that the perception of leniency in sentencing is undermining public confidence in the administration of the criminal justice system.

## Sentencing in NSW: A cross-jurisdictional comparison of full time imprisonment

### Judicial Commission of NSW, Research Monograph No 39 (March 2015)

- 2.21 This study<sup>2</sup> examined how sentences of imprisonment imposed in NSW for offences dealt with on indictment compare with interstate jurisdictions. The study focused on five specific offence categories that permitted robust comparison: sexual assault; child sexual assault; dangerous/culpable driving causing death; robbery; and break and enter/burglary.
- 2.22 The findings showed that sentences for a range of serious offences in NSW are among the most severe across the eastern seaboard states of Australia. Despite some small differences in statutory maximum penalties (and putting to one side partially suspended sentences), NSW had:
- higher full-time imprisonment rates than Queensland and Victoria for all five offence categories examined, and
  - longer median head sentences than both Queensland and Victoria for the offences of child sexual assault, robbery, and break and enter/burglary.
- 2.23 The sentencing patterns presented in this study closely resemble those previously reported by the Judicial Commission in 2007. Both studies found that media calls for more severe sentences in NSW were being made in the context of what was already a comparatively harsher sentencing environment.

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2 G Brignell and H Donnelly, *Sentencing in NSW: A cross-jurisdictional comparison of full-time imprisonment*, Research Monograph 39 (NSW Judicial Commission, 2015).

## Sentencing for the offence of sexual intercourse with a child under 10

### Judicial Commission of NSW, Sentencing Trends and Issues No 44 (July 2015)

- 2.24 This publication<sup>3</sup> focused on sentencing for the offence of sexual intercourse with a child aged under 10 (s 66A of the *Crimes Act 1900* (NSW)) for the period from 1 January 2008 to 31 December 2014. It also compared past and present sentencing practices.
- 2.25 The study analysed sentencing patterns for s 66A offences over the reference period and found that lenient sentence options were rarely used. Non-custodial sentences can be explained to some extent because of an offender's age. Juvenile offenders, in particular, were less likely to be sentenced to full-time imprisonment (39.4%). The prison sentences for juvenile offenders and for offenders sentenced following a special hearing were less severe than for adult offenders. Offenders sentenced following a special hearing and juveniles are not subject to the standard non-parole period (SNPP) scheme.
- 2.26 Following the 2009 repeal and redrafting of s 66A into basic and aggravated forms of the offence, sentences remained high. The relatively lower median sentences for the s 66A(1) basic offence for adult offenders can be explained on the basis that these cases did not have any of the (statutory) aggravating features. The study found the higher rate of non-custodial sentences for juveniles sentenced for s 66A(1) offences could be explained by the relatively high number of cases with a combination of mitigating factors.
- 2.27 The *Crimes Legislation Amendment (Child Sex Offences) Act 2015* (NSW) recently increased the maximum penalty of life imprisonment for all s 66A offences. This increase was a response to perceived leniency in sentencing for offences involving child sexual assault and to the effect of these offences on the victims. That increase may result in higher sentences for s 66A offences not committed in circumstances of aggravation. Past sentencing patterns suggest sentencing levels for s 66A offences will not decrease in the future.

## Operation of guideline judgments

- 2.28 The tables below show the consideration that the NSW Court of Criminal Appeal and Supreme Court have given to the guideline judgments during 2015.

Table 2.1: High-range PCA

Guideline judgment	Attorney General's application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 3 of 2002) [2004] NSWCCA 303; 61 NSWLR 305.		
Total in 2015	0	Total in 2014	1

3. P Poletti, P Mizzi and H Donnelly, *Sentencing for the offence of sexual intercourse with a child under 10*, Sentencing Trends and Issues No 44 (Judicial Commission of NSW, 2015).

Table 2.2: Taking matters into account on Form 1

Guideline judgment	Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 1 of 2002) [2002] NSWCCA 518; 56 NSWLR 146.		
Considered	R v JP [2015] NSWCCA 267 R v Feuerstein [2015] NSWCCA 82 R v Mueller [2015] NSWCCA 292		
Cited	Glare v R [2015] NCSCCA 194 Browning v R [2015] NSWCCA 147 Lam V R [2015] NWCCA 87 MD v R [2015] NSWCCA 37 R v Johnson [2015] NSWSC 31 Nguyen, Kathy v R [2015] NSWCCA 209 R v Lachlan [2015] NSWCCA 178		
Total in 2015	10	Total in 2014	12

Table 2.3: Break, enter and steal

Guideline judgment	R v Ponfield [1999] NSWCCA 435; 48 NSWLR 327.		
Considered	Gal v R [2015] NSWCCA 242 Miller v R [2015] NSWCCA 86 Glare v R [2015] NSWCCA 194		
Total in 2015	3	Total in 2014	0

Table 2.4: Armed robbery

<b>Guideline judgment</b>	R v Henry [1999] NSWCCA 111; 46 NSWLR 346.		
<b>Applied:</b>	R v Omar [2015] NSWCCA 67		
<b>Considered</b>	Baleiovalau v R [2015] NSWCCA 305 Vai v R [2015] NSWCCA 303 McDonald v R [2015] NSWCCA 280 Gardener v R [2015] NSWCCA 170 Allen v R [2015] NSWCCA 113		
<b>Cited</b>	Mun v R [2015] NSWCCA 234 R v Davies [2015] NSWCCA 224 El-Ahmad v R [2015] NSWCCA 65 SL v R [2015] NSWCCA 30 R v Rose [2015] NSWCCA 318 R v Farrell [2015] NSWCCA 68 Lam v R [2015] NSWCCA 87 Dean v R [2015] NSWCCA 307 Johan v R [2015] NSWCCA 58		
<b>Total in 2015</b>	15	<b>Total in 2014</b>	14

Table 2.5: Sentencing discount for guilty plea

Guideline judgment	R v Thomson [2000] NSWCCA 309; 49 NSWLR 383.		
Cited	BR v R [2015] NSWCCA 225 Wei v R [2015] NSWCCA 66 Nguyen v R [2015] NSWCCA 209 Gall v R [2015] NSWCCA 69 R v Tuala [2015] NSWCCA 8 Turnbull v Chief Executive of Office of Environment and Heritage [2015] NSWCCA 278 R v NT [2015] NSWCCA 136 Director of Public Prosecutions (Cth) v Gow [2015] NSWCCA 208 Williamson v R [2015] NSWCCA 250 Sabongi v R [2015] NSWCCA 25		
Considered	De Angelis v R [2015] NSWCCA 197 Andreato v R [2015] NSWCCA 239 Villalon v R [2015] NSWCCA 229 Siddiqi v R [2015] NSWCCA 169 MRM v R [2015] NSWCCA 195		
Total in 2015	15	Total in 2014	28

## Cases of interest

### CCA's residual discretion in a Crown appeal against sentence and approach to leniency for previously undisclosed offences

#### CMB v Attorney General for NSW [2015] HCA 9

- 2.29 In this case, the offender pleaded guilty to a number of sexual offences against his daughter. The offender was considered for diversion under the now repealed *Pre-Trial Diversion of Offenders Act 1985* (NSW). As part of the suitability assessment the offender was encouraged to disclose additional sexual assaults in order to show remorse. The offender disclosed additional offences but was not eligible for diversion for this second group of offences due to the repeal of the diversion legislation. The District Court, in respect of the second group of offences, sentenced the offender to good behaviour bonds each conditional on the offender completing the diversionary program.
- 2.30 The Attorney General lodged a Crown appeal on the grounds of inadequacy of sentence under s 5D of the *Criminal Appeal Act 1912* (NSW). The CCA allowed the appeal on the grounds that the sentence was manifestly inadequate and sentenced the offender to a term of imprisonment. In doing so, the CCA stated that an offender

in a Crown appeal had the onus of establishing that the discretion should be exercised in his or her favour. The CCA also said that it was ultimately not satisfied that there was any reason why it should exercise the discretion not to intervene.

- 2.31 On appeal, the High Court dealt with the question of the CCA's residual discretion to dismiss a Crown appeal against sentence. It also dealt with the CCA's approach to the leniency permitted in applying s 23 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) in cases where an offender voluntarily discloses previously unknown guilt, in particular the requirement that the resulting lesser penalty must not be "unreasonably disproportionate to the nature and circumstances of the offence".
- 2.32 The High Court held that, once error is demonstrated on appeal, the Crown has the burden of establishing that the CCA's residual discretion in Crown appeals should be exercised to vary the sentence imposed by the trial court. In allowing the appeal, it was noted that it was not possible to conclude that the CCA, had it applied the correct test, would have arrived at the decision it did.
- 2.33 The High Court, by majority, held that the issue for the CCA in determining whether the District Court sentences were manifestly inadequate, was not whether it regarded "non-custodial sentences as unreasonably disproportionate to the nature and circumstances of the offences" but whether, in the exercise of the sentencing discretion, it was open to the District Court to determine, in light of the finding that without the offender's honest compliance with the diversionary program the offences would have remained undetected, that they were not. It was noted that in this context "unreasonably" had a wide operation and that "whether a sentence is unreasonably disproportionate necessarily is a judgment about which reasonable minds may differ".
- 2.34 The matter was remitted to the CCA for resentencing.

### Obligation to refer to sentencing principles for mentally ill offenders

#### *Cowan v R* [2015] NSWCCA 118

- 2.35 There was considerable evidence before the sentencing judge that the offender had an intellectual disability, including a psychologist's assessment of cognitive functioning, a pre-sentence report and a psychiatrist's report. The defence, in its sentencing submissions referred briefly to some recommendations in the reports but did not make a submission on the offender's intellectual disability nor on the principles applicable to sentencing mentally ill offenders. The prosecution's submissions referred to the intellectual disability in passing.
- 2.36 The judge's ex tempore remarks on sentencing mentioned the intellectual disability but did not refer to the principles relevant to sentencing an offender with an intellectual disability. On appeal, it was submitted that the judge had failed to consider, in light of the intellectual disability, whether general deterrence was appropriate, whether the offender's moral culpability was reduced and whether the need for retribution and denunciation was reduced.
- 2.37 The CCA found that, notwithstanding that it is inappropriate to take an overly critical approach to reasons for sentence delivered ex-tempore, there was considerable evidence before the sentencing judge about the offender's mental state. The CCA held that, in these circumstances, the judge was under an obligation to consider and, if appropriate, apply the principles relating to sentencing mentally ill offenders, even in the absence of specific submissions.



## Using victim impact statements to show substantial harm

### R v Tuala [2015] NSWCCA 8

- 2.38 This was a Crown appeal against inadequacy of sentences for a number of firearms offences including discharge of a firearm with intent to cause grievous bodily harm (for which the offender was found guilty by jury). A particular point was whether a victim impact statement (VIS) could be used as evidence of the aggravating factor in s 21A(2)(g) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), that “the injury, emotional harm, loss or damage caused by the offence was substantial”.
- 2.39 Medical evidence of the victim's injuries was adduced in the trial, but the sentencing judge did not make explicit findings about it. The victim made a VIS setting out substantial detrimental impacts on himself and his family. The prosecution tendered (without objection) this as part of its bundle of material relevant to sentence. The VIS was unsworn and was not subject to testing by cross-examination. In submissions on sentence, the offender's counsel questioned the reliability of the victim's statement. The sentencing judge made observations about the unreliability of the victim's evidence. The sentencing judge's remarks did not indicate that he made any finding of substantial harm. In the appeal, the Crown relied on the VIS as the only evidence relevant to the question of substantial harm.
- 2.40 The CCA observed that it may not be possible to reach a consensus on the use to which a VIS may be put and “each case will depend upon its own facts and circumstances”.
- 2.41 The CCA held that, in the circumstances, the VIS could not be used to prove beyond reasonable doubt that the injury, loss and damage caused was more substantial than could ordinarily be expected of such offences. While the sentencing judge expressly took into account the evidence of physical injury, the VIS could not be used to extend the assessment of the degree of emotional harm, or other loss and damage (including financial loss) beyond that that could ordinarily be expected in the circumstances of the offences, or that which was proved by other evidence.
- 2.42 The CCA also summarised the effect of a considerable body of case law about using a VIS to establish the aggravating factor of “substantial harm” in sentencing.
- 2.43 The case for accepting a VIS as evidence of substantial harm is strengthened in cases where:
- no objection was taken to the VIS
  - there was no question about the weight to be attributed to it, and
  - there was no attempt to limit its use.
- 2.44 There was also little difficulty in using a VIS where it tends to confirm other evidence (either at trial or in the sentencing proceedings) or where it “attests to harm of the kind that might be expected of the offence in question”.
- 2.45 However difficulties can arise, for example, where:
- the facts to which the VIS attests are in question
  - the credibility of the victim is in question

- the harm which the VIS asserts goes well beyond what might ordinarily be expected of the offence, and
- the VIS is the only evidence of harm.

### Re-opening proceedings to correct a sentencing error

#### Bungie v R [2015] NSWCCA 9

- 2.46 The sentencing judge imposed aggregate sentences on two offenders for aggravated offences of break and enter and armed robbery under s 53A of the *Crimes (Sentencing Procedure) Act 1999* (NSW). However, the sentence was contrary to law, as s 53A did not apply to the offenders since it had not commenced when they pleaded guilty. In re-opened proceedings to correct this error, under s 43(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), the judge declined the defence's application to adduce further evidence about the offenders' progress to rehabilitation.
- 2.47 One of the offenders' grounds of appeal was that the judge erred in holding that the sentence could only be imposed by reference to circumstances that existed when the original sentence was imposed.
- 2.48 The CCA held that the judge's approach was correct. Section 43 was "not intended to afford an opportunity to sentenced offenders to re-litigate what they have already litigated, or to seek a different outcome, on different evidence". Section 43 also "does not extend to a general re-opening of proceedings in such a way as to permit or enable a reconsideration (with or without additional evidence) of the decision originally made".

### Approach to indicative sentences when imposing an aggregate sentence

#### McIntosh v R [2015] NSWCCA 184

- 2.49 The sentencing judge imposed an aggregate sentence under s 53A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) for 42 sexual and other offences against children. However, the indicative sentences for some of these offences appeared to be excessive, with some set at what was the maximum penalty for the relevant offence.
- 2.50 The CCA observed that although indicative sentences are not sentences actually imposed, and therefore cannot be the subject of an appeal, a complaint that particular indicative sentences are excessive may provide a basis for concluding that the sentencing process has miscarried.
- 2.51 The CCA concluded:
- What is remarkable about the indicative sentences is that, despite the care taken in the reasons to identify the features of the specific offending in each case, there was no attempt in fixing the separate sentences to identify where across the range of offences which fell within the particular section of the Crimes Act the individual offending fell. That course would have been required by a proper exercise in sentencing. Indeed, the uniformity of the sentences, together with their proximity to the maximum available sentence suggests that the indications were arbitrary and did not bear a proper relationship to the nature of the offending.

## Sentencing for child pornography offences

### R v Porte [2015] NSWCCA 174

- 2.52 The CCA provided a useful collection of material on sentencing for child pornography offences. In particular, it noted a number of sentencing principles for child pornography offences:
- The ready availability of such material has warranted substantial penalties with general deterrence and denunciation being paramount considerations.
  - Given the predominance of general deterrence and denunciation for such offences, rehabilitation may have reduced significance, with the weight to be attributed to rehabilitation depending upon the seriousness of the particular offence.
  - The comity principle has been applied in establishing sentencing principles for such offences.
  - When an offender is sentenced for accessing and possessing such material, the absence from the charges of sale, distribution or dissemination does not mitigate penalty.
  - Possessing child pornography material creates a market for the continued corruption and exploitation of children.
  - Possession of child pornography is not a victimless crime.
  - In addition to the physical and psychological harm from the abuse itself, harm may also result from the knowledge, as victims grow older, that the material may remain in circulation, heightening the shame and distress associated with being exploited when young and vulnerable.
- 2.53 The CCA made general observations about sentencing for child pornography offences, drawing attention to matters that may be relevant to assessing the objective seriousness of offences involving the possession or dissemination or transmission of child pornography.
- 2.54 The CCA also noted:
- It is common to encounter circumstances where there is a combination of a Commonwealth access offence and an offence under relevant State legislation with respect to possession of child abuse material.<sup>4</sup>
  - It is appropriate to make sample images available to the sentencing court (and appeal court) to allow it to form an impression of the material and its degree of depravity.

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4. Drawing attention to *R v Gordon* [2009] QCA 209 [37]; and *R v Fulop* [2009] VSCA 296 [11]-[13].

## Appeal where sentencing judge compared sentences that had subsequently been set aside

### KB v R [2015] NSWCCA 220

- 2.55 In fixing the sentence, the trial judge took into account two comparable cases that had subsequently been set aside and resented in accordance with the High Court's decision in *Muldrock*<sup>5</sup> in relation to the approach to sentencing standard non-parole periods.
- 2.56 The CCA held that the sentencing judge's decision must be reconsidered on the basis that it took account of the original uncorrected CCA decisions in the two cases. The CCA therefore re-exercised the sentencing discretion.

## Taking aggravating factors into account for an aggravated offence

### McDonald v R [2015] NSWCCA 280

- 2.57 The offender was sentenced for a number of offences including robbery in circumstances of aggravation under s 95(1) of the *Crimes Act 1900* (NSW). The aggravating circumstance was deprivation of the victim's liberty: s 95(2)(c).
- 2.58 The offender appealed against sentence on the grounds that the sentencing judge erred in taking into account the use of violence (pushing the victim) and the use of a weapon as additional aggravating features, contrary to s 21A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which prohibits having additional regard to any aggravating factor in sentencing if it is an element of the offence. The use of violence was itself an aggravating element under s 95(2)(b) and the use of a weapon was the method used to restrict the victim's liberty and therefore constituted corporal violence.
- 2.59 The indictment identified the circumstance of aggravation as being the deprivation of the victim's liberty. The CCA held it was entirely correct for the sentencing judge to have regard to the use of a weapon and actual violence as aggravating features in the case. The court noted that in a case that relied on deprivation of liberty as the aggravating circumstances, the use of corporal violence, or the intentional or reckless infliction of actual bodily harm, would operate in further aggravation.

## Two stage approach to sentencing under the mandatory life provisions

### Dean v R [2015] NSWCCA 307

- 2.60 In an appeal against a sentence for murders under the mandatory life sentence provisions in s 61 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), the principal complaint was that the sentencing judge applied a two-stage approach to sentencing. The two-stage approach involved first determining that the murder offences fell into the "worst case" category in accordance with s 61(1) and then considering whether there were considerations that warranted the conclusion that a lesser sentence than life imprisonment was appropriate in accordance with s 21(1)

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5. *Muldrock v R* [2011] HCA 39; 244 CLR 120.

of the *Crimes (Sentencing Procedure) Act 1999* (NSW).<sup>6</sup> This was said to be contrary to the process of instinctive synthesis.

- 2.61 The CCA observed that this approach accords with the practice that has been commonly adopted in sentencing for murder since the introduction of s 61(1).
- 2.62 In rejecting the appeal the CCA observed that for the exercise contemplated by s 21(1) to arise, there must first be a situation where, by a statutory provision, an offender is made liable to life imprisonment. The CCA concluded:

Logically, a determination of the level of culpability for the purposes of s 61(1) must take place before consideration of whether a lesser sentence than life imprisonment should be imposed. This involves no departure from the conventional approach to instinctive synthesis sentencing where an assessment is made as to the objective seriousness or gravity of the offence, taking into account all relevant factors that inform that assessment, and then there is a consideration (having regard to subjective factors) as to what sentence is appropriate.

## Community interest in deterring single punch assaults

### Field v R [2015] NSWCCA 332

- 2.63 In a severity appeal for an offence of manslaughter, where the victim died as a result of a single punch on leaving a hotel, the CCA, in finding the sentence was not unreasonable or unjust, noted the “clear need for sentences that will serve the community interest of deterring others from public acts of aggression that may, and in this case did, have tragically fatal consequences”.

## Legislative implementation of Sentencing Council recommendations

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### Crimes (Sentencing Procedure) Amendment (Firearms Offences) Act 2015

- 2.64 On 21 August 2015, the *Crimes (Sentencing Procedure) Amendment (Firearms Offences) Act 2015* (NSW) was assented. The legislation established standard non-parole periods (SNPPs) for a number of firearms offences and increased the existing SNPPs for offences relating to prohibited firearms and weapons.
- 2.65 Five new firearms and weapon offences were added to the SNPP scheme. Those offences, and their corresponding SNPPs, are as follows.
- discharging a firearm with intent to cause grievous bodily harm,<sup>7</sup> with an SNPP of 9 years
  - discharging a firearm with intent to resist arrest or detention,<sup>8</sup> with an SNPP of 9 years

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6. See *Knight v R* [2006] NSWCCA 292; (2006) 164 A Crim R 126.

7. *Crimes Act 1900* (NSW) s 33A(1).

8. *Crimes Act 1900* (NSW) s 33A(2).

- fire a firearm at a dwelling house or other building with reckless disregard for the safety of any person,<sup>9</sup> with an SNPP of 5 years
- fire a firearm, during a public disorder, at a dwelling house or other building with reckless disregard for the safety of any person,<sup>10</sup> with an SNPP of 6 years, and
- fire a firearm, in the course of an organised criminal activity, at a dwelling house or other building with reckless disregard for the safety of any person,<sup>11</sup> with an SNPP of 6 years.

2.66 The changes in the Act were recommended in our 2013 report *Standard Non-parole Periods: Final Report* as part of our review into the operation of the SNPP scheme.

### Bail Amendment Act 2015

2.67 On 5 November 2015, the *Bail Amendment Act 2015* (NSW) was assented. It implemented the following recommendations from our 2015 report *Bail – Additional Show Cause Offences*:

the definition of serious personal violence offence in section 16B (3) of the Act be expanded to include offences under the law of the Commonwealth, another State or Territory or another country that are similar to the offences under Part 3 of the *Crimes Act 1900* that are punishable by imprisonment for a term of 14 years or more.

### Crimes Legislation Amendment (Child Sex Offences) Act 2015

2.68 On 29 June 2015, the *Crimes Legislation Amendment (Child Sex Offences) Act 2015* (NSW) was assented. The Act implemented the first phase of the Government’s package of criminal justice reforms in the area of child sexual assault.

2.69 The Act implemented one of our recommendations, taken from our Standard Non-Parole Periods report, to expand the standard non-parole period scheme to include a number of child sex offences. Table 2.6 lists the additional sexual offences against children in the *Crimes Act 1900* (NSW) that were included in the SNPP scheme.

Table 2.6: Additional sexual offences against children in the *Crimes Act 1900* (NSW) recommended for inclusion in the SNPP scheme

Crimes Act 1900	Offence	SNPP (years)
s 66B	Attempt sexual intercourse with a child under 10 years	10
s 66C(1)	Sexual intercourse with a child 10-14 years	7
s 66C(2)	Aggravated sexual intercourse with a child 10-14 years	9
s 66C(4)	Aggravated sexual intercourse with a child 14-16 years	5

9. *Crimes Act 1900* (NSW) s 93GA(1).  
 10. *Crimes Act 1900* (NSW) s 93GA(1A).  
 11. *Crimes Act 1900* (NSW) s 93GA(1B).

Crimes Act 1900	Offence	SNPP (years)
s 66EB(2)	Procure a child under 14 years for unlawful sexual activity	6
s 66EB(2)	Procure a child 14-16 years for unlawful sexual activity	5
s 66EB(2A)	Meet a child under 14 years following grooming	6
s 66EB(2A)	Meet a child 14-16 years following grooming	5
s 66EB(3)	Groom a child under 14 years for unlawful sexual activity	5
s 66EB(3)	Groom a child 14-16 years for unlawful sexual activity	4
s 91D(1)	Induce a child under 14 years to participate in child prostitution	6
s 91E(1)	Obtain benefit from child prostitution, child under 14 years	6
s 91G(1)	Use a child under 14 years for pornographic purposes	6





### 3. Review of intensive correction orders

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#### In brief

Since 2011 there has been moderate growth each year in the number of offenders sentenced to an intensive correction order (ICO). In 2015, 1695 offenders were sentenced to ICOs. In 2015, 1.1% of all NSW offenders were sentenced to an ICO for their principal offence. As a proportion of penalties imposed, ICOs are imposed most frequently in major cities and least frequently in very remote regions.

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- 3.1 We are required to conduct a comprehensive review of the intensive correction order (ICO) provisions of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* (CSPA) five years after their commencement.<sup>1</sup> The review will be complete by October 2016.
- 3.2 In the meantime, we report annually to the Attorney General on the operation and use of ICOs, in accordance with the intention outlined in the second reading speech to the *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010 (NSW)*.<sup>2</sup> This is the sixth such annual report.
- 3.3 This report covers the period from 1 October 2010, when ICOs first became available as a sentencing option in NSW, through to the end of December 2015. We have obtained statistical information on the use of ICOs from Corrective Services NSW (CSNSW) and the NSW Bureau of Crime Statistics and Research (BOCSAR).

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

2. NSW, *Parliamentary Debates*, Legislative Council, 22 June 2010, 24426.

## Background

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- 3.4 In our 2007 *Review of Periodic Detention*,<sup>3</sup> we recommended that the sentence of periodic detention should be replaced by a new sentencing option: a community corrections order. A community corrections order would supersede periodic detention within the sentencing hierarchy between a community service order (CSO) and full-time imprisonment. This recommendation was implemented in 2010 as the ICO.
- 3.5 We considered that community corrections orders could remove inequalities for those whose location acted as a barrier to periodic detention, as well as providing case management support and addressing criminogenic needs through community work and program participation.<sup>4</sup>

## Overview of ICOs

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- 3.6 In summary, an ICO has the following characteristics:
- It is a sentence of imprisonment, of up to 2 years, which is served by way of intensive correction in the community, rather than in a correctional facility.<sup>5</sup>
  - It has three key components:
    - supervision in the community by CSNSW
    - participation in tailored rehabilitation programs, as directed by CSNSW, and
    - completion of 32 hours per month of community service work.
  - The sentence is not available for offenders who are under 18 years,<sup>6</sup> or who have committed a prescribed sexual offence.<sup>7</sup>
  - A court cannot set a parole period for an ICO;<sup>8</sup> the offender must complete the entire length of the sentence, as outlined in the original court order. Alternatively, if an ICO is revoked and not re-instated, the offender must serve the balance of the sentence in custody.
  - The court must decide whether a sentence of 2 years imprisonment or less is appropriate and then refer the offender for suitability assessment by CSNSW before imposing an ICO.<sup>9</sup>

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3. NSW Sentencing Council, *Review of Periodic Detention* (2007).

4. NSW Sentencing Council, *Review of Periodic Detention* (2007) [9.3].

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

6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(1)(a).

7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 66. A prescribed sexual offence is defined under s 66 (2)(a) as an offence under *Crimes Act 1900* (NSW) pt 3 div 10 or 10A, where the victim is a person under the age of 16 years or where the elements include sexual intercourse as defined by *Crimes Act 1900* (NSW) s 61H. Under s 66, the definition of prescribed sexual offence also includes attempting, conspiracy and incitement, to commit such an offence.

8. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7(2).

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

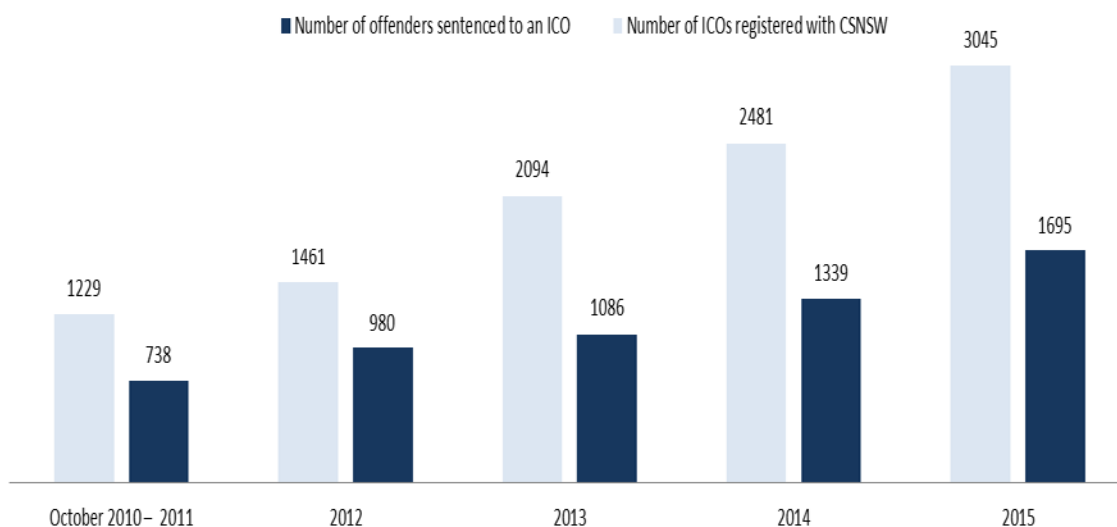
- The assessment criteria include the offender's mental and physical health, substance abuse issues, and housing. These criteria are assessed in so far as such matters impact on the ability of the offender to comply with the obligations of the order, as well as any risk associated with managing the offender in the community.<sup>10</sup>

## Use of ICOs

3.7 Figure 3.1 below shows the number of offenders sentenced to an ICO and the number of ICOs that have been registered at CSNSW since the introduction of the order in October 2010. The data from Figure 3.1 shows that:

- In 2015, 1695 offenders were sentenced to 3045 ICOs.
- Since 2011 there has been moderate growth each year in the number of offenders sentenced to an ICO and the number of ICOs registered with CSNSW.<sup>11</sup>

Figure 3.1: The number of offenders sentenced to ICOs and the number of ICOs registered with CSNSW, 2010 – 2015.



Source: Information provided by Corrective Services NSW, 2016.

3.8 Figure 3.2 below illustrates the number of offenders supervised on an ICO, active at the end of each month, for the period November 2010 to December 2015. The data in Figure 3.2 shows:

- the initial upward trend in the total ICO offender population ended in December 2012, just over 2 years after the commencement of ICOs
- after initial downward trends at the start of 2013, the ICO offender population has steadily increased over time

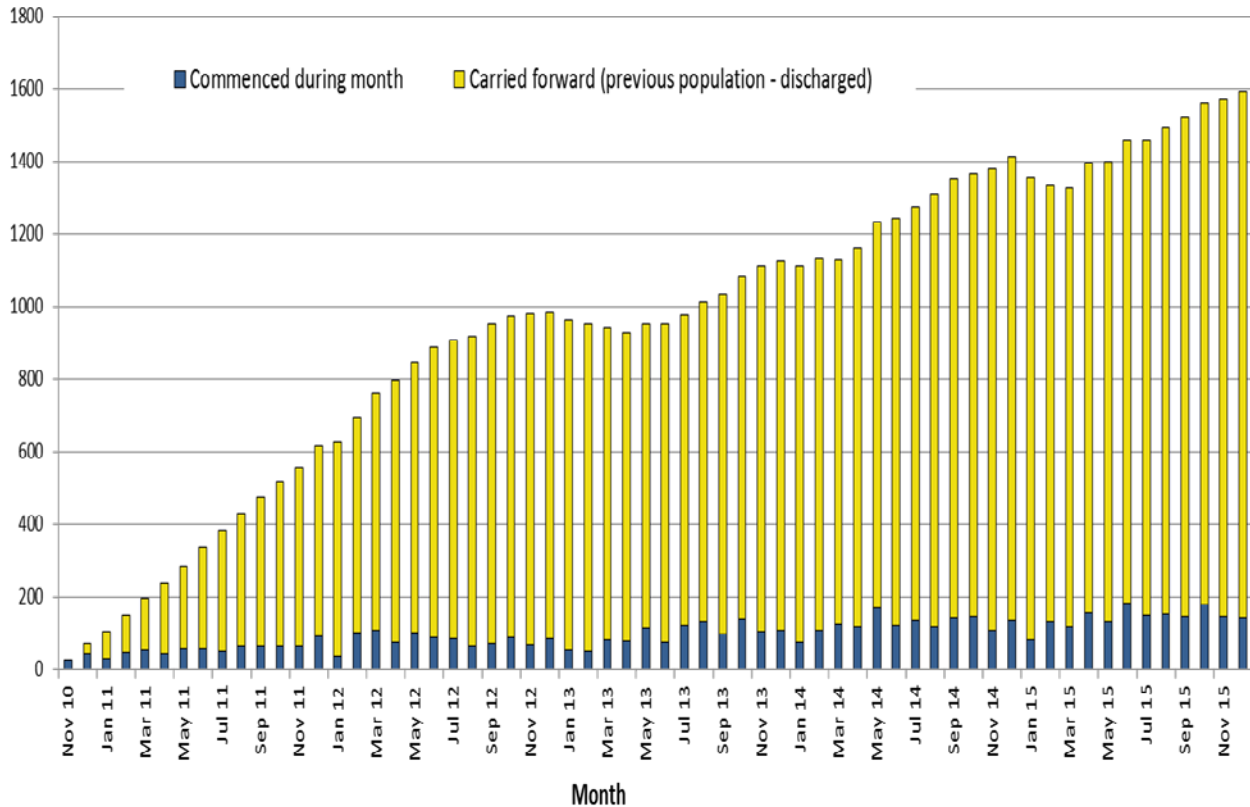
10. *Crimes (Sentencing Procedure) Regulation 2010* (NSW) cl 14.

11. Information provided by Corrective Services NSW, 2016.

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- the month which saw the highest number of offenders serving an ICO (1594) was December 2015, and
- June 2015 saw the greatest number of new offenders (182) register for the commencement of an ICO.<sup>12</sup>

Figure 3.2: The number of offenders supervised on an ICO per month between November 2010 and December 2015



Source: Information provided by Corrective Services NSW, 2016

3.9 Table 3.1 below shows the number of people who received an ICO for the principal offence in the NSW Local, District, and Supreme Courts from 2011-2015. The data in Table 1 shows the following:

- In 2015, 1.1% of all NSW offenders (1,337) were sentenced in the Local, District, and Supreme Courts to an ICO as their principal penalty.
- The number of ICOs issued as the principal penalty has steadily increased each year since 2011.
- The percentage of ICOs issued, as a proportion of total principal penalties, has increased marginally each year since 2011.<sup>13</sup>

3.10 Despite these increases, ICOs continue to represent only a small proportion the offender population in NSW.

12. Information provided by Corrective Services NSW, 2016.

13. Information provided by NSW Bureau of Crime Statistics and Research, 2016.

Table 3.1: The number and percentages of persons receiving an ICO, as the principal penalty, in the NSW Higher and Local, 2011-2015

Year	Number of penalties issued	Number of persons receiving an ICO	ICOs as a percentage of total penalties
2011	112,861	620	0.6
2012	105,840	898	0.8
2013	107,012	1032	1.0
2014	110,702	1285	1.2
2015	118,121	1337	1.1

Source: information provided by NSW Bureau of Crime Statistics and Research, 2016 (unpublished data, ref: Dg1613938HcLcC).

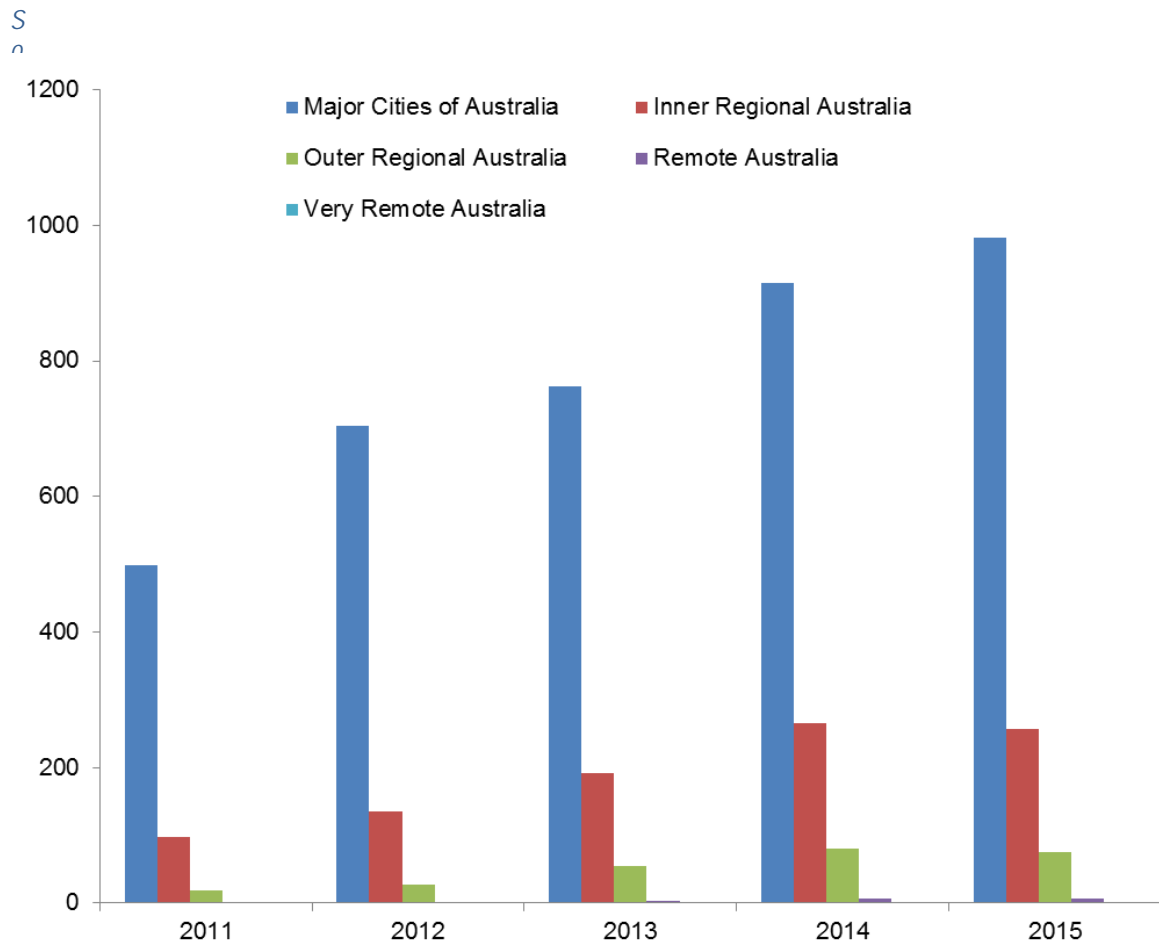
### Regional use of ICOs

3.11 Figure 3.3 illustrates the number of people, by accessibility/remoteness index of Australia (ARIA), who received an ICO as the principal penalty in the NSW Higher and Local Courts from 2011–2015. ARIA is a nationally recognised measure of geographic remoteness used in Australia. The data from Figure 3.3 shows that in 2015:

- 982 ICOs (74%) were issued in the Australian major cities
- 257 ICOs (19%) were issued in Inner Regional Australia, and
- a total of 9 ICOs (0.6%) were issued in Remote and Very Remote Australia.<sup>14</sup>

14. Information provided by NSW Bureau of Crime Statistics and Research, 2016.

Figure 3.3: The number of persons, by ARIA, receiving an ICO as the principal penalty in the NSW Higher and Local courts, 2011-2015



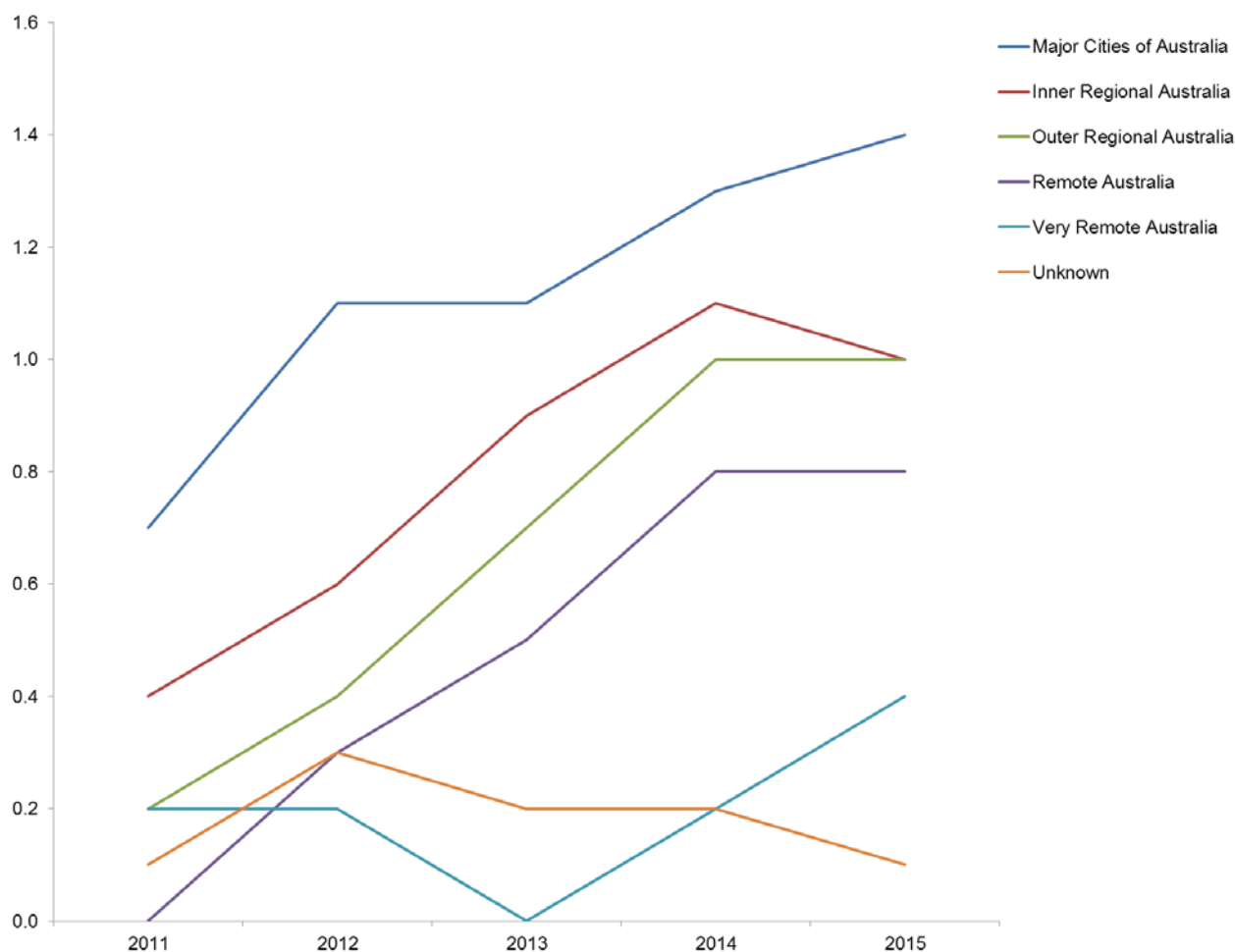
*NSW Bureau of Crime Statistics and Research, 2016 (unpublished data, ref: Dg1613938HcLcC).*

3.12 Figure 3.4 below shows the percentage of people, by ARIA, who received an ICO as the principal penalty in the NSW Higher and Local Courts, as a proportion of all principal penalties for 2011–2015. The data from Figure 3.4 shows that:

- since 2011, there has been modest growth in the percentage of ICOs issued as a proportion of all principal penalties handed down from the NSW Higher and Local Courts, and
- as a proportion of all principal penalties, ICOs are used less frequently in ‘Very Remote Australia’ compared to the other regions.<sup>15</sup>

15. Information provided by NSW Bureau of Crime Statistics and Research, 2016.

Figure 3.4: The percentage of persons, by ARIA, receiving an ICO as the principal penalty in the NSW Higher and Local courts, as a proportion of all principal penalties, 2011-2015



Source: Information provided by NSW Bureau of Crime Statistics and Research, 2016 (unpublished data, ref: Dg1613938HcLcC).

### Indigenous status

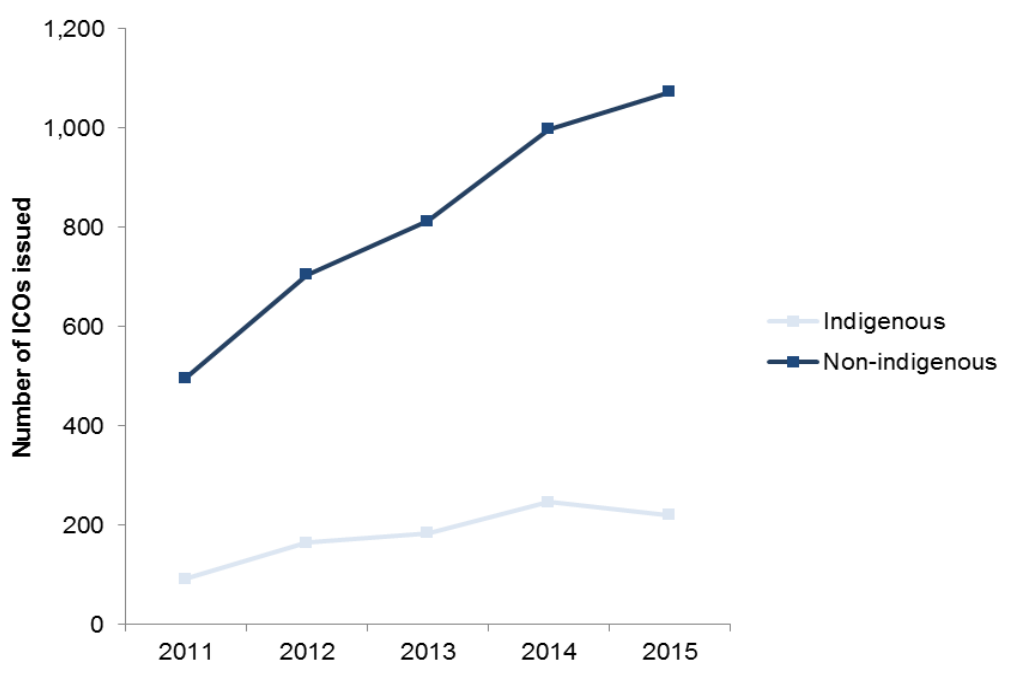
3.13 Figure 3.5 shows the number of people, by Indigenous status, who received an ICO as the principal penalty in the NSW Higher and Local Courts from 2011–2015. In 2015, 1337 offenders were issued an ICO as the principal penalty in the aforementioned courts, of which:

- 220 (17%) were Indigenous offenders
- 1073 (80%) were non-Indigenous offenders, and
- 44 (3%) were unknown.<sup>16</sup>

16. Information provided by NSW Bureau of Crime Statistics and Research, 2016.

3.14 The number of non-Indigenous offenders receiving an ICO as the principal penalty has steadily increased since 2011. This upward trend is also generally reflected for Indigenous offenders. However, 2015 was an exception to this trend, which saw a 10.5% reduction from the previous year for the number of Indigenous offenders receiving an ICO as their principal penalty from the NSW Higher and Local courts.

Figure 3.5: The number of persons, by Indigenous status, receiving an ICO as the principal penalty in the NSW Higher and Local courts, 2011-2015



Source: information provided by NSW Bureau of Crime Statistics and Research, 2016 (unpublished data, ref: Dg1613938HcLcC).

### ICO sentence lengths

3.15 Table 3.2 below compares the average sentence length for persons found guilty in finalised trial and sentence appearances in Local and Higher Courts for 2011–2015.



Table 3.2: Average sentence length, in months, for persons sentenced to an ICO for their principle offence in the Local, District, and Supreme Court, 2011-2015

Year	Average sentence length in months			
	Local Court	District Court	Supreme Court	Average length across all courts
2011	9.8	20.4	24	11.5
2012	10	19.9	24	11.3
2013	10.2	20.1	-	11.7
2014	10.7	20.1	-	12
2015	10	20.3	-	11.9

Source: BOCSAR, *New South Wales Criminal Court Statistics, 2011 – 2014*.

## ICO suitability assessments

- 3.16 An offender may be referred for an ICO suitability assessment if the court is satisfied that no sentence other than imprisonment is appropriate and that the sentence is likely to be for a period of no more than two years.
- 3.17 Table 3.3 shows the outcomes of assessments for ICO suitability. In 2015, the courts requested 2772 ICO assessments and of this figure, 2723 offenders were assessed.<sup>17</sup> Of the offenders who were assessed:
- 1740 (63.9%) were assessed as 'suitable'
  - 950 (34.9%) were assessed as 'unsuitable', and
  - 33 (1.2%) were included in the 'other' or 'unknown' category.<sup>18</sup>
- 3.18 The data in Table 3.3 indicates that the number of offenders assessed as 'suitable' for an ICO has steadily increased each year since October 2010. The greatest increase was from 2014 – 2015 when the number of offenders found suitable for an ICO increased by 4.3%.

17. Information provided by Corrective Services NSW, 2016.

18 The category "Other" includes: resources not available, report rescinded, offender deceased and offender ineligible for ICO.

Table 3.3: Sentencing outcomes for offenders assessed for ICO suitability

Assessment Outcome	2010 - 2012		2013		2014		2015	
	Number	%	Number	%	Number	%	Number	%
Suitable	1856	52.3	1241	57	1574	59.6	1740	63.9
Unsuitable	1852	44.6	901	41	1037	39.3	950	34.9
Other/ Unknown	109	3.1	27	1	28	1	33	1.2
Total	3547	100	2185	100	2639	100	2723	100

Source: *Corrective Services NSW, 2016.*

3.19 Numerous factors can contribute to an offender being assessed as unsuitable. Figure 3.6 below shows the most common factors that contributed to offenders being assessed as unsuitable in 2015. It can be seen from Figure 3.6 that of the 950 offenders assessed as unsuitable in 2015:

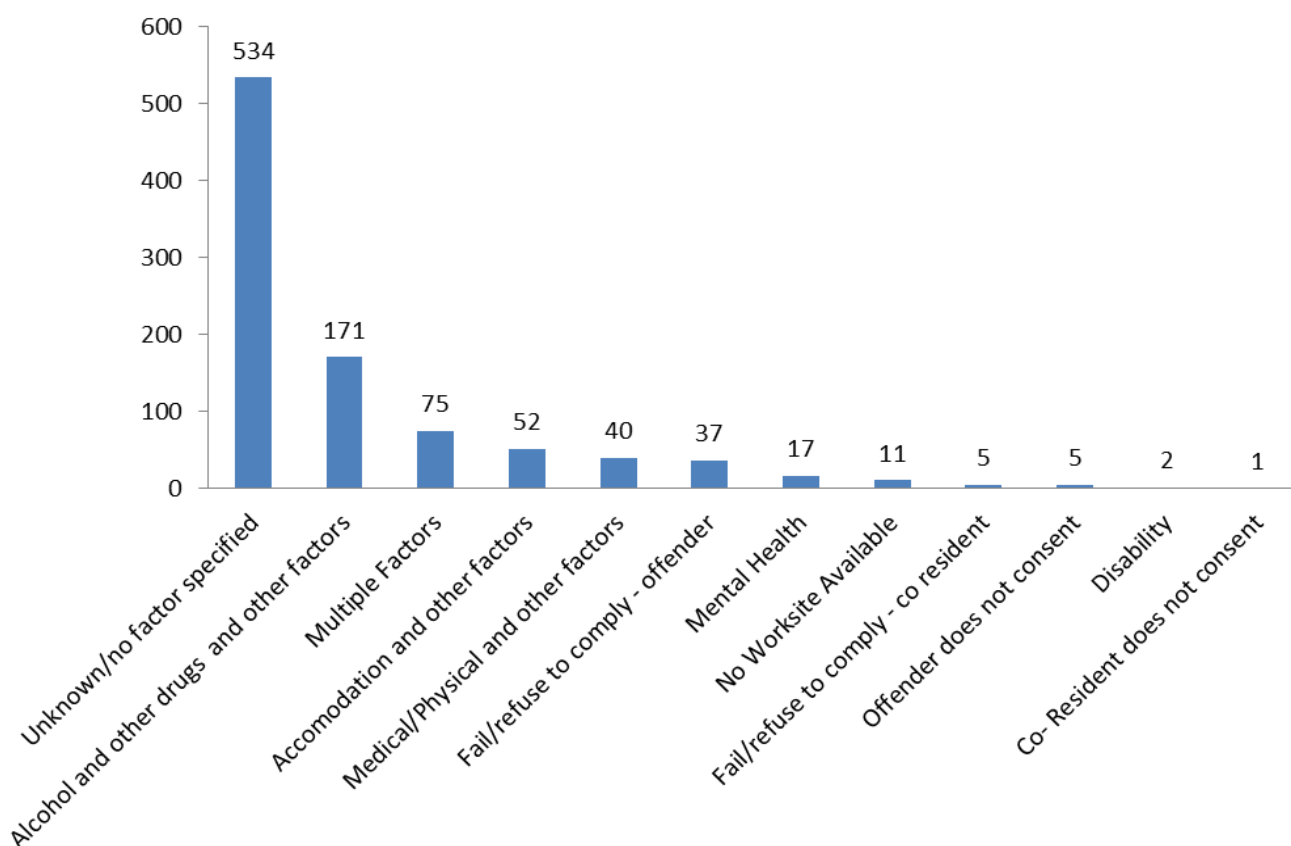
- 534 offenders (56.2%) were assessed as unsuitable due to unknown or unspecified factors
- 171 offenders (18%) were assessed as unsuitable due to alcohol , drugs, and other factors, and
- 75 offenders (7.9%) were assessed as unsuitable due to multiple factors.<sup>19</sup>

3.20 It would be useful to understand the unknown and unspecified factors which contribute to an unsuitable assessment. In our view, data collection should be undertaken more comprehensively in order to identify the “unknown and unspecified” category.

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19. Information provided by Corrective Services NSW, 2016.

Figure 3.6: Factors contributing to an offender being deemed as unsuitable, 2015



Source: Corrective Services NSW, 2016.

## Offence characteristics

3.21 Table 3.4 shows the most common offences for which ICOs were imposed in 2015.<sup>20</sup> The three most common offences were:

- acts intended to cause injury (545)
- traffic and vehicle regulatory offences (433), and
- illicit drug offences (193).<sup>21</sup>

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

21. Data provided by Corrective Services NSW, 2016.

Table 3.4: Profile of the most common offences for which ICOs were imposed, 2010-2015

Offence classification	2015		2014		2013		2010 - 2012	
	Offenders	%	Offenders	%	Offenders	%	Offenders	%
Homicide and related offences	1	0.1	2	0.1	3	0.3	5	0.3
Acts intended to cause injury	545	31.8	456	30.2	340	28.5	458	27
Sexual assault and related offences	28	1.6	22	1.5	16	1.3	23	1.4
Dangerous or negligent acts endangering persons	76	4.4	77	5.1	76	6.4	110	6.5
Abduction, harassment and other offences against the person	17	1.0	8	0.5	9	0.8	6	0.4
Robbery, extortion and related offences	33	1.9	40	2.7	38	3.2	39	2.3
Unlawful entry with intent/burglary, break and enter	85	5.0	82	5.4	65	5.4	77	4.5
Theft and related offences	81	4.7	65	4.3	67	6.5	65	3.8
Fraud, deception and related offences	97	5.7	98	6.5	66	5.5	117	6.9
Illicit drug offences	193	11.3	157	10.4	92	7.7	152	9.0
Prohibited and regulated weapons and explosives offences	25	1.5	23	1.5	13	1.1	30	1.8
Property damage and environmental pollution	13	0.8	16	1.1	16	1.3	25	1.5
Public order offences	32	1.9	27	1.8	12	1.0	24	1.4
Traffic and vehicle regulatory offences	433	25.3	396	26.2	349	29.3	518	30.6
Offences against justice procedures, government security and government operations	46	2.7	34	2.3	28	2.3	44	2.6
Miscellaneous offences	8	0.5	6	0.4	3	0.3	2	0.1
<b>Total</b>	<b>1713</b>	<b>100</b>	<b>1509</b>	<b>100</b>	<b>1193</b>	<b>100</b>	<b>1695</b>	<b>100</b>

Source: Corrective Services NSW, 2016. Offence classification in accordance with the Australian Standard Offence Classification 2008 Division.

## Discharges

- 3.22 In 2015, 2669 ICOs were discharged; of this number:
- 1918 (72%) were discharged as the result of successfully completing the ICO
  - 719 (27%) were revoked, and
  - 32 (1%) were discharged for other reasons.<sup>22</sup>
- 3.23 Table 3.5 below shows the numbers of ICOs that were discharged due to successful completion or to revocation from October 2010 – December 2015. There has been a gradual decrease each year in the number of discharges due to the successful completion of the order, as a percentage of all discharges.

Table 3.5: Discharge of ICOs

Reason for discharge	2010 - 2012		2013		2014		2015	
	Number	ICO %	Number	ICO %	Number	ICO %	Number	ICO %
Successfully completed the ICO	950	78	783	74	1587	73	1918	72
Revoked	271	22	274	26	590	27	717	27
<b>Total</b>	<b>1255</b>	<b>100</b>	<b>1057</b>	<b>100</b>	<b>2177</b>	<b>100</b>	<b>2669</b>	<b>99</b>

Source: *Corrective Services NSW, 2016.*

## Breach information

### Breach process

- 3.24 It is CSNSW policy that all breaches of an offender's obligations under an ICO require a response within 5 working days of the breach's discovery. The response can be managed at a number of levels. Where a Community Corrections Officer determines that a breach can be managed locally, the breach will be managed by such means as:
- verbal and written warnings
  - imposing a more stringent application of the ICO conditions
  - restricting an offender's association with certain people or access to certain places, and
  - case management strategies relevant to the breach (for example, referral to drug intervention strategies if drug use is detected).
- 3.25 More serious breaches will be referred to the State Parole Authority (SPA), and in the case of offenders who have been sentenced for a federal offence, to the

22. Data provided by Corrective Services NSW, 2016.

Commonwealth Director of Public Prosecutions (CDPP). In some circumstances, it is mandatory to submit a breach report to SPA or the CDPP. These circumstances include when an offender:

- has absconded
- removed his or her electronic monitoring device
- is found to be in possession of firearms or offensive weapons
- has been arrested for, or convicted of, a new offence, or
- is deemed to be at risk of re-offending.

3.26 SPA can take a number of courses of action in response to a serious breach. For example, the SPA can issue a warning, impose a period of home detention for up to 7 days, or revoke the ICO.<sup>23</sup>

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

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

### Breach rates

3.29 In 2015, SPA revoked 717 ICOs. CSNSW has advised that it cannot provide data about how many other breaches occurred that were resolved locally within this period.

3.30 In relation to the ICOs revoked by SPA, the majority of revocations were for breach of two or more conditions. Table 3.6 shows the number of breaches of key mandatory conditions that led to the revocation of an ICO for 2014 and 2015.<sup>24</sup>

Table 3.6: Mandatory conditions breached resulting in revocation of an ICO, 2014-2015

The breach of conditions which lead to revocation	Number of breaches of mandatory conditions resulting in revocation	
	2015	2014
Undertake 32 hours of community work per month	240	152
Be of good behaviour and not commit any offence	227	181
Comply with all reasonable directions of a supervisor	219	169
Engage in activities to address the factors associated with his or her offending	124	95

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

24. Data provided by Corrective Services NSW, 2016.

Reside only at premises approved by a supervisor	77	73
Refrain from using prohibited drugs, obtaining drugs unlawfully or abusing drugs lawfully obtained	64	48
Submit to breath testing, drug testing or other medically approved test procedures	12	15
Other	16	23
<b>Total</b>	<b>979</b>	<b>756</b>

Source: *Corrective Services NSW, 2016.*

## Reinstatement process

- 3.31 In accordance with s 165 of the *Crimes (Administration of Sentences) Act 1999* (NSW), SPA may, on the offender's application, reinstate a revoked ICO. An offender can apply for reinstatement after serving at least one month in full-time custody.<sup>25</sup> For SPA to make such an order, the offender must again be assessed for suitability for an ICO.<sup>26</sup>
- 3.32 From 1 October 2010 to 31 December 2015, SPA reinstated ICOs for 373 offenders. Of this number:
- 64 offenders had had their orders revoked
  - 121 offenders had successfully completed their ICOs, and
  - 188 remain ongoing.<sup>27</sup>

## Conclusion

- 3.33 Patterns of operation do not appear to have changed significantly over the last year, although the total number of ICOs imposed continues to increase.
- 3.34 Minor trends observed in 2015 include:
- a decrease in the number of Indigenous offenders receiving an ICO as their principal sentence
  - an increase in the proportion of offenders assessed as suitable for an ICO
  - an increase in the proportion of revoked ICOs
  - increases in the proportion of ICOs imposed for the offences causing injury, illicit drug offences, and traffic and vehicle regulatory offences, and

25. *Crimes (Administration of Sentences) Act 1999* (NSW) s 165(2).

26. *Crimes (Administration of Sentences) Act 1999* (NSW) s 165(3).

27. Data provided by Corrective Services NSW, 2016.

- increases in the proportion of ICOs being revoked for failure to comply with the: mandatory 32 hour work requirement; the good behaviour requirement; reasonable directions of a supervisor; engaging in activities to address offending behaviour; residing only at premises approved by supervisor; and using prohibited drugs.
- 3.35 We note the NSW Law Reform Commission report on *Sentencing* analysed the strengths and weaknesses of ICOs, and proposed changes to strengthen the orders, or introduce more flexible community detention orders.<sup>28</sup>

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28. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) Recommendations 9.6 and 11.1-6.



## 4. Functions and membership of the Council

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### In brief

We continue to carry out our statutory functions and Council meetings are scheduled on a monthly basis. Staff of the Law Reform and Sentencing Council Secretariat (a division of the Strategy and Policy Branch of the Department of Justice) now support our work.

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### Functions of the Council

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- 4.1 The Sentencing Council has the following functions under s 100J of the *Crimes (Sentencing Procedure) Act 1999* (CSPA):
- (a) to advise and consult with the Minister in relation to offences suitable for standard non-parole periods and their proposed length,
  - (b) to advise and consult with the Minister in relation to:
    - (i) matters suitable for guideline judgments under Division 4 of Part 3, and
    - (ii) the submissions to the Court of Criminal Appeal to be made by the Minister in guideline proceedings,
  - (c) to monitor, and to report annually to the Minister on, sentencing trends and practices, including the operation of standard non-parole periods and guideline judgments,
  - (d) at the request of the Minister, to prepare research papers or reports on particular subjects in connection with sentencing,
  - (e) to educate the public about sentencing matters.
- 4.2 In addition, we must conduct a comprehensive review of the ICO provisions of the CSPA 5 years after their commencement.<sup>1</sup> The Government has also asked us to report annually to the Attorney General on the use of ICOs.<sup>2</sup>

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

2. NSW, *Parliamentary Debates*, Legislative Council, 22 June 2010, 24426.

## Council members

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

- a retired judicial officer (not being a retired Magistrate)
- a retired Magistrate
- a member with expertise or experience in law enforcement
- four members with expertise or experience in criminal law or sentencing (of whom one is to have expertise or experience in the area of prosecution and one is to have expertise or experience in the area of defence)
- one member with expertise or experience in Aboriginal justice matters
- four members representing the general community, of whom two are to have expertise or experience in matters associated with victims of crime
- one member with expertise or experience in corrective services
- one member with expertise or experience in juvenile justice
- one representative of the Department of Justice, and
- one member with academic or research expertise or experience of relevance to the functions of the Council.<sup>3</sup>

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

### Chairperson

The Hon James Wood AO QC	Retired judicial officer
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### Members

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

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

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

- 4.5 During the course of 2015, Ms Penny Musgrave, the representative of the Department of Justice, resigned from the Council, having left the Department. Ms Musgrave has been a member of the Council since 2008 and the Council noted the valuable contribution she made to the Council's operation through her expertise and commitment.

## Council business

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- 4.6 Council meetings are scheduled on a monthly basis with business being completed at these meetings and out of session.
- 4.7 During 2015, we received presentations at meetings from:
- Neil Donnelly and Suzanne Poynton of the NSW Bureau of Crime Statistics and Research on their findings on prison penalties for serious domestic and non-domestic assault and tabled a draft of Bureau Brief No 110
  - Judge Dina Yehia SC on proposals for a NSW District Koori Court.
- 4.8 We also provided advice to the Attorney General on matters related to the proposed Koori Court.
- 4.9 We have maintained close working relationships with the Bureau of Crime Statistics and Research, the NSW Law Reform Commission, and other parts of the Department of Justice, including: the State Parole Authority; Corrective Services NSW – Sentence Administration; NSW Courts and Tribunal Services – Reporting Services Branch; and the NSW Police Force.

## Public education

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- 4.10 During 2015, we commenced work on a sentencing information package for circulation to media outlets that report on the courts as part of our community engagement strategy. We anticipate finalising the package in 2016.
- 4.11 We have also undertaken some work reviewing the sentencing information that is available on our website. This, too, will be finalised in 2016.

## Staffing

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- 4.12 Following a restructure of the Department of Justice, the staff of the Law Reform and Sentencing Council Secretariat (a division of the Strategy and Policy Branch of the Department of Justice) now support the work of the Commission.
- 4.13 In September 2015, the Council's Executive Officer, Mark Johnstone went on a 12-month secondment to the Royal Commission into Institutional Responses to Child Sexual Abuse.