



**Police & Justice**  
Sentencing Council

# Sentencing Trends and Practices

---

Annual Report 2013



### NSW Sentencing Council

June 2014

www.lawlink.nsw.gov.au/sentencingcouncil  
Phone: 02 8061 9270  
Email: [sentencingcouncil@agd.nsw.gov.au](mailto:sentencingcouncil@agd.nsw.gov.au)  
GPO Box 6  
SYDNEY NSW 2001

### Copyright permissions

© New South Wales Sentencing Council, Sydney, 2014

You may copy, distribute, display, download and otherwise freely deal with this work for any purpose, provided that you attribute the NSW Sentencing Council. 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 – *Crimes (Sentencing Procedure) Act 1999* Schedule 1A, clause 12.

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

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

### Translating and Interpreter Service

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

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

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

ISBN 978-1-922254-01-6

ISSN 1835-5234

# Table of contents

---

<b>1. Executive summary</b> .....	<b>7</b>
The work of the Council.....	7
Trends and Issues .....	8
Review of intensive correction orders.....	8
Issues for 2014.....	8
<b>2. The work of the Council</b> .....	<b>11</b>
Standard non-parole periods .....	11
Assisting the NSW Law Reform Commission.....	11
Legislation arising from prior reports .....	11
<i>Crimes (Serious Sex Offenders) Amendment Act 2013</i> .....	11
<i>Crimes (Sentencing Procedure) Amendment (Provisional Sentencing for Children) Act 2013</i> .....	12
<b>3. Trends and issues</b> .....	<b>15</b>
Increased volume in the District Court and in custody.....	15
<i>Trials and sentencing</i> .....	15
<i>Custody levels</i> .....	15
Bugmy v The Queen.....	16
<i>Background</i> .....	16
<i>High Court decision</i> .....	17
<i>Implications</i> .....	18
Barbaro v The Queen .....	19
<i>Background</i> .....	19
<i>High Court decision</i> .....	19
<i>Implications</i> .....	20
Standard non-parole periods .....	21
<i>LRC recommendations post-Muldrock</i> .....	21
<i>Review of Pre-Muldrock error cases</i> .....	22
Operation of guideline judgments .....	23
<i>Abbas v R</i> .....	24
<i>Sparos v R</i> .....	25
<b>4. Review of intensive correction orders</b> .....	<b>27</b>
Background .....	27
Overview of ICOs .....	27
Use of ICOs.....	28
<i>ICO assessment outcome</i> .....	30
<i>ICO discharges</i> .....	30
<i>Offence characteristics</i> .....	30
Breach information .....	31
<i>Breach process</i> .....	31
<i>Breach rates</i> .....	32
<i>Reinstatement process</i> .....	33
Conclusion.....	33

<b>5. Functions and membership of the Council.....</b>	<b>36</b>
Functions of the Council .....	<b>36</b>
Council Members.....	<b>36</b>
Council business .....	<b>38</b>
Relationship with the NSW Law Reform Commission .....	<b>38</b>

## Table of abbreviations

---

Abbreviation	Definition
<b>BOCSAR</b>	NSW Bureau of Crime Statistics and Research
<b>CCA</b>	NSW Court of Criminal Appeal
<b>CDPP</b>	Commonwealth Director of Public Prosecutions
<b>CSNSW</b>	Corrective Services NSW
<b>CSPA</b>	<i>Crimes (Sentencing Procedure) Act 1999</i>
<b>DPP</b>	Director of Public Prosecutions
<b>HRVOs</b>	High-Risk Violent Offenders
<b>ICO</b>	Intensive correction order
<b>LRC</b>	NSW Law Reform Commission
<b><i>Muldrock</i></b>	<i>Muldrock v The Queen</i> [2011] HCA 39; 244 CLR 120
<b>SNPP</b>	Standard non-parole period
<b>SPA</b>	State Parole Authority



## 1. Executive summary

---

- 1.1 This is the NSW Sentencing Council's tenth statutory report on sentencing trends and practices,<sup>1</sup> which covers the review period from January to December 2013.
- 1.2 In addition to providing a report on trends and practices in sentencing identified by the Council over the course of 2013, it provides a summary of the work of the Council, and a review of the operation of intensive correction orders (ICOs) during 2013.

### The work of the Council

- 1.3 In 2013 we prepared a stand-alone report on standard non-parole periods (SNPPs). This followed from the recommendations of the NSW Law Reform Commission's (LRC) report on Sentencing, a report which we assisted in preparing.
- 1.4 The SNPP scheme provides an additional level of guidance for sentencing courts when sentencing offenders for offences included within the scheme. The scheme sets a SNPP (that is, the minimum period of the sentence which the offender must spend in prison) for each offence in the scheme, which the Parliament has determined is the appropriate non-parole period for an offence in the mid- range of seriousness.
- 1.5 Our report considered which offences should be included within the SNPP scheme, and a process for including future offences and setting appropriate SNPPs for such offences. The final report was provided to the Attorney General in December 2013.
- 1.6 2 pieces of legislation were also passed in 2013 which drew on recommendations made by the Council in previous years, namely the 2012 report on high risk violent offenders (HRVOs) and the 2009 report on provisional sentencing of children.
- 1.7 The *Crimes (Serious Sex Offenders) Amendment Act 2013* included HRVOs within the existing scheme for managing the continuing detention and supervision for serious sex offenders. The *Crimes (Sentencing Procedure) Amendment (Provisional Sentencing for Children) Act 2013* introduced a scheme to allow provisional sentences to be set for a limited class of young people convicted of murder, allowing a court to review the sentence after the offender has further developed. The intent was to allow the final sentence to better reflect the capacity of the offender for rehabilitation and his or her likelihood of re-offending.

---

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

## Trends and Issues

- 1.8 We have identified a number of issues that arose over the course of 2013. These issues include an increase in volume in the criminal justice system, as evidenced by increased trial registrations in the District Court and increased delays in finalising matters registered for sentencing.
- 1.9 The report also notes, in the context of continued high rates of Indigenous incarceration, the High Court decision in *Bugmy v The Queen*, which established that the effects of profound deprivation on individual offenders, including Indigenous offenders, do not diminish over time, and should be given full weight in sentencing.
- 1.10 Another High Court case of interest was that of *Barbaro v The Queen*, which held that it is not appropriate for prosecutors to present sentencing courts with an 'available range' of sentences which the court can impose for specific offences. While the use of sentencing statistics to indicate sentences which have been given for similar sentences in the past is appropriate, it is for the judge alone to determine the relevant facts and applicable principles which will guide the court in determining the final sentence.
- 1.11 In relation to SNPPs, the *Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013* has clarified the way in which a sentencing court is to use an SNPP in determining a final sentence. The Act legislates and reinforces the interpretation given to the scheme by the 2011 High Court case of *Muldrock v The Queen*.
- 1.12 The report notes the consideration given to guideline judgments in a number of cases in 2013.
- 1.13 We will continue to monitor these trends in 2014 and consider whether further investigation or reform is warranted.

## Review of intensive correction orders

- 1.14 The report provides a snapshot of the use of ICOs in 2013. After an initial dip in the total number of offenders subject to an ICO, the number increased during the latter half of the year, indicating increased adoption of this sentencing option. As required under the enabling legislation, we will conduct a more in depth review of the operation of ICOs in 2015.

## Issues for 2014

- 1.15 We have identified a number of issues that it will monitor in 2014, with any findings to be included in the 2014 Annual Report. These issues include:
- the operation of sentences of imprisonment of 7 to 12 months, including reviewing relevant statistics collected by the Bureau of Crime Statistics and Research, Corrective Services NSW and the Judicial Commission about the proportion of the prison population these offenders represent, the offences for which they receive such sentences, and parole revocation rates
  - the continuing operation of ICOs



- providing improved information on the administration of sentences to sentencing courts
- continuing debate regarding the introduction of mandatory minimum sentences for a range of offences
- the impact of the High Court's decision in *Bugmy v The Queen*
- the interpretation and operation of other recent sentencing legislation, including the high risk offender scheme, amendments to the SNPP scheme and provisional sentencing
- the findings of the Joint Select Committee on the Sentencing of Child Sexual Assault Offenders.



## 2. The work of the Council

---

### Standard non-parole periods

- 2.1 On 11 September 2013 the Attorney General asked the Council to review and advise on options for reforming the following aspects of the standard minimum non-parole period (SNPP) scheme:
- the offences which should be included in the SNPP Table,
  - the SNPPs for those offences, and
  - the process by which any further offences should be considered for inclusion in the Table and any further SNPPs set.
- 2.2 We released a consultation paper in September 2013 and sought submissions by 25 October 2013. 17 submissions were received.
- 2.3 An interim report focusing on sexual offences against children was provided to the Attorney General on 5 November 2013. The Attorney General publicly announced that he had provided a copy of the interim report to the NSW Parliament's Joint Select Committee on Sentencing of Child Sexual Assault Offenders on 12 November 2013. Our final report was provided to the Attorney General on 17 December 2013.

### Assisting the NSW Law Reform Commission

- 2.4 During 2013, we worked in close co-operation with the Law Reform Commission (LRC) on its review of the *Crimes (Sentencing Procedure) Act 1999*. We provided support and advice to the LRC on the reference. In September 2013, the LRC's report on *Sentencing*<sup>1</sup> and its companion volume *Patterns and Statistics*<sup>2</sup> were tabled in Parliament.
- 2.5 The LRC report on sentencing recommends a revised Crimes (Sentencing) Act that will simplify NSW's existing sentencing provisions and make them more transparent.
- 2.6 A summary of the LRC's recommendations is contained in our 2012 Annual Report.

### Legislation arising from prior reports

#### ***Crimes (Serious Sex Offenders) Amendment Act 2013***

- 2.7 The *Crimes (Serious Sex Offenders) Amendment Act 2013* was introduced into Parliament on 19 February 2013 and commenced on 19 March 2013.

---

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

2. NSW Law Reform Commission, *Sentencing – Patterns and Statistics*, Companion Report 139-A (2013).

- 2.8 The Act extended the existing scheme for the continued detention and extended supervision of serious sex offenders to high risk violent offenders (HRVOs).
- 2.9 The Act responds to our May 2012 report on HRVOs, which noted that a majority of Council members considered that there was a gap in the existing legislative response to HRVOs, and that, again by majority, a continuing detention and extended supervision scheme should be introduced for HRVOs, subject to a number of safeguards and support structures outlined in the report.
- 2.10 HRVOs have been sentenced to imprisonment following convictions for a serious violence offence, and, in the opinion of the Supreme Court, pose an unacceptable risk of committing a serious violence offence if they are not kept under supervision. The provisions relating to the application, granting and review of continuing detention and extended supervision orders for serious sex offenders (now known as high-risk sex offenders), now also apply to HRVOs.
- 2.11 A statutory review of the *Crimes (High Risk Offenders) Act 2006*, (as the principal Act has been renamed) is to be undertaken in 2016.

### ***Crimes (Sentencing Procedure) Amendment (Provisional Sentencing for Children) Act 2013***

- 2.12 The *Crimes (Sentencing Procedure) Amendment (Provisional Sentencing for Children) Act 2013* was introduced into Parliament on 21 February 2013 and commenced on 25 March 2013.
- 2.13 The Act introduced a scheme of provisional sentencing for young people convicted of murder where the court is of the opinion that it cannot impose an ordinary sentence because the information presently available does not permit a satisfactory assessment of whether the offender has or is likely to develop a serious personality or psychiatric disorder, or a serious cognitive impairment, such that the court cannot satisfactorily assess either or both of the following matters:
- (i) whether the offender is likely to re-offend,
  - (ii) the offender's prospects of rehabilitation.
- 2.14 The scheme is based on a report prepared for the Sentencing Council in 2009. The report considered the difficulties of assessing a child's development at an early age. This is particularly problematic in the very small number of cases where a child has committed a murder. The offence of murder would ordinarily carry a very long sentence.
- 2.15 The scheme therefore allows a court to set a provisional sentence initially, which is periodically reviewed, ideally by the same sentencing judge, noting the personal development of the child.
- 2.16 The reviews are to take place at least every 2 years, and may be undertaken at the request of any party to the sentencing proceedings, or on the court's own motion. The progress reviews are to be informed by reports prepared by the body responsible for the detention of the person, (that is, Corrective Services NSW, Juvenile Justice or NSW Health), which will include assessments of the treatment

the person has had in custody and his or her psychiatric, cognitive and psychological development.

- 2.17 The court may impose a final sentence after each progress review, and must in any case set a final sentence within 5 years of the provisional sentence being imposed or at least 1 year before any non-parole period expires. The final sentence imposed may replace the provisional sentence, or confirm the provisional sentence as a final sentence, and must not exceed the term of the provisional sentence.
- 2.18 At the time of writing, no provisional sentences had been imposed. We will monitor the use of these provisions in 2014.



### 3. Trends and issues

---

#### Increased volume in the District Court and in custody

- 3.1 We note that, over the last 18 months, a range of indicators have registered significant increases, including the number of criminal trials in the District Court, delays in sentencing after guilty pleas in the District Court, and the number of those in custody, including on remand.

#### *Trials and sentencing*

- 3.2 According to the most recent criminal court statistics published by the Bureau of Crime Statistics and Research (BOCSAR), there was a 21% increase in District Court trial registrations from 2011 to 2012,<sup>1</sup> with no corresponding increase in matters committed for trial and finalised by any means.
- 3.3 Similarly, despite a small drop (1%) in the number of persons registered for sentence in the District Court, there was an 11% drop in persons committed for sentence and finalised.<sup>2</sup>
- 3.4 The November 2013 Law Reform Commission (LRC) Consultation paper on encouraging appropriate early guilty pleas also noted that delays in finalising sentence matters in the District Court have steadily increased since 2008, with a 6% increase in the median number of days from offence to sentencing from 2010 to 2011, and a further 4% increase from 2011 to 2012.<sup>3</sup>
- 3.5 The criminal court statistics for 2013 are due to be published in May 2014 and we will consider whether, in the light of these statistics, the increased workload in the District Court has translated into delays in the system.
- 3.6 In the context of reviewing the criminal court statistics for 2013 and any increase in delays in the District Court, we will be mindful of the balance in workload of the Local Court and District Court. The Council did not recommend an increase in the jurisdictional limit of the Local Court in its 2010 report on the issue.<sup>4</sup>

#### *Custody levels*

- 3.7 Custody statistics collected by BOCSAR indicate that there was significant growth in adult custody levels in NSW in 2013, while juvenile custody rates, including Indigenous juvenile custody rates, remained relatively stable.

---

1. Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics 2012*, 12.  
2. Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics 2012*, 12.  
3. NSW Law Reform Commission, *Encouraging appropriate early guilty pleas: Models for discussion*, Consultation paper 15 (2013) Figure 2.12.  
4. NSW Sentencing Council, *An Examination of the Sentencing Powers of the Local Court in NSW*, (2010) 41.

- 3.8 The adult in-custody population increased from 9653 in December 2012 to 10152 in December 2013,<sup>5</sup> an increase of 5%. The Indigenous in-custody population increased from 2279 to 2443,<sup>6</sup> an increase of 7%.
- 3.9 The adult remand population experienced a steep 17% increase from August 2012 to March 2013. The increase over the course of 2013 was from 2672 to 2873,<sup>7</sup> an increase of 8%.
- 3.10 The adult sentenced population increased from 6981 in December 2012 to 7279 in December 2013,<sup>8</sup> an increase of 4%. The sentenced Indigenous population increased at a greater rate over the same period, increasing from 1609 to 1763, an increase of 10%.<sup>9</sup> This means the sentenced Indigenous population increased from 23% to 24.2% of the overall sentenced population.
- 3.11 The causes of this increased load on the criminal justice system are, as yet, unclear, and we will continue to monitor relevant BOCSAR statistics in 2014.

### Bugmy v The Queen

- 3.12 In the context of the Indigenous in-custody population, we note a significant High Court case handed down on 2 October 2013, *Bugmy v The Queen*.<sup>10</sup>

#### Background

- 3.13 Mr Bugmy pleaded guilty to 2 counts of assault of a law enforcement officer other than a police officer, and 1 count of intentionally causing grievous bodily harm. The conduct relating to the charges was throwing pool balls at correctional services officers, including a ball hitting an officer near the left eye, resulting in a permanent loss of eyesight. In the District Court, Mr Bugmy was sentenced to 2 concurrent terms of 8 months imprisonment for the assaults, and a partially concurrent term of 6 years for the grievous bodily harm offence, including a non-parole period of 4 years.
- 3.14 The Director of Public Prosecutions (DPP) successfully appealed to the Court of Criminal Appeal (CCA), and a new sentence of 7 1/2 years, with a 5 year non-parole period, was substituted for the grievous bodily harm offence. In the course of the judgment, Justice Hoeben made the statement that “I agree that with the

---

5. Bureau of Crime Statistics and Research, *NSW Custody Statistics, Quarterly Update December 2013*, 27.

6. Bureau of Crime Statistics and Research, *NSW Custody Statistics, Quarterly Update December 2013*, 27.

7. Bureau of Crime Statistics and Research, *NSW Custody Statistics, Quarterly Update December 2013*, 27.

8. Bureau of Crime Statistics and Research, *NSW Custody Statistics, Quarterly Update December 2013*, 27.

9. Bureau of Crime Statistics and Research, *NSW Custody Statistics, Quarterly Update December 2013*, 27.

10. *Bugmy v The Queen* [2013] HCA 37.



passage of time, the extent to which social deprivation in a person's youth and background can be taken into account, must diminish.”<sup>11</sup>

### **High Court decision**

- 3.15 Mr Bugmy successfully appealed to the High Court, which noted that the CCA failed to establish explicitly manifest inadequacy or consider the exercise of the residual discretion nonetheless to dismiss the appeal. For these reasons the appeal was allowed.<sup>12</sup> The matter was remitted to the CCA for redetermination of the Crown appeal.
- 3.16 The joint judgment (Chief Justice French, and Justices Hayne, Crennan, Kiefel, Bell and Keane) went on to consider submissions from the appellant regarding the unique circumstances of all Aboriginal offenders, as well as the impact of the passage of time on the extent to which social deprivation is to be taken into account in sentencing.
- 3.17 The judgment endorsed the view that the principles enunciated by Justice Wood in *Fernando*<sup>13</sup> do not require a sentencing court, when sentencing an Aboriginal offender, to apply a method of analysis different to that which applies when sentencing other offenders.<sup>14</sup>
- 3.18 Rather, they stand for the proposition that “an Aboriginal offender’s deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender’s sentence.”<sup>15</sup> Thus, while not all Aboriginal offenders come from backgrounds characterised by the abuse of alcohol and alcohol-fuelled violence, the fact that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate a sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way.<sup>16</sup>
- 3.19 The joint judgment also accepted the Crown’s concession that the effects of profound deprivation do not diminish over time and should be given full weight in the determination of an appropriate sentence in every case.<sup>17</sup>
- 3.20 Justice Gageler agreed with the conclusion reached by the joint judgment that the CCA had failed to determine explicitly the issue of manifest inadequacy, and that the appeal must be allowed. However, he declined to accept either the proposition that there must be a diminution in the extent to which it is appropriate to take into account the effects of social deprivation, or that there is no such diminution. Rather,

---

11. *R v Bugmy* [2012] NSWCCA 223 [50].

12. *Bugmy v The Queen* [2013] HCA 37 [24].

13. *R v Fernando* (1992) 76 A Crim R 58.

14. *Bugmy v The Queen* [2013] HCA 37 [36].

15. *R v Bugmy* [2012] NSWCCA 223 [37].

16. *Bugmy v The Queen* [2013] HCA 37 [40].

17. *Bugmy v The Queen* [2013] HCA 37 [42].

the weight to be afforded to the effects of social deprivation is for individual assessment in each case.<sup>18</sup>

### *Implications*

- 3.21 In its report on Sentencing, the LRC noted that special leave to appeal had been granted by the High Court in *Bugmy*, but the decision had not yet been handed down. The LRC considered that there was not, at the time of writing, sufficient justification for a statutory statement of the Fernando principles, or a specific reference to the circumstances of Aboriginal and Torres Strait Islander offenders in the principles or objectives of sentencing.<sup>19</sup>
- 3.22 The LRC recommended that the government consider including a reference to the circumstances of Aboriginal and Torres Strait Islander offenders in the factors a court must take into account when sentencing, following the *Bugmy* decision.<sup>20</sup>
- 3.23 In light of the decision's conclusion that the same method of analysis should apply when sentencing Indigenous offenders as when sentencing other offenders, there would not appear to be any support from the High Court for a specific reference to Aboriginal and Torres Strait Islander offenders.
- 3.24 While *Bugmy* clarified that the effects of profound deprivation suffered by individual Indigenous offenders do not diminish over time, and should continue to be taken into account when sentencing throughout an offender's life, the fact remains that in the 22 years since the *Fernando* decision, the rate of imprisonment of Aboriginal people and Torres Strait Islanders has not decreased in NSW.
- 3.25 In fact, in 2009 BOCSAR noted that the Indigenous imprisonment rate in NSW had increased by 48% from 2001 to 2008, with increases in the proportion of Indigenous offenders sent to prison and average sentence length.<sup>21</sup> According to the Australian Bureau of Statistics, the rate of imprisonment for Aboriginal and Torres Strait Islander prisoners as at 30 June 2013 was 13.5 times higher than the rate for non-Indigenous prisoners in NSW, a slight increase since 2008, when the rate was 12.3 times higher.<sup>22</sup> As noted above at paragraph 3.10, the Indigenous sentenced population increased at more than twice the rate of the overall sentenced population over 2013.
- 3.26 Increases in the Indigenous imprisonment rate were noted in the Discussion Paper prepared for the Sentencing Council by Janet Manuell SC in December 2009 - *The Fernando principles: the sentencing of Indigenous offenders in NSW*.<sup>23</sup> The paper noted the interpretation and application of the Fernando principles since 1992, and

---

18. *Bugmy v The Queen* [2013] HCA 37 [56].

19. NSW Law Reform Commission, *Sentencing*, Report 139 (2013), [17.34].

20. NSW Law Reform Commission, *Sentencing*, Report 139 (2013), Recommendation 17.1.

21. Bureau of Crime Statistics and Research, *Why are Indigenous imprisonment rates rising?*, Issue paper no. 41 (2009).

22. Australian Bureau of Statistics, *Prisoners in Australia 2013*, 4517.0, Table 18.

23. NSW Sentencing Council, *The Fernando principles: the sentencing of Indigenous offenders in NSW* (2009).

considered whether a specialist Indigenous sentencing court could be implemented in NSW.

- 3.27 We note these figures with concern, and will continue to monitor the availability and use of non-custodial options for indigenous offenders. The LRC noted BOCSAR's findings that the best way to reduce Indigenous overrepresentation in the court system is to reduce recidivism through effective rehabilitation programs, such as intensive supervision coupled with treatment, vocational education and drug courts.<sup>24</sup>
- 3.28 We will also monitor the impact of the recently introduced provision in the *Crimes (Sentencing Procedure) Act 1999* (CSPA) which provides that self-induced intoxication is not to be taken into account as a mitigating factor<sup>25</sup>, and whether this provision has any impact on the interpretation of the *Fernando* principles.

### Barbaro v The Queen

- 3.29 The recent High Court decision of *Barbaro v The Queen* may have consequences for sentencing hearings in NSW.<sup>26</sup>

#### Background

- 3.30 The case was an appeal from sentences handed down by the Supreme Court of Victoria for offences relating to the trafficking and possession of commercial quantities of MDMA and cocaine. The appellants had pleaded guilty to the offences, after discussions with the Commonwealth DPP indicating the 'sentencing range' applicable to the offences.
- 3.31 Early in the sentencing hearing, the judge made clear that she did not intend to ask for any submissions on the ranges within which the sentences should fall, and the prosecution made no submissions about the 'available range' of sentences. The sentences handed down were in some respects more severe than the range that had been indicated by the prosecution in discussions with the appellants' lawyers.<sup>27</sup>

#### High Court decision

- 3.32 The appellants conceded that the actual sentences passed were not manifestly excessive, but argued that the sentencing hearing had been unfair because the judge had declined to take a submission about the available sentencing range, and had thereby failed to take into account a relevant consideration in sentencing.
- 3.33 The joint judgment (Chief Justice French, and Justices Hayne, Kiefel and Bell) held that a statement from the prosecution as to the bounds of the available range of sentences is a statement of opinion, not a statement of law or fact. As such, it is not

---

24. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [17.30].

25. *Crimes (Sentencing Procedure) Act 1999*, s 21A (5AA), inserted by the *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014*, commenced 31 January 2014.

26. *Barbaro v The Queen* [2014] HCA 2.

27. *Barbaro v The Queen* [2014] HCA 2 [15].

something that a judge need take into account in finding the relevant facts or applying the relevant principles of law to yield the appropriate sentence.<sup>28</sup>

- 3.34 The judgment indicated clearly that the prosecution is not required, and should not be permitted, to make a statement of bounds to a sentencing judge.<sup>29</sup> The judgment also distinguished the setting of bounds of the available range of sentences from the 'proper and ordinary' use of sentencing statistics, which merely indicates sentences that have been imposed in comparable cases. In this regard, the judgement noted that consistency in sentencing is important.<sup>30</sup> However, it is for the judge alone to decide what sentence should be imposed.<sup>31</sup>
- 3.35 Justice Gageler also dismissed the appeal. He found that a submission that a sentence within a given range would or would not be available to be imposed by a court in the circumstances of a particular case is a submission of law, but noted that the court is not bound to accept the submission.<sup>32</sup> As such a submission is simply a statement of a range of outcomes that can result from the lawful exercise of discretion, it cannot be said to be, of itself, a consideration that must be taken into account in the exercise of that discretion.<sup>33</sup>
- 3.36 As it had been conceded that there was no error in setting the sentences that were imposed, the prosecution's proposed statement of ranges was clearly in error, as it did not encompass those final sentences. Therefore, there was no practical procedural unfairness in the judge's refusal to hear those submissions.<sup>34</sup>

### *Implications*

- 3.37 As the Court made it clear that the use of sentencing statistics to indicate sentences that have previously been imposed for similar offences was not inappropriate, there is still room for prosecutors to make such submissions to sentencing courts. The judgment does not preclude the prosecution from handing up a range of sentence precedents from similar cases, so as to assist the court to identify a relevant sentencing pattern.
- 3.38 However, some clarification may be required over the type of assistance prosecutors may appropriately provide to the sentencing court. Initial Council discussions have highlighted some potential difficulties in practice with the position expressed by the High Court. We will consult with the DPP about whether it may provide any assistance in this regard.

---

28. *Barbaro v The Queen* [2014] HCA 2 [7].

29. *Barbaro v The Queen* [2014] HCA 2 [7].

30. *Barbaro v The Queen* [2014] HCA 2 [40].

31. *Barbaro v The Queen* [2014] HCA 2 [47].

32. *Barbaro v The Queen* [2014] HCA 2 [62].

33. *Barbaro v The Queen* [2014] HCA 2 [64].

34. *Barbaro v The Queen* [2014] HCA 2 [65].

## Standard non-parole periods

- 3.39 The Standard Non-Parole Period (SNPP) scheme was introduced as an amendment to the CSPA. It took effect on 1 February 2003. The scheme provides statutory guidance<sup>35</sup> to sentencing courts on appropriate non-parole periods for specified serious indictable offences. These offences are set out in the Table to Division 1A of Part 4 of the CSPA.
- 3.40 Just over a year later, the CCA considered the application of the SNPP scheme in *R v Way*.<sup>36</sup> However, the *Way* approach to implementing the SNPP scheme changed significantly in October 2011 with the decision of the High Court of Australia in *Muldrock v The Queen*.<sup>37</sup> The High Court held in *Muldrock* that the CCA decision in *Way* had been wrongly decided.
- 3.41 The High Court rejected the appellant's submission that the SNPP has no role in sentencing for an offence in the low (or high) range of objective seriousness. It accepted the respondent's submission that the effect of s 54B(2) of the CSPA is not to "mandate a particular [non-parole period] for a particular category of offence rather it preserves the full scope of the judicial discretion to impose a non-parole period longer or shorter than the [standard non-parole period]".<sup>38</sup>
- 3.42 The High Court observed, among other points, that:

Section 54B(2) and s 54B(3) oblige the court to take into account the full range of factors in determining the appropriate sentence for the offence. In so doing, the court is mindful of two legislative guideposts: the maximum sentence and the standard non-parole period. The latter requires that content be given to its specification as "the non-parole period for an offence in the middle of the range of objective seriousness". Meaningful content cannot be given to the concept by taking into account characteristics of the offender. The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. It is to be determined wholly by reference to the nature of the offending.

Nothing in the amendments introduced by the amending Act requires or permits the court to engage in a two-stage approach to the sentencing of offenders for Div 1A offences, commencing with an assessment of whether the offence falls within the middle range of objective seriousness by comparison with an hypothesised offence answering that description and, in the event that it does, by inquiring if there are matters justifying a longer or shorter period.<sup>39</sup>

## LRC recommendations post-Muldrock

- 3.43 Following *Muldrock*, a number of unresolved issues remained, including whether the SNPP scheme should be maintained; whether it should be amended (and if so, how); or whether it should be repealed and replaced by an alternative scheme.

---

35. *Crimes (Sentencing Procedure) Act 1999* pt 4 div 1A.

36. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168.

37. *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120.

38. *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120 [24].

39. *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120 [27]–[28].

- 3.44 The LRC, in consultation with the Council, considered these issues further in the context of its sentencing reference — in the interim report in relation to SNPPs<sup>40</sup> and in the recent sentencing report.<sup>41</sup> In both reports the LRC made recommendations for reform of legislation on SNPPs post-*Muldrock*.<sup>42</sup>
- 3.45 The LRC recommended that the SNPP scheme be retained as a further guidepost for the sentencing of serious offences, and that the statute be amended to reflect the High Court’s interpretation of the scheme in *Muldrock*.<sup>43</sup> The Government’s response to this recommendation is reflected in the *Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013*, which commenced on 29 October 2013.
- 3.46 Under the Act:
- A court is to take the SNPP for an offence into account when determining the appropriate sentence for an offence (together with the other matters that a court can or must take into account, such as the maximum penalty, the aggravating and mitigating factors set out in s 21A of the CSPA, and the factors and principles arising at common law).<sup>44</sup>
  - The SNPP “represents the non-parole period for an [SNPP] offence ... that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness”.<sup>45</sup>
  - The court must give reasons for setting a non-parole period that is different from the SNPP and must identify each factor that it took into account.<sup>46</sup>
- 3.47 We will continue to monitor patterns of sentencing under the SNPP scheme.

### **Review of Pre-Muldrock error cases**

- 3.48 In the sentencing report, the LRC noted that CCA had considered and rejected the use of section 43 of the CSPA as a mechanism for correcting pre-Muldrock sentencing errors in *Achurch v The Queen (No 2)*.<sup>47</sup>
- 3.49 The High Court granted special leave to appeal in *Achurch*, and the final decision was handed down on 2 April 2014.<sup>48</sup> The High Court dismissed the appeal, finding

---

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

41. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) and *Sentencing - Patterns and Statistics*, Companion Report 139-A (2013) were tabled in Parliament in September 2013.

42. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) Recommendations 4.1, 4.2 and 7.1. NSW Law Reform Commission, *Sentencing: Interim Report on Standard Minimum Non-Parole Periods*, Report 134 (2012) Option 2 and Recommendation [2.60]-[2.79]; and discussion on the 6 options for reform [2.53]-[2.133].

43. NSW Law Reform Commission, *Sentencing: Interim Report on Standard Minimum Non-Parole Periods*, Report 134 (2012) Option 2 and Recommendation [2.60]-[2.79].

44. Now reflected in *Crimes (Sentencing Procedure) Act 1999* s 54B(2).

45. Now reflected in *Crimes (Sentencing Procedure) Act 1999* s 54A(2).

46. Now reflected in *Crimes (Sentencing Procedure) Act 1999* s 54B(3).

47. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [7.16]. *Achurch v The Queen (No 2)* [2013] NSWCCA 117.

48. *Achurch v The Queen* [2014] HCA 10.

that the terms of the section should be interpreted narrowly, such that the section can only be used to re-open proceedings where a penalty has been imposed that is patently in error, for example, it exceeds the maximum penalty for the offence, or is otherwise beyond the power of the court to impose.<sup>49</sup>

- 3.50 The joint judgment (Chief Justice French, and Justices Crennan, Kiefel and Bell) noted that prior to the CCA's decision in *Achurch*, a broader interpretation of section 43 had been adopted by the CCA.<sup>50</sup> However, the joint judgment approved the narrower construction adopted by the CCA in *Achurch*, on the basis that this fits the text and limited purpose of the section.<sup>51</sup>
- 3.51 As such, the section is not a suitable vehicle to revisit pre-*Muldrock* error cases, which should continue to be dealt with through normal appeal mechanisms.

### Operation of guideline judgments

- 3.52 The table below indicates the consideration that the promulgated guideline judgments received during 2013 in reported cases.

Subject	Guideline judgment	Consideration
<b>High-range PCA</b>	<i>Attorney General's application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 3 of 2002)</i> [2004] NSWCCA 303; 61 NSWLR 305.	Considered in 2 cases in the ACT. Cited in 2 cases in NSW, and 2 further cases in the ACT.
<b>Form 1</b>	<i>Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 1 of 2002)</i> [2002] NSWCCA 518; 56 NSWLR 146.	Considered in 8 cases and cited in a further 8. The case of <i>Abbas v R</i> [2013] NSWCCA 115 considered the interpretation of the guideline judgment in some detail and is discussed below. Commentary on the subsequent case of <i>Sparos v R</i> [2013] NSWCCA 223 is also provided.
<b>Guilty plea</b>	<i>R v Thomson</i> [2000] NSWCCA 309; 49 NSWLR 383	Applied in 3 cases, considered in 1, and cited in a further 22 NSW cases.
<b>Break, enter and steal</b>	<i>R v Ponfield</i> [1999] NSWCCA 435; 48 NSWLR 327	Considered in 4 NSW cases and cited in 2 cases, including 1 citation in the ACT.
<b>Armed robbery</b>	<i>R v Henry</i> [1999] NSWCCA 111; 46 NSWLR 346	Distinguished in 1 case, applied in 3 cases, considered in 12 cases (including once in WA) and cited in a further 12 cases, including 1 case in the ACT and 1 in Tasmania.
<b>Dangerous driving</b>	<i>R v Jurisic</i> (1998) 45 NSWLR 209 reformulated in <i>R v Whyte</i> [2002] NSWCCA 343; 55 NSWLR 252	Considered in 3 cases and cited in 2 cases, including 1 citation in Victoria.

49. *Achurch v The Queen* [2014] HCA 10 [32].

50. *Achurch v The Queen* [2014] HCA 10 [30].

51. *Achurch v The Queen* [2014] HCA 10 [36].

### *Abbas v R*

- 3.53 The case of *Abbas v R*<sup>52</sup> considered the appropriate way to take into account 'Form 1' offences, and the proper application of the guideline judgment in *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 1 of 2002)* [2002] NSWCCA 518. The CCA upheld the correctness of the guideline judgment and clarified that Form 1 offences should not be the subject of separate penalties, but can legitimately result in an increase to a sentence for the principal offence by being reflected in consideration of factors such as deterrence and retribution.

#### *Background*

- 3.54 The appellants had been charged with various drug offences, and 3 had agreed to have additional offences placed on a 'Form 1', to be taken into account in sentencing. The 'Form 1' procedure is set out in sections 32 and 33 of the CSPA. The procedure allows a sentencing court to take into account other offences which the offender has admitted but of which he or she has not been convicted. This avoids multiple proceedings and prevents the offender from being charged later for the offences listed. It also provides for those offences to be taken into account when sentencing for the principal offence.
- 3.55 In the sentencing remarks, the judge noted the Form 1 offences and stated that the additional criminality in the Form 1 offences needed to be reflected in the sentence imposed for the primary offence.
- 3.56 The appellants argued that this was an inappropriate way to take Form 1 offences into account, as it suggested that punishment was being given for the Form 1 offences, contrary to the guideline judgment. They cited 2 dissenting judgments of Justice Adams,<sup>53</sup> which suggested that a sentencing court cannot take into account the criminality of the Form 1 offences, as to do so would be to 'punish' an offender for offences of which the person has not been convicted. In Justice Adams' view, the Form 1 offences can only inform the criminality involved in the substantive offence, and issues such as remorse and rehabilitation.
- 3.57 The appellants stated they were not challenging the guideline judgment, although Justice Basten noted that it was difficult to avoid the conclusion that that was the substantive effect of the appeal.<sup>54</sup>

#### *CCA Decision*

- 3.58 All 5 judges of the CCA gave separate judgments, although all agreed that the sentencing judge correctly applied the guideline judgment.
- 3.59 Chief Justice Bathurst (with whom Justice Garling agreed on the Form 1 issue) reinforced the guideline judgment's principles that while a sentencing court cannot impose a separate penalty for Form 1 offences, it may take them into account in

---

52. *Abbas v R* [2013] NSWCCA 115.

53. *Dionys v The Queen* [2011] NSWCCA 272 and *R v Calcutt* [2012] NSWCCA 40.

54. *Abbas v R* [2013] NSWCCA 115 [58].



reference to the additional need for personal deterrence and retribution in sentencing for the principal offence.<sup>55</sup>

- 3.60 Justice Hoeben noted that the guideline judgment had already established that any increase to a sentence that results from consideration of Form 1 offences could technically be characterised as punishment for the Form 1 offences, but this concept of ‘punishment’ was too broad and would, if adopted, entirely defeat the point of the Form 1 process.<sup>56</sup>

### *Sparos v R*

- 3.61 Subsequent to *Abbas*, the case of *Sparos v R* also considered the taking into account of Form 1 offences.<sup>57</sup> The case clarified that Form 1 offences cannot be taken into account when considering issues of accumulation of sentences for multiple offences.

#### *Background*

- 3.62 The appellant had pleaded guilty to an importation and a supply drug offence, with a count of dealing with the proceeds of crime dealt with as a Form 1.
- 3.63 The sentences for the importation and supply offences were partially accumulated, and the judge had indicated that the Form 1 offence militated against complete concurrence of the principal offence (the supply offence) with the importation offence.
- 3.64 The appeal was partially based on the submission that the judge had erred in partially accumulating the sentences on account of the criminality of the Form 1 offence.

#### *CCA Decision*

- 3.65 All 3 judges in the CCA held that the appeal should be dismissed. All 3 judges also held that *Abbas* correctly stated the law on Form 1 offences, although it left open the question of whether Form 1 offences could be taken into account, not only in assessing a principal offence, but also in determining issues of totality.<sup>58</sup>
- 3.66 Justice Fullerton (with whom Justice Beazley agreed) found that the sentencing judge had erred in taking into account the Form 1 offence when considering issues of accumulation, finding that Form 1 offences should only be taken into account when initially determining the sentence for the principal offence. However, the partial accumulation had in any case been appropriate given the totality of the offending, and thus the appeal should be dismissed.<sup>59</sup>
- 3.67 Justice Beech-Jones found that the expression in the Act of taking the “further offence into account when dealing with the offender for the principal offence” was sufficiently broad to allow Form 1 offences to be taken into account not only when

---

55. *Abbas v R* [2013] NSWCCA 115 [22].

56. *Abbas v R* [2013] NSWCCA 115 [104].

57. *Sparos v R* [2013] NSWCCA 223.

58. *Sparos v R* [2013] NSWCCA 223 Fullerton J at [5], Beech-Jones J at [54].

59. *Sparos v R* [2013] NSWCCA 223 [6].

setting a sentence for the principal offence, but also when considering issues of concurrency with other offences.<sup>60</sup>

---

60. *Sparos v R* [2013] NSWCCA 223 [55].

## 4. Review of intensive correction orders

---

- 4.1 The Sentencing Council is required to conduct a comprehensive review of the intensive correction order (ICO) provisions of the *Crimes (Sentencing Procedure) Act 1999* (CSPA) 5 years after their commencement.<sup>1</sup> That review is due to commence in 2015.
- 4.2 In the meantime, the Council reports annually to the Attorney General on the operation and use of ICOs, in accordance with the intention outlined in the second reading speech to the *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Bill 2010*.<sup>2</sup> This is the third such annual report.
- 4.3 This report covers the period from 1 October 2010, when ICOs first became available as a sentencing option in NSW, through to the end of December 2013. We have obtained statistical information on ICOs from Corrective Services NSW (CSNSW).

### Background

- 4.4 In its 2007 *Review of Periodic Detention*,<sup>3</sup> we recommended that the sentence of periodic detention be replaced by a new sentencing option, a community corrections order, which would take its place within the sentencing hierarchy between a community service order (CSO) and full-time imprisonment. This recommendation was implemented in 2010 as the ICO.
- 4.5 In making that recommendation, we considered that Community Corrections Orders could remove inequalities for those whose place of residence acted as a barrier to periodic detention, as well as providing case management support and addressing criminogenic needs through community work and program participation.<sup>4</sup>

### Overview of ICOs

- 4.6 ICOs are governed by the CSPA, the *Crimes (Sentencing Procedure) Regulation 2010*, the *Crimes (Administration of Sentences) Act 1999* and the *Crimes (Administration of Sentences) Regulation 2008*. In summary, the ICO is characterised as follows:
- It is a sentence of imprisonment, of up to 2 years, which is served by way of intensive correction in the community under the supervision of CSNSW, rather than in a correctional facility.<sup>5</sup>
  - It has 3 key components:

---

1. *Crimes (Sentencing Procedure) Act 1999* s 73A.  
2. NSW, *Parliamentary Debates*, Legislative Council, 22 June 2010, 24426.  
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* s 7.

- 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>
  - It is not possible for a court to set a parole period for an ICO;<sup>8</sup> the offender must serve the entire length of the sentence, as outlined in the original court order.
  - A court can only impose an ICO following a suitability assessment by CSNSW,<sup>9</sup> which occurs prior to sentencing.<sup>10</sup> The court must decide a sentence of 2 years imprisonment or less is appropriate and then refer the offender for assessment by CSNSW before imposing a sentence.
  - The assessment criteria are set out in cl 14 of the *Crimes (Sentencing Procedure) Regulation 2010*, and include criteria such as the offender's mental and physical health, substance abuse issues and housing, so far as such matters impact on the ability of the offender to comply with the obligations of the order, as well any risks associated with managing the offender in the community.

## Use of ICOs

- 4.7 During the period from 1 October 2010 to 31 December 2013, 2804 offenders were sentenced to 4784 ICOs.<sup>11</sup> However, ICOs represent a small proportion of all offenders. In 2012, 0.92% of all NSW offenders (898 people) were sentenced in the Local, District or Supreme Courts to an ICO as their principal penalty.<sup>12</sup>
- 4.8 Although being an infrequently used sentencing option, ICOs tend to be used more readily than periodic detention orders were used for sentences longer than 12 months. See Table 1 below. 5% of all ICOs imposed from 1 October 2010 to 31 December 2013 were for the maximum duration of 2 years.<sup>13</sup>

---

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

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

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

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

10. *Crimes (Sentencing Procedure) Act 1999* s 67(4).

11. Information provided by Corrective Services NSW, 2014.

12. NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics* (2012).

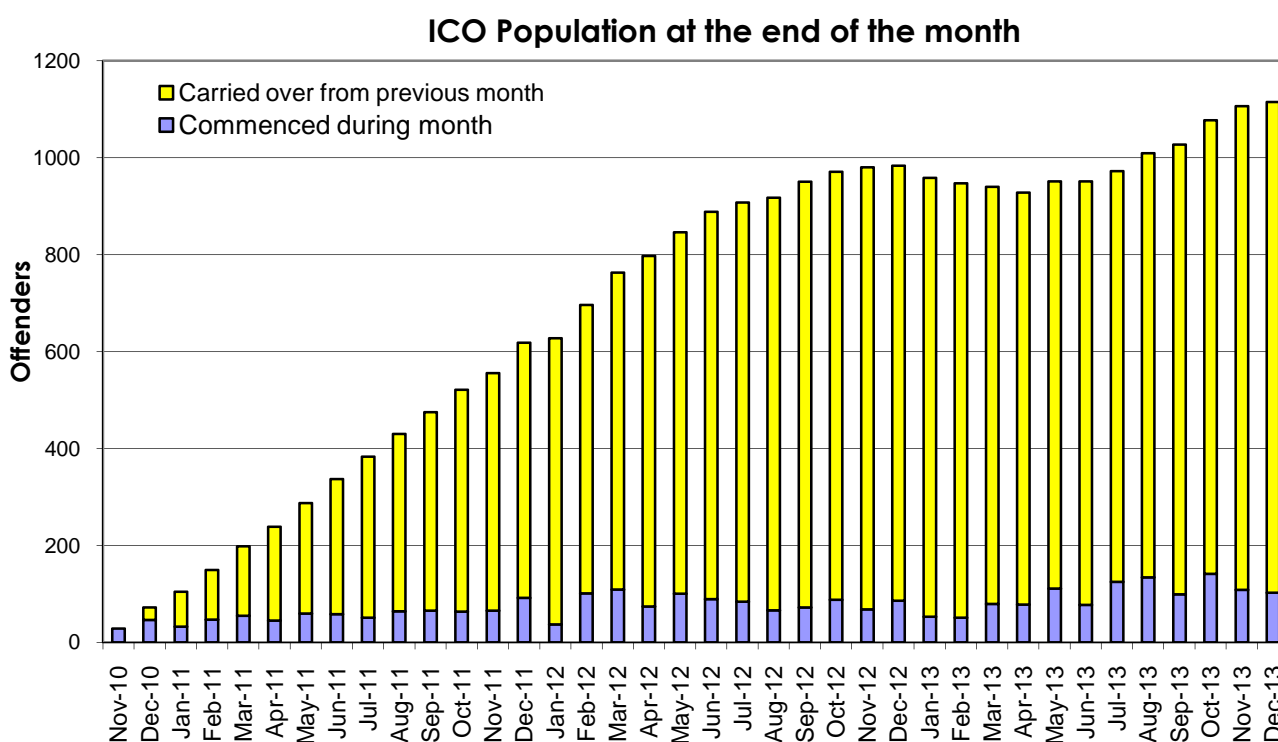
13. 5% being 233 out of 4784 orders. Data provided by Corrective Services NSW, 2014.

**Table 1: Sentence length for periodic detention orders imposed in 2006 and ICOs imposed in the period October 2010 – December 2013<sup>14</sup>**

Sentence length	Periodic detention %	ICO %
< 6 months	23.0	15.1
6-12 months	59.0	41.1
12-18 months	12.0	28.5
> 18 months	6.0	15.3

4.9 The initial upward trend in the total ICO offender population ended in December 2012 (just over 2 years after the commencement of ICOs). After an initial downward trend at the start of 2013, the total population increased from June 2013 to a new high of 1115 offenders in December 2013. The peak of new offenders being registered occurred in October 2013, with 141.<sup>15</sup>

**Figure 1: Number of offenders supervised on an ICO per month between November 2010 and December 2013<sup>16</sup>**



14. Data on periodic detention terms taken from: NSW Sentencing Council, *Review of Periodic Detention* (2007) [3.3] Table 2. Data on ICOs provided by Corrective Services NSW, 2014, and relate to the period October 2010 - December 2013.

15. Data provided by Corrective Services NSW, 2014.

16. Data and graph provided by Corrective Services NSW, 2014.

### ICO assessment outcome

- 4.10 Table 2 below illustrates ICO assessment outcomes during the period from 1 January 2013 to December 2013.<sup>17</sup>

**Table 2: ICO assessment outcomes 2013**

Result	Number	%
Suitable	1241	57
Unsuitable	901	41
Other*	27	1
Unknown	16	1
<b>Total</b>	<b>2185</b>	<b>100</b>

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

### ICO discharges

- 4.11 Of the 1057 ICOs that were discharged in 2013, 783 (74%) were discharged as the result of a successful completion of the ICO, and 274 (26%) were revoked.<sup>18</sup>

### Offence characteristics

- 4.12 The most common offences, for which ICOs were imposed during the period from October 2010 to December 2013, were traffic and vehicle regulatory offences (29.9%), acts intended to cause injury (27.7%), and illicit drug offences (8.4%), as seen in Table 3 below.<sup>19</sup>
- 4.13 As can be seen from the Table, these were also the most common offences for which ICOs were imposed during 2013.

17. Data provided by Corrective Services NSW, 2014.

18. Data provided by Corrective Services NSW, 2014.

19. Data provided by Corrective Services NSW, 2014. 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 in category 15.

**Table 3: The most common offences for which ICOs were imposed 2013, and October 2010 – December 2013**

Offence classification <sup>20</sup>	Jan 2013 – Dec 2013		Oct 2010 - Dec 2013	
	Offenders	%	Offenders	%
Homicide and related offences	3	0.3	8	0.3
Acts intended to cause injury	340	28.5	821	27.7
Sexual assault and related offences	16	1.3	39	1.3
Dangerous or negligent acts endangering persons	76	6.4	185	6.2
Abduction, harassment and other offences against the person	9	0.8	17	0.6
Robbery, extortion and related offences	38	3.2	77	2.6
Unlawful entry with intent/burglary, break and enter	65	5.4	146	4.9
Theft and related offences	67	6.5	140	4.7
Fraud, deception and related offences	66	5.5	192	6.5
Illicit drug offences	92	7.7	248	8.4
Prohibited and regulated weapons and explosives offences	13	1.1	43	1.4
Property damage and environmental pollution	16	1.3	44	1.5
Public order offences	12	1.0	37	1.2
Traffic and vehicle regulatory offences	349	29.3	888	29.9
Offences against justice procedures, government security and government operations	28	2.3	77	2.6
Miscellaneous offences	3	0.3	6	0.2
<b>Total</b>	<b>1193</b>	<b>100</b>	<b>2968</b>	<b>100</b>

## Breach information

### *Breach process*

- 4.14 It is the policy of Community Corrections, the body within CSNSW responsible for the management of ICOs, that all breaches of an offender's obligations under an ICO require a response within 5 working days of the discovery of the breach. The response to the breach can be managed at a number of levels. Where it is determined by a Community Corrections Officer that a breach can be managed locally, the breach will be managed by means including, but not limited to, verbal

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

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 importantly, case management strategies as relevant to the breach (for example, referral to drug intervention strategies if drug use is detected).

- 4.15 More serious breaches will be referred to the State Parole Authority (SPA), and in the case of offenders who have been sentenced for a federal offence, to the Commonwealth Director of Public Prosecutions (CDPP). In some circumstances, it is mandatory to submit a breach report to the SPA or the CDPP. These circumstances include, but are not limited to, when an offender has absconded or removed his/her electronic monitoring device; when an offender is found to be in possession of firearms or offensive weapons; when an offender has been arrested for, or convicted of, a new offence; and when the offender is deemed to be at risk of re-offending.
- 4.16 The SPA has a number of courses of action it can take 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.
- 4.17 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 take no action, impose a fine, or revoke the ICO and re-sentence the offender.
- 4.18 After a breach report is submitted, the CCO continues to manage the offender according to his or her order conditions until advice is received from the SPA or the CDPP about the outcome of the report.

### **Breach rates**

- 4.19 Of the 2914 ICOs finalised during the period from October 2010 to December 2013, CSNSW has advised that SPA has revoked 561 ICOs (19%). CSNSW has advised it cannot provide data about how many breaches occurred that were resolved by CCMG or by the ICO Management Committee within this period.
- 4.20 In relation to the ICOs revoked by SPA, the following breaches of key mandatory conditions led to revocation:<sup>21</sup>
- Breach of the work component of the order (25.6% of conditions breached – up from 23.5% as at December 2012)
  - Breach of condition to be of good behaviour/not offend (21.7% of conditions breached – down from 25.5% as at December 2012)
  - Breach of condition to comply with all reasonable directions of a supervisor (18.4% of conditions breached – up from 13.6% as at December 2012)
  - Breach of condition to reside only at premises approved by supervisor (11.6% of conditions breached – down from 13.1% as at December 2012)

---

21. Data provided by Corrective Services NSW, 2014.



- Breach of condition to engage in programs/activities to address offending behaviour (8.6% of conditions breached – up from 6.6% as at December 2012) and
- Breach of condition to refrain from using prohibited drugs (5.9% of conditions breached – down from 6.6% as at December 2012).

### **Reinstatement process**

- 4.21 In accordance with s 165 of the *Crimes (Administration of Sentences) Act 1999*, the SPA may, on application of the offender, reinstate a revoked ICO. An offender can apply for reinstatement after serving at least 1 month in full-time custody.<sup>22</sup> In order for SPA to make an order reinstating the offender, the offender must again be assessed for suitability for an ICO.<sup>23</sup>
- 4.22 In the period from 1 October 2010 to 31 December 2013, SPA reinstated ICOs for 76 offenders. As at 1 January 2014, 18 of these offenders had had their orders revoked and 34 offenders had successfully completed their ICOs. The remainder (24) were still ongoing.<sup>24</sup>

### **Conclusion**

- 4.23 This report provides an update on the numbers of ICOs used and their operation. Patterns of operation do not appear to have changed significantly over the last year, although the total number of ICOs imposed continues to increase.
- 4.24 Minor trends observed in 2013 include:
- an increase in the proportion of offenders assessed as suitable for an ICO
  - an increase in the proportion of ICOs ending in revocation
  - increases in the proportion of ICOs imposed for offences of causing injury, and robbery, unlawful entry and theft type offences
  - decreases in the proportion of ICOs imposed for offences relating to fraud, illicit drugs and traffic violations
  - increases in the proportion of ICOs being revoked for breaches of work components, failing to comply with reasonable directions and engaging in activities to address offending behaviour
  - decreases in the proportion of ICOs being revoked for failing to be of good behaviour, not residing at approved premises and using prohibited drugs.
- 4.25 A further review of ICO use will be included in our 2014 Annual Report.

---

22. *Crimes (Administration of Sentences) Act 1999*, s 165(2).

23. *Crimes (Administration of Sentences) Act 1999*, s 165(3).

24. Data provided by Corrective Services NSW, 2014.

- 4.26 We note the Law Reform Commission Sentencing report analyses the strengths and weaknesses of ICOs, and proposes changes to strengthen the orders, or introduce more flexible community detention orders.<sup>25</sup>

---

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



## 5. Functions and membership of the Council

---

### Functions of the Council

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

- (2)(a) to advise and consult with the Minister in relation to offences suitable for standard non-parole periods and their proposed length,
  - (b) to advise and consult with the Minister in relation to:
    - (i) matters suitable for guideline judgments under Division 4 of Part 3, and
    - (ii) the submissions to the Court of Criminal Appeal to be made by the Minister in guideline proceedings,
  - (c) to monitor, and to report annually to the Minister on, sentencing trends and practices, including the operation of standard non-parole periods and guideline judgments,
  - (d) at the request of the Minister, to prepare research papers or reports on particular subjects in connection with sentencing,
  - (e) to educate the public about sentencing matters.
- (2) Any advice given to the Minister by the Sentencing Council may be given either at the request of the Minister or without any such request.
- (3) The Sentencing Council has such other functions as are conferred or imposed on it by or under this or any other Act.
- (4) In the exercise of its functions, the Sentencing Council may consult with, and may receive and consider information and advice from, the Judicial Commission of New South Wales and the Bureau of Crime Statistics and Research of the Attorney General's Department (or any like agency that may replace either of those agencies).

5.2 In addition, we have been given an additional function to conduct a comprehensive review of the ICO provisions of the CSPA 5 years after their commencement,<sup>1</sup> and has also been asked by Government to report annually to the Attorney General on the use of ICOs.<sup>2</sup>

### Council Members

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

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

---

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

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

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

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

#### **Chairperson**

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

#### **Members**

The Hon Anthony Whealy QC (from 19 August 2013) Deputy Chairperson	Retired judicial officer/ Member with expertise or experience in criminal law or sentencing
His Honour Acting Judge Paul Cloran	Retired magistrate
Mr David Hudson APM (until 24 May 2013)	Member with expertise or experience in law enforcement
Mr Mark Jenkins (from 5 August 2013)	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

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

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
Ms Karin Abrams (until 24 May 2013)	Community member
Mr Howard Brown OAM	Community member - experience in matters associated with victims of crime
Ms Martha Jabour (until 24 May 2013)	Community member - experience in matters associated with victims of crime
Mr Ken Marslew AM	Community member - experience in matters associated with victims of crime
Mr Peter Severin	Member with expertise or experience in corrective services
Ms Penny Musgrave	Representative of the Department of Attorney General and Justice
Professor David Tait	Member with relevant academic or research expertise or experience

### Council business

- 5.5 We meet on a monthly basis with Council business being completed at these meetings and out of session.
- 5.6 We have maintained our close working relationship with the Bureau of Crime Statistics and Research, the Judicial Commission of New South Wales, the NSW Law Reform Commission (LRC), and the Department of Attorney General and Justice in 2013. During 2013, we provided advice and assistance to the LRC on its wide-ranging review of the CSPA.

### Relationship with the NSW Law Reform Commission

- 5.7 Since 2012-13, the secretariats of the LRC and the Sentencing Council have been a single administrative unit under a memorandum of understanding. Both statutory bodies require similar secretariat support to undertake projects and propose law reforms (with the Council specialising in sentencing law and providing a specialist advisory function through its expert members). Joining in this way has strengthened the work of both by enabling access to joint operational policies and by enabling more flexible use of resources.