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Law Reform Commission

Sentencing
Question Paper 10

Ancillary orders

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Question Paper 10: Ancillary orders

10.1 The ancillary orders described in this Question Paper, while imposed on offenders who are being (or have been) sentenced, are, for a variety of reasons, not treated as independent sentencing options in NSW. Some of these orders are treated as independent sentencing options in other jurisdictions.[1]

10.2 Each order can achieve one or more of the purposes of sentencing. In the case of compensation, this includes recognising the harm done to the victim of the crime and the community. In the case of driver licence disqualification, and non-association and place restriction orders, this includes incapacitation and deterrence.

10.3 The overarching question for each of these ancillary orders is whether they are currently effective and whether any changes need to be made to integrate them more fully into the structure of sentencing in NSW.

Compensation orders

10.4 Orders for compensation in the context of criminal proceedings are often considered under the broader heading of "reparation" which also includes restitution of property to its rightful owner.

10.5 Restitution is available under s 43 of the *Criminal Procedure Act 1986* (NSW),[2] so that a court can order property to be restored to the person who appears to be lawfully entitled to it in any criminal proceedings in which it is alleged that the accused has "unlawfully acquired or disposed of" the property. The court can make such an order regardless of whether it has found the accused guilty of the offence. The provision is simply a means by which property can be restored to its entitled owner and, as such, is of little relevance to the sentencing discretion.

10.6 Compensation is available to victims of crime under Part 4 of the *Victims Support and Rehabilitation Act 1996* (NSW) in relation to both physical injury and loss.

1. NSW Law Reform Commission, *Non-custodial Sentencing Options,* Sentencing Question Paper 7 (2012) Annexure A.
2. Formerly *Criminal Procedure Act 1986* (NSW) s 126 and *Crimes Act 1900* (NSW) s 438.

10.7 If a person is convicted of an offence (or has an offence taken into account[3]), the court on its own initiative, upon conviction or at any time afterwards, may direct that the property of the offender be used to pay an aggrieved person a sum not exceeding $50,000, by way of compensation, for any *injury* sustained through the commission of the offence.[4] In this context, "injury" refers to either actual physical bodily harm, or psychological or psychiatric harm, but does not include injury arising from loss or damage to property.[5]

10.8 If a person has suffered a *loss* sustained through the commission of an offence, a Court may award an amount not in excess of the maximum available for the recovery of a debt in its civil jurisdiction.[6]

10.9 In NSW, a compensation order can only be made as an ancillary order.[7] It is not a sentencing option in its own right. Since the introduction of a limited power in England to order compensation in 1870,[8] the courts have been wary of their powers to order compensation in criminal cases[9] and there has been strong support for the proposition that such an order should have limited relevance to sentencing.[10] This follows from the general principle established in England that:

> it must never be thought that the convicted criminal can buy his way out of imprisonment or any part of it. The significance of an offer to pay compensation is that it may be treated as some token of remorse on the defendant's behalf ... to that extent and no further it sounds in the sentencing exercise.[11]

10.10 This position can be contrasted with the position in New Zealand under the *Sentencing Act 2002* (NZ) where there is now a presumption in favour of reparation. A court, if entitled to impose a sentence of reparation, must do so unless, amongst other things, it is "satisfied that the sentence or order would result in undue hardship for the offender or the dependants of the offender, or that any other special circumstances would make it inappropriate".[12] The NZ Court of Appeal has observed in relation to an earlier set of provisions under the *Criminal Justice Act 1985* (NZ)[13] that the traditional position no longer applied and that the court was now "obliged, as part of the sentencing process, to consider reparation".[14]

10.11 This raises the question of whether compensation orders should be better integrated with other sentencing options. Such integration could be achieved in a variety of ways, such as by allowing compensation orders to be taken into account

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3. Under *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 3 div 3: see s 34.
4. *Victims Support and Rehabilitation Act 1996* (NSW) s 71.
5. *Victims Support and Rehabilitation Act 1996* (NSW) Dictionary.
6. *Victims Support and Rehabilitation Act 1996* (NSW) s 77B, s 77C.
7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26, s 34.
8. *Forfeiture of Felony Act 1870* (UK) s 4.
9. *RK v Mirik* (2009) 21 VR 623 [43]-[49].
10. K Warner, *Sentencing in Tasmania* (2nd ed, 2002) 142; See also R G Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, Oxford UP, 1999) 436.
11. *R v Barney* (1991) 11 Cr App R (S) 448, 450.
12. *Sentencing Act 2002* (NZ) s 12(1).
13. *Criminal Justice Act 1985* (NZ) s 11, s 22, s 23.
14. *R v O'Rourke* [1990] 1 NZLR 155, 158. See also *RK v Mirik* (2009) 21 VR 623 [43]-[49].

in sentencing or by making a compensation order available as a sentencing option under the *Crimes (Sentencing Procedure) Act 1999* (NSW) ('CSPA').

Compensation orders as a sentencing option

10.12 The question arises as to whether a compensation order should be viewed as an independent sentencing option. The Australian Law Reform Commission has recently considered this issue and concluded that a reparation order should not be seen as punitive and thus should not be available as a substitute to other punitive penalties.[15] Previous reports by the Victorian Parliament's Law Reform Committee and the NSW Law Reform Commission have also maintained this position.[16]

10.13 However, some other jurisdictions have integrated compensation orders more closely into their sentencing regimes. For example, Queensland makes provision for compensation for loss or injury as one of the orders available at sentencing.[17] If the court is considering imposing a fine and a compensation order, the court must give preference to compensation if the offender does not have the means to pay both.[18] Also, when dealing with an offender for breach of a suspended sentence, a Queensland court may take into account, in assessing whether the offender has made a "genuine effort at rehabilitation", any "fines, compensation or restitution paid".[19]

10.14 South Australia also requires that preference be given to the payment of compensation if the court is considering the imposition of a fine and a compensation order.[20] Courts in South Australia are also required to give reasons for not awarding compensation if the circumstances of the offence suggest that a right to compensation has arisen.[21] Finally, a bond may include a condition requiring the offender to pay compensation.[22]

10.15 The Tasmanian Law Reform Institute has suggested that compensation orders should be viewed as a sentencing option in their own right. A necessary result of the shift towards the criminal justice system being more responsive to victims is that orders should not merely be punitive, but reparative and restorative.[23] In this way, compensation orders may be a means of effectively achieving a number of purposes of sentencing, including recognising the harm done to the victim of the crime and the community. However, Tasmania has not adopted this proposal.

15. Australian Law Reform Commission, *Same Crime, Same Time,* Report 103 (2006) [8.2.1].
16. Parliament of Victoria, Law Reform Committee, *Restitution for Victims of Crime: Final Report,* PP 96 (1994) xviii; NSW Law Reform Commission, *Sentencing,* Report 79 (1996) [13.2].
17. *Penalties and Sentences Act 1992* (Qld) s 34-43.
18. *Penalties and Sentences Act 1992* (Qld) s 14, s 48(3).
19. *Penalties and Sentences Act 1992* (Qld) s 147(3)(a)(v)(C).
20. *Criminal Law (Sentencing Act) 1988* (SA) s 14.
21. *Criminal Law (Sentencing Act) 1988* (SA) s 53(2a).
22. *Sentencing Act 1991* (Vic) s 50.
23. Tasmanian Law Reform Institute, *Sentencing*, Final Report No 11 (2008) [4.4.17].

10.16 The Probation and Parole Officers' Association of NSW has suggested that a "greater emphasis on victim compensation and reparation during the pre sentence period needs to occur and should be recognised when determining penalty".[24]

10.17 Arguably, the use of compensation accords with an overarching principle of reparative justice, acknowledging that the state should support the securing of compensation where it aims to repair damage done by crime.[25]

10.18 It should be noted that reparation when made on the initiative of the offender (rather than imposed as an order of the court) may count as a mitigating factor. Under s 21A of the CSPA one factor that a court can take into account in determining the appropriate sentence for an offence is:

> the remorse shown by the offender for the offence, but only if:
>
> (i) the offender has provided evidence that he or she has accepted responsibility for his or her actions, and
>
> (ii) the offender has acknowledged any injury, loss or damage caused by his or her actions or made reparation for such injury, loss or damage (or both).[26]

10.19 The push towards restorative justice has raised several arguments in trying to reconcile sentencing and compensation orders:

- The accessibility of reparative sentencing options relieves the burden of punishment on the offender while offering the potential for a more constructive, forward looking sentence.[27]
- The use of reparation in preference to traditional retributive penalties, provides an element of restoration to both the victim and the offender. Accordingly, reparation assists in repairing the damage done by the crime, and may also reduce the possibility of a dissatisfied victim from taking the law into their own hands. Concurrently, reparation serves as a deterrent by ensuring that offenders do not profit from their offences.[28]
- Additionally, for the offender, it may assist in relieving feelings of guilt and alienation, both factors which often contribute to further re-offending. It is noted that the ability to increase an offender's self-esteem is largely beneficial to aiding and rehabilitating such individuals for reintegration.[29]

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24. Probation and Parole Officers' Association of NSW, *Preliminary Submission PSE20*, 15.
25. L Zedner, "Reparation and Retribution: Are They Reconcilable?" (1994) 57 *Modern Law Review* 228.
26. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(i).
27. L Zedner, "Reparation and Retribution: Are They Reconcilable?" (1994) 57 *Modern Law Review* 228.
28. Parliament of Victoria, Law Reform Committee, *Restitution for Victims of Crime: Final Report,* PP 96 (1994) 6.
29. J Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989); Parliament of Victoria, Law Reform Committee, *Restitution for Victims of Crime: Final Report,* PP 96 (1994) 6.

10.20 However, compensation orders present many of the same practical problems as fines when the question of enforcement arises.[30]

Making greater use of compensation orders

10.21 Under Part 4 of the *Victims Support and Rehabilitation Act 1996* (NSW), a court may make a direction for compensation on its own initiative or on application made to it by or on behalf of the aggrieved person.

10.22 This differs markedly from New Zealand (discussed above)[31] and Tasmania. In Tasmania, the court, regardless of whether the prosecutor or victim has made an application, must order an offender who is convicted or found guilty of "burglary, stealing, or unlawfully injuring property" to pay compensation for any injury, loss or damage which the court finds another person has suffered as a result.[32] The court has discretion in the making of compensation orders for injury, loss, destruction or damage as a result of other offences.[33]

10.23 The principle behind the imposition of mandatory compensation orders in Tasmania was to fulfil the promise of compensating victims of property crime. It was suggested in the second reading speech that compensation orders were accorded low priority in criminal proceedings, resulting in lengthy delays before compensation was paid to victims.[34] The orders were made mandatory to ensure a more efficient and speedy process for victims. Interestingly, these provisions appear to have fallen short of their intended goal, with few compensation orders made in cases where there was evidence of loss, and even fewer resulting in compensation actually being paid.[35]

10.24 The Tasmanian Law Reform Institute has suggested that the most practical approach, where a loss or injury has been suffered, is to require courts to *consider* making a compensation order rather than *compelling* the making of such an order.[36] This approach reflects the current position in England and Wales.[37]

Questions 10.1

Are compensation orders working effectively and should any changes be made to the current arrangements?

30. See NSW Law Reform Commission, *Penalty Notices*, Report 132 (2012) ch 8 and 9.
31. See para [10.10].
32. *Sentencing Act 1997* (Tas) s 68(1)(a).
33. *Sentencing Act 1997* (Tas) s 68(1)(b).
34. Tasmania, *Parliamentary Debates*, Legislative Council, 26 November 1997, 28-60.
35. K Warner and J Gawlik, "Mandatory Compensation Orders for Crime Victims and the Rhetoric of Restorative Justice" (2003) 36(1) *Australian and New Zealand Journal of Criminology* 60.
36. Tasmanian Law Reform Institute, *Sentencing*, Final Report No 11 (2008) [4.4.16].
37. *Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 130-134.

Driver licence disqualification

10.25 Subject to certain other provisions[38] a court may, on convicting a person of an offence under the road transport legislation, "order the disqualification of the person from holding a driver licence for such period as the court specifies".[39] At present, driver licence disqualification is regulated under various pieces of road transport legislation. An initial question is whether it should be treated as a sentencing option under the *Crimes (Sentencing Procedure) Act 1999* (NSW).

10.26 Automatic disqualification without a specific order of the court has been enacted in relation to specific major offences such as negligent, furious or reckless driving, menacing driving, offences involving prescribed concentrations of alcohol and driving under the influence of alcohol or other drug (and in relation to testing), and failure to stop and assist after impact causing injury.[40] The court convicting an offender of one of these offences can reduce the automatic disqualification period, subject to a statutory minimum, if it thinks fit.[41]

10.27 There are also automatic periods of disqualification for offenders who drive while unlicensed, disqualified, suspended or cancelled, or after their application for a licence has been refused. The automatic periods can be reduced by the court, giving rise to minimum disqualification periods which range from 3 months (from an automatic disqualification of 6 months) to 3 years (automatic 5 years).[42]

10.28 Provisions are in place for offenders to participate in an interlock program as an alternative to disqualification for "alcohol related major offences". Under such a program the offender is issued with a conditional licence that restricts the offender to driving a motor vehicle fitted with an approved interlock device which prevents the vehicle from being started if it detects more than a certain concentration of alcohol in a breath analysis.[43]

10.29 The effectiveness of licence disqualification as a deterrent for road transport offenders is open to debate. Notwithstanding the evidence from past studies that licence disqualification is an effective sanction for deterring further offending among driving offenders,[44] the results of a 2007 study by the NSW Bureau of Crime Statistics and Research suggested "that longer licence disqualifications have little to

38. *Road Transport (General) Act 2005* (NSW) s 188, *Road Transport (Safety and Traffic Management) Act 1999* (NSW) s 40 and *Road Transport (Driver Licensing) Act 1998* (NSW) s 25 and s 25A.

39. *Road Transport (General) Act 2005* (NSW) s 187(1).

40. *Road Transport (Safety and Traffic Management) Act 1999* (NSW) s 9, s 11B, s 15, s 16, s 18D(2), s 18E(9), s 18G(1), s 22, s 24D(1), s 29, s 42, s 43, and s 70.

41. *Road Transport (General) Act 2005* (NSW) s 188. See also *Road Transport (Safety and Traffic Management) Act 1999* (NSW) s 40.

42. *Road Transport (Driver Licensing) Act 1998* (NSW) s 25(3), s 25A(7) and (10).

43. *Road Transport (General) Act 2005* (NSW) pt 5.4 div 2; *Road Transport (Driver Licensing) Act 1998* (NSW) pt 2A.

44. See the studies referred to in S Briscoe, *The Impact of Increased Drink-Driving Penalties on Recidivism Rates in NSW*, Alcohol Studies Bulletin No 5 (NSW Bureau of Crime Statistics and Research, 2004) 3; and D Zaal, *Traffic Law Enforcement: A Review of the Literature* (Monash University Accident Research Centre, 1994).26-27. Relying on these studies, Briscoe proposed that a greater percentage of drink-driving offenders should receive licence disqualifications: at 9.

no deterrent effect and, in fact, for some driving offences, may actually increase the risk of reoffending".[45] In particular, in relation to speeding offences, the study found that "longer licence disqualification periods appear to increase the risk of subsequent offending".[46] However, this may be no more than an illustration of the failure of increasing penalty levels to achieve marginal specific deterrence.[47]

10.30 Two main issues arise in relation to licence disqualification: the inflexible operation of the mandatory minimum periods of disqualification in some cases; and making the option available for offences other than those under road transport legislation.

Mandatory minimum periods of disqualification

10.31 Some preliminary submissions have expressed concern that the automatic imposition of disqualification periods leads to a higher incidence of offences of driving while disqualified. This can lead to people sometimes accumulating periods of disqualification of 10-20 years or more, and exposing them to periods of full-time imprisonment when they would otherwise be unlikely to receive such a penalty.[48] This is especially so in light of the fact that such offenders are frequently assessed as unsuitable for community service orders, intensive corrections orders, or home detention.[49]

10.32 One submission has observed:

> The lack of adequate discretion in the sentencing court in relation to disqualification periods on conviction for unlicensed, suspended, cancelled and disqualified drivers is one contributing factor to these lengthy existing disqualifications. The other is that there is currently no way in NSW for a person already disqualified for a lengthy period to apply to have their disqualification removed (apart from an application for executive clemency).[50]

10.33 The current mandatory disqualification periods can only be overcome by disposing of the matter under s 10 of the Act, under which a conviction is not recorded. However, it has been noted that this is an inappropriate penalty option in many cases.[51]

10.34 One option would be to provide courts with more discretion by removing the provision that imposes an automatic three year disqualification for a person convicted for the second time of driving unlicensed, who has not held a licence in

45. S Moffatt and S Poynton, *The Deterrent Effect of Higher Fines on Recidivism: Driving Offences*, Crime and Justice Bulletin No 106 (NSW Bureau of Crime Statistics and Research, 2007) 10.
46. S Moffatt and S Poynton, *The Deterrent Effect of Higher Fines on Recidivism: Driving Offences*, Crime and Justice Bulletin No 106 (NSW Bureau of Crime Statistics and Research, 2007) 9-10.
47. See NSW Law Reform Commission, *Purposes of Sentencing*, Sentencing Question Paper 1 (2012) [1.45].
48. C Farnan, *Preliminary Submission PSE06*, 1-3; The Shopfront Youth Legal Centre, *Preliminary Submission PSE13*, 8.
49. C Farnan, Preliminary Submission *PSE06*, 1.
50. C Farnan, Preliminary Submission *PSE06*, 2.
51. C Farnan, *Preliminary Submission PSE06*, 2; Shopfront Youth Legal Centre, *Preliminary Submission PSE13*, 8. See also NSW Law Reform Commission, *Non-custodial Sentencing Options*, Sentencing Question Paper 7 (2012) [7.78]-[7.79].

the preceding five years.[52] This could be replaced with a provision giving the court a discretion to impose an appropriate disqualification period, if necessary with a lesser minimum disqualification period.

10.35 Another option would be to create a relicensing scheme whereby offenders who have not committed a driving offence for a specified period of time may make an application to a court for an order permitting them to reapply for a drivers licence. If the application is successful, the remaining period of disqualification could be quashed.[53]

10.36 It has been suggested that:

> Such a scheme would give such offenders a real incentive not to reoffend during the specified period. Offenders would still need to satisfy the court that it was appropriate to quash the disqualification in their circumstances.[54]

10.37 The NSW Government is considering a recommendation of the Sentencing Council for "good behaviour licences"[55] for those who are found guilty of drink-driving offences but currently receive a non-conviction order.[56]

10.38 The NSW Sentencing Council recently considered a proposal to make the alcohol interlock program mandatory in relation to bonds for prescribed content of alcohol offences. The Sentencing Council rejected the proposal on the basis that it did not support any option which would effectively exclude offenders from sentencing options or which would further narrow the discretion of the sentencing court. The Sentencing Council supported the availability of the program for all prescribed content of alcohol offenders and noted that the program may currently be imposed as a condition of a s 9 or a s 10 bond in accordance with s 95A(3) of the Act.[57]

Driver licence disqualification for other offences

10.39 In most other Australian jurisdictions, licence disqualification is available as an option in sentencing legislation in relation to a variety of offences and circumstances that extend beyond road transport offences. Licence disqualification (for such time as the court considers appropriate) is available in the sentencing legislation of the following jurisdictions:

- **Australian Capital Territory** – for offenders convicted or found guilty of a motor vehicle theft offence.[58]

52. *Road Transport (Driver Licensing) Act 1998* (NSW) s 25(3).
53. C Farnan, *Preliminary Submission PSE06*, 3.
54. C Farnan, Preliminary Submission PSE06, 3.
55. Similar to those available under *Road Transport (Driver Licensing) Act 1998* (NSW) s 16(8).
56. NSW Sentencing Council, *Good Behaviour Bonds and Non-Conviction Orders* (Report, 2011) [5.27]-[5.34]; G Smith, "Drink Drivers on Notice after Sentencing Report" (Media Release, 12 March 2012).
57. NSW Sentencing Council, *Good Behaviour Bonds and Non-Conviction Orders* (Report, 2011) [5.35]-[5.41].
58. *Crimes (Sentencing) Act 2005* (ACT) s 16.

- **Northern Territory** – for offenders convicted or found guilty of an offence who "used a motor vehicle when committing or to facilitate the commission of the offence".[59]

- **Queensland** – for offenders convicted of "an offence in connection with, or arising out of, the driving of a motor vehicle". However, the court must be "satisfied having regard to the nature of the offence, or to the circumstances in which it was committed, that the offender should, in the interests of justice", be so disqualified.[60]

- **Tasmania** – for offenders convicted of an offence of reckless driving[61] or an offence triable on indictment "arising out of the driving, operation or use of a motor vehicle or in the commission of which a vehicle was used or the commission of which was facilitated by a motor vehicle". If it thinks fit, the court may also order that, after the period of disqualification, the offender is "not to be granted a driver licence unless the offender passes such driving test or attends such driver training course, or both, as the Registrar of Motor Vehicles may direct or approve".[62]

- **Western Australia** – for offenders found guilty of an offence an "element of which is the driving or use of a motor vehicle"; "stealing or attempting to steal or conspiring to steal a motor vehicle"; "receiving or attempting to receive or conspiring to receive a motor vehicle"; an offence where a motor vehicle is used in the commission of the offence or to aid or facilitate the commission of the offence; an offence triable on indictment where a motor vehicle is used to leave the location or to avoid apprehension.[63]

- **Victoria** – for an offender found guilty or convicted of stealing or attempting to steal a motor vehicle.[64] However, there are mandatory minimum disqualifications of 24 months for an offender found guilty of the following offences arising out of the driving of a motor vehicle: manslaughter, negligently causing serious injury, and culpable driving causing death, and also mandatory minimum disqualifications of 18 months for offenders convicted of dangerous driving causing death or serious injury.[65]

10.40 If licence disqualification were to be extended beyond motor traffic offences in NSW, consideration would need to be given to bringing the provisions that regulate disqualification orders within the *Crimes (Sentencing Procedure) Act 1999* (NSW).

10.41 It should also be noted that an expanded regime of licence disqualification, albeit imposed at the discretion of the court, would still give rise to problems of enforcement and, particularly in relation to people who drive while disqualified.

59. *Sentencing Act* (NT) s 98.
60. *Penalties and Sentences Act 1992* (Qld) s 187(1).
61. Under *Traffic Act 1925* (Tas) s 32.
62. *Sentencing Act 1997* (Tas) s 55.
63. *Sentencing Act 1995* (WA) s 105.
64. *Sentencing Act 1991* (Vic) s 89(4).
65. *Sentencing Act 1991* (Vic) s 89(1). At the end of the period of disqualification, the offender must apply to the Magistrates' Court, if he or she wants to have a new licence: s 89(2).

Question 10.2

1. What changes, if any, should be made to the provisions governing driver licence disqualification or to its operational arrangements?
2. Should driver licence disqualification be made available in relation to offences that do not arise under road transport legislation?

Non-association and place restriction orders

10.42 Non-association and place restriction orders may be made when sentencing for an offence punishable by imprisonment for at least six months.[66] The maximum duration of an order is 12 months.[67] An order must not be made if the only sentence imposed is a s 10 dismissal or good behaviour bond, or a s 11 deferral.[68]

10.43 The *Justice Legislation Amendment (Non-association and Place Restriction) Act 2001* (NSW) introduced non-association and place restriction orders in an attempt to deal with gang-related crime.

10.44 A non-association or place restriction order is imposed in addition to, and not as an alternative to, another ("stronger"[69]) sentence.[70] It was stated that the courts should not use the orders "to water down the sentences they would have otherwise imposed".[71] A court may only impose an order "if it is satisfied that it is reasonably necessary" so as to prevent the offender from committing further offences.[72] As such, while non-association or place restriction orders were described as "a new form of sentence",[73] the orders are intended as a means of preventing crime and promoting rehabilitation rather than as an additional form of punishment.[74]

10.45 The NSW Ombudsman reviewed the operation of non-association and place restriction orders in 2008 and found that between 22 July 2002 and 22 July 2004, 20 orders were imposed at sentencing. Of those, four were non-association orders and 16 were place restriction orders.[75]

10.46 While the stated purpose of the legislation is to make it more difficult for gangs to engage in criminal activity, the orders do not appear to have been used to that effect. The Ombudsman classed five of the 20 matters as "'gang-type' offences" but none of these involved criminal conduct by members of serious organised gangs. Of the five offences, two were shoplifting by a small group of young people; one was an assault of a group by two young males; one was a robbery on a train involving

66. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17A(1).
67. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17A(5).
68. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17A(4).
69. NSW, *Parliamentary Debates*, Legislative Assembly, 26 October 2001, 18104 (T Stewart).
70. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17A(4).
71. NSW, *Parliamentary Debates*, Legislative Assembly, 26 October 2001, 18104 (T Stewart).
72. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17A(2).
73. NSW, *Parliamentary Debates*, Legislative Assembly, 26 October 2001, 18104 (T Stewart).
74. NSW, *Parliamentary Debates*, Legislative Assembly, 26 October 2001, 18104 (T Stewart).
75. NSW Ombudsman, *Review of the Justice Legislation Amendment (Non-association and Place Restriction) Act 2001*, Final Report (2008) 33.

six young people; and one was an offence of affray involving five young males influenced by intoxication and road rage.[76]

10.47 It would appear that the recently introduced offence of consorting under s 93X of the *Crimes Act 1900* (NSW)[77] may provide a means of dealing with more serious gang-related criminal activity. A person may now be convicted of consorting if he or she habitually consorts in person or through electronic communication with at least two people who have been convicted of an indictable offence and continues to consort with them after receiving an official warning from a police officer. The maximum penalty has been increased from six months imprisonment or four penalty units to three years imprisonment or 150 penalty units or both.

10.48 Some other jurisdictions also have orders available that restrict where offenders may go and with whom they may associate. In Victoria, a court may order non-association with specified people or classes of people, residence restriction or exclusion, place or area exclusion, and alcohol exclusion as part of a community based order.[78] In Queensland, a court may impose, as sentencing orders, a non-contact order and a banning order (the latter prohibits a person from entering or remaining in, or in the vicinity of, certain licensed premises, or public events where liquor will be sold).[79] The ACT also has non-association and place restriction orders available as sentencing options.[80]

Associations and activities not restricted

10.49 Section 100A of the Act prevents a non-association order from imposing certain restrictions on an offender associating with the offender's close family members and prevents the imposition of certain restrictions on the places or districts that the offender may frequent or visit.

10.50 Following amendments to this section,[81] non-association orders may now be made in relation to close family members if the history of criminal activity involving the offender and the member means that there is a risk of the offender committing another offence.[82] Place restriction orders may be made in relation to places normally not attracting a restriction (for example, the offender's workplace or educational institution) if, having regard to the history of the offender's criminal behaviour in that place or district, there is a risk of the offender committing a further offence.[83]

76. NSW Ombudsman, *Review of the Justice Legislation Amendment (Non-association and Place Restriction) Act 2001*, Final Report (2008) 42.
77. *Crimes Amendment (Consorting and Organised Crime) Act 2012* (NSW) sch 1.
78. *Sentencing Act 1991* (Vic) s 48F, s 48G, s 48H, s 48J.
79. *Penalties and Sentences Act 1992* (Qld) s 43A-43F s 43G-43O.
80. *Crimes (Sentencing) Act 2005* (ACT) pt 3.4.
81. *Courts and Other Legislation Amendment Act 2009* (NSW) sch 1.5.
82. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100A(1A).
83. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100A(2A).

10.51 If the court decides to make a non-association or place restriction order under the circumstances detailed above, it must record its reasons for doing so,[84] although failure to do so will not invalidate the order.[85]

10.52 Further amendments were made to take account of Aboriginal kinship systems and to allow an offender to access to health and welfare services.[86] These amendments originated in recommendations made by the NSW Ombudsman.[87]

Procedural

10.53 A person subject to a non-association and place restriction order is not required to abide by its conditions while in custody, however, the duration of the order remains the same.[88] This means that an offender who is sentenced to six months imprisonment with a 12 month non-association and place restriction order will only be subject to that order for the six months the offender is free from custody.[89] The Ombudsman considered whether the date of completion of an order should be postponed so that time in custody is disregarded. It was found that such a course would create inconsistency in the law as other orders including apprehended violence orders and driving licence suspensions are not extended to take into account time in custody.[90] The potential lack of relevance of orders made before an offender's lengthy term of full time imprisonment in prison was also considered.[91] Practical problems with changing the end dates in the records held by various agencies and the difficulty of informing offenders were other concerns.[92]

10.54 Rather than extending the term of the order each time the offender is imprisoned while the order is still in effect, another option is to make it possible for a court to impose a non-association and place restriction order that commences after the offender is released from custody. In New Zealand a non-association order may be made cumulative on a sentence of imprisonment so that the order commences when the offender is released.[93]

84. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100A(2B).
85. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100A(2C).
86. *Courts and Other Legislation Amendment Act 2009* (NSW) sch 1.5.
87. NSW Ombudsman, *Review of the Justice Legislation Amendment (Non-association and Place Restriction) Act 2001*, Final Report (2008).
88. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100D.
89. NSW Ombudsman, *Review of the Justice Legislation Amendment (Non-association and Place Restriction) Act 2001*, Final Report (2008) 45-46.
90. NSW Ombudsman, *Review of the Justice Legislation Amendment (Non-association and Place Restriction) Act 2001*, Final Report (2008) 78.
91. NSW Ombudsman, *Review of the Justice Legislation Amendment (Non-association and Place Restriction) Act 2001*, Final Report (2008) 79.
92. NSW Ombudsman, *Review of the Justice Legislation Amendment (Non-association and Place Restriction) Act 2001*, Final Report (2008) 78.
93. *Sentencing Act 2002* (NZ) s 117(2).

10.55 Section 100H of the Act aims to avoid unfair assumptions being made about people named in a non-association order by preventing the publication or broadcast of the content of an order.[94]

Breach

10.56 It is an offence to contravene a non-association and place restriction order without reasonable excuse. The maximum penalty is 10 penalty units, six months imprisonment, or both. A reasonable excuse for association with a specified person may include, but is not limited to, association in compliance with a court order, or unintentional association that is "immediately terminated" by the offender. An offender may visit a specified place or district if allowed under a court order or with any other reasonable excuse.[95]

Question 10.3

1. Should non-association and place restriction orders be retained?
2. Should any changes be made to the regulation and operation of non-association and place restriction orders?

94. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100H; NSW, *Parliamentary Debates*, Legislative Assembly, 26 October 2001, 18106 (T Stewart).
95. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100E.

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