



New South Wales  
Law Reform Commission

Report  
**139**

## Sentencing

July 2013

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The Hon G Smith SC MP  
Attorney General for New South Wales  
Level 31, Governor Macquarie Tower  
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SYDNEY NSW 2000

Dear Attorney

**Sentencing**

We make this report under the reference to this Commission received 21 September 2011.

The report is accompanied by a companion volume: *Sentencing – Patterns and Statistics*. This is a comprehensive summary of the research on sentencing as well as an overview of sentencing statistics. The information underpins the recommendations in the report.

A handwritten signature in black ink, appearing to read 'J. R. Wood'.

The Hon James Wood AO QC  
Chairperson  
July 2013

## Table of contents

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Tables and figures.....	xi
Participants.....	xii
Terms of reference.....	xiii
Executive summary.....	xv
Recommendations.....	xxv
<b>1. Introduction to the sentencing review.....</b>	<b>1</b>
<b>The context of our review.....</b>	<b>1</b>
<b>Our process.....</b>	<b>3</b>
<b>What should a revised Crimes (Sentencing) Act achieve? .....</b>	<b>5</b>
Consolidation, rather than codification.....	5
A transparent framework for balancing factors: individualised justice.....	6
Simpler law.....	7
Reflecting the community’s interests in sentencing: transparency and consistency .....	8
A range of sentence options.....	9
<b>A revised Crimes (Sentencing) Act .....</b>	<b>9</b>
Including an objects clause in the Act.....	9
Sentencing principles and factors.....	10
New practical community-based sentencing options .....	10
<b>Drafting a revised Crimes (Sentencing) Act .....</b>	<b>12</b>
<b>2. Purposes of sentencing.....</b>	<b>13</b>
<b>Current law on the purposes of sentencing .....</b>	<b>13</b>
Legislatively stated purposes in other jurisdictions.....	14
The specific s 3A purposes in NSW .....	16
<b>Statement of the purposes of sentencing in a revised Act .....</b>	<b>21</b>
Need for a legislative statement .....	21
Non-exhaustive statement of purposes .....	23
All purposes to be considered .....	24
No hierarchy of purposes.....	25
<b>Proposed list of purposes.....</b>	<b>27</b>
Punishment and making the offender accountable for his or her actions .....	28
Denunciation.....	29
Protection of the community from the offender .....	29
Recognition of harm done to the victim and the community .....	30
Deterrence.....	31
Promoting rehabilitation.....	35
Reduction of crime.....	36
<b>Purposes not adopted .....</b>	<b>37</b>
Effective operation of the criminal justice system .....	37
Reparation and restoration .....	38
<b>3. General principles of sentencing.....</b>	<b>41</b>
<b>Overview of the current law in NSW.....</b>	<b>42</b>
Proportionality.....	42

Imprisonment as a last resort .....	44
Parity .....	45
Sentencing offenders only for the offence of which they are convicted (the De Simoni principle) .....	48
Totality.....	48
<b>Legislative statements of the principles .....</b>	<b>49</b>
Australian Law Reform Commission’s proposal .....	49
Canada.....	50
New Zealand .....	52
Other Australian states .....	53
<b>Key principles to be included in a revised Crimes (Sentencing) Act .....</b>	<b>54</b>
Proportionality.....	55
Parity .....	56
Totality.....	57
The De Simoni principle .....	57
Imprisonment as a last resort .....	58
<b>Matters not included as principles .....</b>	<b>58</b>
Individualised justice.....	58
Aggravating and mitigating circumstances .....	59
Consistency .....	59
Parsimony .....	61
Instinctive synthesis.....	63
Sentencing guideposts .....	65
Double punishment and double-counting .....	65
Reasons for sentence.....	65
<b>4. Relevant factors on sentencing .....</b>	<b>69</b>
<b>History of s 21A aggravating and mitigating factors .....</b>	<b>70</b>
Section 21A – version 1 .....	70
Section 21A – version 2.....	71
<b>Aggravating and mitigating factors in other jurisdictions.....</b>	<b>72</b>
<b>Should s 21A be retained, abolished or reformed? .....</b>	<b>74</b>
Advantages and disadvantages of s 21A .....	74
Our previous view, and the views of other law reform commissions.....	78
Our current view .....	79
<b>General structure of the proposed new provision .....</b>	<b>81</b>
<b>Sentencing factors included in the proposed new provision .....</b>	<b>82</b>
(a) The nature, circumstances and seriousness of the offence .....	84
(b) The personal circumstances and vulnerability of any victim.....	85
(c) The extent of any injury, emotional harm, loss or damage resulting from the offence or any significant risk or danger created by the offence, including any risk to national security .....	86
(d) The offender’s character, general background, offending history, age, and physical and mental condition (including any cognitive or mental health impairment) .....	88
(e) The extent of the offender’s remorse.....	90
(f) The prospects of the offender’s rehabilitation.....	91
<b>Other factors we recommend not be included .....</b>	<b>91</b>
Provocation.....	92
Other offences that are required or permitted to be taken into account.....	92
Offence forming part of a course of conduct and representative offences.....	93
Deterrence and the need for adequate punishment .....	93
Effect on offender’s family or dependants .....	94
Deportation and foreign nationals.....	94
<b>Factors to be addressed by separate provisions.....</b>	<b>96</b>

Pleas of guilty, assistance to the authorities, and facilitating the interests of justice.....	96
Time spent in custody, etc.....	96
Sex offender restrictions .....	96
Confiscation of assets or forfeiture of proceeds of crime.....	98
Good character in sexual offences against children .....	102
Offence committed while the offender was unlawfully at large or on conditional liberty....	105
Hate crimes .....	107
Criminal organisations .....	113
<b>5. Reductions in penalty .....</b>	<b>117</b>
<b>Discount for a plea of guilty .....</b>	<b>117</b>
Current law on guilty plea discounts .....	117
Past NSW schemes for guilty plea discounts .....	121
Quantify the reduction for the utilitarian value of the plea.....	122
Alignment of the NSW and federal approaches.....	126
<b>Discount for assistance to law enforcement authorities .....</b>	<b>128</b>
Our view .....	130
<b>Discount for facilitating the conduct of the trial.....</b>	<b>132</b>
Our view .....	133
<b>6. Full-time imprisonment.....</b>	<b>135</b>
<b>The current law on full-time imprisonment.....</b>	<b>136</b>
Head sentences – setting the non-parole period and the parole period .....	136
Fixed terms.....	137
Commencement of the sentence.....	138
Accumulation or concurrency .....	138
Aggregate sentences.....	139
Taking offences into account on a Form 1.....	139
<b>Proposals to change the way terms of imprisonment are set.....</b>	<b>140</b>
“Bottom up” or “top down” approach to imposing the sentence .....	140
The ratio between the non-parole period and the head sentence.....	143
Fixed terms.....	153
Accumulated sentences and the statutory ratio .....	154
Aggregate sentencing.....	156
Aggregate sentencing in the Local Court.....	159
Aggregation or accumulation of sentences of six months or less .....	160
<b>Short sentences of imprisonment .....</b>	<b>161</b>
Retention of short sentences of imprisonment.....	161
Possibility of a parole period for short sentences of imprisonment.....	165
<b>Combining sentences of imprisonment with other options .....</b>	<b>167</b>
Short periods of imprisonment in combination with other options.....	167
Back-end home detention as part of sentence of imprisonment .....	171
<b>7. Standard minimum non-parole period scheme .....</b>	<b>177</b>
<b>Background .....</b>	<b>177</b>
<b>Our view .....</b>	<b>181</b>
<b>Review of pre-Muldrock error cases .....</b>	<b>182</b>
<b>8. Life sentences and parole .....</b>	<b>183</b>
<b>Life sentences in NSW.....</b>	<b>183</b>
Past provisions .....	183
Reforms in 1989 .....	184
Offences currently subject to life imprisonment .....	184



Redetermination of sentences imposed before 12 January 1990.....	186
Statistics .....	189
<b>Proposals for reform</b> .....	190
<b>Our view</b> .....	192
<b>9. Home detention and intensive correction orders (if retained)</b> .....	195
<b>The current law</b> .....	196
Nature of home detention .....	197
Nature of an ICO .....	198
Requirement for a suitability assessment .....	199
<b>Key advantages of home detention and ICOs</b> .....	199
Importance of increasing the use of community-based alternatives .....	200
<b>Reform of the current legislation to increase use</b> .....	201
Expansion of geographic availability.....	201
Reduced exclusion of particular offences .....	203
Increase to maximum length of home detention .....	207
Increase to maximum length of an ICO and introduction of a non-parole period.....	209
Streamlining suitability assessments .....	212
Removing current barriers to suitability .....	214
ICO breach process.....	217
<b>Reintroduction of periodic detention</b> .....	217
Our view .....	219
<b>10. Suspended sentences</b> .....	221
<b>Background</b> .....	222
History .....	222
The form of the sentence.....	222
Revocation.....	224
Use of suspended sentences .....	224
Effectiveness of suspended sentences .....	226
<b>Should suspended sentences be retained?</b> .....	226
Advantages of suspended sentences.....	226
Problems with suspended sentences .....	227
Our view .....	229
<b>Possible areas for reform if suspended sentences are retained</b> .....	230
Limiting the offences for which suspended sentences should be available .....	231
Maximum duration of the sentence.....	231
Partial suspension .....	232
Conditions attached to the bond.....	233
Bond length .....	235
Breach and revocation process .....	236
<b>11. A new community detention order</b> .....	243
<b>A new combined order would be simpler, more transparent, and more flexible</b> .....	243
<b>The new order should be custodial</b> .....	246
Our view .....	247
<b>Recommended features of a new community detention order</b> .....	248
Automatic and optional requirements of the CDO .....	249
Additional discretionary conditions .....	250
Maximum length of the order and duration of the requirements .....	251
The work and intervention requirement .....	252
Target group for the CDO.....	255
Consent and criminal record.....	256

<b>The assessment process</b> .....	258
<b>Administering the work and intervention requirement of the CDO</b> .....	260
<b>Combination with other sentences</b> .....	261
<b>Variation, breach and revocation</b> .....	261
<b>12. Existing non-custodial orders (if retained)</b> .....	265
<b>Current law</b> .....	266
Nature of a CSO .....	266
Nature of a s 9 bond .....	267
Orders under s 10 and s 10A.....	268
Breach and revocation of existing non-custodial sentencing options.....	269
Support for existing non-custodial sentencing options.....	271
Use of existing non-custodial sentencing options .....	272
<b>Proposals for reform</b> .....	273
Meaning of “good behaviour” in s 9 and s 10(1)(b) bonds .....	273
Power to vary a s 9 or s 10(1)(b) good behaviour bond.....	274
Standard form of supervision conditions for s 9 and s 10(1)(b) bonds.....	275
Jurisdictional issues in dealing with breaches of s 9 and s 10(1)(b) bonds .....	276
Other issues raised regarding s 10.....	278
Availability of CSOs and s 9 bonds for fine-only offences.....	279
Time to complete CSO work hours.....	280
Availability of community service work and access to CSOs .....	281
Combinations of orders.....	284
<b>13. New non-custodial community-based orders</b> .....	289
<b>New non-custodial orders to address less serious offending</b> .....	289
<b>A new community correction order in place of CSOs and s 9 bonds</b> .....	290
Similarity to Victoria’s community correction order .....	291
Automatic conditions .....	292
Optional requirements of the community correction order .....	293
Duration of order.....	296
Duration of the optional requirements.....	297
Additional discretionary conditions of the community correction order .....	298
Consent .....	298
The assessment process.....	299
Variations, breaches and revocations of the community correction order.....	300
Criminal record .....	300
<b>A new conditional release order in place of s 10(1)(b) and s 10(1)(c) orders</b> .....	301
Nature of the conditional release order.....	301
The assessment process.....	302
<b>A “no penalty” provision to replace s 10(1)(a) and s 10A</b> .....	304
<b>Combinations of the new sentences with other penalties</b> .....	305
<b>14. Fines</b> .....	307
<b>Current law</b> .....	307
<b>Proposals for change</b> .....	308
Better consideration of capacity to pay .....	309
No link between a fine amount and the length of imprisonment available .....	311
Flexible combination of fines with other sentencing options .....	313
Introduction of a suspended fine option.....	317
No introduction of fines held in trust .....	317

<b>15. Drug dependent offenders</b>	<b>319</b>
<b>Drug Court program</b>	<b>320</b>
Outline of the program	320
Extending the program to cover non-prohibited drugs	324
Extending the program's geographic coverage	325
Extending the program to more types of offenders	326
<b>Compulsory drug treatment detention (CDTD)</b>	<b>329</b>
Compulsory drug treatment order	329
Expanding eligibility for the CDTD program	333
Problems with the requirement for a sentence of an eligible length	335
Procedural reforms	337
Geographical reach	337
<b>16. Diversion and deferral of sentencing</b>	<b>339</b>
<b>Early Diversion - cautions</b>	<b>340</b>
Pre-charge cautions	340
Cautions administered when the matter reaches court	344
<b>Pre-sentence interventions</b>	<b>345</b>
Magistrates Early Referral into Treatment (MERIT) program	345
Court Referral of Eligible Defendants Into Treatment (CREDIT) program	349
Section 11 adjournment	352
Intervention programs	354
<b>17. Aboriginal and Torres Strait Islander offenders</b>	<b>363</b>
<b>Background</b>	<b>364</b>
NSW statistics	364
Legislation	364
Case law	365
<b>Submissions</b>	<b>367</b>
<b>Our view</b>	<b>369</b>
<b>18. NSW Sentencing Council and guideline judgments</b>	<b>373</b>
<b>NSW Sentencing Council</b>	<b>374</b>
Current nature of the NSW Sentencing Council	374
Other sentencing councils	378
Possible reforms	380
<b>Guideline Judgments</b>	<b>383</b>
Guideline judgments in NSW	383
Guideline judgments in other jurisdictions	385
Should NSW take a different approach to developing guidelines?	388
Our view	390
<b>19. Victims of crime</b>	<b>395</b>
<b>Victim impact statements</b>	<b>395</b>
Current position of victim impact statements	395
The Previterra issue	397
No change to the types of offences for which a VIS can be received	399
<b>Victim compensation and reparation</b>	<b>401</b>
Reform is not required	402
<b>20. Other matters</b>	<b>405</b>
<b>Driver licence disqualification and suspension</b>	<b>405</b>
The current law	406

Frequency of driver licence disqualification .....	409
Stakeholder concerns .....	409
Proposals for change .....	411
Our view .....	412
<b>Non- association and place restriction orders .....</b>	<b>413</b>
The current law .....	413
Use of non-association and place restriction orders .....	414
Submissions .....	414
Our view .....	416
<b>Parole .....</b>	<b>417</b>
Our view .....	418
<b>The Local Court’s sentencing powers.....</b>	<b>419</b>
No increase to jurisdictional limit .....	419
Jurisdictional limit not restricted to “worst cases” .....	423
Aggregate sentencing in the Local Court.....	425
<b>Rising of the court .....</b>	<b>425</b>
History and operation of rising of the court .....	425
Submissions .....	426
Our view .....	427
 <b>Appendix A: Submissions .....</b>	 <b>429</b>
 <b>Appendix B: Consultations .....</b>	 <b>433</b>
 <b>Appendix C: Provisions of the Crimes (Sentencing Procedure) Act 1999 (NSW)</b> <b>subject to recommendations .....</b>	 <b>445</b>
 <b>Appendix D: Provisions of the Crimes (Sentencing Procedure) Act 1999 (NSW)</b> <b>not subject to recommendations.....</b>	 <b>447</b>
 <b>Bibliography .....</b>	 <b>449</b>

## Tables and figures

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Figure 1.1: Current and proposed NSW sentencing options .....	12
Table 6.1: Special circumstances for armed robbery and robbery in company offences (12 May 1999 to 11 May 2002) in a study sample by the Judicial Commission of NSW .....	145
Table 6.2: Provisions in other jurisdictions in relation to the statutory ratios between non-parole periods and head sentences.....	146
Table 8.1: NSW offences punishable by life imprisonment .....	185
Table 8.2: NSW offenders in custody serving life sentences as at 30 June 2012 .....	189
Table 9.1: Number of home detention and ICO sentences imposed as principal penalty in the Local and Higher Courts.....	196

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- Judicial Commission of NSW;
- Corrective Services NSW;
- Sentencing Council of NSW; and
- The Hon Roderick Howie QC;

as well as the organisations which provided staff on secondment to the LRC:

- the Office of the Director of Public Prosecutions (NSW); and
- Legal Aid NSW.

## Terms of reference

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Pursuant to section 10 of the Law Reform Commission Act 1967, the Law Reform Commission is to review the Crimes (Sentencing Procedure) Act 1999. In undertaking this inquiry, the Commission should have regard to:

1. current sentencing principles including those contained in the common law
2. the need to ensure that sentencing courts are provided with adequate options and discretions
3. opportunities to simplify the law, whilst providing a framework that ensures transparency and consistency
4. the operation of the standard minimum non-parole scheme; and
5. any other related matter.

[Received 21 September 2011]





## Executive summary

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- 0.1 Our aim in this report is to:
- achieve a sentencing regime that is fair for offenders, victims and the community as a whole;
  - reduce the complexity of sentencing law and deliver transparency and consistency in approach; and
  - develop a range of sentencing options that are flexible to the circumstances of the case and that promote prevention and reduction of reoffending.
- 0.2 We have also focussed in this review on the government's objectives of preventing and reducing crime and reducing the level of offending as set out in NSW 2021.
- 0.3 To advance these objectives, we propose introducing a revised Crimes (Sentencing) Act. The new Act would replace the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA) although it would preserve many of its provisions.
- 0.4 We have engaged in a thorough consultation process to obtain the views of stakeholders and the public. These have informed our recommendations.

## Purposes of the Act, and purposes and principles of sentencing (Chapters 1, 2 and 3)

---

- 0.5 The objectives of the new Act should include promoting consistency and transparency in sentencing and imposing just sentences having regard to all of the circumstances of the offending, the offender and the impact on the victim. (Recommendation 1.1)
- 0.6 The existing statutory statement of the seven purposes of sentencing is working well. A revised Crimes (Sentencing) Act should include a similar list of sentencing purposes, with some small changes designed to clarify the meaning of each purpose of sentencing. The purposes we propose are to:
- ensure that the offender is punished for the offence and is held accountable for his or her actions,
  - denounce the conduct of the offender,
  - recognise the harm done to the victim of the crime and the community,
  - protect the community from the offender,
  - deter the offender and others from committing offences,
  - promote the rehabilitation of the offender, and
  - reduce crime. (Recommendation 2.1)

- 0.7 Some key sentencing principles have been developed through the common law to guide courts when sentencing an offender. Currently, not all of these principles are stated in statutory form. To improve transparency, we recommend that a revised Crimes (Sentencing) Act should list five well-established sentencing principles: proportionality, parity, totality, imprisonment as a last resort, and the *De Simoni* rule. (Recommendation 3.1)
- 0.8 We also recommend amending the *Criminal Appeal Act 1912* (NSW) to ensure that the parity principle is not applied on appeal in a way that would result in a manifestly inadequate sentence. (Recommendation 3.2)

## Sentencing factors and discounts (Chapters 4 and 5)

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- 0.9 Section 21A of the CSPA currently lists 22 aggravating and 13 mitigating factors that courts must take into account when formulating an appropriate sentence, even though the common law already addresses many of these. The large number of s 21A factors and their division into “aggravating” and “mitigating” factors has made them difficult to apply.
- 0.10 To simplify the sentencing process, while at the same time increasing the level of transparency and consistency in the factors the courts apply, we propose the replacement of s 21A by a new provision that lists six general factors that a court should consider in sentencing, leaving the detail to the common law. These factors include the nature, circumstances and seriousness of the offence, the personal circumstances and vulnerability of the victim, the extent of the harm caused, the offender’s character, background and offending history, the extent of any remorse shown and the offender’s prospects of rehabilitation. (Recommendations 4.1 and 4.2)
- 0.11 We also propose a series of stand-alone provisions that would require the court to take into account circumstances where the offence: was committed while the offender was on conditional liberty; was motivated by group hatred or prejudice; or was committed while the offender was subject to a criminal organisations control order. These address important issues that generally aggravate the seriousness of the offence and consequently the sentence. (Recommendations 4.7-4.9)
- 0.12 Additionally, we propose that several stand-alone provisions should continue to require the court to disregard, as a potential mitigating factor: the consequences arising from conviction as a sex offender and high risk violent offender; the consequences arising from the confiscation of assets or forfeiture of the proceeds of crime; and good character in child sexual offences (Recommendations 4.4 - 4.6)
- 0.13 A revised Crimes (Sentencing) Act should also replicate the current discounts for guilty pleas, assistance to the authorities and assistance in facilitating the conduct of the trial. We recommend clarifying that a guilty plea discount reflects only the utilitarian value of the plea and requiring that the court quantify it. These factors have an important role to play in improving the efficiency and effectiveness of the criminal justice system. (Recommendations 5.1-5.3)

## Setting a term of imprisonment (Chapter 6)

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- 0.14 The rules that courts must follow when setting a term of imprisonment have become overly complicated and difficult to implement. We recommend improvements to simplify these rules, including:
- A return to the top down approach which requires the court to set the head sentence first followed by the non-parole period, except where the court imposes a fixed term sentence. (Recommendation 6.1)
  - The adoption of a presumptive ratio that the non-parole period should be two-thirds of the head sentence. The court should be able to depart from the ratio only if, having regard to all the purposes of sentencing, it is satisfied that there are good reasons for such a departure. This would replace the over-used and much criticised “special circumstances” test. (Recommendation 6.2)
  - The preservation and clarification of the operation of aggregate sentencing, and the introduction of new provisions (as an alternative) to permit a court to accumulate sentences into an overall effective head sentence and then to fix a single non-parole period. (Recommendation 6.4-6.6)
- 0.15 We do not propose abolishing sentences of imprisonment of six months or less and consider that the courts should continue to be precluded from setting a non-parole period in these cases. While short sentences have a number of problems, including the potential to increase the risk of reoffending, they are nonetheless part of the continuum of sentencing. We have focussed on improving community-based custodial options as a way of discouraging the use of short sentences. (Recommendations 6.8 and 6.9)
- 0.16 We also oppose combining imprisonment with any community-based sentences, although we will give further consideration to the option of back-end home detention as part of our review of parole in NSW.

## Standard non-parole periods (Chapter 7)

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- 0.17 The standard minimum non-parole period (SNPP) scheme is controversial and complex and has created difficulties in practice. We recommend that the government retain the scheme but implement the recommendations from our interim SNPP report that would simplify the sentencing process in accordance with the instinctive synthesis approach and ensure that it is the same as that employed for all other offences.
- 0.18 There is, however, an apparent inconsistency in the basis for selecting offences for the scheme and for selecting the SNPPs. We recommend that the government consult with stakeholders and the community about which offences should be included in the scheme, at what level the SNPPs should be set, and what the process should be for adding or removing offences from the scheme. (Recommendation 7.1)

## Life sentences and non-parole periods (Chapter 8)

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- 0.19 A court cannot currently set a non-parole period when imposing a life sentence. Unlike other Australian jurisdictions, offenders sentenced to life imprisonment in NSW must spend their entire lives in custody without possibility of release on parole. We recommend that courts, when imposing a life sentence, be able, but not required, to set a non-parole period. This would allow a release decision to be deferred until the Serious Offenders Review Council and the State Parole Authority (SPA) can make a better assessment of the risks posed by the offender. This proposal would accommodate lifetime parole, the breach of which would see the offender returned to custody, an option that would be suitable for high level offenders convicted of murder who, under the current law, would not qualify for a mandatory life sentence. (Recommendation 8.1)

## Home detention orders and intensive correction orders (Chapter 9)

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- 0.20 Home detention and intensive correction orders (ICOs) are underused sentencing options. They have important advantages in terms of reducing reoffending, reducing costs, and keeping offenders out of prison.
- 0.21 There have been difficulties in making home detention and ICOs available across the state, and there are significant limitations on the offences for which they are available.
- 0.22 A large proportion of those who have received ICOs have been low risk offenders needing little in the way of intervention. At the same time, those for whom an intervention is appropriate have been excluded. There have also been problems with the regional availability of ICOs and home detention. Dissatisfaction was widely reported about the unnecessary delay arising from the need for separate suitability assessments to be made for ICOs and home detention.
- 0.23 Our preferred option is for both orders to be replaced with a new community detention order (CDO). However, in the interim, in order to increase the number of offenders who can be sentenced to home detention or an ICO, we recommend improvements that aim to:
- Permit alternative methods for supervising compliance where electronic monitoring is not available, to ensure that home detention is available state-wide.
  - Reduce the number of offences that exclude an offender from home detention order or an ICO.
  - Extend the maximum period of home detention and an ICO to 3 years, and permit the setting of a non-parole period for an ICO.
  - Permit home detention to include a period of residence in an institution providing in-house drug rehabilitation.

- Enlarge the scope of the activities that can satisfy the work component of an ICO, including engaging in literacy/numeracy courses, and work-ready, educational or other programs and, where appropriate, deferring commencement of the work for completing a residential drug or alcohol treatment program.
  - Require the court to set the head sentence for the term of imprisonment first before requesting a single suitability assessment for an ICO or home detention or both. (Recommendations 9.1-9.6)
- 0.24 We do not support the reintroduction of periodic detention as it can never be available state-wide. It uses scarce resources inefficiently and does little to address the risk of reoffending. (Recommendation 9.7)

## Suspended sentences (Chapter 10)

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- 0.25 Suspended sentences are a conceptually and practically flawed sentencing option that can be both too lenient (if the bond is not breached) and too severe (if the bond is breached).
- 0.26 Our preferred option is to abolish them and replace them with our proposed CDO. (Recommendation 10.1) However, if the CDO is not introduced and suspended sentences are retained we recommend changes to improve their operation and minimise the problems they cause:
- Requiring the bond to include a condition that the offender not commit a further offence punishable by imprisonment (in place of the indeterminate requirement to be of “good behaviour”).
  - Maintaining the maximum sentence of imprisonment that could be suspended at two years but permitting the length of the bond to exceed the imprisonment term by up to 12 months.
  - Amending the breach provision by requiring a court to revoke the suspension order unless there are “good reasons” for excusing the offender’s failure to comply with its conditions, and giving greater content to that test. (Recommendations 10.3-10.5)
- 0.27 We do not support a return to partial suspension of sentences. (Recommendation 10.2)

## A new community detention order (Chapter 11)

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- 0.28 We propose a new flexible community-based custodial order to replace home detention, ICOs and suspended sentences. We have provisionally named the new order a “community detention order”. The CDO is a custodial order that combines and strengthens the main features of home detention and ICOs in a way that should increase the number of offenders who are able to serve their terms of imprisonment in the community and help to address the causes of their offending. (Recommendation 11.1)

- 0.29 A CDO could also be framed in a way that would substantially replicate a suspended sentence for the limited class of offenders who do not have criminogenic or other factors that need to be addressed. However, even within this group, requirements could be included that would add further rigour to a form of sentence that has been regarded as overly lenient.
- 0.30 The main features of the proposed CDO include:
- A core condition that requires an offender not to commit a further offence and to submit to supervision.
  - Optional requirements, which we expect would be widely used, of a period of home detention or a work and intervention requirement (or both). A court could also impose other additional conditions like alcohol and drug abstinence, place and association restrictions and curfews. The requirements should only be imposed after Corrective Services NSW has assessed the offender favourably as part of a single assessment process.
  - In many cases, the most important element of the CDO will be a work and intervention requirement. The hours imposed as part of such a requirement could be satisfied by participating in any combination of community service work, psychological or psychiatric treatment, intervention programs, educational programs, vocational or life skills programs, counselling, drug or other addiction treatment. The times and speed at which the offender completes these hours should be left to the discretion of Corrective Services NSW. This will improve flexibility and provide both a punitive and rehabilitative aspect to the sentence. (Recommendation 11.3)
- 0.31 SPA would deal with breaches of a CDO. Revocation should lead to the offender serving the remainder of the sentence in full-time imprisonment, unless SPA reinstates the CDO. This would take advantage of SPA's breach and revocation procedures already in place for ICOs, home detention and parole. It would ensure consistency through having a single agency deal with breaches, revocation and reinstatement. (Recommendation 11.6)

## **Existing non-custodial orders (Chapter 12)**

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- 0.32 Community service orders (CSOs), s 9 good behaviour bonds, and s 10 and s 10A orders are important to ensure that imprisonment is reserved as a sentence of last resort.
- 0.33 To rationalise the non-custodial options available to a court and increase the flexibility and use of these options, we recommend that the existing range of non-custodial sentences should be replaced by three new combination orders.
- 0.34 However, if the existing options are retained, we recommend improvements to streamline their operation and to increase the use of CSOs, including:
- Replacing the "good behaviour" condition in s 9 and s 10(1)(b) bonds with a condition not to commit a further offence.
  - Allowing a court to vary a s 9 or s 10(1)(b) bond on application by the offender or Corrective Services NSW even though no breach has occurred.

- Specifying a series of standard obligations for supervision where the court imposes a requirement to submit to supervision by Corrective Services NSW as a condition of a bond.
- Making s 9 bonds unavailable for fine-only offences unless the court is precluded in relation to certain traffic offences from imposing a s 10(1)(b) bond.
- Widening the activities or programs that can be regarded as “work” and allowing Corrective Services NSW to determine the activities through which an offender can satisfy the necessary work hours of a CSO.
- Allowing s 9 bonds and CSOs to be imposed together for a single offence. (Recommendations 12.1-12.8)

## New non-custodial community-based orders (Chapter 13)

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- 0.35 Existing community-based non-custodial orders are structured in an overlapping and unnecessarily rigid and complicated way. Strong and flexible community-based options are essential to ensure that imprisonment is only used as a last resort.
- 0.36 We propose three new flexible, community-based, non-custodial orders.

### Community correction order (CCO)

- 0.37 The new community correction order (CCO) would replace CSOs and s 9 bonds with a more flexible order that can focus on the offender’s criminogenic needs. The order would be less intense than a CDO and sit lower than the CDO in the sentencing hierarchy. It would only be available with a conviction for offences punishable by imprisonment. It would include:
- An automatic condition that the offender not commit a further offence and appear in court if called on; and optional discretionary conditions concerning supervision, work and program participation and personal restrictions, or entry into an intervention plan. A work and program component should only be imposed if a suitability assessment report has confirmed its need and availability.
  - A provision requiring breaches to be referred to, and dealt with by the court that imposed the order or any other court before which an offender appears for a fresh offence. (Recommendations 13.1-13.10)

### New conditional release order (CRO)

- 0.38 We propose a new conditional release order (CRO) that can be imposed with or without recording a conviction to replace s 10(1)(b) bonds and s 10(1)(c) orders.
- 0.39 It would be available for offences punishable by imprisonment and for fine-only offences and would include an automatic condition that the offender must not commit a further offence and optional conditions relating to supervision and personal restrictions. The court could also attach additional conditions appropriate to a non-custodial order at this level. (Recommendation 13.11-13.15)

0.40 Breach would be dealt with by a court. (Recommendation 13.16)

### **New “no penalty” sentence**

0.41 We propose a new “no penalty” sentence that can be imposed with or without conviction in place of s 10(1)(a) and s 10A orders. (Recommendation 13.17)

## **Fines (Chapter 14)**

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0.42 Most stakeholders are satisfied with fines as a sentencing option. There were some concerns about fining offenders with limited capacity to pay and the prohibition on imposing fines in combination with non-conviction orders.

0.43 We propose:

- The continuation of the requirement that a court consider the means of the offender to pay a fine. (Recommendation 14.1(1))
- The formation of a working group to better inform and facilitate the process by which the court assesses an offender’s capacity to pay a fine. (Recommendation 14.1(2))
- A more flexible regime for combining fines with other sentencing options (other than a “no penalty” sentence). (Recommendation 14.2)
- Allowing a court to impose a suspended fine. (Recommendation 14.3)

## **Drug dependent offenders (Chapter 15)**

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0.44 The Drug Court has been shown to reduce recidivism and is an effective (although resource intensive) way to address the offending of drug dependent offenders. Most stakeholders would like to see the Drug Court program and compulsory drug treatment detention expanded to a wider pool of offenders. We recommend some limited ways to expand both programs.

0.45 The reach of the Drug Court Program should be expanded to a wider group of offences, by amending the violent conduct (offence) exclusion to allow offenders to participate where they have been convicted of an offence of which violence is an element if the court is satisfied that it did not involve the actual infliction of bodily harm; or (alternatively) if the court is satisfied that the harm caused or the threat of harm was minor. (Recommendation 15.1-15.2)

0.46 The reach of compulsory drug treatment detention orders should be expanded and the eligibility criteria relaxed to a limited extent. (Recommendation 15.3-15.6)

## **Diversion and deferral of sentencing (Chapter 16)**

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0.47 Diversion and deferral options are an important way of diverting offenders from sentencing and imprisonment. Stakeholders are strongly supportive of cautioning,



the MERIT and CREDIT programs, and the use of s 11 adjournments to facilitate access to other rehabilitation programs.

0.48 We recommend:

- An extension of the Cannabis Cautioning Scheme to small quantities of other drugs and the introduction of a wider non-court based cautioning scheme for adults.
- The retention of s 11 adjournments to permit entry into rehabilitation programs and the intervention programs declared under the *Criminal Procedure Regulation 2010* (NSW).
- The expansion of the MERIT program.
- The simplification of the legislation which governs the Traffic Offenders Program. (Recommendations 16.1-16.5)

0.49 Stakeholders had mixed views about the value of the Circle and Forum Sentencing programs and, while we support retaining them, we recommend that their aims and scope be reconsidered. (Recommendations 16.6 and 16.7)

## Aboriginal offenders (Chapter 17)

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0.50 Aboriginal and Torres Strait Islander people are severely overrepresented in the NSW criminal justice system and the sentenced prisoner population. Several stakeholders supported including an offender's Aboriginality as a relevant matter in the principles or purposes of sentencing, or as a factor that a court must take into account when sentencing.

0.51 We suggest further consideration be given to including an offender's Aboriginality as a factor that a court must take into account, where it is relevant to the sentencing exercise. This should follow the High Court's delivery of its decision in *Bugmy*. (Recommendation 17.1)

## NSW Sentencing Council and guideline judgments (Chapter 18)

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0.52 The NSW Sentencing Council plays an important advisory and public education role. It should be continued with a slightly expanded membership and an enhanced role in the guideline judgment process. (Recommendations 18.1 and 18.2)

0.53 We consider that the existing system of guideline judgments has proved valuable in encouraging greater consistency in sentencing, in correcting inappropriate levels of sentencing and in giving guidance to courts, both in providing numerical ranges and in stating overarching principles. The system could however be improved by expanding the Council's role to provide the Attorney General and the Court of Criminal Appeal with a comprehensive report to assist in the preparation of an application for a guideline judgement, and the guideline judgment itself. Such a report could cover statistical data on current sentencing standards and options for a particular offence, the frequency of the offence, data on the impact of the offence

and demographics of offenders, and approaches in other jurisdictions. The report could include public submissions, or research on informed public opinion.

- 0.54 The government should also consider funding the Council at an increased level to ensure that it can properly perform its statutory functions.

## Victims of crime (Chapter 19)

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- 0.55 Victim impact statements (VIS) are an important way for victims of serious violent crimes to have a role in the sentencing process. We recommend that the VIS provisions should not be changed, except, as recommended in our Report 138 for proceedings in which an offender has been found not guilty by reason of mental illness or given a limiting term in a special hearing. (Recommendation 19.1)

## Other matters (Chapter 20)

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- 0.56 We make recommendations concerning other matters that were raised in the course of this review, including that:
- The government review the current system of driver licence disqualification, suspension and cancellation. (Recommendation 20.1)
  - The government consider relaxing the current restriction on an offender applying for reinstatement of parole for 12 months from the time when he or she is returned to custody. (Recommendation 20.2)
  - The NSW Sentencing Council monitor the consequences of the Local Court's jurisdictional limits, in particular having regard to any adverse impact it may be having on the timely disposition of criminal cases in NSW. (Recommendation 20.3)
- 0.57 We also recommend that the common law sentence of “the rising of the court” be abolished. It is outdated and little used. Other available sentencing options and procedures can achieve the same effect. (Recommendation 20.4)

# Recommendations

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<b>1</b>	<b>Introduction to the sentencing review</b>	<b>page</b>
1.1	<b>A revised Crimes (Sentencing) Act</b>	<b>10</b>
	(1) A revised Crimes (Sentencing) Act should replace the <i>Crimes (Sentencing Procedure) Act 1999</i> (NSW).	
	(2) A revised Crimes (Sentencing) Act should state that its objectives are to:	
	(a) provide for sentencing law and procedure;	
	(b) promote consistency and transparency in the application of sentencing principle and its understanding by the public	
	(c) promote the imposition of just sentences, having regard to:	
	(i) all of the circumstances of the offending and the offender; and	
	(ii) the impact on the victim. (Individualised justice)	
	(3) A revised Crimes (Sentencing) Act should:	
	(a) consolidate, not codify, the sentencing law of NSW; and	
	(b) not derogate from the powers that a court may exercise, or the rights that a person may have, under any law (including the common law) except to the extent that the Act is expressly inconsistent with them.	
<b>2</b>	<b>Purposes of sentencing</b>	<b>page</b>
2.1	<b>Recommendation 2.1: Statement of the purposes of sentencing</b>	<b>37</b>
	A revised Crimes (Sentencing) Act should include a statement of the purposes of sentencing as follows:	
	(1) To the extent relevant to the case before the court, the purposes for which a court may impose a sentence are to:	
	(a) ensure that the offender is punished for the offence and is held accountable for his or her actions,	
	(b) denounce the conduct of the offender,	
	(c) recognise the harm done to the victim of the crime and the community,	
	(d) protect the community from the offender,	
	(e) deter the offender and others from committing offences,	
	(f) promote the rehabilitation of the offender, and	
	(g) reduce crime.	
	(2) Nothing about the order in which the purposes appear implies that any purpose must be given greater weight than any other purpose.	
<b>3</b>	<b>General principles of sentencing</b>	<b>page</b>
3.1	<b>Key principles of sentencing</b>	<b>55</b>
	A revised Crimes (Sentencing) Act should provide:	
	(1) The court, when imposing a sentence, must apply (although not to the exclusion of any other relevant principles) the common law concepts reflected in the following key principles:	
	(a) proportionality;	
	(b) parity;	
	(c) totality; and	
	(d) the rule that an offender is only to be sentenced for an offence of which he or she has been convicted (the rule in <i>De Simon</i> ).	
	(2) The court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate (imprisonment as a last resort).	

3.2 Dealing with parity on appeal 57

The *Criminal Appeal Act 1912* (NSW) should be amended to provide that the parity principle, in relation to an appeal by an offender against the severity of a sentence, is not to be applied in a way that would result in a sentence that, in all of the circumstances of the case, would be manifestly inadequate.

4 Relevant factors on sentencing page

4.1 Replacement of s 21A 81

Section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should not be replicated in a revised Crimes (Sentencing) Act. Instead, a new provision should include a non-exhaustive list of a number of factors a court must take into account on sentencing. This list should not be categorised into “aggravating” and “mitigating” factors.

4.2 Sentencing factors to be included in a revised Act 83

A revised Crimes (Sentencing) Act should provide that:

- (1) When imposing a sentence, the court must take into account such of the factors as are known to the court that relate to the following matters:
  - (a) the nature, circumstances and seriousness of the offence
  - (b) the personal circumstances and vulnerability of any victim arising because of the victim’s age, occupation, relationship to the offender, disability or otherwise
  - (c) the extent of any injury, emotional harm, loss or damage resulting from the offence or any significant risk or danger created by the offence, including any risk to national security
  - (d) the offender’s character, general background, offending history, age, and physical and mental condition (including any cognitive or mental health impairment)
  - (e) the extent of the offender’s remorse for the offence, taking into account, in particular, whether:
    - (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 voluntarily made reparation for such injury, loss or damage (or both)
  - (f) the offender’s prospects of rehabilitation.
- (2) These matters are in addition to any other matters that the court is required or permitted to take into account under any Act or rule of law.
- (3) The court is not to have regard to any factor in sentencing if it would be contrary to any Act or rule of law to do so.
- (4) The fact that any such factor is relevant and known to the court does not require the court to increase or reduce the sentence for the offence.
- (5) The following definitions apply:
  - (a) **Cognitive impairment** means an ongoing impairment in comprehension, reason, adaptive functioning, judgement, learning or memory that is the result of any damage to, dysfunction, developmental delay, or deterioration of the brain or mind. Such cognitive impairment may arise from, but is not limited to, the following:
    - (i) intellectual disability;
    - (ii) borderline intellectual functioning;
    - (iii) dementias;
    - (iv) acquired brain injury;
    - (v) drug or alcohol related brain damage;
    - (vi) autism spectrum disorders.
  - (b) **Mental health impairment** means a temporary or continuing disturbance of thought, mood, volition, perception, or memory that impairs emotional wellbeing, judgement or behaviour, so as to affect functioning in daily life to a material extent. Such mental health impairment may arise from but is not limited to the following:
    - (i) anxiety disorders;

	(ii) affective disorders;	
	(iii) psychoses;	
	(iv) severe personality disorders;	
	(v) substance induced mental disorders (which include ongoing mental health impairments such as drug-induced psychoses, but exclude substance abuse disorders (addiction to substances) or the temporary effects of ingesting substances).	
	(6) In assessing the nature, circumstances and seriousness of the offence, the court must have regard to the matters personal to the offender that are causally connected with, or materially contributed to, the commission of the offence including, for example, the offender's motivation in committing the offence, as well as the degree to which the offender participated in its commission.	
<b>4.3</b>	<b>Retain s 24 in a revised Act</b>	<b>96</b>
	A revised Crimes (Sentencing) Act should contain a stand-alone provision in the general terms of s 24 of the <i>Crimes (Sentencing Procedure) Act 1999</i> (NSW) (time in custody, etc).	
<b>4.4</b>	<b>Irrelevance of certain offender restrictions to be addressed separately</b>	<b>98</b>
	A revised Crimes (Sentencing) Act should contain a stand-alone provision in the general terms of the current s 24A of the <i>Crimes (Sentencing Procedure) Act 1999</i> (NSW).	
<b>4.5</b>	<b>Irrelevance of confiscation of assets to be addressed separately</b>	<b>102</b>
	A revised Crimes (Sentencing) Act should contain a stand-alone provision in the general terms of the current s 24B of the <i>Crimes (Sentencing Procedure) Act 1999</i> (NSW) (confiscation of assets, etc). The provision should state that it has effect despite any Act or rule of law to the contrary.	
<b>4.6</b>	<b>Sexual offences against children facilitated by good character to be addressed separately</b>	<b>105</b>
	(1) A revised Crimes (Sentencing) Act should contain stand-alone provisions in the general terms of the current <i>Crimes (Sentencing Procedure) Act 1999</i> (NSW) s 21A(5A) to (6) (child sexual offences).	
	(2) The provisions should not apply to juvenile offenders convicted of sexual offences.	
<b>4.7</b>	<b>Reoffending while on conditional liberty or unlawfully at large to be addressed separately</b>	<b>106</b>
	(1) A revised Crimes (Sentencing) Act should contain a stand-alone provision to the effect that the court, when sentencing for an offence that was committed while on conditional liberty or while unlawfully at large, should take the fact it was so committed into account when assessing the need for the sentence to contain an additional element of specific deterrence, denunciation and/or community protection, and also when assessing the offender's prospects of rehabilitation.	
	(2) There should be a definition of the expressions "conditional liberty" and "unlawfully at large" to take into account the sentences that become available under a revised Crimes (Sentencing) Act, as well as circumstances involving escape or failure to comply with any conditions imposed under any sentence that allows the offender to serve a sentence in the community.	
<b>4.8</b>	<b>Hate crimes to be addressed separately</b>	<b>112</b>
	A revised Crimes (Sentencing) Act should contain a stand-alone provision to the effect that the court, when sentencing for an offence that was motivated wholly or partly by hatred for or prejudice against a group of people to which the offender believed the victim belonged or with which the offender believed the victim was associated (being people of a particular religious belief, racial, ethnic or national origin, age, sexual orientation, transgender status or having a particular disability or illness), should take that motivation into account when assessing the need for the sentence to contain an additional element of deterrence, denunciation and/or community protection from the offender, and also when assessing the offender's prospects of rehabilitation.	
<b>4.9</b>	<b>Consider addressing existence of control order separately</b>	<b>114</b>
	The government should consider including in a revised Crimes (Sentencing) Act a stand-alone provision to the effect that the court, when sentencing an offender for a serious criminal offence that was committed by a person who at the time of the offence was subject to a control order under the <i>Crimes (Criminal Organisations Control) Act 2012</i> (NSW), should take the fact that it was so committed into account when assessing the need for the sentence to contain an additional element of deterrence, denunciation and/or community protection from the offender, and also when assessing the offender's prospects of rehabilitation.	

5	Reductions in penalty	page
5.1	<p><b>Recommendation 5.1: Quantification of discount for a guilty plea</b></p> <p>(1) A revised Crimes (Sentencing) Act should provide for discounts for guilty pleas in similar terms to s 22 of the <i>Crimes (Sentencing Procedure) Act 1999</i> (NSW). The provision should clarify that the lesser penalty imposed must reflect the utilitarian value of the plea.</p> <p>(2) The provision should also require the court to quantify the reduction in penalty given for the utilitarian value of a guilty plea, unless there are reasons for not doing so which the court must record in its reasons for sentence.</p>	126
5.2	<p><b>Reduction in penalty for assistance to authorities</b></p> <p>A revised Crimes (Sentencing) Act should provide for discounts for assistance to law enforcement authorities in terms similar to s 23 of the <i>Crimes (Sentencing Procedure) Act 1999</i> (NSW).</p>	132
5.3	<p><b>Reduction for facilitating the administration of justice</b></p> <p>A revised Crimes (Sentencing) Act should provide for discounts for facilitating the administration of justice in terms similar to s 22A of the <i>Crimes (Sentencing Procedure) Act 1999</i> (NSW). The provision should be extended to apply to all indictable offences, whether tried summarily or on indictment.</p>	133
6	Full-time imprisonment	page
6.1	<p><b>Return to the top down approach</b></p> <p>In a revised Crimes (Sentencing) Act:</p> <p>(1) There should be a return to top down sentencing. The Act should provide that when a court sentences a person to imprisonment for an offence, unless imposing a fixed term, the court is to impose a head sentence which consists of a non-parole period and a parole period. The court is to pronounce the head sentence first and then the non-parole period.</p> <p>(2) The terminology of “non-parole period”, “parole period” and “head sentence” should be used consistently throughout the Act and in all associated legislation.</p> <p>(3) The “non-parole period” should be defined as “the minimum period for which the offender must be kept in detention in relation to the offence”.</p> <p>(4) A “fixed term” should be defined as “a sentence that requires the offender to serve the entire period of the sentence in detention”.</p>	142
6.2	<p><b>The “statutory ratio” and the test to depart from the ratio</b></p> <p>A revised Crimes (Sentencing) Act should continue to provide guidance about the ratio between the non-parole period and the head sentence as follows:</p> <p>(1) The presumptive ratio of the non-parole period to the head sentence should be two-thirds.</p> <p>(2) The “special circumstances” test should be replaced. A new test should allow the court to depart from the presumptive ratio only if, having regard to all the purposes of sentencing, it is satisfied that there are good reasons for such a departure.</p> <p>(3) The court must record its reasons for any departure from the presumptive ratio, but a failure to do so would not invalidate the sentence.</p>	153
6.3	<p><b>Fixed terms and the SNPP scheme</b></p> <p>A revised Crimes (Sentencing) Act should contain a provision amending s 45 of the <i>Crimes (Sentencing Procedure) Act 1999</i> (NSW) that would:</p> <p>(1) permit the court to impose a fixed term for an offence included in the SNPP Table; and</p> <p>(2) specify that the sentence imposed must not be less than that which the court would have set as the non-parole period for the offence.</p>	154
6.4	<p><b>Accumulation of sentences</b></p> <p>(1) A revised Crimes (Sentencing) Act should provide that the court, when accumulating sentences:</p> <p>(a) must state the term of each sentence, without specifying a non-parole period or a fixed term;</p> <p>(b) must state whether the sentences (including the sentences already being served), are to be served concurrently or consecutively or partly concurrently and partly consecutively and state an overall</p>	156

	effective term;	
	(c) must specify whether the overall effective term is a fixed term, or set a single non-parole period;	
	(d) when setting the single non-parole period, may depart from the presumptive ratio only if, having regard to all of the purposes of sentencing, it is satisfied that there are good reasons to do so and must provide reasons for the departure.	
	(2) A court should be able to order that the offender serve accumulated sentences by way of a single home detention or intensive correction order (if these sentences are retained) or a single community detention order (if this order is adopted).	
	(3) A court should have the power, on the application of the parties, or on its own motion, to make any adjustment to the effective non-parole period if it made an error in the way in which the individual sentences were translated into the effective overall sentence. This amendment could be incorporated into a restated s 43 of the <i>Crimes (Sentencing Procedure) Act 1999</i> (NSW).	
<b>6.5</b>	<b>Aggregate sentences</b>	<b>159</b>
	In a revised Crimes (Sentencing) Act:	
	(1) Aggregate sentencing (as provided for in s 53A of the <i>Crimes (Sentencing Procedure) Act 1999</i> (NSW)) should be preserved.	
	(2) The court should be required to state the individual head sentences (but not the non-parole periods) that would have been imposed for each offence had the court not imposed an aggregate sentence.	
	(3) A court should be able to order that the offender serve an aggregate sentence by way of a single home detention or intensive correction order (if these sentences are retained) or a single community detention order (if this order is adopted).	
	(4) If suspended sentences are retained, they should be excluded from aggregate sentencing.	
	(5) When a court is specifying the non-parole period for an aggregate sentence, the top down approach should apply and the court should be required to record its reasons for departing from the presumptive ratio between the non-parole period and the head sentence.	
<b>6.6</b>	<b>Aggregate sentencing in the Local Court</b>	<b>160</b>
	(1) The <i>Crimes (Sentencing Procedure) Act 1999</i> (NSW) should be immediately amended to clarify that the Local Court may impose an aggregate sentence of up to five years imprisonment.	
	(2) A revised Crimes (Sentencing) Act should permit the Local Court to impose an aggregate sentence of up to five years imprisonment.	
	(3) The Local Court's power to impose an aggregate sentence does not increase the jurisdictional limit that applies when sentencing for individual offences.	
<b>6.7</b>	<b>Accumulating or aggregating fixed term sentences</b>	<b>160</b>
	The government should consider including in a revised Crimes (Sentencing) Act a provision that permits a single non-parole period to be set where fixed term sentences are accumulated or combined into an aggregate sentence of more than six months imprisonment.	
<b>6.8</b>	<b>Retention of sentences of six months or less</b>	<b>165</b>
	A revised Crimes (Sentencing) Act should allow courts to impose sentences of six months imprisonment or less.	
<b>6.9</b>	<b>Parole not available for short terms of imprisonment</b>	<b>167</b>
	A revised Crimes (Sentencing) Act should continue to preclude the fixing of a non-parole period where the head sentence is six months or less.	
<b>7</b>	<b>Standard minimum non-parole period scheme</b>	<b>page</b>
<b>7.1</b>	<b>Implementation of the Commission's interim report recommendations on the standard non-parole period scheme</b>	<b>182</b>
	(1) The recommendations in the NSW Law Reform Commission's report, <i>Sentencing: Interim Report on Standard Minimum Non-parole Periods</i> , Report 134 (2012) should be implemented, taking into account our recommendations for reform of s 21A of the <i>Crimes (Sentencing Procedure) Act 1999</i> (NSW) in Recommendations 4.1-4.2 of this report.	
	(2) The government should consult further with stakeholders and the community about the following aspects	

of the standard minimum non-parole period (SNPP) scheme:

- (a) the offences which should be included in the SNPP Table;
  - (b) the SNPPs for those offences; and
  - (c) the process by which any further offences should be considered for inclusion in the Table and any further SNPPs should be set.
- (3) The NSW Sentencing Council should monitor patterns of sentencing under the SNPP scheme in order to detect any inconsistencies.

<b>8</b>	<b>Life sentences and parole</b>	<b>page</b>
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<b>8.1</b>	<b>Life sentences and parole</b>	<b>193</b>
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In a revised Crimes (Sentencing) Act, subject to any provision to the contrary:

- (1) When imposing a life sentence for any offence that attracts a maximum sentence of life imprisonment, a court should be able either to:
  - (a) impose life imprisonment without the possibility of release on parole; or
  - (b) impose life imprisonment specifying a non-parole period and a parole period that operates for the rest of the offender's life.
- (2) The court should give reasons for setting or declining to set a non-parole period for a life sentence, although failing to do so will not invalidate the sentence.
- (3) This recommended provision should only apply to life sentences imposed for offences committed after the commencement of a revised Crimes (Sentencing) Act.

<b>9</b>	<b>Home detention and intensive correction orders (if retained)</b>	<b>page</b>
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<b>9.1</b>	<b>Geographic availability</b>	<b>203</b>
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If home detention and intensive correction orders (ICOs) are retained as sentencing options in a revised Crimes (Sentencing) Act:

- (1) Corrective Services NSW should make home detention and ICOs available across NSW.
- (2) Corrective Services NSW should provide information to the courts and to legal practitioners about the local availability of home detention and ICOs and of the necessary support services and programs.
- (3) The *Crimes (Administration of Sentences) Regulation 2008* (NSW) should be amended to make clear that, where electronic monitoring is not possible and there are adequate alternative methods for supervising compliance, alternative methods of surveillance and supervision may be used.

<b>9.2</b>	<b>Exclusion of certain offences</b>	<b>207</b>
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If ICOs and home detention are retained as sentencing options in a revised Crimes (Sentencing) Act, no offences should automatically exclude an offender from home detention and ICOs except:

- (a) domestic violence offences committed against a likely co-resident;
- (b) murder; and
- (c) offences under Part 3 Divisions 10 and 10A of the *Crimes Act 1900* (NSW) when the victim is under the age of 16 years and the offence carries a maximum penalty of more than 5 years imprisonment.

<b>9.3</b>	<b>Maximum length of home detention</b>	<b>209</b>
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If home detention is retained as a sentencing option in a revised Crimes (Sentencing) Act:

- (1) The maximum length of a home detention order should be extended to three years with a maximum non-parole period of two years. If no non-parole period is set, then the maximum period of the order should be two years.
- (2) In the Local Court, the maximum length of a home detention order should continue to be two years, and three years where the offender is sentenced for multiple offences.
- (3) Where the State Parole Authority (SPA) revokes a parole order for a sentence of home detention it should be able to return the offender either to home detention or to full-time imprisonment depending on the circumstances of the case.
- (4) Offenders who have been returned to full-time imprisonment because SPA revoked the home detention order during the non-parole period should be able to apply to SPA for reinstatement of the order after



	one month.	
	(5) Offenders who have been returned to home detention or full-time imprisonment because SPA revoked parole should be able to apply to SPA for reinstatement of parole after one month.	
<b>9.4</b>	<b>Maximum length of ICOs</b>	<b>212</b>
	If the ICO is retained as a sentencing option in a revised Crimes (Sentencing) Act:	
	(1) The maximum allowable length of an ICO should be extended from two to three years.	
	(2) In the Local Court, the maximum length of an ICO should continue to be two years, or three years where the offender is sentenced for multiple offences.	
	(3) The court should be able to set a non-parole period of up to two years as part of an ICO. If the court does not set a non-parole period, the maximum length of the ICO should continue to be two years.	
	(4) Where SPA revokes an ICO during the non-parole period, SPA should be able to commit the offender to either full-time custody or home detention. The offender should be able to apply to SPA for reinstatement of the ICO after one month.	
	(5) Where an offender who is serving the parole period of an ICO breaches the conditions of parole, SPA should be able to revoke the parole and order the offender's return to full-time imprisonment or home detention or to order the offender resume 32 hours of work per month. The offender should be able to reapply for parole after one month.	
<b>9.5</b>	<b>Timing of suitability assessments</b>	<b>214</b>
	If home detention and ICOs are retained as sentencing options in a revised Crimes (Sentencing) Act:	
	(1) The court should first set the term of imprisonment (the head sentence).	
	(2) If the head sentence is of an eligible length, the court should be able to refer the offender for a single suitability assessment for home detention or an ICO or both.	
	(3) If the court imposes an ICO or home detention order (after a positive suitability assessment) it should, at that time, either set a non-parole period or decline to do so.	
<b>9.6</b>	<b>Removal of barriers to suitability</b>	<b>217</b>
	If home detention and ICOs are retained as sentencing options in a revised Crimes (Sentencing) Act:	
	(1) It should be possible to satisfy the hours of community service work attached to an ICO by a range of activities including engaging in literacy, numeracy, work-ready, educational or other programs according to the needs of the offender.	
	(2) It should be possible to serve part of a home detention order in an institution providing residential drug or alcohol treatment. This should not increase the length of the order.	
	(3) Corrective Services NSW should be able to defer the offender's commencement of the work hours requirement while the offender completes residential drug or alcohol treatment or another program. This should not increase the length of the order.	
<b>9.7</b>	<b>Periodic detention</b>	<b>219</b>
	Periodic detention should not be reintroduced.	
<b>10</b>	<b>Suspended sentences</b>	<b>page</b>
<b>10.1</b>	<b>Abolition of suspended sentences</b>	<b>230</b>
	(1) If a revised Crimes (Sentencing) Act makes a community detention order (CDO) available as a sentencing option, suspended sentences should be abolished.	
	(2) If suspended sentences are not abolished, they should be amended as set out in Recommendations 10.2-10.5.	
<b>10.2</b>	<b>No partial suspended sentences</b>	<b>233</b>
	If suspended sentences are retained, a revised Crimes (Sentencing) Act should not allow the partial suspension of sentences of imprisonment.	
<b>10.3</b>	<b>Conditions on suspended sentences</b>	<b>235</b>
	If suspended sentences are retained, a revised Crimes (Sentencing) Act should provide that the bond with	

which an offender must comply when a sentence of imprisonment is suspended:

- (1) must contain conditions that, during the term of the bond (or order) the offender must:
  - (a) appear before the court if called on to do so; and
  - (b) not commit a further offence punishable by imprisonment;
- (2) must not contain conditions requiring the offender to:
  - (a) perform community service work; or
  - (b) make any payment, whether in the nature of a fine, compensation or otherwise;
- (3) may contain other conditions, including a condition that the offender must:
  - (a) submit to Corrective Services NSW supervision and comply with all reasonable directions; or
  - (b) engage in rehabilitation, intervention or other programs as specified in the order or as directed by Corrective Services NSW.

**10.4 Bond length for suspended sentences 236**

If suspended sentences are retained, a revised Crimes (Sentencing) Act should provide that the length of the bond can exceed the term of imprisonment that is suspended by up to 12 months.

**10.5 Breach and revocation of suspended sentences 240**

If suspended sentences are retained, a revised Crimes (Sentencing) Act should provide:

- (1) If an offender breaches the bond attached to the suspended sentence of imprisonment, the court must revoke the bond unless it is satisfied that there are good reasons for excusing the offender's breach.
- (2) Where the offender breaches the bond by committing an offence punishable by imprisonment, the court should, in determining whether there are good reasons to excuse the breach, have regard to whether there were sufficient extenuating circumstances surrounding its commission that would make it unjust to revoke the bond.
- (3) Where the breach of the bond arises because the offender failed to comply with a condition of the bond other than by committing a further offence punishable by imprisonment, the court should, in determining whether there are good reasons to excuse the breach, have regard to:
  - (a) the extent to which the breach was deliberate or accidental;
  - (b) any extenuating circumstances that explain the breach;
  - (c) any prior breaches; and
  - (d) the extent to which the offender has otherwise complied with the conditions of the bond, such that it would be unjust to revoke the bond.
- (4) A court may, on revoking the bond, order that the sentence of imprisonment be served by way of an intensive correction order or home detention.
- (5) Section 99(1)(c), (2)-(5) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should be replicated.
- (6) Where a higher court deals with an offence that constitutes a breach of a bond attached to a suspended sentence that was imposed in the Local Court the higher court should have jurisdiction to deal with the breach of the bond without the offender's consent.
- (7) Where a bond attached to a suspended sentence that was imposed in a higher court after appeal from the Local Court, is breached by a further offence that is dealt with in the Local Court, the Local Court should also be able to deal with the breach of the bond.

**11 A new community detention order page**

**11.1 A new community detention order (CDO) 246**

In place of home detention, intensive correction orders and suspended sentences, a revised Crimes (Sentencing) Act should provide for a new community detention order (CDO).

**11.2 Custodial status of the CDO 248**

In a revised Crimes (Sentencing) Act:

- (1) The CDO should be constituted as a custodial order; that is, as a way of serving a term of imprisonment in the community.

- (2) The State Parole Authority (SPA) should deal with breaches, revocations and reinstatement applications for CDOs.
- (3) Revocation of a CDO should lead to the offender serving the remainder of the sentence in full-time custody unless SPA reinstates the CDO.

### 11.3 Features of a CDO

256

In a revised Crimes (Sentencing) Act:

- (1) The CDO should only be imposed after Corrective Services NSW has assessed the offender favourably and the offender has consented to it.
- (2) The CDO should have automatic statutory conditions that are in force for the full term of the order. The conditions should require the offender:
  - (a) not to commit an offence;
  - (b) to submit to supervision from Corrective Services NSW as required;
  - (c) to report to Corrective Services NSW as directed by a supervisor or assigned officer;
  - (d) to reside at approved premises;
  - (e) to obey a supervisor's (or assigned officer's) reasonable directions;
  - (f) to submit to electronic monitoring if directed by a supervisor or assigned officer;
  - (g) to accept home visits by a supervisor or assigned officer; and
  - (h) to submit to searches and alcohol and drug tests.

The conditions should be drafted in such a way that the offender is required to accept any supervision provided by Corrective Services NSW, but Corrective Services NSW is not obliged to supervise the offender where supervision is unnecessary.

- (3) The court may impose one or both of the following optional requirements as part of a CDO:
  - (a) a home detention requirement; and/or
  - (b) a work and intervention requirement.
- (4) The CDO should be for a maximum of three years when imposed by the District and Supreme Courts and two years where imposed by the Local Court (or three years where the case is one that attracts the extended jurisdiction of the Local Court).
- (5) The court should set the duration of the optional requirements separately from the duration of the whole CDO, to a maximum of two years.
- (6) The court should be able to add discretionary conditions to a CDO aimed at reducing the likelihood of reoffending such as alcohol and drug abstinence, place restrictions, non-association or curfews. The discretionary conditions should not include payment of any money.
- (7) The work and intervention requirement should involve a set number of hours, calculated at between a minimum of 4 hours and a maximum of 8 hours multiplied by the number of weeks during which the requirement is in force.
- (8) An offender should be able to satisfy the hours imposed as part of a work and intervention requirement by participating in any combination of community service work, psychological or psychiatric treatment, intervention programs, educational programs, vocational or life skills programs, counselling, drug or other addiction treatment.
- (9) Corrective Services NSW should have the discretion to determine the activities undertaken by the offender as part of the work and intervention requirement and set the times and speed at which the offender completes the activities. The maximum number of CDO hours that the offender may spend on community service work should be capped at 500.
- (10) The court should be able to stipulate activities to occupy some or all of the hours of the work and intervention requirement, but should only be able to specify an activity if the assessment report has indicated that the activity is available and suitable for the offender.
- (11) No offences should automatically exclude an offender from a CDO except:
  - (a) domestic violence offences committed against a likely co-resident;
  - (b) murder; and
  - (c) offences under Part 3 Divisions 10 and 10A of the *Crimes Act 1900* (NSW) when the victim is under the age of 16 years and the offence carries a maximum penalty of more than 5 years

imprisonment.

**11.4 Assessment process for the CDO**

258

In a revised Crimes (Sentencing) Act:

- (1) Before imposing a CDO, the court should first set the term of imprisonment that an offender must serve (but not any non-parole period). The court may then (if the term is of an eligible length) refer the offender to Corrective Services NSW for a CDO availability assessment.
- (2) The availability assessment report should include the following information:
  - (a) the offender's current offence(s) and criminal record;
  - (b) the offender's likelihood of reoffending and other risks associated with managing the offender in the community, including risks of self-harm or harm to any other person, and the likelihood of the offender committing a domestic violence offence;
  - (c) the effect of the order on the offender's family and other co-residents, specifically including the effects of the order on any child under 18;
  - (d) whether the offender's co-residents are likely to consent to the order;
  - (e) whether the offender has (or needs) suitable residential accommodation;
  - (f) the offender's physical and mental health, including any substance dependencies or other addictions;
  - (g) the offender's employment, education and other personal circumstances; and
  - (h) the causes of the offender's criminal conduct.
- (3) The assessment report should be comprehensive, and include information about:
  - (a) the desirability of imposing either a home detention requirement or a work and intervention requirement or both;
  - (b) the likely level of supervision required given the offender's risk level;
  - (c) if a work and intervention requirement is being considered:
    - (i) the likely mix between work, programs and other activities;
    - (ii) any programs or activities that are recommended for the offender and their availability in the area where the offender lives;
  - (d) if the offender is assessed as not currently suitable for home detention or community service work, whether he or she may become suitable by completing certain programs under a work and intervention requirement and if so, whether these programs are available; and
  - (e) any additional conditions that it would be desirable for the court to add to the order.
- (4) A working group including representatives of Corrective Services NSW and the courts should be convened:
  - (a) to develop a strategy for the preparation of the assessment reports that will be required;
  - (b) to promote awareness of the kind of programs and work opportunities that are available; and
  - (c) to promote awareness of the way in which a CDO will be administered in practice.

**11.5 Administering the CDO**

260

- (1) Corrective Services NSW should be adequately resourced to make the CDO available across NSW, including the establishment and/or funding of appropriate programs, treatment and community service work placements for offenders subject to the work and intervention requirement.
- (2) Other government agencies should support Corrective Services NSW to administer the work and intervention component of the CDO as part of a multi-agency model. The government should consider a model which imposes a statutory duty to cooperate on relevant agencies.

**11.6 Variation, breach and revocation of the CDO**

262

- (1) SPA should deal with breaches and revocations of a CDO and should be able:
  - (a) to revoke a CDO;
  - (b) not to revoke a CDO where good reasons exist for excusing the breach; and
  - (c) to refer the CDO, where appropriate, back to the sentencing court for variation.

- (2) If SPA refers the matter back to the court, the court should be able to:
  - (a) confirm the CDO in its current form;
  - (b) vary the CDO; or
  - (c) revoke the CDO.
- (3) Revocation of the CDO should lead to the offender being required to serve the remainder of the sentence in full-time imprisonment, unless SPA reinstates the CDO.
- (4) SPA should have the power to revoke a CDO temporarily by specifying, at the time of revocation, a date at which the CDO will be automatically reinstated.
- (5) If a CDO is revoked and the offender is committed to full-time imprisonment, the offender should also be able to apply for reinstatement of the CDO after one month. If refused, SPA should set a date for any further application.
- (6) A CDO management committee (constituted similarly to the current ICO Management Committee) within Corrective Services NSW should manage CDO breaches and have discretion to limit applications to revoke CDOs.
- (7) The court should be able to vary a CDO on application from the offender, or Corrective Services NSW, whether or not a breach has occurred.
- (8) Corrective Services NSW and SPA should be able to make small administrative changes to a CDO, such as change of required residence or a variation to reporting requirements.

12	Existing non-custodial orders (if retained)	page
12.1	<p><b>Meaning of “good behaviour” requirement in s 9 and s 10(1)(b) bonds</b></p> <p>If s 9 and s 10(1)(b) bonds are retained, a revised Crimes (Sentencing) Act should replace the requirement that an offender be of “good behaviour” with a requirement that the offender not commit a further offence.</p>	274
12.2	<p><b>Power to vary a s 9 or s 10(1)(b) bond</b></p> <p>If s 9 and s 10(1)(b) bonds are retained, a revised Crimes (Sentencing) Act should allow the court to vary a s 9 or s 10(1)(b) bond, on application made either by the offender or Corrective Services NSW, even though breach has not occurred.</p>	275
12.3	<p><b>Standard obligations for a supervised bond</b></p> <p>If s 9 and s 10(1)(b) bonds are retained:</p> <ol style="list-style-type: none"> <li>(1) A revised Crimes (Sentencing) Act should specify standard obligations to be applied when a court makes supervision a condition of a s 9 or s 10(1)(b) bond, unless the court directs otherwise. The standard obligations should be for the offender to:               <ol style="list-style-type: none"> <li>(a) follow all reasonable directions of the Corrective Services NSW supervising officer;</li> <li>(b) attend programs and undertake other intervention activities as the Corrective Services NSW supervising officer directs;</li> <li>(c) live at an address approved by the Corrective Services NSW supervising officer;</li> <li>(d) receive home visits by the Corrective Services NSW supervising officer for any purpose connected with the administration of the bond; and</li> <li>(e) submit to drug and alcohol testing as the Corrective Services NSW supervising officer directs.</li> </ol> </li> <li>(2) The standard obligations of supervision should be phrased to make clear that, while the offender is required to submit to supervision, Corrective Services NSW has the discretion to provide supervision according to the needs of the case.</li> </ol>	276
12.4	<p><b>Jurisdiction to deal with breach of bond</b></p> <p>If s 9 and s 10(1)(b) bonds are retained, in a revised Crimes (Sentencing) Act:</p> <ol style="list-style-type: none"> <li>(1) Where a higher court deals with an offence that constitutes a breach of a s 9 or s 10(1)(b) bond that was imposed in the Local Court, the higher court should have jurisdiction to deal with the breach of the bond without the offender’s consent.</li> <li>(2) If a higher court deals with breach of a bond made in the Local Court, the higher court should deal with the breach within the Local Court’s jurisdictional limits.</li> <li>(3) Where a bond that was imposed in a higher court after an appeal from the Local Court, is breached by a</li> </ol>	278

	<p>further offence that is dealt with in the Local Court, the Local Court should also be able to deal with the breach of the bond within its jurisdictional limits.</p> <p>(4) Where a higher court imposes a CSO after an appeal from the Local Court, and the offender subsequently appears before the Local Court in relation to a further offence, the Local Court should be able to deal (within its jurisdictional limits) with any application to revoke the CSO and resentence the offender at the same time.</p>	
<b>12.5</b>	<b>Availability of CSOs and s 9 bonds for fine-only offences</b>	<b>280</b>
	<p>If s 9 and s 10(1)(b) bonds and community service orders are retained, in a revised Crimes (Sentencing) Act:</p> <p>(1) It should be clear that CSOs are only available for offences punishable by imprisonment.</p> <p>(2) Section 9 bonds should not be available for fine-only offences unless, in relation to certain traffic offences, the court is expressly precluded from imposing a s 10(1)(b) bond.</p>	
<b>12.6</b>	<b>Time in which to complete CSO work hours</b>	<b>281</b>
	<p>If the CSO is retained, a revised Crimes (Sentencing) Act should provide that the duration of a CSO is to be calculated by reference to the number of hours of work required, at the rate of one week for every four hours.</p>	
<b>12.7</b>	<b>Increased access to and flexibility of CSOs</b>	<b>284</b>
	<p>If the CSO is retained:</p> <p>(1) Corrective Services NSW should increase the number of community service work placements available.</p> <p>(2) A revised Crimes (Sentencing) Act should provide that:</p> <p>(a) The suitability assessment report, which must be ordered before the court imposes a CSO, should indicate:</p> <p>(i) whether the offender is suitable for community service work;</p> <p>(ii) whether appropriate work is available; and</p> <p>(iii) whether there are any other programs, treatments, courses or activities that are available and recommended for the offender.</p> <p>(b) Unless the court requires otherwise, Corrective Services NSW should have the discretion to determine the activities through which an offender can satisfy CSO work hours, including community service work, medical or mental health treatment, education, vocational or life skills courses, financial or other counselling, drug or alcohol treatment, or any combination of these activities.</p> <p>(c) The court may require an offender to participate in a particular activity if the assessment report indicates that it is appropriate and available.</p>	
<b>12.8</b>	<b>Combining CSOs and s 9 bonds</b>	<b>285</b>
	<p>If CSOs and s 9 bonds are retained, the court should be able to impose a CSO and a s 9 bond together for the one offence.</p>	
<b>13</b>	<b>New non-custodial community-based orders</b>	<b>page</b>
<b>13.1</b>	<b>A new community correction order</b>	<b>291</b>
	<p>A revised Crimes (Sentencing) Act should replace CSOs and s 9 bonds with a new order, the community correction order (CCO), available in relation to offences punishable by imprisonment.</p>	
<b>13.2</b>	<b>Automatic conditions of the CCO</b>	<b>292</b>
	<p>The community correction order should have automatic conditions requiring an offender not to commit an offence and to appear in court if called upon to do so during the term of the order.</p>	
<b>13.3</b>	<b>Optional requirements of the CCO</b>	<b>295</b>
	<p>(1) The court should be able, but not required, to attach one or more of the following optional requirements to a community correction order (CCO):</p> <p>(a) a supervision requirement;</p> <p>(b) a work and program requirement; or</p> <p>(c) a personal restriction requirement.</p>	

- (2) The nature and conditions of the supervision, work and program and personal restriction requirements should be set out in legislation.
  - (3) The standard obligations of the supervision requirement should be for the offender to:
    - (a) follow all reasonable directions of the Corrective Services NSW supervising officer;
    - (b) live at an address approved by the Corrective Services NSW supervising officer;
    - (c) receive home visits by the Corrective Services NSW supervising officer for any purpose connected with the administration of the CCO; and
    - (d) submit to drug and alcohol testing as the Corrective Services NSW supervising officer directs.
  - (4) The standard obligations of supervision should be phrased to make clear that, while the offender is required to submit to supervision, Corrective Services NSW has the discretion to provide supervision according to the needs of the case.
  - (5) A court may impose a work and program requirement of up to 500 hours.
  - (6) Unless the court requires otherwise, Corrective Services NSW should have the discretion to determine the activities through which an offender can satisfy CCO work and program hours, including community service work, medical or mental health treatment, education, vocational or life skills courses, financial or other counselling, drug or alcohol treatment, or any combination of these activities. Of the hours imposed, the maximum number of hours that can be spent on community service work is 300.
  - (7) Personal restriction requirements may include a curfew; a place restriction; a non-association condition; and/or an alcohol or drug abstinence condition. Conditions which a court could impose as part of the personal restriction requirement should be subject to statutory restrictions appropriate to a non-custodial sentence at this level.
- 13.4 Duration of the CCO** **297**
- The maximum duration of a community correction order should be three years.
- 13.5 Duration of the optional requirements of the CCO** **298**
- (1) The court should be able to set the length of any optional requirements of the community correction order (CCO) independently from but not to exceed the length of the CCO.
  - (2) The duration of a work and program requirement of a CCO should be calculated by reference to the number of hours of required, at the rate of one week for every four hours.
- 13.6 Additional conditions of a CCO** **298**
- (1) The court should be able to attach additional conditions to a community correction order (CCO) at its discretion (including compliance with an intervention plan arising from one of the programs stipulated in the *Criminal Procedure Regulation 2010* (NSW)) other than a condition requiring the offender to make any monetary payment.
  - (2) The court should be able to set the length of any additional conditions independently from but not to exceed the length of the CCO.
- 13.7 Requirement for offender's consent** **299**
- The community correction order should only be imposed with an offender's consent.
- 13.8 Assessment for a CCO** **299**
- (1) The court should not be able to make a community correction order that includes a work and program requirement unless it has received an assessment report indicating that some work or other program is appropriate for the offender and is available.
  - (2) The court should be able to stipulate that a particular activity be performed as part of an offender's work and program hours if the assessment report has identified that activity as appropriate and available (otherwise Corrective Services NSW should determine the activities to be performed).
- 13.9 Variations, breaches and revocations of the CCO** **300**
- (1) A breach of a community correction order (CCO) should be dealt with by:
    - (a) the court that imposed the order; or
    - (b) where the breach arises from a further offence, the court dealing with that offence.
  - (2) If a CCO is revoked, the court should resentence the offender for the original offence.

- (3) A court should be able, on application made by either the offender or by Corrective Services NSW, to vary a CCO whether or not breach has occurred.
  - (4) Corrective Services NSW should be able to make minor administrative changes to a CCO, such as a change of address or a variation in reporting requirements.
- 13.10 Criminal history following the CCO** **301**
- The criminal history that follows the imposition of a community correction order should contain a record of the conditions imposed.
- 13.11 A new conditional release order** **302**
- (1) A revised Crimes (Sentencing) Act should replace orders under s 10(1)(b) and s 10(1)(c) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) with a new order, to be called a conditional release order (CRO).
  - (2) The CRO should be available for offences punishable by imprisonment and for fine-only offences.
  - (3) The court should be able to impose a CRO with or without recording a conviction.
- 13.12 Automatic conditions of the CRO** **302**
- The conditional release order should have automatic conditions requiring an offender not to commit any offence and to appear in court if called upon to do so during the term of the order.
- 13.13 Optional requirements of the CRO** **303**
- (1) When imposing a conditional release order (CRO), the court should be able, but not required, to attach one or more of:
    - (a) a supervision requirement;
    - (b) a personal restriction requirement.
  - (2) The nature and conditions of the supervision and personal restriction requirements should be set out in legislation.
  - (3) The standard obligations of the supervision requirement should be for the offender to:
    - (a) follow all reasonable directions of the Corrective Services NSW supervising officer;
    - (b) live at an address approved by the Corrective Services NSW supervising officer;
    - (c) receive home visits by the Corrective Services NSW supervising officer for any purpose connected with the administration of the CRO; and
    - (d) submit to drug and alcohol testing as the Corrective Services NSW supervising officer directs.
  - (4) The standard obligations of supervision should be phrased to make clear that, while the offender is required to submit to supervision, Corrective Services NSW has the discretion to provide supervision according to the needs of the case.
  - (5) Personal restriction requirements may include a place restriction; a non-association condition; and/or an alcohol or drug abstinence condition, but should not include a curfew. Conditions which a court could impose as part of the personal restriction requirement should be subject to statutory restrictions appropriate to a non-custodial sentence at this level.
- 13.14 Duration of the CRO and optional requirements.** **303**
- (1) The maximum duration of the conditional release order should be two years.
  - (2) The court should be able to set the length of any optional requirements independently from the length of the order (although not longer than the duration of the order imposed).
- 13.15 Additional conditions and consent for the CRO** **303**
- (1) The court should be able to attach additional conditions to a conditional release order (CRO) at its discretion (including compliance with an intervention plan arising from one of the programs stipulated in the *Criminal Procedure Regulation 2010* (NSW)) other than one requiring the offender to make any monetary payment.
  - (2) The court should only impose a CRO with an offender's consent.
- 13.16 Variation, breach and revocation of the CRO** **304**
- (1) The court should be able, on application by either the offender or by Corrective Services NSW, to vary a



conditional release order (CRO) whether or not a breach has occurred.

- (2) A breach of the CRO should be dealt with by:
  - (a) the court that imposed the order; or
  - (b) where the breach arises from a further offence, the court dealing with that offence.
- (3) If a court revokes a CRO it should resentence the offender for the original offence.

**13.17 A new “no penalty” provision 304**

A revised Crimes (Sentencing) Act should replace s 10(1)(a) and s 10A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) with a single new “no penalty” provision. The provision should state:

- (1) Where a court finds a person guilty of an offence but it is inappropriate to impose any penalty, it can:
  - (a) without recording a conviction, dismiss the charge; or
  - (b) upon recording a conviction, discharge the person without penalty.
- (2) Before deciding not to record a conviction, a court must have regard to:
  - (a) the person’s character, antecedents, age, and physical and mental condition (including any cognitive or mental health impairment);
  - (b) the nature and seriousness of the offence;
  - (c) any extenuating circumstances in which the offence was committed; and
  - (d) any other matter the court thinks proper to consider.

**13.18 Aggregate community-based sentences 306**

A revised Crimes (Sentencing) Act should provide that the court has power to impose an aggregate community-based sentence in respect of multiple offences, that can be exercised either:

- (a) when the court is sentencing an offender for multiple offences; or
- (b) when it is resentencing an offender for an original offence at the same time as it is sentencing that person for a fresh offence.

**14 Fines page**

**14.1 Consideration of capacity to pay a fine 311**

- (1) A provision to the effect of s 6 of the *Fines Act 1996* (NSW), requiring the court to consider the means of the offender to pay a fine, should be included in a revised Crimes (Sentencing) Act.
- (2) The Local Court of NSW, Law Society of NSW, Legal Aid NSW and any other relevant stakeholders should consider establishing a working group to develop a practice note or protocol concerning the way in which adequate information about an offender’s financial means can be provided to the court before it imposes a fine.

**14.2 Combination of fines with other options 316**

In a revised Crimes (Sentencing) Act:

- (1) If s 10 orders are retained, a court should be able to impose a fine with a s 10 order.
- (2) If the new sentencing options proposed in recommendations 11.1-11.6 and 13.1-13.18 are implemented:
  - (a) The current law on combining fines with imprisonment should apply both to terms of full-time imprisonment and to a community detention order.
  - (b) In cases where a court can impose a community correction order, it should be possible to impose a fine together with that order.
  - (c) A court should be able to impose a fine together with a conditional release order (CRO), whether imposed with or without conviction.
  - (d) A court should not be able to impose a fine together with a sentence of “no penalty”.
  - (e) When a court is sentencing an offender for more than one offence, it should be able to impose a fine and any other sentence so long as they are available for the offences in question.

**14.3 Suspended fines 317**

Where a court imposes a bond under s 10(1)(b) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), or (if

our new sentencing options are adopted) imposes a CRO without conviction, the court should be able also to impose a fine but suspend payment by ordering that it become payable upon breach and revocation of the bond (or CRO).

15	Drug dependent offenders	page
15.1	<p><b>Consider expanding the Drug Court's geographic coverage</b></p> <p>The possibility of extending the Drug Court program in other areas of the state should be kept under review and implemented, as resources permit and demand justifies. The government should give priority to those areas where drug dependent crime is particularly prevalent.</p>	326
15.2	<p><b>New test for Drug Court eligibility criteria regarding violent conduct</b></p> <p>(1) The test of eligibility contained in the Drug Court Act with respect to violent conduct should be amended so that the Drug Court may accept an offender who has committed an offence of which violence is an element, if it is satisfied that the offence did not involve the actual infliction of bodily harm.</p> <p>(2) Alternatively, the Drug Court should be able to accept an offender into the program where the offender has committed an offence of violence if it is satisfied that the harm or threat of harm caused by the offender was minor in nature.</p> <p>(3) The Drug Court should be able to decline to accept any offender if it has concerns about the safety of the community or of the staff involved in the Drug Court program.</p>	329
15.3	<p><b>Expanded eligibility for the CDTD program</b></p> <p>(1) Consideration should be given to redrafting the current legislative requirements about recidivism in order to allow flexibility in admitting recidivist offenders with relevant offences slightly outside the five year limit to the program.</p> <p>(2) Corrective Services NSW should develop and cost a model for the provision of CDTD appropriate for the needs of:</p> <p>(a) female offenders; and</p> <p>(b) offenders with a mental health or cognitive impairment.</p>	335
15.4	<p><b>Amending the length of sentences eligible for a CDTO</b></p> <p>The sentences eligible to be served by way of a CDTO should be described in terms of the total effective sentence being served by the person. Consideration should be given to a limit of six years total sentence. Only those offenders with an unexpired non-parole period of at least 18 months should be admitted to the program.</p>	336
15.5	<p><b>Procedural issues for CDTD</b></p> <p>Subject to further consultation, the government should consider implementation of the Drug Court's proposals for streamlining the procedural operation of CDTOs.</p>	337
15.6	<p><b>Expanded geographic reach of CDTD program</b></p> <p>Subject to resource constraints, the government should consider extending the geographical reach of the CDTO program.</p>	337
16	Diversion and deferral of sentencing	page
16.1	<p><b>Expanded cautioning options</b></p> <p>(1) The cannabis cautioning scheme should be expanded to cover possession of small quantities of other prohibited drugs.</p> <p>(2) Consideration should be given to the introduction of an expanded legislative cautioning scheme for adults in addition to the diversion scheme recommended in our report, <i>People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion</i>, Report 135 (2012).</p>	343
16.2	<p><b>No court-based cautioning for adults</b></p> <p>Court-based cautioning for adults should not be introduced in NSW.</p>	345
16.3	<p><b>Expansion of the MERIT program</b></p> <p>Consideration should be given to expanding the operation of the MERIT program as far as is possible given</p>	349

resource constraints. Options for expansion that should be considered include:

- (a) relaxing the eligibility criteria so those defendants charged with more serious offences are also eligible;
- (b) providing the MERIT program in more locations;
- (c) providing Alcohol MERIT in more locations;
- (d) redesigning aspects of the program so that defendants with limited literacy, limited English, or a cognitive or mental health impairment may participate;
- (e) redesigning aspects of the MERIT program so that it is of more benefit to Aboriginal and Torres Strait Islander defendants;
- (f) expanding the program to defendants with other addictions such as to gambling or prescription drugs; and
- (g) allowing juvenile defendants access to MERIT.

**16.4 Retention of s 11 adjournments 354**

A revised Crimes (Sentencing) Act should preserve the power of courts to defer sentencing (currently provided for in s 11 of the *Crimes (Sentencing Procedure) Act 1999* (NSW)) and to order that an offender enter into a rehabilitation or intervention program.

**16.5 Traffic Offenders Intervention Program 356**

The legislation which governs the Traffic Offenders Intervention Program should be simplified and the relevant provisions relocated in a revised Crimes (Sentencing) Act and its regulations.

**16.6 Reconsideration of Forum Sentencing 359**

- (1) The legislation which governs Forum Sentencing should be simplified by relocating the relevant provisions in a revised Crimes (Sentencing) Act and its regulations.
- (2) The goals and scope of the Forum Sentencing program should be carefully reconsidered in light of the findings of the NSW Bureau of Crime Statistics and Research that the program is not effective in reducing reoffending.

**16.7 Reconsideration of Circle Sentencing 362**

- (1) The scope and operation of the Circle Sentencing program should be reconsidered with the objective of reaching a larger proportion of Aboriginal and Torres Strait Islander defendants.
- (2) The legislation which governs Circle Sentencing should be simplified by relocating the relevant provisions in a revised Crimes (Sentencing) Act and its regulations.

**17 Aboriginal and Torres Strait Islander offenders page**

**17.1 Consider including Aboriginality as a factor to be taken into account 372**

After the High Court has delivered the decision in *Bugmy*, the government should consider, in light of that decision, whether to amend the factors that a court must take into account to include that an offender is an Aboriginal person or a Torres Strait Islander where that is relevant to the sentencing exercise.

**18 NSW Sentencing Council and guideline judgments page**

**18.1 Membership, functions and procedure of the NSW Sentencing Council 382**

- (1) A revised Crimes (Sentencing) Act should contain provisions to the general effect of s 100I-100L and sch 1A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) but also:
  - (a) increase the membership of the Sentencing Council to 18 by adding one person with expertise or experience in legal aid and one person with expertise or experience in law reform;
  - (b) include the NSW Law Reform Commission as an agency with which the Council may consult and from which it may receive and consider information and advice;
  - (c) require the annual reports and any reports or research papers provided by the Sentencing Council in response to a request from the Minister to be tabled within 14 sitting days of receipt by the Minister.
- (2) The government should consider providing increased resources for the Council to allow it to fulfil its statutory functions to the expected level and, in particular, to allow it to expand its public education activities.

**18.2 Guideline judgments and the NSW Sentencing Council 393**

- (1) A revised Crimes (Sentencing) Act should continue to provide for the Court of Criminal Appeal to issue guideline judgments on the Attorney General's application, and on its own motion, by preserving the procedures set out in the *Crimes (Sentencing Procedure) Act 1999* (NSW), Part 3 Division 4.
- (2) The NSW Sentencing Council should continue to have the function of advising and consulting with the Attorney General on matters suitable for guideline judgment applications, and on submissions that may be made to the Court of Criminal Appeal.
- (3) The NSW Sentencing Council should also have the specific function of preparing a research and advisory report:  
 on the request of the Attorney General, for lodgement with an application for a guideline judgment; and  
 for lodgement with the Court of Criminal Appeal, where the Court decides on its own motion to issue or review a guideline judgment.
- (4) A revised Crimes (Sentencing) Act should require the Court of Criminal Appeal to give notice to the NSW Sentencing Council if it is considering issuing or reviewing a guideline judgment on its own motion, and to receive any research and advisory report the Council provides in response.
- (5) The Sentencing Council should be specifically resourced to undertake this work.

**19 Victims of crime page**

**19.1 No change to VIS provisions 401**

A revised Crimes (Sentencing) Act should contain provisions that replicate s 26 to s 30A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), subject to the amendment recommended in our report, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report 138 (2013), recommendation 8.4(1).

**20 Other matters page**

**20.1 Review of driver licence disqualification 412**

- (1) The government should review the system of driver licence disqualification, suspension and cancellation. The review should include, but not be limited to, a consideration of:
  - (a) the length of the automatic and mandatory disqualification periods, and the maximum available sentences of imprisonment, that currently arise under the legislation;
  - (b) the courts' powers to impose or vary disqualification periods;
  - (c) the abolition of the habitual traffic offender declaration;
  - (d) placing a cap on the accumulation of disqualification periods, or permitting such periods to apply concurrently;
  - (e) introducing an administrative review procedure in relation to non court imposed suspensions or cancellations; and
  - (f) introducing a procedure for the courts to cancel licence disqualifications after the offender has served a prescribed period of disqualification without further offending.
- (2) For ease of understanding and consistency in expression, any revision of the proposed Road Transport Act should consolidate in one Part of the Act all of the provisions relating to driver licence disqualification, suspension, cancellation and ineligibility along with any rights for review, or licence restoration, as well as any alternatives to disqualification or suspension (good behaviour licences, interlock devices etc).

**20.2 Relaxing the 12 month restriction on parole 419**

The government should consider amending the *Crimes (Administration of Sentences) Act 1999* (NSW) to relax the current restriction that prevents an offender who is returned to custody while on release on parole or following revocation of parole from applying for re-release on parole for 12 months from the time when he or she is returned to custody.

**20.3 No change to the jurisdictional limit of the Local Court at this time 423**

- (1) At this time, the general jurisdictional limit of the Local Court should remain at two years when sentencing for a single offence.
- (2) The NSW Sentencing Council should monitor the consequences of the limit on the Local Court's

sentencing jurisdiction. The Council should consider any difficulties that the limit presents for imposing appropriate sentences and any other relevant matter, including the possibility that it is adversely affecting the timely disposition of the state's criminal caseload. The Council should report on its review within two years.

### 20.4 Abolition of rising of the court

428

The sentence "to the rising of the court" should be abolished.



# 1. Introduction to the sentencing review

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<b>The context of our review</b> .....	1
<b>Our process</b> .....	3
<b>What should a revised Crimes (Sentencing) Act achieve?</b> .....	5
Consolidation, rather than codification.....	5
A transparent framework for balancing factors: individualised justice.....	6
Simpler law.....	7
Reflecting the community's interests in sentencing: transparency and consistency .....	8
A range of sentence options.....	9
<b>A revised Crimes (Sentencing) Act</b> .....	9
Including an objects clause in the Act.....	9
Sentencing principles and factors.....	10
New practical community-based sentencing options .....	10
<b>Drafting a revised Crimes (Sentencing) Act</b> .....	12

- 1.1 Sentencing law is a critical part of the criminal justice system that governs how we as a community respond to criminal offending. Sentencing decisions often receive extensive media coverage and are widely discussed in the community. Judges and magistrates say that sentencing is one of the most complex tasks they undertake. We have undertaken a thorough review of the *Crimes (Sentencing Procedure) Act 1999 (NSW) (CSPA)* together with the main common law principles of sentencing. We have also considered all the available data on sentencing patterns and statistics in NSW, which we have published in a companion volume to this report.<sup>1</sup> Informed by these statistics, this report makes recommendations to clarify and simplify the law, and to create new sentencing options.

## The context of our review

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- 1.2 We received terms of reference for our sentencing review on 21 September 2011:

Pursuant to section 10 of the *Law Reform Commission Act 1967*, the Law Reform Commission is to review the *Crimes (Sentencing Procedure) Act 1999*. In undertaking this inquiry, the Commission should have regard to:

1. current sentencing principles including those contained in the common law
2. the need to ensure that sentencing courts are provided with adequate options and discretions
3. opportunities to simplify the law, whilst providing a framework that ensures transparency and consistency
4. the operation of the standard minimum non-parole period scheme; and
5. any other related matter.

- 1.3 The terms of reference are broad, requiring a review of the CSPA as well as common law sentencing principles. They ask us to focus particularly on:

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1. NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013).

- ensuring adequate sentencing options and discretions
  - achieving simplicity, transparency and consistency in sentencing.
- 1.4 These aims were also reflected in the views of stakeholders that we consulted. We have taken these principles seriously in this review and sought to recommend a revised Crimes (Sentencing) Act that conforms with these values.
- 1.5 The goals set out by the government in *NSW 2021*<sup>2</sup> are at the forefront of our consideration of sentencing laws, in particular:
- Goal 16: prevent and reduce the level of crime.
  - Goal 17: prevent and reduce the level of reoffending.
- 1.6 Goal 17 in particular involves a number of practical actions that are intended to deal with criminogenic factors associated with offending. Sentencing law should, in part, provide a robust legal framework for preventing and reducing reoffending. The Attorney General, in announcing this review, made plain the government's commitment to reducing reoffending and to using alternatives to prison for less serious offences.<sup>3</sup>
- 1.7 This review has also arisen in the context of:
- the high rate of imprisonment in NSW compared with other Australian jurisdictions;<sup>4</sup>
  - community concerns about the overrepresentation of certain groups in the prison population, including Aboriginal people and Torres Strait Islanders<sup>5</sup> and people with cognitive and mental health impairments;
  - the complexity of existing sentencing law; and
  - a history of piecemeal legislative enactments that now sees sentencing practice and administration embodied in several statutory instruments.
- 1.8 In a broad historical context, sentencing law has moved away from regarding retribution through imprisonment as the prime response to criminal offending. That approach was brought again to prominence to some extent in the "just deserts" theory of sentencing that came into vogue in the 1980s and 1990s.<sup>6</sup> It is also visible in the "law and order" debate that has become associated with the electoral cycle,

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2. NSW, Department of Premier and Cabinet, *NSW 2021: A Plan to Make NSW Number One* (2011).

3. G Smith, "Sentencing Laws to be Reviewed" (Media Release, 23 September 2011) 1.

4. See NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) Figures 3.6, 3.7.

5. See NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) ch 7.

6. Australian Law Reform Commission, *Sentencing of Federal Offenders*, Interim Report 15 (1980) [41]; Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [4.5]; Victoria, Attorney-General's Department, *Sentencing: Report of the Victorian Sentencing Committee* (1988) [3.6.22]; NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [3.3].



and that has emphasised the punitive aspect of sentencing at the expense of rehabilitation.<sup>7</sup>

- 1.9 A more enlightened approach has been one that recognises, apart from the temporary advantage of incapacitation and the questionable value of imprisonment as a deterrent, that full-time imprisonment is a blunt instrument that can be counterproductive for the offender and is invariably expensive for the state.
- 1.10 Both within NSW, and in other Australian jurisdictions, recent years have seen a significant shift in sentencing theory towards improving alternatives to imprisonment to facilitate rehabilitation and reduce the risk of harm to the community. This does not preclude imprisonment, even imprisonment for lengthy terms, in those cases where the seriousness of the conduct involved, and the offenders' continuing disobedience to the law, or risk of serious (sexual or violent) offending warrant it.
- 1.11 Within NSW, examples of this approach include the introduction of intensive correction orders (ICOs), home detention and diversionary intervention programs and the establishment of the Drug Court. Similar innovations can be seen in:
- the introduction of community corrections orders in Victoria;
  - the introduction of community custody or community-based orders in the Northern Territory;
  - the adoption of the restorative justice approach that underpins strategies such as those seen in the Neighbourhood Justice Centre in Victoria, the South Australian Nunga Court and the Queensland Murri Court;
  - the enactment in England and Wales of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (UK);<sup>8</sup> and
  - the "justice reinvestment" movement that has come to the fore in the US and Canada.<sup>9</sup>

## Our process

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- 1.12 In this reference, we have consulted widely. We have deliberately adopted a flexible and broad ranging process for engaging with stakeholders. We are grateful for the input and expertise of those involved. We believe our report is the stronger for the extent of the consultation and cooperation that took place.
- 1.13 We set some limits on our review, arising from the terms of reference. The reference focuses on the sentencing principles that apply in NSW under statute and the common law. Our review does not extend to:
- the maximum penalties for offences;

7. See G MacKenzie and N Stobbs, *Principles of Sentencing* (The Federation Press, 2010) 3.

8. Implementing reforms recommended in England and Wales, Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, Cm 7972 (2010).

9. See, eg, T Lanning, I Loader and R Muir, *Redesigning Justice: Reducing Crime Through Justice Reinvestment* (2nd ed, Institute for Public Policy Research, 2011).

- the laws that apply to the sentencing of young people under the age of 18 years under the *Children (Criminal Proceedings) Act 1987* (NSW);
  - the administration of sentences (for example, the operation of the parole system, the interstate transfer and security classification of prisoners and prison security and administration); and
  - appeals from sentences.
- 1.14 Soon after receiving our terms of reference, we released a preliminary outline paper<sup>10</sup> that was designed to encourage input from stakeholders and interested members of the public. We received some submissions and conducted some preliminary consultation meetings.
- 1.15 In early 2012, following the High Court's decision in *Muldock v The Queen*,<sup>11</sup> the Attorney General asked us to provide an urgent interim report on the operation of the standard minimum non-parole period (SNPP) scheme. We consulted stakeholders in a roundtable, and provided that report on 24 May 2012.<sup>12</sup>
- 1.16 Meanwhile, in the first half of 2012, we released 12 question papers in three phases that dealt with the following topics:
- **Question Papers 1-4:** fundamental issues relating to the sentencing of offenders, including the purposes of sentencing, common law sentencing principles, and the factors that a court must take into account on sentence and other discounting factors.
  - **Question Papers 5-7:** custodial and non-custodial sentencing options.
  - **Question Papers 8-12:** flexibility in combining sentencing options, schemes for diversion and deferral of sentencing, ancillary orders, special categories of offenders, and jurisdictional and procedural aspects.
- 1.17 We received submissions on these issues and held further consultations with stakeholders and interested parties during the remainder of 2012, and the first quarter of 2013.
- 1.18 As part of our consultation processes, we conducted roundtable meetings on issues arising from current sentencing options, and ways those might be addressed. Our proposals for simplifying sentencing options, and making them more flexible and responsive, arose from those meetings and were fully canvassed in that process.
- 1.19 As the Attorney General requested, we also consulted the Sentencing Council on our proposals and recommendations, including our recommendations on the Council itself.
- 1.20 Finally we circulated our report in draft form to a range of stakeholders for their feedback. We have taken their responses into account in completing this final report.

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10. NSW Law Reform Commission, *Sentencing: Preliminary Outline of the Review* (2012).

11. *Muldock v The Queen* [2011] HCA 39; 244 CLR 120.

12. See Chapter 7.

## What should a revised Crimes (Sentencing) Act achieve?

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- 1.21 Our aim in this report is to:
- achieve a sentencing regime that is fair for offenders, victims and the community as a whole;
  - reduce the complexity of sentencing law and deliver transparency and consistency in approach; and
  - develop a range of sentencing options that are flexible to the circumstances of the case and that promote prevention and reduction of reoffending.
- 1.22 We consider the time is right for a revised Crimes (Sentencing) Act. A revised Act provides an opportunity to streamline the law, and achieve the right balance between the aims mentioned above.
- 1.23 In this context we ask: what should a revised Crimes (Sentencing) Act achieve, and what attributes should it have?

### Consolidation, rather than codification

- 1.24 We do not propose that the sentencing law should be codified. None of our stakeholders supported codification. In saying this we recognise that the primary focus of codification is on the factors and principles that apply to sentencing decisions – rather than the sentencing options available which are currently governed by statute.
- 1.25 The common law has developed a considerable body of sentencing principles and it would be dangerous to attempt to codify it. The common law allows for the appropriate evolution and development of the criminal law and centuries of experience demonstrate the wisdom of sentencing offenders justly through the exercise of judicial discretion.<sup>13</sup> The ability of the common law to respond to new circumstances means that it can develop as need requires.
- 1.26 We were opposed to codification in our 1996 sentencing report<sup>14</sup> and we continue to believe strongly that it is necessary to maintain a role for the common law in sentencing. As the Australian Law Reform Commission (ALRC) observed in its 2006 report on the federal sentencing system, “[d]etailed provisions can promote consistency in application, but if the provisions are overly prescriptive they can lead to inflexibility”. The ALRC favoured sentencing provisions which provided a broad framework, including purposes and general principles, and “enough detail to provide guidance to judicial officers, without being overly prescriptive or inflexible”.<sup>15</sup>
- 1.27 We agree with this as a general approach. We also recognise that the community expects a level of transparency in the law. Where relevant we have framed

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13. G Green, “The Concept of Uniformity in Sentencing” (1996) 70 *Australian Law Journal* 112, 119-120.

14. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [1.7], [14.4].

15. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [2.36]-[2.37].

recommendations to introduce statutory provisions that help inform the community about how courts apply sentencing law. We have not, however, attempted to restate in a statute all aspects of the common law nor does our model prevent the common law from developing.

### A transparent framework for balancing factors: individualised justice

- 1.28 Almost every aspect of sentencing concerns the inherent and unavoidable tension between the exercise of individual judicial discretion, and the consistency of approach that is required in order to maintain public confidence in the criminal justice system. This tension lies at the heart of much debate and criticism of sentencing and is relevant to the way in which we have approached the terms of reference and our recommendations.
- 1.29 The common law adopts as a fundamental proposition that justice is best served by allowing courts a wide discretion to impose a just and appropriate sentence in each case, taking into account all relevant sentencing factors and excluding any irrelevant factor. However, the courts recognise that in almost every case there is no single “correct” sentence and courts are permitted to impose a penalty from within a legitimate or permissible range of dispositions. Our terms of reference recognise the need for the exercise of judicial discretion, and our stakeholders strongly supported its preservation.
- 1.30 The courts have long recognised that sentencing an offender can involve an extremely complicated weighing of competing considerations, as the purposes or aims of sentencing law do not always “point in the same direction”. As the High Court observed in 1988:

The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.<sup>16</sup>

- 1.31 More recently, NSW Chief Justice Bathurst remarked on the difficulties that the courts face:

When a judge sentences, therefore, he or she must balance an impossibly conflicted set of considerations. Judges must contend with the complex histories of offenders, the impact of crime upon victims, the expectations and protection of communities and the sometimes faintest of hopes that in pronouncing sentence some good may come from the worst of circumstances. This is all done within an elaborately detailed framework of legislative and common law requirements, considerations and limitations. It therefore bears repeating: *Sentencing is one of the hardest things a judge can do.* But believe me, they try very hard to get it right.<sup>17</sup>

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16. *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476.

17. T Bathurst, “Keynote Address” (Speech, NSW Legal Aid Criminal Law Conference, Sydney, 1 August 2012) 2-3.

- 1.32 As we explain in more detail later in this report, the approach that is now favoured to bring together all of the competing factors in sentencing is labelled “instinctive synthesis”.<sup>18</sup> When dealing with a large number of competing considerations, it is almost inevitable that a decision maker would adopt such an approach. We do not propose any departure from that approach.
- 1.33 A revised Crimes (Sentencing) Act has a role to play in reflecting community values and making transparent the main purposes, principles and factors that the courts use in sentencing, recognising that the common law still has a significant role to play. It provides a touchstone for courts in making sentencing decisions. It provides a guide for the public to understand the main aspects of sentencing law.
- 1.34 Within this framework, courts strive to find the right sentence that does justice in light of the circumstances of the offence, the offender and the impact on the victim.

### Simpler law

- 1.35 Speaking in March 2012, the Attorney General referred to the “ridiculous complexity of our sentencing laws” and said that there was “a solid argument in favour of a consistent and transparent framework for sentencing decisions”.<sup>19</sup> Many of the stakeholders in the criminal justice system have echoed his comments. The general thrust of the submissions and consultations was that the sentencing law in NSW needs to be simplified. For example, the Chief Judge of the District Court said in his preliminary submission:

I welcome this reference because, in my view, sentencing has become far too complicated and that has led to judges taking more time to impose sentences than is desirable. It has also led to more technical arguments being run in the Court of Criminal Appeal and that again delays the finalisation of the sentencing process. The High Court has repeatedly said that the process of sentencing is by “instinctive synthesis” and that should mean that sentencing is a relatively simple process. It was certainly a simpler process in New South Wales 30 or 40 years ago.<sup>20</sup>

- 1.36 Justices McHugh, Hayne and Callinan made similar observations in *Pearce v The Queen*:

Fourthly, and very importantly, it is highly undesirable that the process of sentencing should become any more technical than it is already. Nearly 30 years ago, Sir John Barry, in his lecture on “The Courts and Criminal Punishments” said [45]:<sup>21</sup>

Dr Leon Radzinowicz has rightly observed that the criminal law is fundamentally ‘but a social instrument wielded under the authority of the State to secure collective and individual protection against criminal’.[46]<sup>22</sup> It is a social instrument whose character is determined by its practical purposes and its practical limitations. It has to employ methods which are,

18. As first explained in those terms in *R v Williscroft* [1975] VR 292, 300 (Adam and Crockett JJ) and as adopted by McHugh J in *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 [51].

19. G Smith, Opening Speech (Public Defenders’ Conference, Sydney, 24 March 2012) 6.

20. R Blanch, *Preliminary submission PSE3*, 1.

21. J Barry, *The Courts and Criminal Punishments* (1969) 14-15.

22. L Radzinowicz, *In Search of Criminology* (1961) 181.

in important aspects, rough and ready, and in the nature of things it cannot take fully into account mere individual limitations and the philosophical considerations involved in the theory of moral, as distinct from legal, responsibility. It must be operated within society as a going concern. To achieve even a minimal degree of effectiveness, it should avoid excessive subtleties and refinements. It must be administered publicly in such a fashion that its activities can be understood by ordinary citizens and regarded by them as conforming with the community's generally accepted standards of what is fair and just. Thus it is a fundamental requirement of a sound legal system that it should reflect and correspond with the sensible ideas about right and wrong of the society it controls, and this requirement has an important influence on the way in which the judges discharge the function of imposing punishments upon persons convicted of crime.<sup>23</sup>

That remains true. “[E]xcessive subtleties and refinements” must be avoided.

- 1.37 There is now a formidable body of legislative and appellate sentencing law and courts take considerable time in sentencing in an endeavour to comply with their many requirements. As we note later in the report, issues surrounding the double counting of “aggravating” and “mitigating” factors, the factors to be taken into account in selecting one sentencing option over another, and the mathematical challenges of accumulating individual sentences with their own starting and finishing dates have significantly complicated the sentencing process.
- 1.38 In our view, a revised Crimes (Sentencing) Act should try to avoid this over complication. We take this opportunity to make recommendations to streamline the process.

### Reflecting the community's interests in sentencing: transparency and consistency

- 1.39 The community has an enduring and direct interest in sentencing law. Maintaining an appropriate balance between sentencing discretion and a consistency in outcome, that will “reflect and correspond” with the interests of the broader community and its expectations, must underpin this report.
- 1.40 An out-of-touch or overly complicated sentencing system that does not “reflect and correspond” with society's expectations has the potential to bring the law into disrepute. This is a crucial issue because sentencing is perhaps one of the most prominent areas of the law in the public consciousness. As NSW Chief Justice Bathurst has also pointed out:

public confidence in our courts and criminal justice system is not only necessary to the maintenance of the rule of law, but to the quality and perception of our governance structures. In the popular consciousness, criminal justice often represents the entire legal system.<sup>24</sup>

- 1.41 Community confidence will grow with community understanding of the law. The law should be as transparent as possible, and set out a clear and understandable framework for sentencing. Our recommendations are framed accordingly.

23. *Pearce v The Queen* [1998] HCA 57; 194 CLR 610 [39].

24. T Bathurst, “Community Participation in Criminal Justice” (2012) 50(2) *Law Society Journal* 55, 56.

## A range of sentence options

- 1.42 A sentencing system needs to ensure that the resources available to the criminal justice system are put to their best use and that the interests of law enforcement are respected.
- 1.43 Often the focus of sentencing discussion is on imprisonment. Imprisonment is an essential means of responding to serious crime and its availability as a sentencing option must be preserved. However, under the current law most (91%) of people who plead or are found guilty of crimes do not go to prison.<sup>25</sup> They require a range of community-based options that courts can tailor to the specific case.
- 1.44 Imprisonment is expensive, and can increase the risk of reoffending on release.<sup>26</sup> In 1996, the then Minister for Corrective Services observed:
- There is clear consensus in the community that full-time imprisonment should be reserved for those who represent a threat to public safety or who have committed crimes meriting the harshest of sanctions. The majority of offenders are not in this category and are far better dealt with through various community-based options. ... The increase in the inmate population since 1988 demands greater cost-effectiveness in the use of resources.<sup>27</sup>
- 1.45 To similar effect, in 2012, the Attorney General observed that for less serious offences, “[w]e need to encourage the use of more non-custodial and community-based sentences as a viable alternative to full-time incarceration”. He said that the NSW government is “committed to investing money and resources in diversionary programs” in an effort to break the cycle of recidivism following the release of prisoners back into the community.<sup>28</sup> We have endeavoured to give effect to that objective.

## A revised Crimes (Sentencing) Act

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- 1.46 This report makes substantial recommendations for change. It improves the framework for decision making, and introduces new sentencing options. The time is right for a revised Crimes (Sentencing) Act.

## Including an objects clause in the Act

- 1.47 In our view, a revised Crimes (Sentencing) Act should give greater guidance to the courts while preserving the common law and simplify sentencing practice. It should also allow the courts a greater flexibility to impose sentences of full-time imprisonment or community-based detention, and of non-custodial community sentences, as the circumstances of the individual case and offender require. The

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25. NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics* (2012). See also our NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) figure 3.3.

26. See NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) figure 2.7 and [3.63]-[3.82].

27. NSW, *Parliamentary Debates*, Legislative Assembly, 20 June 1996, 3385.

28. G Smith, “Sentencing Laws to be Reviewed” (Media Release, 23 September 2011) 1.

concept of individualised justice is essential to our approach.<sup>29</sup> To give effect to this concept, we propose adopting, as an objective of a revised Crimes (Sentencing) Act, that the sentence imposed on an offender is a just sentence, having regard to all of the circumstances of the offending, the offender and the impact on the victim. We propose recognising it expressly in the revised Act, along with several other key objectives.

- 1.48 Drawing on the discussion above, we propose establishing a statutory framework for a revised Crimes (Sentencing) Act in accordance with the following recommendations.

#### **Recommendation 1.1: A revised Crimes (Sentencing) Act**

- (1) A revised Crimes (Sentencing) Act should replace the *Crimes (Sentencing Procedure) Act 1999* (NSW).
- (2) A revised Crimes (Sentencing) Act should state that its objectives are to:
  - (a) provide for sentencing law and procedure;
  - (b) promote consistency and transparency in the application of sentencing principle and its understanding by the public
  - (c) promote the imposition of just sentences, having regard to:
    - (i) all of the circumstances of the offending and the offender; and
    - (ii) the impact on the victim. (Individualised justice)
- (3) A revised Crimes (Sentencing) Act should:
  - (a) consolidate, not codify, the sentencing law of NSW; and
  - (b) not derogate from the powers that a court may exercise, or the rights that a person may have, under any law (including the common law) except to the extent that the Act is expressly inconsistent with them.

### **Sentencing principles and factors**

- 1.49 Other key reforms aimed at simplifying sentencing and promoting transparency include stating, in statutory form, the central principles that the courts are to apply when sentencing an offender, as well as the factors that the courts must take into account. The proposed simplified list of factors departs significantly from the current s 21A of the CSPA and abandons the binary division into aggravating and mitigating circumstances.

### **New practical community-based sentencing options**

- 1.50 In recommending a revised Crimes (Sentencing) Act, we have focused on creating a set of practical community-based sentencing options. We recommend a

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29. As discussed, eg, in *R v Lattouf* (Unreported, NSW CCA, 12 December 1996); *Kable v DPP* (NSW) (1995) 36 NSWLR 374, 394; *R v SDM* [2001] NSWCCA 158; 127 A Crim R 318 [8].

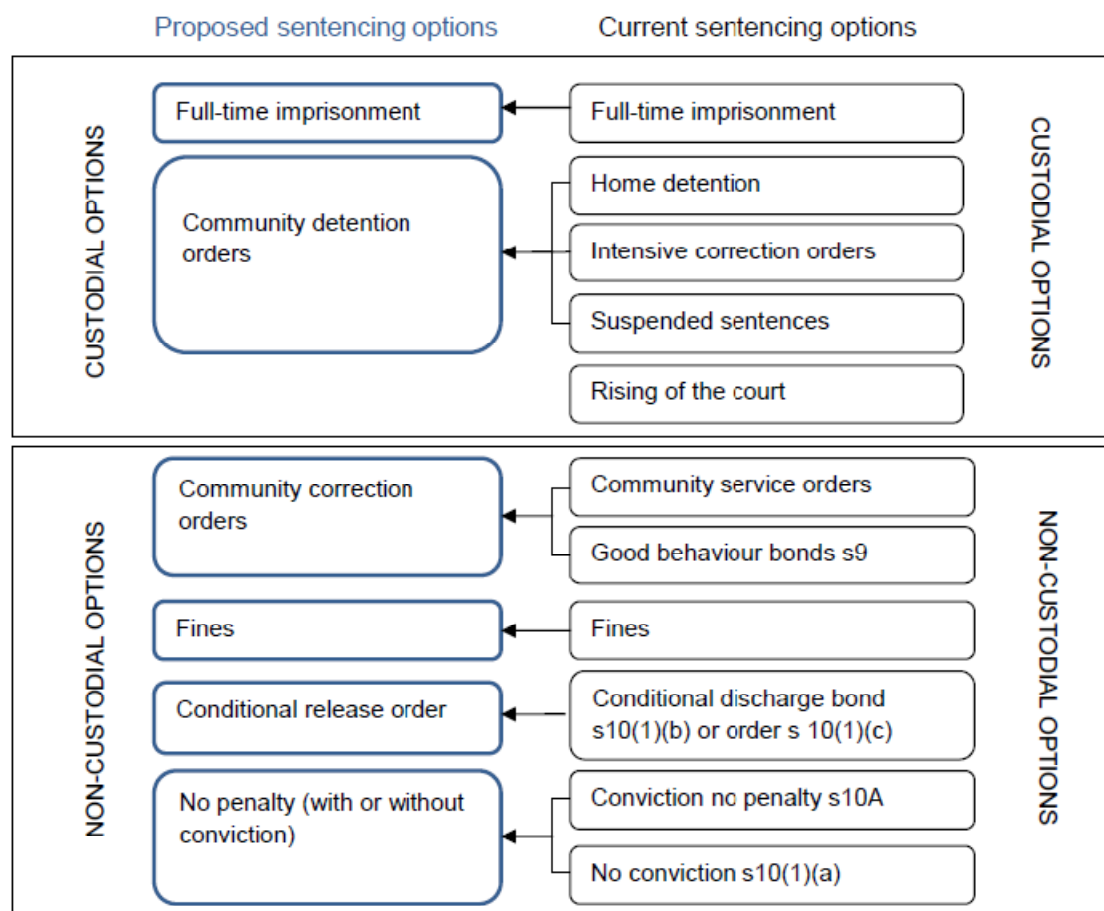


simplification of the options available, with the introduction of 3 new community-based orders:

- a community detention order (CDO) which is custodial in nature;
- a community correction order (CCO) which is non-custodial; and
- a conditional release order (CRO) which is non-custodial.

- 1.51 We also recommend introducing a new “no penalty” sentence to replace the current sentences of conviction with no other penalty (s 10A order) and dismissal without conviction (s 10(1)(a) order).
- 1.52 In recommending the CDO, we have paid particular attention to creating a sentence that is served in the community as a custodial option. It is not a soft option. It allows those who comply with its terms to remain in the community, under Corrective Services NSW supervision, while undertaking community work or rehabilitation and intervention programs, or a combination of them. The State Parole Authority will quickly call up offenders who breach such orders and, where appropriate, return them to prison.
- 1.53 The proposed CDO would replace the current community-based custodial sentences, that is, suspended sentences, ICOs and home detention. The CCO would replace community service orders and s 9 bonds. The CRO (with or without conviction) would replace s 10(1)(b) and (c) orders. Finally, the no penalty sentence would replace s 10(1)(a) and s 10A orders. Each would draw on and preserve the essential elements of the existing orders, although in a simplified and more flexible form that will remove some of the current barriers to their availability.
- 1.54 In taking this course we acknowledge that introducing the proposed new orders constitutes a significant change in sentencing law. However, we consider the change is justified because of its capacity to introduce greater flexibility into sentencing and to facilitate a more effective application of resources in pursuing the objectives of rehabilitation and reduction in recidivism.
- 1.55 This report is however framed in a way that would allow the government, if it prefers, to preserve the existing options subject to a number of specific reforms to those options that we consider necessary, **or** to preserve those options until such time as it might be thought appropriate to implement our proposed new orders. If this alternative was preferred then a staged approach would be possible, for example by introducing a revised Crimes (Sentencing) Act that would embrace both sets of sentencing options, deferring commencement of the provisions relating to the new options until a later date and, on their commencement, repealing the existing options.
- 1.56 Figure 1.1 sets out an overview of our proposals for simplification.

Figure 1.1: Current and proposed NSW sentencing options



## Drafting a revised Crimes (Sentencing) Act

- 1.57 We have not attempted to draft a Bill to give effect to this report. However, to assist in considering the recommendations and in preparing any Bill, we set out in Appendix C, the provisions of the CSPA which are the direct subject of recommendations.
- 1.58 In Appendix D, we set out the provisions of the CSPA that are not the subject of specific recommendations. Some are standard procedural provisions that would need to be retained; others are ancillary to provisions that are subject to recommendations and their retention or amendment would need to be considered in the light of the government’s response to our recommendations.
- 1.59 We have not included in these lists any reference to the savings, transitional and other provisions contained in s 104-106 of the CSPA or in Schedules 1, 1A or 2.

## 2. Purposes of sentencing

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### In brief

The existing statutory statement of the seven purposes of sentencing is working well. We recommend that a revised Crimes (Sentencing) Act include a similar list of sentencing purposes, with some small changes designed to clarify the meaning of each purpose of sentencing.

<b>Current law on the purposes of sentencing</b> .....	13
Legislatively stated purposes in other jurisdictions .....	14
The specific s 3A purposes in NSW .....	16
<i>Adequate punishment for the offence - s 3A(a)</i> .....	16
<i>Deterring the offender and others from committing similar offences – s 3A(b)</i> .....	17
<i>Protection of the community from the offender – s 3A(c)</i> .....	18
<i>Promotion of the offender’s rehabilitation – s 3A(d)</i> .....	18
<i>Making the offender accountable for his or her actions – s 3A(e)</i> .....	19
<i>Denunciation of the offender’s conduct – s 3A(f)</i> .....	20
<i>Recognition of the harm done to the victim and the community – s 3A(g)</i> .....	20
<b>Statement of the purposes of sentencing in a revised Act</b> .....	21
Need for a legislative statement .....	21
Non-exhaustive statement of purposes .....	23
All purposes to be considered .....	24
No hierarchy of purposes .....	25
<b>Proposed list of purposes</b> .....	27
Punishment and making the offender accountable for his or her actions .....	28
Denunciation .....	29
Protection of the community from the offender.....	29
Recognition of harm done to the victim and the community .....	30
Deterrence.....	31
<i>General deterrence</i> .....	31
<i>Specific deterrence</i> .....	33
<i>Retaining general and specific deterrence</i> .....	34
Promoting rehabilitation.....	35
Reduction of crime.....	36
<b>Purposes not adopted</b> .....	37
Effective operation of the criminal justice system .....	37
Reparation and restoration .....	38

- 2.1 In this chapter we consider the purposes for which a sentence is to be imposed.

### Current law on the purposes of sentencing

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- 2.2 Section 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA) currently provides:

The purposes for which a court may impose a sentence on an offender are as follows:

- (a) to ensure that the offender is adequately punished for the offence,
- (b) to prevent crime by deterring the offender and other persons from committing similar offences,
- (c) to protect the community from the offender,
- (d) to promote the rehabilitation of the offender,
- (e) to make the offender accountable for his or her actions,
- (f) to denounce the conduct of the offender,
- (g) to recognise the harm done to the victim of the crime and the community.

2.3 The current s 3A was introduced as part of a number of amendments aimed at promoting “consistency and transparency in sentencing” and promoting “public understanding of the sentencing process”.<sup>1</sup>

2.4 It has been observed<sup>2</sup> that this provision is “in substance a codification and elaboration of the purposes of criminal punishment” described by the High Court in *Veen v The Queen [No 2]*:

The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.<sup>3</sup>

2.5 Consistently with the common law, s 3A does not identify a single overarching purpose, nor does it rank the various purposes. The courts in NSW have, however, held that a court must address all of the purposes when framing a sentence.<sup>4</sup>

### Legislatively stated purposes in other jurisdictions

2.6 The statutory prescription of a list of purposes is replicated in other major common law jurisdictions, although not necessarily in the same terms or to the same extent. For example, the purposes of sentencing are set out under s 142(1) of the *Criminal Justice Act 2003* (UK):

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1. *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW); NSW, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5813.

2. *R v MA* [2004] NSWCCA 92; 145 A Crim R 434 [23].

3. *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476; *Muldock v The Queen* [2011] HCA 39; 244 CLR 120 [20].

4. *R v Stunden* [2011] NSWCCA 8 [112] (Garling J); *R v Field* [2011] NSWCCA 13 [59]-[60] (Garling J).

Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing:

- (a) the punishment of offenders,
- (b) the reduction of crime (including its reduction by deterrence),
- (c) the reform and rehabilitation of offenders,
- (d) the protection of the public, and
- (e) the making of reparation by offenders to persons affected by their offences.

2.7 In New Zealand, s 7 of the *Sentencing Act 2002* (NZ) sets out the purposes of sentencing:

- (1) The purposes for which a court may sentence or otherwise deal with an offender are:
  - (a) to hold the offender accountable for harm done to the victim and the community by the offending; or
  - (b) to promote in the offender a sense of responsibility for, and an acknowledgement of, that harm; or
  - (c) to provide for the interests of the victim of the offence; or
  - (d) to provide reparation for harm done by the offending; or
  - (e) to denounce the conduct in which the offender was involved; or
  - (f) to deter the offender or other persons from committing the same or a similar offence; or
  - (g) to protect the community from the offender; or
  - (h) to assist in the offender's rehabilitation and reintegration; or
  - (i) a combination of 2 or more of the purposes in paragraphs (a) to (h).
- (2) To avoid doubt, nothing about the order in which the purposes appear in this section implies that any purpose referred to must be given greater weight than any other purpose referred to.

2.8 In Canada, s 718 of the *Criminal Code* sets out the fundamental purpose of sentencing and the objectives through which this purpose should be achieved:

The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;

- (b) to deter the offender and other persons from committing offences;
  - (c) to separate offenders from society, where necessary;
  - (d) to assist in rehabilitating offenders;
  - (e) to provide reparations for harm done to victims or to the community; and
  - (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.<sup>5</sup>
- 2.9 By way of contrast, the *Crimes Act 1914* (Cth) that applies to the sentencing of federal offenders does not include a general statement of the purposes of sentencing. However, it does include within the list of factors that a court is to take into account several factors that can be identified as purposes of sentencing, namely specific deterrence, punishment, and rehabilitation.<sup>6</sup>
- 2.10 The *Sentencing Act 1997* (Tas) takes a rather different approach by setting out the purposes of the Act rather than the purposes of sentencing, including, for example:
- promoting the protection of the community as a primary consideration in sentencing;
  - promoting consistency in sentencing and public understanding of sentencing practices; and
  - helping to prevent crime and promote respect for the law by allowing courts to impose sentences that are aimed at deterring offenders and others from committing offences, that are aimed at the rehabilitation of offenders and that denounce the conduct of offenders.<sup>7</sup>

### The specific s 3A purposes in NSW

- 2.11 In the following section we review the individual purposes of sentencing as identified in s 3A.

#### *Adequate punishment for the offence - s 3A(a)*

- 2.12 This provision has been referred to as the statutory expression of the “fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed and the circumstances of the crime committed”.<sup>8</sup>

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5. *Criminal Code*, RSC 1985, c C-46 (Can) s 718.

6. *Crimes Act 1914* (Cth) s 16A(2)(j), (k), (n).

7. *Sentencing Act 1997* (Tas) s 3(b), (c), (e), (f).

8. *R v Scott* [2005] NSWCCA 152 [15]. It arises at common law: *R v Geddes* (1936) 36 SR (NSW) 554, 556; *R v Dodd* (1991) 57 A Crim R 349, 354.

- 2.13 It is a principle that is replicated in the legislation in force in several Australian jurisdictions.<sup>9</sup>

*Deterring the offender and others from committing similar offences – s 3A(b)*

- 2.14 This purpose is aimed at preventing crime by way of specific deterrence and general deterrence. It has its origins in an often-quoted judgment of the New Zealand Court of Appeal:

one of the main purposes of punishment, ... is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. ... The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment, or with only a light punishment. If a Court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences.<sup>10</sup>

- 2.15 General deterrence has long been identified as a purpose of sentencing at common law. It has been held to be of particular importance for sentences in relation to offences such as armed robberies, possession of child pornography, assaults of police officers in the course of their duty, sexual offences involving children, fraud committed by a financial officer of a public company where detection of the fraud is difficult, social security fraud and serious offences arising from the use of a motor vehicle both generally and in relation to drink driving.<sup>11</sup>
- 2.16 Despite the doubts that have been expressed about the general deterrent effect of a sentence,<sup>12</sup> the NSW Court of Criminal Appeal (CCA) has affirmed that deterrence is a “structural assumption” of the criminal justice system and that judges cannot simply dismiss it as a purpose of sentencing.<sup>13</sup>
- 2.17 Specific deterrence assumes that the imposition of a sentence will deter an offender from committing further offences. Courts have held that specific deterrence is an important purpose of sentencing, for example, in cases where a real prospect of

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9. *Sentencing Act* (NT) s 5(1)(a); *Sentencing Act 1991* (Vic) s 5(1)(a); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(j); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(a).

10. *R v Radich* [1954] NZLR 86, 87. See *R v Rushby* [1977] 1 NSWLR 594, 597-598; *R v AEM Snr* [2002] NSWCCA 58 [92].

11. *Tilyard v R* [2007] NSWCCA 7 [22]; *R v Booth* [2009] NSWCCA 89 [40]-[44]; *R v Cook; Ex parte DPP (Cth)* [2004] QCA 469 [21]; *R v Gent* [2005] NSWCCA 370; 162 A Crim R 29 [36]-[37]; *R v Myers* (Unreported, NSWCCA, 13 February 1990) 6-7 (Hunt J); *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 2 of 2002)* [2002] NSWCCA 515; 137 A Crim R 196 [26]; *R v L* (Unreported, NSW CCA, 3 July 1986); *R v Daley* [2010] NSWCCA 223 [61]; *R v Glenister* [1980] 2 NSWLR 597, 616; *R v Scott* [1999] NSWCCA 233 [17]; *Briant v Bessell* (1994) 74 A Crim R 204, 208.

12. See, eg, A von Hirsch, A Ashworth and J Roberts (ed), *Principled Sentencing: Readings on Theory and Policy* (Hart, 3rd ed, 2009) 43; M Bagaric and T Alexander, “(Marginal) Deterrence Doesn't Work – and What it Means for Sentencing” (2011) 35 *Criminal Law Journal* 269.

13. See *R v Miria* [2009] NSWCCA 68 [11]-[12]; *R v Wong* [1999] NSWCCA 420; 48 NSWLR 340 [127].

reoffending can be identified, such as possession of child pornography.<sup>14</sup> It is likely to have particular relevance to an offender with a prior criminal record who is showing signs of wilful disobedience to the law.<sup>15</sup>

- 2.18 The purpose of deterrence, whether expressed in general terms, or in the specific terms of s 3A(b) is replicated in most legislative statements of the purposes of sentencing.<sup>16</sup>

#### *Protection of the community from the offender – s 3A(c)*

- 2.19 Although this purpose can be understood as related primarily to depriving the offender of the opportunities of reoffending, an objective more generally known as “incapacitation”, it can also include a broader, overarching objective that is to be achieved through a combination of incapacitation, rehabilitation, and deterrence.<sup>17</sup>
- 2.20 A provision of the kind seen in s 3A(c) appears in the legislation of other Australian jurisdictions.<sup>18</sup>

#### *Promotion of the offender’s rehabilitation – s 3A(d)*

- 2.21 Rehabilitation, as a purpose of sentencing, assumes that the occasion of sentencing and the imposition of an appropriate sentence can address or reduce the factors that have influenced an offender’s criminal behaviour,<sup>19</sup> with the aim of preventing reoffending by that person.
- 2.22 Rehabilitation can be encouraged through the medium of sentencing in a number of ways, for example, through rehabilitation programs that are made available to incarcerated offenders, or to offenders who are serving community-based custodial sentences, as well as through non-custodial supervised sentences and through the opportunity of release on parole.
- 2.23 It can also be reflected in the framing of a sentence tailored to a particular individual, for example, a lenient sentence may be imposed where it has been demonstrated that rehabilitation is underway at the time of sentencing.<sup>20</sup> A non-custodial sentence may be justified where to impose a sentence of imprisonment

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14. *Mouscas v R* [2008] NSWCCA 181 [28]. See also P Mizzi, T Gotsis and P Poletti, *Sentencing Offenders Convicted of Child Pornography and Child Abuse Material Offences*, Monograph 34 (Judicial Commission of NSW, 2010) 7.

15. *R v McNaughton* [2006] NSWCCA 242; 66 NSWLR 566 [54]; *R v Saunders* [2010] VSCA 93 [13].

16. *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(b); *Penalties and Sentences Act 1992* (Qld) s 9(1)(c); *Sentencing Act* (NT) s 5(1)(c); *Sentencing Act 1991* (Vic) s 5(1)(b); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(i); *Crimes Act 1914* (Cth) s 16A(2)(j). See also *Criminal Justice Act 2003* (UK) s 142(1)(b); *Criminal Code*, RSC 1985, c C-46 (Can) s 718(b).

17. *R v Zamagias* [2002] NSWCCA 17 [32]. See also *Veen v The Queen [No 2]* (1988) 164 CLR 465, 473; *R v Valentini* (1980) 2 A Crim R 170, 174; M Bargaric, “Sentencing: the Road to Nowhere” (1999) 21 *Sydney Law Review* 587, footnote 26.

18. *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(c); *Sentencing Act* (NT) s 5(1)(e); *Penalties and Sentences Act 1992* (Qld) s 9(1)(e); *Sentencing Act 1991* (Vic) s 5(1)(e); *Criminal Law (Sentencing) Act 1988* (SA) s 10(2)(a). See also *Sentencing Act 1995* (WA) s 6(4)(b).

19. See *R v Channon* (1978) 20 ALR 1, 5 (Brennan J); R G Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, Oxford UP, 1999) [3.410].

20. *Duncan v R* (1983) 9 A Crim R 354; *R v Rai* [2002] NSWCCA 506 [13].



would jeopardise rehabilitation that has already taken place.<sup>21</sup> However, the need for rehabilitation cannot reduce a sentence which is called for by the objective features of the crime and the need for deterrence.<sup>22</sup>

- 2.24 In *R v Lewfatt* it was said that “[i]f one of the main purposes of punishment is to protect society, society’s interests are best served by a sentencing disposition which promotes the rehabilitation of the prisoner, rather than a disposition which may have the opposite effect”.<sup>23</sup> In *R v Zamagias* it was said that:

It is perhaps trite to observe that, although the purpose of punishment is the protection of the community, that purpose can be achieved in an appropriate case by a sentence designed to assist in the rehabilitation of the offender at the expense of deterrence, retribution and denunciation.<sup>24</sup>

- 2.25 The purpose of rehabilitation is a common inclusion in the statutory statements of the purposes of sentencing of other jurisdictions.<sup>25</sup>

### *Making the offender accountable for his or her actions – s 3A(e)*

- 2.26 It is not entirely clear what is intended by this purpose of sentencing. It has been suggested that making the offender accountable for his or her actions may introduce “a new element into the sentencing task”.<sup>26</sup> For example, it has been argued that making the offender accountable amounts to a statutory recognition of restorative justice as a purpose of sentencing,<sup>27</sup> which appears to be the focus of the provisions in New Zealand<sup>28</sup> and Canada.<sup>29</sup>
- 2.27 The Australian Law Reform Commission (ALRC) in its report on the sentencing of federal offenders did not include making the offender accountable among its recommended purposes of sentencing. However, it did include as a purpose the promotion of the “restoration of relations between the community, the offender and the victim”, noting that “restorative initiatives ... provide an effective way (for offenders) to ... accept responsibility for their actions”.<sup>30</sup>
- 2.28 The alternative view is that this purpose does not necessarily reflect restorative principles, but rather a “justice model” of sentencing which has “long advocated

21. *R v Fabian* (1992) 64 A Crim R 365.

22. *R v Gordon* (1994) 71 A Crim R 459, 468-469.

23. *R v Lewfatt* (1993) 3 NTLR 29, 39.

24. *R v Zamagias* [2002] NSWCCA 17 [32].

25. *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(d); *Sentencing Act* (NT) s 5(1)(b); *Penalties and Sentences Act 1992* (Qld) s 9(1)(b); *Sentencing Act 1991* (Vic) s 5(1)(c); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(m); *Criminal Justice Act 2003* (UK) s 142(1)(c); *Criminal Code*, RSC 1985, c C-46 (Can) s 718(d).

26. *Attorney General’s Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 2 of 2002)* [2002] NSWCCA 515; 137 A Crim R 196 [59].

27. P Johnson, “Reforms to New South Wales Sentencing Law: The Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002” (2003) 6 *Judicial Review* 314, 320-325.

28. *Sentencing Act 2002* (NZ) s 7(1)(a).

29. *Criminal Code*, RSC 1985, c C-46 (Can) s 718(f).

30. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) rec 4-1(f); [4.28].

aiming to make young offenders in particular accountable and responsible for their offending long before restorative justice ideals became popular”.<sup>31</sup>

2.29 Viewed in this way, the purpose is more appropriately understood as directed at retribution, a purpose that has traditionally been identified at common law.<sup>32</sup> Retribution has been described as involving “retaliation or revenge against the offender for committing a wrong and is concerned with the community’s expectation that offenders will be punished”.<sup>33</sup> A question accordingly arises as to whether this purpose adds anything to that of ensuring that the offender is adequately (or justly) punished for the offence.

2.30 Of the other Australian jurisdictions, only the ACT has included accountability as a purpose of sentencing.<sup>34</sup>

#### *Denunciation of the offender’s conduct – s 3A(f)*

2.31 Denunciation of an offender’s conduct can be achieved by the court imposing a sentence, the severity of which makes a public statement that society does not tolerate the offence either generally or in the specific instance.<sup>35</sup>

2.32 To the extent that the court’s denunciation is aimed at discouraging future offending, it can be said to have a very similar aim to the purpose of deterrence.<sup>36</sup>

2.33 The legislation in some jurisdictions has given further content to this purpose by adding that the denunciation or disapproval is that of “the community, acting through the court”.<sup>37</sup>

#### *Recognition of the harm done to the victim and the community – s 3A(g)*

2.34 This purpose is a statutory recognition of the interest that victims have in the criminal justice system, and reflects the common law position that the courts are entitled “to have regard to the harm done to the victim by the commission of the crime”<sup>38</sup> or, as some decisions have expressed it, the “intended” or “foreseeable” harm to the victim.<sup>39</sup>

2.35 It has been suggested that this purpose may also amount to a statutory recognition of restorative justice.<sup>40</sup> In New Zealand, this purpose is reinforced in the *Sentencing Act 2002* (NZ) which provides that where the court is entitled to impose a sentence

31. K Warner, “Sentencing Review 2002-2003” (2003) 27 *Criminal Law Journal* 325, 332.

32. *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476.

33. *R v De Souza* (Unreported, NSW Supreme Court, Dunford J, 10 November 1995) 4.

34. *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(e).

35. NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [3.9].

36. See, eg, *R v McKenna* (Unreported, NSW CCA, 16 October 1992) (Lee AJ) 9.

37. *Sentencing Act* (NT) s 5(1)(d); *Penalties and Sentences Act 1992* (Qld) s 9(1)(d).

38. *Siganto v The Queen* [1998] HCA 74; 194 CLR 656 [29]; *R v RKB* (Unreported, NSW CCA, 30 June 1992) 4-5 (Badgery-Parker J).

39. *Josefski v R* [2010] NSWCCA 41.

40. *Attorney General’s Application under s 37 of the Crimes (Sentencing Procedure) Act 1999* (No 2 of 2002) [2002] NSWCCA 515; 137 A Crim R 196 [59]-[60].

of reparation, it 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”.<sup>41</sup>

- 2.36 The Australian Capital Territory has also legislated for a similar purpose.<sup>42</sup>

## Statement of the purposes of sentencing in a revised Act

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- 2.37 In this part of the chapter, we consider whether and how a statement of the purposes of sentencing should be included in a revised Crimes (Sentencing) Act.

### Need for a legislative statement

- 2.38 As noted earlier, the sentencing laws in some Australian jurisdictions contain a statutory statement of the purposes of sentencing, while others achieve this indirectly through identifying the matters that are to be taken into account or provide a list of purposes of their sentencing statute.<sup>43</sup>
- 2.39 Submissions generally supported the continuing availability of a legislative statement of the purposes of sentencing.<sup>44</sup> The reasons given were that such provisions ensure transparency and consistency in sentencing decisions,<sup>45</sup> and assist the community in understanding the sentencing process,<sup>46</sup> thereby increasing public confidence in the criminal justice system.
- 2.40 Similar considerations have arisen in overseas jurisdictions. For example, the statement of the objectives of sentencing that are currently contained in the Criminal Code of Canada<sup>47</sup> was based on Canadian Sentencing Commission research that found that confusion about the purposes of sentencing was the “most frequently alleged cause for unwarranted variation in sentencing”.<sup>48</sup>
- 2.41 Accepting that “sentencing cannot by itself solve major social problems such as the occurrence of crime or the plight of victims of crime”, the Commission nonetheless

41. *Sentencing Act 2002* (NZ) s 12(1). See also *R v O'Rourke* [1990] 1 NZLR 155, 158; *RK v Mirik* [2009] VSC 14; 21 VR 623 [43]-[49].

42. *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(g).

43. *Sentencing Act 1997* (Tas) s 3.

44. Public Defenders, *Submission SE2*, 1; NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 1; Children's Court of NSW, *Submission SE4*, 1; Police Association of NSW, *Submission SE6*, 4; Law Society of NSW, *Submission SE7*, 2; Homicide Victims' Support Group (Aust) Inc, *Submission SE8*, 3; NSW Bar Association, *Submission SE9*, 1; G Henson, *Submission SE10*, 1; Legal Aid NSW, *Submission SE11*, 3; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 5; NSW Police Force, *Submission SE14*, 1; Probation and Parole Officers' Association of NSW, *Submission SE15*, 6; Corrective Services NSW, *Submission SE51*, 1.

45. Children's Court of NSW, *Submission SE4*, 1; Homicide Victims' Support Group (Aust) Inc, *Submission SE8*, 5; Corrective Services NSW, *Submission SE51*, 1.

46. Children's Court of NSW, *Submission SE4*, 1; Homicide Victims' Support Group (Aust) Inc, *Submission SE8*, 5.

47. *Criminal Code*, RSC 1985, c C-46 (Can) s 718.

48. Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1987) pt I, 133.

concluded that the inclusion in the Code of sentencing purposes and principles was crucial to ensuring that “the principles of justice and equity prevail in the exercise of the power to impose and enforce sanctions”.<sup>49</sup>

- 2.42 The NZ Ministry of Justice has observed that since the promulgation of a purposes provision<sup>50</sup> along with a statement of principles<sup>51</sup> and aggravating and mitigating factors<sup>52</sup> in the *Sentencing Act 2002* (NZ), the courts are routinely referring to those elements for consideration.<sup>53</sup>
- 2.43 In 1993, the Council of Europe recommended that the rationales for sentencing be declared expressly.<sup>54</sup>
- 2.44 Legislative statements of the purposes of sentencing have not been without their critics. Professor Andrew Ashworth has observed in relation to the purposes contained in the *Criminal Justice Act 2003* (UK):

First of all, because they are contradictory I think it is very difficult to pursue two of them in particular cases, and I think giving the court the choice rather than having a hierarchy of purposes is a mistake in itself, but, more importantly, I cannot see how it is consistent with the idea of sentencing guidelines because if you have sentencing guidelines you cannot possibly have judges or magistrates deciding which purpose they will pursue today. I cannot see that offering them all that choice is consistent with the idea of principled sentencing.<sup>55</sup>

Professor Ashworth also drew attention to the fact that, since the introduction of the statutory list of purposes in England and Wales, very little mention had been made of them in the reasons that were given for sentences.<sup>56</sup>

- 2.45 We are satisfied that it is important to have a statutory list of purposes of sentencing, together with other provisions that outline the principles of sentencing (see Chapter 3) and the factors to be taken into account (see Chapter 4). Together they constitute a statement of the approach that the courts are expected to take when sentencing. In this way they provide guidance for the courts and the legal profession and educate the community.

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49. Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1987) pt I, xxvii.

50. *Sentencing Act 2002* (NZ) s 7.

51. *Sentencing Act 2002* (NZ) s 8.

52. *Sentencing Act 2002* (NZ) s 9.

53. R Chhana, P Spier, S Roberts and C Hurd, *The Sentencing Act 2002: Monitoring the First Year* (New Zealand, Ministry of Justice, 2004) [14]. In stating what were already accepted purposes in no order of importance, the Act arguably allows judges to continue sentencing offenders much as they did prior to the 2002 reforms: J V Roberts, “Sentencing Reform in New Zealand: An Analysis of the Sentencing Act 2002” (2003) 36 *Australian and New Zealand Journal of Criminology* 249, 256.

54. Council of Europe. Recommendation No R (92) 17 of the Committee of Ministers to Member States Concerning Consistency in Sentencing (adopted by the Committee of Ministers on 19 October 1992 at the 482nd meeting of the Ministers’ Deputies, Appendix) A [1].

55. A Ashworth, Oral evidence taken before the Justice Committee, 14 October 2008 HC (2007-08) 1095-1 Q 1.

56. A Ashworth, Oral evidence taken before the Justice Committee, 14 October 2008 HC (2007-08) 1095-1 Q 2.

- 2.46 A statutory statement of the purposes of sentencing is in line with general legislative trends in comparable common law jurisdictions. It also accords with the recommendation of the ALRC in its report on the sentencing of federal offenders.<sup>57</sup>
- 2.47 Accordingly, we accept that a revised Crimes (Sentencing) Act should include a statement of the purposes of sentencing. This statement of purposes would give further content to the overall objectives of the Act which are the subject of Recommendation 1.1.

### Non-exhaustive statement of purposes

- 2.48 Logically the next question that arises is whether the list of the purposes of sentencing should be exclusive. Some jurisdictions have identified the purposes listed as the “only purposes” for which a sentence may be imposed.<sup>58</sup>
- 2.49 One benefit of that approach is that it can prevent the pursuit of illegitimate sentencing purposes.<sup>59</sup> The submissions that we received were divided over whether it should be possible for the court to refer to purposes that are not included in the statutory list.<sup>60</sup>
- 2.50 The Probation and Parole Officers’ Association of NSW took the view that the current list of purposes is “an encompassing set of purposes” and that any other purpose would likely be related to, or would simply particularise the listed purposes.<sup>61</sup> Some of those in favour of not restricting the purposes to those in the list emphasised the need to allow the common law to develop in response to circumstances as they arise.<sup>62</sup>
- 2.51 We consider that there is no need to establish an exclusive list. The common law should be allowed to develop additional purposes as circumstances arise. It is also desirable to preserve the possibility of additional purposes being included in legislation having a specific field of application, for example, laws relating to the sentencing of children, or breaches of health and safety laws or environmental laws.

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57. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) rec 4-1.

58. *Sentencing Act* (NT) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9(1); *Sentencing Act 1991* (Vic) s 5(1).

59. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [4.37]. See also Homicide Victims’ Support Group (Aust) Inc, *Submission SE8*, 4-5.

60. Against: Public Defenders, *Submission SE2*, 1; Children’s Court of NSW, *Submission SE4*, 2; Homicide Victims’ Support Group (Aust) Inc, *Submission SE8*, 4; in favour: NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 2; Law Society of NSW, *Submission SE7*, 2; NSW Bar Association, *Submission SE9*, 2; Legal Aid NSW, *Submission SE11*, 3; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 5; Corrective Services NSW, *Submission SE51*, 1.

61. Probation and Parole Officers’ Association of NSW, *Submission SE15*, 7.

62. NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 2; NSW Bar Association, *Submission SE9*, 2; Legal Aid NSW, *Submission SE11*, 3; Corrective Services NSW, *Submission SE51*, 1; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 5.

## All purposes to be considered

2.52 Some jurisdictions have tried to deal with the fact that the purposes sometimes point in different directions. Methods include:

- accompanying the statement of the purposes of sentencing with a provision to the effect that a court “may impose a sentence on an offender for one or more of the following purposes”,<sup>63</sup> or
- including a provision that allows the courts to consider “a combination of two or more” of the listed purposes.<sup>64</sup>

2.53 Some submissions supported the requirement that the courts take each purpose in the statutory list into account when determining an appropriate sentence,<sup>65</sup> a requirement that, however, does not encroach on the capacity of the court to exercise a discretion as to the weight to be given to the individual factors where they overlap, a task that has been recognised as “troublesome but unavoidable”.<sup>66</sup>

2.54 As was discussed in *R v King*:

Troublesome though the task may be, it is essential that the sentence reflect the factors set out in s 3A. The fact that s 3A confers a discretion upon the sentencing judge as to the factors to be taken into account does not detract from that proposition. It reflects legislative recognition of the principles in *Veen v R (No 2)* and, in particular, the necessity to reconcile and rationalise the s 3A purposes in considering the sentence appropriate to the particular offence. The sentencing judge must reach an “instinctive synthesis” which takes account of and balances the “conflicting and contradictory” factors which bear upon the sentencing exercise.<sup>67</sup>

2.55 For example, a court will generally not give prominence to general deterrence in the case of an offender with a mental health or cognitive impairment<sup>68</sup> and, depending on the seriousness of the offence, rehabilitation will be given greater weight as a purpose in sentencing a young offender.<sup>69</sup>

2.56 It is desirable that all of the purposes listed be taken into account even if they are given little weight in the context of an individual sentence. Ultimately the emphasis given to any particular purpose will depend on the circumstances of the case, including the characteristics of the offender and the nature of the offending.

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63. *Crimes (Sentencing) Act 2005* (ACT) s 7(1).

64. *Sentencing Act* (NT) s 5(1)(f); *Penalties and Sentences Act 1992* (Qld) s 9(1)(f); *Sentencing Act 1991* (Vic) s 5(1)(f).

65. Public Defenders, *Submission SE2*, 1; Children’s Court of NSW, *Submission SE4*, 2; Homicide Victims’ Support Group (Aust) Inc, *Submission SE8*, 3; NSW Bar Association, *Submission SE9*, 1; NSW Police Force, *Submission SE14*, 1; Police Association of NSW, *Submission SE6*, 4.

66. *R v MA* [2004] NSWCCA 92; 145 A Crim R 434 [23].

67. *R v King* [2004] NSWCCA 444; 150 A Crim R 409 [130], citing *Wong v The Queen* [2001] HCA 64; 207 CLR 584 [75].

68. *R v Hemsley* [2004] NSWCCA 228 [34]; *R v Engert* (1995) 84 A Crim R 67, 71.

69. *R v DAR* (Unreported, NSW CCA, 2 October 1997) 6; *R v Mazzilli* [2001] NSWCCA 177 [23]. See also *R v Nichols* (1991) 57 A Crim R 391, 395; *R v Pham* (1991) 55 A Crim R 128, 135; *R v AEM Snr* [2002] NSWCCA 58 [97]-[98]; NSW, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5816.

- 2.57 In order to reflect this process we have included in the introduction to the proposed list of purposes wording to make it clear that each purpose applies to the extent relevant to the case before the court.

### No hierarchy of purposes

- 2.58 We have considered whether a hierarchy of purposes should be established, or whether an overarching or primary purpose should be stated, either generally or in relation to specific classes of offences or offenders.

- 2.59 Some Australian law reform agencies have noted that there is no agreement as to whether there should be a primary purpose of sentencing stated (and if so, what it should be) or whether the purposes should be ranked.<sup>70</sup> A different approach has been advocated elsewhere. For example, in 1993 the Council of Europe in recommending that the rationales for sentencing be declared also recommended:

A.2 Where necessary, and in particular where different rationales may be in conflict, indications should be given of ways of establishing possible priorities in the application of such rationales for sentencing.

A.3 Wherever possible, and in particular for certain classes of offences or offenders, a primary rationale should be declared.<sup>71</sup>

- 2.60 In England and Wales, the 2002 white paper *Justice for All*, which recommended that the purposes of sentencing be set out in legislation, stated that sentences should:

first and foremost protect the public. This is paramount.<sup>72</sup>

- 2.61 The *Criminal Justice Act 2003* (UK), which was subsequently introduced, did not include an overarching or fundamental purpose of sentencing. Nor did it establish a hierarchy of purposes.<sup>73</sup> It is necessary for the sentencing judge to have regard to each of the five purposes and to decide how to apply them in the case before the court.<sup>74</sup>

70. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [14.13]; Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [4.48]; Tasmania Law Reform Institute, *Sentencing*, Final Report 11 (2008) [7.1.36].

71. Council of Europe. Recommendation No R (92) 17 of the Committee of Ministers to Member States Concerning Consistency in Sentencing. (Adopted by the Committee of Ministers on 19 October 1992 at the 482nd meeting of the Ministers' Deputies, Appendix) A [2]-[3].

72. England and Wales, Home Office, *Justice for All*, Cm 5563 (2002) 87. By contrast, a statement released in 2008 by the Secretary of State for Justice asserted that "the sentences of the court are first and foremost for the punishment of those who have broken the law": United Kingdom, House of Commons Justice Committee, *Sentencing Guidelines and Parliament: Building a Bridge*, 6th Report, Session 2008-2009 (2009) [50].

73. *Criminal Justice Act 2003* (UK) s 142.

74. England and Wales Sentencing Council, *What Sentences are for* <[sentencingcouncil.judiciary.gov.uk/sentencing/what-sentences-for.htm](http://sentencingcouncil.judiciary.gov.uk/sentencing/what-sentences-for.htm)>.

- 2.62 The majority of submissions received rejected the identification of a single overarching or primary purpose of sentencing.<sup>75</sup> It was noted, for example that the primary purpose of sentencing will differ depending on the circumstances of the case<sup>76</sup> and that the identification of a primary purpose would needlessly complicate and constrain the sentencing process and possibly lead to injustice.<sup>77</sup>
- 2.63 Some jurisdictions have adopted the approach of legislatively identifying a purpose that should have priority in the context of particular classes of offenders or offences. For example, the ACT sentencing legislation provides that, in the case of a young offender, “a court must consider the purpose of promoting the rehabilitation of the young offender and may give more weight to that purpose than it gives to any of the other purposes stated”.<sup>78</sup>
- 2.64 South Australia has singled out a primary purpose in relation to the following classes of offences:
- home invasions - protection of the security of lawful occupants;
  - lighting bushfires - bringing home the extreme gravity of the offence and reparation; and
  - child sex offences - deterrence.<sup>79</sup>
- 2.65 In Victoria, when sentencing a recidivist serious arson, drug, sexual or violent offender for a further offence of the same kind, the court “must regard the protection of the community from the offender as the principal purpose for which the sentence is imposed”.<sup>80</sup> The Canadian Criminal Code requires a court to “give primary consideration to the objectives of denunciation and deterrence” in relation to offences involving the abuse of a person under the age of 18 years; assaults against police officers; the use of weapons; and other serious assaults.<sup>81</sup>
- 2.66 One submission received in response to this reference suggested that the harm to the victim and the community should be the primary purpose in the case of “violent crimes such as murder and manslaughter”.<sup>82</sup> Another submission suggested that “[a]n approach which clarifies by specifying overarching sentencing principles for

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75. Public Defenders, *Submission SE2*, 1-2; NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 2; Children’s Court of NSW, *Submission SE4*, 2; Law Society of NSW, *Submission SE7*, 2; NSW Bar Association, *Submission SE9*, 2; G Henson, *Submission SE10*, 1; Legal Aid NSW, *Submission SE11*, 4; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 6; Corrective Services NSW, *Submission SE51*, 1.

76. NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 2; Law Society of NSW, *Submission SE7*, 2; G Henson, *Submission SE10*, 1; Legal Aid NSW, *Submission SE11*, 4.

77. G Henson, *Submission SE10*, 1; Children’s Court of NSW, *Submission SE4*, 2.

78. *Crimes (Sentencing) Act 2005* (ACT) s 133C(1).

79. *Criminal Law (Sentencing) Act 1988* (SA) s 10(2).

80. *Sentencing Act 1991* (Vic) s 6D(a). See R G Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, Oxford UP, 1999) [3.416].

81. *Criminal Code*, RSC 1985, c C-46 (Can) s 718.01, 718.02.

82. Homicide Victims’ Support Group (Aust) Inc, *Submission SE8*, 4.



different types or severity of offences is more in line with both community expectations and the needs of sentencers”.<sup>83</sup>

- 2.67 On the other hand, the *Crimes (Sentencing) Act 2005* (ACT) states that “nothing about the order in which the purposes appear ... implies that any purpose must be given greater weight than any other purpose”.<sup>84</sup> The *Sentencing Act 2002* (NZ) takes a similar approach.<sup>85</sup> In proposing a statement of purposes of sentencing in our 1996 Report on Sentencing, we recommended that legislation should make it clear that no priority is assigned to the stated purposes, lest the legislation is unintentionally interpreted to have this effect.<sup>86</sup>
- 2.68 We acknowledge that the emphasis to be given to a particular purpose of sentencing will depend on the circumstances of the case. Consequently we do not propose any change to the existing law that would identify a primary purpose of sentencing or establish a hierarchy, either generally or with respect to particular classes of offences or offenders. Any such change might have an undesirable consequence in precluding an appropriate exercise of the sentencing discretion and may even lead to injustice.
- 2.69 However, we do recommend that, in order to avoid doubt, legislation should state that nothing about the order in which the purpose appears implies that any purpose must be given greater weight than any other purpose.

## Proposed list of purposes

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- 2.70 In settling the purposes to be included in the statutory list for a revised Crimes (Sentencing) Act we have not departed significantly from the existing s 3A. However, we propose some limited amendments to tidy up anomalies and to better align the list with the law and community expectations. We considered, but rejected, adding some other purposes.
- 2.71 We propose a provision that would state that the purposes of sentencing are to:
- (a) ensure that the offender is punished for the offence and is held accountable for his or her actions,
  - (b) denounce the conduct of the offender,
  - (c) recognise the harm done to the victim of the crime and the community,
  - (d) protect the community from the offender,
  - (e) deter the offender and others from committing offences,

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83. Probation and Parole Officers' Association of NSW, *Preliminary submission PSE20*, 10. See NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [3.22].

84. *Crimes (Sentencing) Act 2005* (ACT) s 7(2).

85. *Sentencing Act 2002* (NZ) s 7(2).

86. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [14.13].

- (f) promote the rehabilitation of the offender, and
- (g) reduce crime.

### **Punishment and making the offender accountable for his or her actions**

- 2.72 In Recommendation 2.1(a) we propose the combination of the two “retributive” purposes of sentencing that are currently contained in s 3A(a) and (e) of the CSPA.
- 2.73 We have not included “retribution” as an express purpose as we consider it to be included within this purpose, an approach that would be consistent with the submissions that suggested that it was already embraced within the purposes included in the current s 3A.<sup>87</sup>
- 2.74 We recognise that the purpose of holding an offender “accountable” for his or her actions may not add anything to the purpose of ensuring that an offender is punished for the offence. Some submissions agreed with this view,<sup>88</sup> but only some of them considered that it should be removed from the statutory list.<sup>89</sup> However, in the light of their close connection, we consider it helpful to bring these two purposes together into a single statement.<sup>90</sup>
- 2.75 In adopting the proposed purpose of punishment (a) we have removed the adverb “adequately”, and have not otherwise qualified the purpose. The limiting principle of proportionality, which is imported by expressions such as “adequate” or “appropriate” punishment arises under the common law. It would continue to apply under the common law and it is expressly included in the list of principles that we consider should be given statutory recognition.<sup>91</sup>
- 2.76 There was some support for the removal of any reference to the offender being “punished”.<sup>92</sup> Such an approach would be consistent with that which is adopted in Canada<sup>93</sup> and New Zealand.<sup>94</sup> The legislative statements in those jurisdictions do not mention the concept of “punishment” although they do refer to accountability or responsibility. Our view is that removing a reference to the offender being “punished” from the list of purposes would be contrary to established law and also contrary to community expectations.

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87. NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 4; Children’s Court of NSW, *Submission SE4*, 5; Law Society of NSW, *Submission SE7*, 6; Legal Aid NSW, *Submission SE11*, 7; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 10; Public Defenders, *Submission SE2*, 4; Corrective Services NSW, *Submission SE51*, 4. But see: NSW Police Force, *Submission SE14*, 1, 4; Police Association of NSW, *Submission SE6*, 12.

88. Public Defenders, *Submission SE2*, 4; NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 4; Law Society of NSW, *Submission SE7*, 6; Legal Aid NSW, *Submission SE11*, 7; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 9-10.

89. NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 4; Law Society of NSW, *Submission SE7*, 6; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 9.

90. Children’s Court of NSW, *Submission SE4*, 5: noted that retribution is “already encapsulated in s 3A” because of its close linkage to adequacy of punishment, denunciation and accountability.

91. Recommendation 3.1(1)(a).

92. Legal practitioners, *Consultation SEC24*.

93. *Criminal Code*, RSC 1985, c C-46 (Can) s 718.

94. *Sentencing Act 2002* (NZ) s 7.

## Denunciation

- 2.77 The Victorian Sentencing Committee supported denunciation as a purpose of sentencing on the basis that it can assist in preventing crime and in achieving social coherence by making a public statement that the community will not tolerate certain offences. Additionally, it was seen as valuable in recognising the harm done to victims of crimes and in making a statement directly to the offender that society will not tolerate the commission of the crime for which he or she has been convicted.<sup>95</sup>
- 2.78 However, the Committee also referred to the fact that effective denunciation relies on sufficient publicity being given to the sentence, and to the possibility that denunciation may not affect the public's perception of the seriousness of an offence even if it could be measured.<sup>96</sup>
- 2.79 Several submissions supported denunciation as a valid purpose of sentencing,<sup>97</sup> although others suggested that it overlapped with deterrence,<sup>98</sup> or that it was inherent in the court's delivery of reasons for sentence.<sup>99</sup> We see denunciation as an important purpose of sentencing. No reason has been advanced to remove it, and we support its retention.

## Protection of the community from the offender

- 2.80 The majority of submissions received considered the protection of the community from the offender to be a valid purpose of sentencing.<sup>100</sup> It was supported as an objective of incapacitation (or removal of the offender from the community) and also as an objective of the purposes of rehabilitation and deterrence.<sup>101</sup>
- 2.81 Consideration of this purpose raises the question of whether a purpose of incapacitation needs to be more clearly expressed in the statutory list, or whether it is sufficiently embodied in a purpose expressed in terms of protecting the community. Incapacitation can work to reduce crime as individual offenders who are

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95. Victoria, Attorney-General's Department, *Sentencing: Report of the Victorian Sentencing Committee* (1988) vol 1, 102.

96. Victoria, Attorney-General's Department, *Sentencing: Report of the Victorian Sentencing Committee* (1988) vol 1, 103. On these points see also: Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1987) 142-143.

97. Public Defenders, *Submission SE2*, 4; NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 5; Children's Court of NSW, *Submission SE4*, 5; NSW Bar Association, *Submission SE9*, 9; G Henson, *Submission SE10*, 1; NSW Police Force, *Submission SE14*, 4.

98. Law Society of NSW, *Submission SE7*, 6.

99. NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 10; Legal practitioners, *Consultation SEC24*.

100. Public Defenders, *Submission SE2*, 3; NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 4; Children's Court of NSW, *Submission SE4*, 4; Police Association of NSW, *Submission SE6*, 9; G Henson, *Submission SE10*, 1; Legal Aid NSW, *Submission SE11*, 6; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 9; NSW Police Force, *Submission SE14*, 3; Corrective Services NSW, *Submission SE51*, 3.

101. Law Society of NSW, *Submission SE7*, 5; Legal Aid NSW, *Submission SE11*, 6; NSW Bar Association, *Submission SE9*, 7-8; M Bagaric, *Submission SE13*, 1.

- imprisoned are unable to reoffend during the period they are in custody, although the extent of this effect as a crime control strategy is not clear.<sup>102</sup>
- 2.82 A number of other jurisdictions, like NSW, have identified the protection of the community from the offender as being a purpose of sentencing, without expressly referring to incapacitation.<sup>103</sup>
- 2.83 In its 2006 Report on the sentencing of federal offenders, the ALRC recommended that one of the purposes of sentencing should be “to protect the community by limiting the capacity of the offender to reoffend”,<sup>104</sup> which would seem to embrace the notion of incapacitation.
- 2.84 The Canadian Criminal Code, which includes the maintenance of a “safe society” as part of its fundamental purposes of sentencing, includes the objective of “separat[ing] offenders from society, where necessary”.<sup>105</sup>
- 2.85 Several submissions expressly rejected the need for any clearer statement of incapacitation in the list of purposes.<sup>106</sup>
- 2.86 We are not persuaded that there is a need to make a more explicit reference to incapacitation in a list of the purposes of sentencing. It is implicit, that giving effect to the other purposes such as punishment and accountability, deterrence, crime reduction and community protection will involve incapacitation, either through the imposition of full-time imprisonment, or of some form of community detention with supervision. Nevertheless to place this beyond doubt we consider it appropriate to maintain the protection of the community from the offender as a purpose of sentencing in a revised Crimes (Sentencing) Act.

### Recognition of harm done to the victim and the community

- 2.87 Most of the submissions that we received agreed that recognition of the harm done to the victim and the community is a valid purpose of sentencing.<sup>107</sup>

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102. J Chan, *The Limits of Incapacitation as a Crime Control Strategy*, Crime and Justice Bulletin No 25 (NSW Bureau of Crime Statistics and Research, 1995) 1; D Weatherburn, J Hua and S Moffat, *How Much Crime Does Prison Stop? The Incapacitation Effect of Prison on Burglary*, Crime and Justice Bulletin No 93 (NSW Bureau of Crime Statistics and Research, 2006) 8; D Brown, “The Limited Benefit of Prison in Controlling Crime” (2010) 22 *Current Issues in Criminal Justice* 137. See also NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) [3.79]-[3.82].

103. *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(c); *Sentencing Act* (NT) s 5(1)(e); *Penalties and Sentences Act 1992* (Qld) s 9(1)(e); *Sentencing Act 1991* (Vic) s 5(1)(e).

104. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) Recommendation 4-1(d).

105. *Criminal Code*, RSC 1985, c C-46 (Can) s 718(c).

106. Children’s Court of NSW, *Submission SE4*, 4; Law Society of NSW, *Submission SE7*, 5; NSW Bar Association, *Submission SE9*, 8; Legal Aid NSW, *Submission SE11*, 6; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 9; NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 4.

107. Public Defenders, *Submission SE2*, 4; NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 5; Children’s Court of NSW, *Submission SE4*, 5; Police Association of NSW, *Submission SE6*, 13; Law Society of NSW, *Submission SE7*, 6; NSW Bar Association, *Submission SE9*, 9; G Henson, *Submission SE10*, 1; Legal Aid NSW, *Submission SE11*, 8; NSW Young Lawyers Criminal Law

- 2.88 Corrective Services NSW, however, suggested altering the current expression of this purpose as follows: “to recognise and attempt to mitigate the harm done to the victim of the crime and the community”.<sup>108</sup>
- 2.89 We recommend that the recognition of the harm done to the victim and the community should continue to be included in the statutory list of purposes of sentencing. It reflects the common law position and has general support.
- 2.90 Later in this chapter we consider whether to expand the recognition of the interests of victims by introducing the purposes of reparation or restoration.<sup>109</sup>

## Deterrence

- 2.91 In considering whether the purpose of deterrence should be retained, we have given separate consideration to general deterrence and specific deterrence.

### *General deterrence*

- 2.92 General deterrence has been criticised on the grounds that it effectively punishes one person for the possibility of future offending by others and therefore runs counter to the principle of proportionality. It is also criticised on the basis that the punishment of one offender has not been shown to reduce offending by other persons.<sup>110</sup>
- 2.93 There are two forms of general deterrence:
- **marginal general deterrence** which assumes that an increase in the penalties imposed for an offence will result in a corresponding decrease in offending behaviour; and
  - **absolute general deterrence** which assumes that the existence of an appropriate level of punishment for an offence will have an impact on that form of offending behaviour.
- 2.94 While there is some evidence that absolute general deterrence has a validity as a purpose of sentencing, marginal general deterrence does not appear to be effective.<sup>111</sup> For example, a recent NSW Bureau of Crime Statistics and Research (BOCSAR) study has highlighted that increasing the risk of arrest or the risk of imprisonment reduces crime while increasing the duration of prison sentences “exerts no measurable effect at all”.<sup>112</sup>

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Committee, *Submission SE12*, 10; NSW Police Force, *Submission SE14*, 4; Corrective Services NSW, *Submission SE51*, 5.

108. Corrective Services NSW, *Submission SE51*, 5.

109. Para [2.123]-[2.136].

110. A von Hirsch, A Ashworth and J Roberts (ed), *Principled Sentencing: Readings on Theory and Policy* (Hart, 3rd ed, 2009) 43-44.

111. M Bagaric and T Alexander, “(Marginal) Deterrence Doesn’t Work – and What it Means for Sentencing” (2011) 35 *Criminal Law Journal* 269, 273-277.

112. W Wan, S Moffatt, C Jones and D Weatherburn, *The Effect of Arrest and Imprisonment on Crime*, Crime and Justice Bulletin No 158 (NSW Bureau of Crime Statistics and Research, 2012) 15-16.

2.95 Many reasons have been suggested for the failure of increasing prison terms to achieve marginal general deterrence (some of which also apply to absolute general deterrence):

- A number of factors can influence a person's decision to engage in criminal activity that are unconnected with the deterrent effect of a sentence, including psychological predispositions, drug or alcohol dependency or abuse, mental health or cognitive impairments, and social and economic disadvantage.<sup>113</sup>
- Offenders may be subject to various cognitive biases such as giving greater weight to the immediate benefit of the crime as opposed to the delayed negative consequences of arrest and punishment.
- Deterrence may be better achieved by an increase in the certainty of detection and apprehension than by the threat of an increased term of imprisonment.<sup>114</sup>
- Potential offenders may not learn of the increases in sentences that are meant to deter their criminal activities because they are not communicated.
- Sentences aimed at deterrence may have no effect in communities where no stigma attaches to imprisonment.
- Sentences aimed at deterrence may have a limited effect on overall offending rates in cases where only a minority of offenders are actually apprehended.<sup>115</sup>

2.96 The differences in motivation and in the presence or absence in individual offenders of factors of the kind listed above is likely to mean that notions of general deterrence will not apply equally across the board. The risk of detection and of imprisonment may well have a stronger impact for white collar criminals,<sup>116</sup> environmental offenders and corporate offenders than it will for a drug addict who feeds an addiction through robbery, or to the homeless, or to those who are economically disadvantaged. This point was made in some of the submissions.<sup>117</sup>

2.97 Notwithstanding this consideration, there was support in the submissions for the retention of general deterrence as a purpose of sentencing.<sup>118</sup> Although the findings in recent studies as to its limited impact were acknowledged, this did not result in support for its removal, on the basis that it may have an impact on some offenders.<sup>119</sup> Several respondents acknowledged the unrealistic position of seeking

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113. M Bagaric and T Alexander, "(Marginal) Deterrence Doesn't Work – and What it Means for Sentencing" (2011) 35 *Criminal Law Journal* 269, 277-278.

114. See R Homel and P Wilson, *Death and Injuries on the Road: Critical Issues for Legislative Action and Law Enforcement* (Australian Institute of Criminology, 1987) 25-27.

115. R Homel and P Wilson, *Death and Injuries on the Road: Critical Issues for Legislative Action and Law Enforcement* (Australian Institute of Criminology, 1987) 12.

116. See, eg, *R v Dalzell* [2011] NSWSC 454 [8]-[11].

117. Law Society of NSW, *Submission SE7*, 4; Public Interest Advocacy Centre Ltd, *Submission SE5*, 4-5.

118. Public Defenders, *Submission SE2*, 2-3; NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 3; Children's Court of NSW, *Submission SE4*, 3; G Henson, *Submission SE10*, 2; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 7; NSW Police Force, *Submission SE14*, 3; Corrective Services NSW, *Submission SE51*, 2-3.

119. NSW Bar Association, *Submission SE9*, 6; G Henson, *Submission SE10*, 2; Public Defenders, *Submission SE25*, 1-2.

the removal of a “structural assumption” of the sentencing regime, and of the possible negative message that it might convey.<sup>120</sup>

### *Specific deterrence*

- 2.98 Questions have also been raised as to the effectiveness of imprisonment in achieving specific deterrence:
- Some studies have suggested that a sentence of imprisonment will either have no effect on an offender’s criminal activities post release or will have a negative effect (as evidenced by the recidivism rate).<sup>121</sup> Some of the reasons for what is often referred to as the criminogenic effect of imprisonment include that:
    - prison provides a learning environment for crime;
    - imprisonment effectively labels an offender as “criminal” reducing that person’s capacity to obtain employment, or otherwise to re-enter the community; and
    - prison is a poor response to the underlying problems that may have caused the person to offend in the first place.<sup>122</sup>
  - Systemic delays in the justice process may weaken the link between the offending behaviour and the deterrent effect of punishment.<sup>123</sup>
  - It is not an appropriate purpose of sentencing in cases where the offender has a mental health or cognitive impairment.
- 2.99 Don Weatherburn, Director of BOCSAR, has suggested that “it would be unwise to imprison offenders when the only reason for doing so is a belief in the specific deterrent effect of prison”.<sup>124</sup>
- 2.100 Some of these issues relate only to sentences of full-time imprisonment. In appropriate cases, other sentences, which involve an incentive not to offend, may have a useful deterrent effect, for example, suspended sentences, compulsory drug treatment, and good behaviour bonds.
- 2.101 The majority of submissions accepted that specific deterrence is a valid purpose of sentencing generally,<sup>125</sup> or at least in relation to certain classes of offenders.<sup>126</sup> On

120. NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 3; Law Society of NSW, *Submission SE7*, 3.

121. D Weatherburn, *The Effect of Prison on Adult Re-offending*, Crime and Justice Bulletin No 143 (NSW Bureau of Crime Statistics and Research, 2010).

122. See D Brown, “The Limited Benefit of Prison in Controlling Crime” (2010) 22 *Current Issues in Criminal Justice* 137, 141.

123. See M Bagaric and T Alexander, “(Marginal) Deterrence Doesn’t Work – and What it Means for Sentencing” (2011) 35 *Criminal Law Journal* 269, 278.

124. D Weatherburn, *The Effect of Prison on Adult Re-offending*, Crime and Justice Bulletin No 143 (NSW Bureau of Crime Statistics and Research, 2010) 10.

125. Public Defenders, *Submission SE2*, 3; NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 3; Children’s Court of NSW, *Submission SE4*, 3; G Henson, *Submission SE10*, 2; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 8; NSW Police Force, *Submission SE14*, 3; Corrective Services NSW, *Submission SE51*, 3.

this point, the Halliday Review of the sentencing framework for England and Wales observed:

The available evidence strongly suggests that deterrence works differently for different people – much better for those who desist rapidly from offending than for those who persist in the face of repeated punishment. For large numbers of offenders any sentence may be enough to result in a “life style choice” to desist from further crime. There appears to be no statistical correlation between types of sentence and likelihood of desistance, according to Home Office analysis of the Offenders’ Index. What happens to an offender during sentence, or happens in parallel or afterwards for extraneous reasons, may have as much to do with desistance as the type of sentence passed.<sup>127</sup>

and that:

Deterrence is more likely to work for the general population, and for the large group of offenders who have short criminal careers – perhaps because they have more to lose if they persist. In that respect the successes of sentencing – those who never commit crime or desist quickly – are unseen, unmeasured and therefore unsung. Performance tends to be measured in relation to the effects of sentences on those most resistant to change who take up a disproportionate amount of the resources spent on sentencing. A truer measure would take account of those who never appear (perhaps after a caution) or do not keep coming back for more.<sup>128</sup>

- 2.102 In supporting the preservation of specific deterrence as a purpose of sentencing, several submissions recognised that the relevance or weight to be given to it must depend on the circumstances of the case and of the individual offender.<sup>129</sup>

### *Retaining general and specific deterrence*

- 2.103 We recommend the retention of deterrence as a purpose of sentencing because it may work in some cases, either through sentencing itself or in conjunction with other components of the criminal justice system.
- 2.104 In recommending the retention of deterrence as a purpose of sentencing, we do, however, propose two changes to the current formulation in s 3A of the CSPA.
- 2.105 First we have decoupled “prevention of crime” because deterrence is not the only means by which sentencing can reduce or prevent crime. Rehabilitation, denunciation, and incapacitation, for example, can also be said to be aimed at the prevention or reduction of crime.

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126. Children’s Court of NSW, *Submission SE4*, 3; NSW Bar Association, *Submission SE9*, 7; Police Association of NSW, *Submission SE6*, 9.

127. J Halliday, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* (Home Office, 2001) [1.63].

128. J Halliday, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* (Home Office, 2001) [1.64].

129. Public Defenders, *Submission SE2*, 3; NSW Bar Association, *Submission SE9*, 7; Law Society of NSW, *Submission SE7*, 5; Legal Aid NSW, *Submission SE11*, 6; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 8.



- 2.106 We also propose the removal of “similar” from the current formulation. We note that several other jurisdictions, including the Commonwealth, South Australia, Canada and England and Wales do not limit the purpose of deterrence (whether general or specific) as one that is directed to the prevention of the same or similar offences. For the most part, in a practical sense, the message that the imposition of a sentence conveys will have a particular relevance for the type of offending that attracted that offence. In some instances, for example, where there is an increased incidence in the commission of a serious form of offence such as gangland shootings or child pornography, this will have a particular resonance.
- 2.107 However, the purpose of sentencing should have a wider message to convey that is of general application in deterring crime.

### Promoting rehabilitation

- 2.108 A question does arise as to the extent to which sentencing can be seen to serve an objective of advancing rehabilitation.
- 2.109 Some earlier studies have pointed to a lack of evidence of the effectiveness of rehabilitation programs in reducing recidivism.<sup>130</sup> However, they have been criticised as inadequate on several grounds<sup>131</sup> and more sophisticated research techniques have demonstrated positive results with respect to at least some offenders. This has prompted the Tasmania Law Reform Institute to observe:
- the pessimism of the last decades of the twentieth century has been replaced by a cautious optimism that some programmes are effective in reducing the criminal behaviour of at least some offenders.<sup>132</sup>
- 2.110 Fox and Freiberg have suggested that such qualified support for rehabilitation as a purpose explains “the cautious manner in which rehabilitation is referred to in the *Sentencing Act 1991 (Vic)*”,<sup>133</sup> that is, “to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated”.<sup>134</sup>
- 2.111 The majority of the submissions that we received, however, supported the promotion of rehabilitation as a valid purpose of sentencing.<sup>135</sup>

130. Tasmania Law Reform Institute, *Sentencing*, Final Report 11 (2008) [2.1.40].

131. See, eg, Victoria, Attorney-General’s Department, *Sentencing: Report of the Victorian Sentencing Committee* (1988) vol 1, 82-84; Australian Law Reform Commission, *Sentencing*, Report 44 (1988) [50]; R G Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, Oxford UP, 1999) [3.412].

132. Tasmania Law Reform Institute, *Sentencing*, Final Report 11 (2008) [2.1.40].

133. R G Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, Oxford UP, 1999) [3.412].

134. *Sentencing Act 1991 (Vic)* s 5(1)(c).

135. Public Defenders, *Submission SE2*, 3, NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 4; Children’s Court of NSW, *Submission SE4*, 4; Police Association of NSW, *Submission SE6*, 9-10; Law Society of NSW, *Submission SE7*, 5; NSW Bar Association, *Submission SE9*, 8; G Henson, *Submission SE10*, 1; Legal Aid NSW, *Submission SE11*, 7; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 9; NSW Police Force, *Submission SE14*, 4; Corrective Services NSW, *Submission SE51*, 4.

- 2.112 Corrective Services suggested altering the current expression of this purpose as follows: “to promote the rehabilitation of the offender ... and his or her safe reintegration into the community, where applicable”.<sup>136</sup> This follows the New Zealand model where one of the purposes for which a court may sentence an offender is “to assist in the offender’s rehabilitation and reintegration”.<sup>137</sup>
- 2.113 Notwithstanding the concerns that have been expressed about the effectiveness of the programs that are available to achieve rehabilitation, we consider that it should be retained as a purpose of sentencing. It has traditionally been accepted as a purpose of sentencing under the common law. Moreover, many of the proposals for sentences other than full-time imprisonment that are contained in other parts of this report are aimed at facilitating the rehabilitation of offenders. Clearly the moment of sentencing can be a touchstone for offenders to review whether or not they wish to pursue a life of crime, but more importantly to decide whether or not to engage in the programs or treatment that might address their criminogenic needs. Unless rehabilitation is maintained as a purpose, the well established structure for release on parole, deferred sentencing, diversion and so on risks being undermined.
- 2.114 Reintegration into the community is a pivotal objective of rehabilitation and, as a consequence we do not consider it necessary for it to be given statutory expression.

### Reduction of crime

- 2.115 The decoupling of “prevention of crime” from the purpose of deterrence noted above poses the question of whether the prevention or reduction of crime should be retained as a stand-alone purpose.
- 2.116 The prevention or reduction of crime is obviously closely related to deterrence and also to the purpose of the protection of the community from crime.<sup>138</sup> All of the purposes of sentencing could be said to have this objective, although the “forward-looking” purposes of deterrence, incapacitation and rehabilitation are more strongly associated with crime prevention and reduction than are the “backward-looking” objectives of retribution, denunciation and recognising harm to the victim.
- 2.117 One of the purposes of sentencing included in the *Criminal Justice Act 2003* (UK) is stated to be “the reduction of crime (including its reduction by deterrence)”.<sup>139</sup> This gave effect to a recommendation of the white paper, which noted that “[s]entencing must be an effective tool which leads to fewer crimes”.<sup>140</sup>

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136. Corrective Services NSW, *Submission SE51*, 4.

137. *Sentencing Act 2002* (NZ) s 7(1)(h).

138. *R v Cuthbert* (1967) 86 WN (Pt 1) (NSW) 272, 274; *Channon v R* (1978) 20 ALR 1, 5. Some jurisdictions have identified protection of the community or maintenance of public safety as a primary policy or objective of sentencing or the criminal law: See, eg, *Criminal Law (Sentencing) Act 1988* (SA) s 10(2)(a); *Sentencing Act 1997* (Tas) s 3(b); *Kentucky Revised Statutes* ch 532 s 007(1); *Criminal Code*, RSC 1985, c C-46 (Can) s 718.

139. *Criminal Justice Act 2003* (UK) s 142(1)(b).

140. England and Wales, Home Office, *Justice for All*, Cm 5563 (2002) 87.

- 2.118 In *NSW 2021: A Plan to Make NSW Number One*, the government committed to preventing crime and reducing the level of crime (goal 16), and preventing reoffending and reducing the level of reoffending (goal 17) in NSW.<sup>141</sup> Including the reduction of crime as an explicit purpose of sentencing would reflect the state's broader commitment to these goals. Our view is that crime reduction should be a stated purpose which is included in its own right.
- 2.119 The CCA has noted that adding "from the offender" to the purpose of protecting the community from the offender has the potential to narrow the more general common law purpose of protecting the community.<sup>142</sup> The proposed purpose of reducing crime may incorporate the more general aspects of the common law purpose of protection of the community.

### Recommendation 2.1: Statement of the purposes of sentencing

A revised Crimes (Sentencing) Act should include a statement of the purposes of sentencing as follows:

- (1) To the extent relevant to the case before the court, the purposes for which a court may impose a sentence are to:
- (a) ensure that the offender is punished for the offence and is held accountable for his or her actions,
  - (b) denounce the conduct of the offender,
  - (c) recognise the harm done to the victim of the crime and the community,
  - (d) protect the community from the offender,
  - (e) deter the offender and others from committing offences,
  - (f) promote the rehabilitation of the offender, and
  - (g) reduce crime.
- (2) Nothing about the order in which the purposes appear implies that any purpose must be given greater weight than any other purpose.

## Purposes not adopted

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### Effective operation of the criminal justice system

- 2.120 We gave consideration to the question whether the "effective operation of the criminal justice system" should be identified as an additional purpose of sentencing. A purpose of this kind could be seen to support the mitigation of a sentence, because of a plea of guilty or assistance provided by the offender, or more generally by encouraging public confidence in the system through the punishment of offenders.

141. NSW, Department of Premier and Cabinet, *NSW 2021: A Plan to Make NSW Number One* (2011) 34-35.

142. *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 2 of 2002)* [2002] NSWCCA 515; 137 A Crim R 196 [58].

- 2.121 The majority of submissions received were, however, opposed to adding the effective operation of the criminal justice system as a purpose of sentencing.<sup>143</sup>
- 2.122 In our view, it is a purpose that is so indefinite that it does not add to the more specific purposes that are proposed. At worst it is capable of occasioning unnecessary complexity and confusion. Accordingly we do not support its addition to the list.

### Reparation and restoration

- 2.123 We considered whether reparation and restoration should be identified as additional purposes of sentencing.
- 2.124 Reparation and restoration can be said to encompass both restitution and compensation to victims and the community generally, through community service, the return of an item of property to its lawful owner and the making good by an offender of the harm caused,<sup>144</sup> for example through an order to remove graffiti. Each is also reflected in aspects of “restorative” justice.
- 2.125 There has been some support from law reform agencies for the addition of a purpose expressed in terms of supporting restoration or reparation, and precedent exists for its adoption in some jurisdictions.
- 2.126 The ALRC, in recommending that one of the purposes of sentencing should be “to promote the restoration of relations between the community, the offender and the victim”, noted that:

Restoration may not always be an appropriate purpose of sentencing. However, where appropriate, restorative initiatives have demonstrated their potential to complement and enhance the operation of the criminal justice system. They provide an effective way to recognise victims’ interests in the sentencing process and to encourage offenders to accept responsibility for their actions.<sup>145</sup>

- 2.127 The Tasmania Law Reform Institute has similarly recommended that one of the purposes of sentencing should be “restoration or repairing the harm caused by the offence and restoring relations between the offender, the victim and the community”.<sup>146</sup>

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143. Public Defenders, *Submission SE2*, 5; NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 6; Children’s Court of NSW, *Submission SE4*, 5; Law Society of NSW, *Submission SE7*, 7; NSW Bar Association, *Submission SE9*, 10; G Henson, *Submission SE10*, 3; Legal Aid NSW, *Submission SE11*, 9; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 11.

144. See NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [10.24]-[10.30].

145. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [4.28], rec 4-1(f).

146. Tasmania Law Reform Institute, *Sentencing*, Final Report 11 (2008) [7.1.36].

- 2.128 This purpose was seen as complementing the Institute’s recommendation that a compensation order be a sentencing option in its own right<sup>147</sup> and that community conferencing for young adults be piloted.<sup>148</sup>
- 2.129 The purposes specified in the *Sentencing Act 2002* (NZ) for which a court may sentence an offender include providing reparation for harm done by the offending.<sup>149</sup>
- 2.130 In Canada, in addition to the promotion of an “acknowledgment of the harm done to victims and to the community”,<sup>150</sup> the purposes of sentencing include providing “reparations for harm done to victims or to the community”.<sup>151</sup>
- 2.131 In our 1996 review of sentencing, we did not regard reparation as one of the purposes of sentencing since it links punishment to “the victim’s need for restitution or compensation, rather than to the gravity of the offender’s conduct”.<sup>152</sup> Reparation was, therefore, seen as ancillary to the sentencing process.
- 2.132 There was little support in the submissions for including reparation and restoration as express purposes of sentencing.<sup>153</sup>
- 2.133 One submission pointed to the lack of consensus about the meaning of the terms and suggested that it would not be useful to expect a court to allocate a relative weight to such purposes as part of a consideration of the circumstances before it.<sup>154</sup>
- 2.134 On the other hand, the NSW Bar Association supported the inclusion of reparation and restoration as a purpose of sentencing. The Association acknowledged that there was no universally accepted definition of restorative justice, but supported restorative initiatives as a means by which “those involved in, and affected by, criminal activity [can be] given a real opportunity to participate in the process by which the response to the crime is decided”.<sup>155</sup>
- 2.135 We note that some of the mechanisms currently aimed at achieving restorative justice sit outside the sentencing options available to the courts, limiting the extent to which effect could be given to purposes of reparation and restoration. Victim impact statements are part of the sentencing hearing, and may inform a court of a number of relevant matters, but otherwise they have a limited role.
- 2.136 In our view objectives of reparation and restoration are sufficiently accommodated within the proposed purposes concerned with accountability and recognition of the

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147. Tasmania Law Reform Institute, *Sentencing*, Final Report 11 (2008) [4.4.17].

148. Tasmania Law Reform Institute, *Sentencing*, Final Report 11 (2008) [4.3.5].

149. *Sentencing Act 2002* (NZ) s 7(1)(d).

150. *Criminal Code*, RSC 1985, c C-46 (Can) s 718(f).

151. *Criminal Code*, RSC 1985, c C-46 (Can) s 718(e).

152. NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [3.21].

153. Public Defenders, *Submission SE2*, 5; NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 5; Law Society of NSW, *Submission SE7*, 7; G Henson, *Submission SE10*, 2; Legal Aid NSW, *Submission SE11*, 8-9; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 11.

154. NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 11.

155. NSW Bar Association, *Submission SE9*, 9.

harm caused, and that as ancillary orders or aspects of criminal procedure there is no need for their inclusion in the proposed list.

### 3. General principles of sentencing

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#### **In brief**

Some key sentencing principles have been developed through the common law to guide courts when sentencing an offender. Currently, not all of these principles are stated in statutory form. We recommend that a revised Crimes (Sentencing) Act list five well-established sentencing principles.

<b>Overview of the current law in NSW</b> .....	<b>42</b>
Proportionality .....	<b>42</b>
Imprisonment as a last resort .....	<b>44</b>
Parity .....	<b>45</b>
Sentencing offenders only for the offence of which they are convicted (the De Simoni principle) .....	<b>48</b>
Totality.....	<b>48</b>
<b>Legislative statements of the principles</b> .....	<b>49</b>
Australian Law Reform Commission's proposal .....	<b>49</b>
Canada.....	<b>50</b>
New Zealand .....	<b>52</b>
Other Australian states .....	<b>53</b>
<b>Key principles to be included in a revised Crimes (Sentencing) Act</b> .....	<b>54</b>
Proportionality .....	<b>55</b>
Parity .....	<b>56</b>
Totality.....	<b>57</b>
The De Simoni principle .....	<b>57</b>
Imprisonment as a last resort .....	<b>58</b>
<b>Matters not included as principles</b> .....	<b>58</b>
Individualised justice.....	<b>58</b>
Aggravating and mitigating circumstances .....	<b>59</b>
Consistency .....	<b>59</b>
Parsimony .....	<b>61</b>
Instinctive synthesis.....	<b>63</b>
Sentencing guideposts .....	<b>65</b>
Double punishment and double-counting .....	<b>65</b>
Reasons for sentence.....	<b>65</b>

- 3.1 A number of key sentencing principles developed by the common law guide the courts in the imposition of sentences. These principles play a part in securing consistency both in approach and in the sentence that is imposed. A court's departure from these principles may give rise to appealable error.
- 3.2 In this chapter we consider whether these principles, which are stated in general terms, should be retained, extended, or modified. We also consider whether they should be the subject of a statutory statement, either as general principles, or in a more detailed form to reflect the way in which they developed at common law through the considerable body of case law that attaches to each of them.

## Overview of the current law in NSW

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### Proportionality

- 3.3 It is a fundamental principle at common law that the court must impose a sentence that is proportional to the offence committed by the offender.<sup>1</sup> This means that the sentence should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances.<sup>2</sup> Paragraph 3A(a) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA) reflects this as a purpose (although not a principle) of sentencing.<sup>3</sup>
- 3.4 The High Court referred to the concept of proportionality in *Veen v The Queen*,<sup>4</sup> a case in which the offender, having been found guilty of manslaughter by reason of diminished responsibility, was nonetheless sentenced to life imprisonment without parole. The Court of Criminal Appeal (CCA) upheld the sentence and accepted the soundness in principle of the trial judge's approach in finding that, as it was probable that when released Veen would again commit a crime of serious violence, the only applicable theory in determining the appropriate sentence was the entitlement of the community to be protected from violence.<sup>5</sup> The High Court overturned the life sentence and imposed a fixed term of 12 years' imprisonment. It accepted as a general principle that "the punishment to be inflicted must be proportionate to the crime";<sup>6</sup> and that courts could not impose a sentence that was longer than appropriate simply for the purposes of preventive detention.
- 3.5 In *Veen [No 2]*,<sup>7</sup> the High Court revisited the application of this principle. Nine months after his release, Veen killed another victim in very similar circumstances to his first homicide. He pleaded guilty to manslaughter, on the ground of diminished responsibility. He was sentenced to life imprisonment without parole, a sentence that was left undisturbed on appeal to the CCA and the High Court. The majority in the High Court noted that there was an obvious difference between this case and *Veen [No 1]* in that it was then uncertain, but was now known, that Veen had a propensity to kill when under the influence of alcohol and stress.<sup>8</sup>
- 3.6 The majority observed:

The principle of proportionality is now firmly established in this country. It was the unanimous view of the court in *Veen [No 1]* that a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender;<sup>9</sup>

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1. *Veen v The Queen [No 1]* (1979) 143 CLR 458; *Veen v The Queen [No 2]* (1988) 164 CLR 465.

2. *Hoare v The Queen* (1989) 167 CLR 348, 354.

3. *R v Scott* [2005] NSWCCA 152 [15]. See also *R v Geddes* (1936) 36 SR (NSW) 554, 556 and *R v Dodd* (1991) 57 A Crim R 349, 354.

4. *Veen v The Queen [No 1]* (1979) 143 CLR 458.

5. *R v Veen* (Unreported, NSW CCA, 6 August 1976).

6. *Veen v The Queen [No 1]* (1979) 143 CLR 458, 468 (Mason J), 490 (Jacobs J), 495 (Murphy J).

7. *Veen v The Queen [No 2]* (1988) 164 CLR 465.

8. *Veen v The Queen [No 2]* (1988) 164 CLR 465, 470 (Mason CJ, Brennan, Dawson and Toohey JJ).

9. *Veen v The Queen [No 2]* (1988) 164 CLR 465, 472.



although adding:

It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible.<sup>10</sup>

...

It must be acknowledged, however, that the practical observance of a distinction between extending a sentence merely to protect society and properly looking to society's protection in determining the sentence calls for a judgment of experience and discernment.<sup>11</sup>

### 3.7 The majority explained:

the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences: *Director of Public Prosecutions v Ottewill* [1970] AC 642 at 650. The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind.<sup>12</sup>

3.8 The maximum penalty fixed for an offence reflects the seriousness of the criminal conduct that gives rise to the offence as it is perceived by the public, and expressed through parliament.<sup>13</sup> The imposition of the maximum penalty for an offence is reserved for the “worst category” of cases for which the penalty is prescribed (usually described simply as the “worst type of case”),<sup>14</sup> and in that respect it provides guidance (or acts as a guide post) for a court in applying the principle of proportionality to the facts of the case before it.

3.9 Some jurisdictions, however, make special provision for dangerous or high risk offenders, permitting the courts to frame a sentence in a way that is aimed at securing the protection of the community. This is achieved through indeterminate or indefinite sentencing,<sup>15</sup> or through legislation that permits an order for continuing

10. *Veen v The Queen [No 2]* (1988) 164 CLR 465, 473.

11. *Veen v The Queen [No 2]* (1988) 164 CLR 465, 474.

12. *Veen v The Queen [No 2]* (1988) 164 CLR 465, 477.

13. *R v H* (1980) 3 A Crim R 53, 65 (Moffitt P); *R v Moon* [2000] NSWCCA 534; 117 A Crim R 497 [67] (Howie J).

14. *Ibbs v The Queen* (1987) 163 CLR 447, 451-452.

15. For example, various indefinite detention schemes are set out in the following legislation: *Sentencing Act 1991* (Vic) s 18A–18P; *Penalties and Sentences Act 1992* (Qld) s 162–179; *Sentencing Act* (NT) s 65–78; *Criminal Law (Sentencing) Act 1988* (SA) s 21-29; *Sentencing Act 1997* (Tas) s 19-23; *Sentencing Act 1995* (WA) s 98-101; *Criminal Justice Act 2003* (UK) s 224-236; *Criminal Procedure*

detention or extended supervision to be made toward the end of the proportionate sentence that was imposed.<sup>16</sup>

- 3.10 Legislation was enacted in NSW in 2006 that permits the Supreme Court to make a continuing detention order or an extended supervision order in relation to a serious sexual offender where, prior to the person's release, it is "satisfied to a high degree of probability that the offender poses an unacceptable risk of committing a serious sex offence if he or she is not kept under supervision".<sup>17</sup>
- 3.11 The NSW government has extended these provisions to high-risk violent offenders<sup>18</sup> in response to a report from the NSW Sentencing Council.<sup>19</sup>

### Imprisonment as a last resort

- 3.12 Imprisonment is recognised at common law as a sentencing option of "last resort".<sup>20</sup> It has statutory expression in s 5 of the CSPA, which provides that a court "must *not* sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate".<sup>21</sup> It is also consistent with s 17A of the *Crimes Act 1914* (Cth), which states that a court shall not impose imprisonment on an offender unless, after having considered all other available sentences, the court "is satisfied that no other sentence is appropriate in all the circumstances of the case".<sup>22</sup> The principle is generally supported in other Australian jurisdictions.<sup>23</sup>
- 3.13 In NSW in *R v Zamagias* the CCA held that the court must engage in what has been described as a three step process:
- first, to determine that no other penalty except imprisonment is appropriate in the circumstances;
  - secondly, to determine the length of the sentence without considering what form the custodial term may take; and
  - thirdly, and only then, to decide whether or not the sentence should be full-time detention or one of the alternatives to full-time detention, being a suspended sentence, an intensive correction order or home detention.<sup>24</sup>

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(*Scotland*) Act 1995 (UK) s 210A-210G; *Sentencing Act 2002* (NZ) s 87-90; *Criminal Code*, RSC 1985, c C-46 (Can) s 752-753.

16. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); *Dangerous Sexual Offenders Act 2006* (WA); *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic).

17. *Crimes (Serious Sex Offenders) Act 2006* (NSW) s 9(2), 17(2).

18. *Crimes (Serious Sex Offenders) Amendment Act 2013* (NSW).

19. NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options*, Report (2012).

20. *Way v R* [2004] NSWCCA 131; 60 NSWLR 168 [115].

21. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1).

22. *Crimes Act 1914* (Cth) s 17A(1).

23. *Crimes (Sentencing) Act 2005* (ACT) s 10(2); *Penalties and Sentences Act 1992* (Qld) s 9(2)(a)(i); *Criminal Law (Sentencing) Act 1988* (SA) s 11(1)(a)(iv); *Sentencing Act 1991* (Vic) s 5(4); *Sentencing Act 1995* (WA) s 6(4)(a).

24. *R v Zamagias* [2002] NSWCCA 17 [25]-[29].

- 3.14 The three step process has been criticised.<sup>25</sup> Nonetheless, it underlines the fundamental point that the court must approach imprisonment on the basis that it is the last resort.

## Parity

- 3.15 The parity principle requires that there be parity (or relativity or due proportionality) between the sentences imposed on co-offenders, such that like conduct is treated as like, and due allowance is made for differences between the offenders.<sup>26</sup> It is an aspect of equal justice<sup>27</sup> and reflects the wider objective of avoiding inconsistency in punishment.<sup>28</sup>

- 3.16 Justice Hoeben succinctly stated the application of the parity principle in *Lee v R*.<sup>29</sup>

The parity principle is an expression of the concept of equal justice. It requires that like offenders should be treated in a like manner. However, the parity principle also allows for different sentences to be imposed upon like offenders to reflect different degrees of culpability and/or different circumstances ...<sup>30</sup> For the Court [of Criminal Appeal] to intervene on the grounds of disparity, the difference in sentences between co-offenders must be “marked” or “clearly unjustifiable” or “manifest” ... “such as to engender a justifiable sense of grievance”. A sense of grievance is “justifiable” when a reasonable mind looking over all of what happened would see that a grievance was justified.<sup>31</sup>

- 3.17 More than a simple difference in sentencing outcomes is required to attract an application of the principle. Justice Howie has observed that:

It should be borne in mind that the High Court's decisions on this area of appellate intervention speak of “gross”, “marked”, “glaring” or “manifest” disparity.<sup>32</sup>

- 3.18 The test for determining whether there is a legitimate sense of grievance is objective. It does not depend on the subjective feelings of the person complaining of the disparity.<sup>33</sup> It allows courts legitimately to impose different sentences to reflect different degrees of culpability and differences in the circumstances of the offenders whose sentences are compared.

- 3.19 The parity principle applies at first instance where two or more co-offenders (perhaps better referred to as those “involved in related offending”) are being sentenced at the one time in the same hearing, or where one has already been

25. *Amado v R* [2011] NSWCCA 197 [5] (Basten JA).

26. *Lowe v The Queen* (1984) 154 CLR 606; *Green v The Queen* [2011] HCA 49; 244 CLR 462 [28].

27. *Postiglione v The Queen* (1997) 189 CLR 295, 301 (Dawson and Gaudron JJ).

28. *Lowe v The Queen* (1984) 154 CLR 606, 610-611.

29. *Lee v R* [2012] NSWCCA 123 [37].

30. Citing *Postiglione v The Queen* (1997) 189 CLR 295, 301; *Green v The Queen* [2011] HCA 49; 244 CLR 462 [28]-[30]; *Lowe v The Queen* (1984) 154 CLR 606, 610.

31. Citing *Green v The Queen* [2011] HCA 49; 244 CLR 462 [30]-[32]; *Rees v R* [2012] NSWCCA 47 [50].

32. *England v R* [2009] NSWCCA 274 [62]-[66], citing *Lowe v The Queen* (1984) 154 CLR 606 and *Postiglione v The Queen* (1997) 189 CLR 295.

33. *Rae v R* [2011] NSWCCA 211 [58]-[63]; *Green v The Queen* [2011] HCA 49; 244 CLR 462.

- sentenced in a previous hearing.<sup>34</sup> The court should seek to avoid imposing a sentence on an offender that would result in a marked disparity with that imposed on a co-offender, that is, after giving due consideration to the differences between them such as age, background, criminal history, general character and the part that each has played in the relevant criminal conduct.<sup>35</sup>
- 3.20 The parity principle applies only to co-offenders and cannot apply where one offender is compared with a group of other offenders with similar characteristics who may have committed similar but unrelated crimes at other times.<sup>36</sup> The sentences in those cases may be useful so far as they form part of the range of sentences for the relevant offences, but they cannot be called directly in aid by reference to the parity principle.
- 3.21 The appeal courts will also need to consider the parity principle, for example, in the following circumstances:
- an appeal by an offender against the severity of a sentence, so as to reduce the sentence to one that is not markedly disparate with that of a co-offender, even though it would otherwise have withstood challenge;<sup>37</sup>
  - a Crown appeal against leniency where, although the court is satisfied that a longer sentence was warranted, nevertheless it is necessary to dismiss the appeal so as to avoid creating a marked (that is, unjustifiable) disparity with an unchallenged sentence imposed on a co-offender.<sup>38</sup>
- 3.22 There is an important difference in approach between appeals by an offender and the Crown. The purpose of a Crown appeal is not simply to increase an erroneous sentence; it has a wider purpose, being to achieve consistency in sentencing and the establishment of sentencing principles.<sup>39</sup> As a result, in a Crown appeal, the prosecution is unable to rely on the parity principle to increase a sentence imposed on an offender because a heavier sentence was imposed on a co-offender.<sup>40</sup>
- 3.23 The likelihood of appeals based on parity arguments is obviously increased if different judicial officers sentence different co-offenders or parties to a common enterprise.<sup>41</sup> For this reason the practice of the same judicial officer sentencing

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34. See S Thomson, "Unifying Sentencing Law: A Principled Approach to Sentencing Justice" (2011) 85 *Australian Law Journal* 798, 798-799.

35. *Green v The Queen* [2011] HCA 49; 244 CLR 462 [31].

36. *R v Ellis* (1993) 68 A Crim R 449, 461 (Hunt CJ at CL); *R v Morgan* (1993) 70 A Crim R 368, 371; *Kardoulias v R* [2005] NSWCCA 456; 159 A Crim R 252 [106].

37. See, eg, *Lowe v The Queen* (1984) 154 CLR 606, 613-614 (Mason J); *Postiglione v The Queen* (1997) 189 CLR 295, 301 (Dawson and Gaudron JJ). In *Green v The Queen* [2011] HCA 49; 244 CLR 462 [32] it was held that unjustified disparity can be an appealable error in itself.

38. *Green v The Queen* [2011] HCA 49; 244 CLR 462 [37] (French CJ, Crennan and Kiefel JJ).

39. *R v Borkowski* [2009] NSWCCA 102; 195 A Crim R 1 cited with approval in *Green v The Queen* [2011] HCA 49; 244 CLR 462 [37].

40. *R v Nguyen* [2010] NSWCCA 331 [62].

41. *OM v R* [2009] NSWCCA 267 [9] (Basten JA).

each of the co-offenders or parties to a common enterprise has been strongly encouraged.<sup>42</sup>

- 3.24 Justice Campbell noted in *Jimmy v R* that intermediate appeal courts had not limited the parity principle strictly to co-offenders who are convicted of the same offence; but recognised that it can play a role, albeit within limits, in the comparison of sentences for different crimes committed by people who were involved in a “common criminal enterprise”.<sup>43</sup> However, practical difficulties can arise in this respect which become greater as the difference between the crimes charged becomes greater.<sup>44</sup>
- 3.25 The majority of the High Court in *Green v The Queen* agreed that offenders engaged in the same criminal enterprise need not be charged with identical offences in order for parity to be relevant, because it is an aspect of equal justice.<sup>45</sup> It similarly noted the practical difficulties that can arise where there is a difference between the crimes charged (such as the difference in the maximum available penalties), or where the exercise of prosecutorial discretion affected the choice of the charges laid.
- 3.26 The majority went on to hold that, when the prosecution appealed against what it asserted to be an erroneously lenient sentence and the appeal was allowed, the parity principle did not prohibit the creation of any disparity. However, it observed that the appeal court’s residual discretion could be enlivened in this case and that the creation of “unjustifiable disparity” would be a “powerful consideration against allowing a Crown appeal”.<sup>46</sup> The majority also stated that:

There is a question whether a sentence which would otherwise be appropriate *can* be reduced on the ground of disparity to a level which, had there been no disparity, would be regarded as erroneously lenient. In *Lowe*<sup>47</sup> that question was answered explicitly in the affirmative by Mason J and less explicitly but to like effect by Dawson J, with whom Wilson J agreed. It has also been answered in the affirmative in a number of cases in the Court of Criminal Appeal of New South Wales.<sup>48</sup> On the other hand, as Simpson J correctly pointed out in *R v Steele*,<sup>49</sup> the existence of a discretion, where unjustified disparity is shown, to reduce a co-offender’s sentence to one which is inadequate does not amount to an obligation to do so. Certainly, the discretion of the Court of Criminal Appeal to reduce a sentence to a less than adequate level would not require it to consider reducing the sentence to a level which would be, as Street CJ put it in *Draper*, “an affront to the proper administration of justice”.<sup>50</sup> Moreover, if the relevant sentencing legislation, on its proper construction, does not permit an

42. *R v Speechley* [2012] NSWCCA 130 [46] (Johnson J); *Postiglione v The Queen* (1997) 189 CLR 295, 320 (Gummow J), citing *Lowe v The Queen* (1984) 154 CLR 606, 617 (Brennan J); *Dwayhi v R* [2011] NSWCCA 67; 205 A Crim R 274 [33]-[46].

43. *Jimmy v R* [2010] NSWCCA 60; 77 NSWLR 540 [136], [199].

44. *Jimmy v R* [2010] NSWCCA 60; 77 NSWLR 540 [203].

45. *Green v The Queen* [2011] HCA 49; 244 CLR 462 [30] (French CJ, Crennan and Kiefel JJ).

46. *Green v The Queen* [2011] HCA 49; 244 CLR 462 [37] (French CJ, Crennan and Kiefel JJ).

47. *Lowe v The Queen* (1984) 154 CLR 606.

48. Citing *R v Tisalandis* [1982] 2 NSWLR 430, 435; *R v Anastasio* (Unreported, NSW CCA, 21 November 1986) 3; *R v Smith* (Unreported, NSW CCA, 5 December 1986); *R v Draper* (Unreported, NSW CCA, 12 December 1986) 5; *R v Diamond* (Unreported, NSW CCA, 18 February 1993) 5, 11; *R v Maslen* (1995) 79 A Crim R 199, 207-8, 212.

49. *R v Steele* (Unreported, NSW CCA, 17 April 1997) 8-11.

50. *R v Draper* (Unreported, NSW CCA, 12 December 1986) 5.

inadequate sentence to be imposed, there can be no discretion on appeal to impose one. Whether or not the discretion to reduce a sentence to an inadequate level is available, marked and unjustified disparity may be mitigated by reduction of the sentence appealed against to a level which, although lower, is still within the range of appropriate sentences.<sup>51</sup>

### Sentencing offenders only for the offence of which they are convicted (the *De Simoni* principle)

- 3.27 This principle provides that a court “in imposing sentence, is entitled to consider all of the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence”.<sup>52</sup> The principle is currently recognised in s 21A(4) of the CSPA which prohibits a court from taking into account circumstances of aggravation or mitigation if it would be contrary to any Act or rule of law to do so.<sup>53</sup>
- 3.28 Where the *Crimes Act 1900* (NSW) makes provision for a higher maximum penalty for a particular offence if there are circumstances of aggravation present (as is the case, for example, in relation to a number of sexual assault offences), then the potential for infringement of the *De Simoni* principle can be avoided by charging those circumstances in the indictment. Similarly an infringement will be avoided if a more serious form of offence is available and is charged, that is assuming it is justified in all of the circumstances of the case.

### Totality

- 3.29 The totality principle applies where a court sentences an offender for multiple offences, or sentences an offender for a fresh offence or offences when he or she is already serving a separate sentence.<sup>54</sup> It requires the overall sentence that is imposed (after taking into account the extent to which the individual sentences should be served concurrently, consecutively, or partly concurrently and consecutively, or where an aggregate sentence is imposed) to be “just and appropriate” to the totality of the offending behaviour.<sup>55</sup> It also requires the court to have regard to the effect of the total length of the sentence for all of the offences, and in doing so, avoid a “crushing” sentence that would not accord with an offender’s “record and prospects of rehabilitation”.<sup>56</sup> In that respect it is related to the principle of proportionality.<sup>57</sup>

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51. *Green v The Queen* [2011] HCA 49; 244 CLR 462 [33] (French CJ, Crennan and Kiefel JJ) (some footnotes omitted).

52. *R v De Simoni* (1981) 147 CLR 383, 389 (Gibbs CJ).

53. *R v Wickham* [2004] NSWCCA 193 [26].

54. *Mill v The Queen* (1988) 166 CLR 59, 62-63.

55. *Mill v The Queen* (1988) 166 CLR 59, 63 citing D Thomas, *Principles of Sentencing* (2nd ed, Heinemann, 1979) 56-57.

56. *Postiglione v The Queen* (1997) 189 CLR 295,304 (Dawson and Gaudron JJ), citing *Mill v The Queen* (1988) 166 CLR 59, 63, citing D Thomas, *Principles of Sentencing* (2nd ed, Heinemann, 1979) 57-58; *Cahyadi v R* [2007] NSWCCA 1; 168 A Crim R 41 [27]; *Smale v R* [2007] NSWCCA 328 [130]-[133].

57. *R v MMK* [2006] NSWCCA 272; 164 A Crim R 481 [11].

- 3.30 The principle extends to sentences that are part of a course of criminal conduct, or are closely related to the offences before the court,<sup>58</sup> and is not restricted to offences that are part of exactly the same activity.<sup>59</sup> It is subject to the caution that, where multiple offences have overlapping elements, or are closely associated, the court should not punish the offender twice in relation to the elements that are common;<sup>60</sup> although this does not exclude some degree of accumulation to take into account any additional factual elements that may be involved in one or other of the offences.<sup>61</sup>

## Legislative statements of the principles

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- 3.31 Legislative statements of the principles of sentencing have been proposed and implemented in several Australian jurisdictions as well as in some overseas jurisdictions.<sup>62</sup> In some instances, they comprise a mixture of principles and of relevant factors that are to be taken into account. In developing our recommendations in this Report we prefer to preserve the distinction between principles and relevant factors.

### Australian Law Reform Commission's proposal

- 3.32 In its 2006 report on the sentencing of federal offenders, the Australian Law Reform Commission (ALRC) recommended that a federal sentencing statute should specify the fundamental principles of sentencing, as follows:
- (a) a sentence should be proportionate to the objective seriousness of the offence, which includes the culpability of the offender (proportionality);
  - (b) a sentence should be no more severe than is necessary to achieve the purpose or purposes of the sentence (parsimony);
  - (c) where an offender is being sentenced for more than one offence, or is already serving a sentence and is being sentenced for a further offence, the aggregate of the sentences should be just and appropriate in all the circumstances (totality);
  - (d) where possible, a sentence should be similar to sentences imposed on like offenders for like offences (consistency and parity); and
  - (e) a sentence should take into consideration all circumstances of the individualized case, in so far as they are relevant and known to the court (individualized justice).<sup>63</sup>
- 3.33 The ALRC considered that incorporating these sentencing principles in a federal sentencing statute would emphasise their importance to courts and practitioners. It

58. *R v Larsen* (1989) 44 A Crim R 121.

59. *R v Close* (1992) 31 NSWLR 743.

60. *Pearce v The Queen* [1998] HCA 57; 194 CLR 610 [40] (McHugh, Hayne and Callinan JJ).

61. *Ng v R* [2011] NSWCCA 227; 214 A Crim R 191 [101].

62. See, eg, *Sentencing Act 1995* (WA) s 6; *Penalties and Sentences Act 1992* (Qld) s 9; *Criminal Law (Sentencing) Act 1988* (SA) s 10; *Sentencing Act 1991* (Vic) s 5.

63. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) rec 5-1.

did not consider that specifying the five principles would lead to unnecessary confusion, as they are firmly established at common law which would continue to provide guidance.<sup>64</sup>

- 3.34 The ALRC commented that proportionality is the primary mechanism for ensuring that sentences imposed on offenders are fair. It observed that the principle operates to prevent courts imposing sentences that are manifestly excessive or manifestly lenient in the light of the objective circumstances of the offence, and noted that a court can pursue any of the established purposes of sentencing within the parameters of the proportionate sentence.<sup>65</sup>
- 3.35 The ALRC noted that the principle of consistency requires courts to adopt a similar approach to the task of sentencing generally, and to impose sentences that fall within an appropriate range in light of the objective seriousness of the offence and the subjective circumstances of the offender.<sup>66</sup> It suggested that the principle of parity between co-offenders is essentially a subset of the principle of consistency.<sup>67</sup>
- 3.36 The ALRC defined individualised justice as the principle that requires the court to impose a sentence that is just and appropriate in all the circumstances of the case before it. It commented that individualised justice can only be achieved if courts possess a broad sentencing discretion that enables them to consider and balance multiple facts and circumstances when sentencing.<sup>68</sup> The ALRC supported the proposition that a broad sentencing discretion is needed in order to achieve individualised justice on the basis that sentencing is ultimately “a synthesis of competing features which attempts to translate the complexity of the human condition and human behaviour to the mathematics of units of punishment usually expressed in time or money”.<sup>69</sup>

## Canada

- 3.37 The Canadian *Criminal Code* also specifies a set of principles of sentencing combined with a statement of the factors that are to be taken into account. It identifies proportionality as the first principle:

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.<sup>70</sup>

and continues:

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64. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [5.24].

65. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [5.6]-[5.7].

66. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [5.19].

67. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [5.20].

68. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [5.21].

69. *Weininger v The Queen* [2003] HCA 14; 212 CLR 629 [24].

70. *Criminal Code*, RSC 1985, c C-46 (Can) s 718.1.



A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
  - (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,
  - (ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,
  - (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
  - (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
  - (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,
  - (iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or
  - (v) evidence that the offence was a terrorism offence
 shall be deemed to be aggravating circumstances;
- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.<sup>71</sup>

3.38 These principles followed recommendations for a statutory enactment of sentencing principles made in the 1987 Canadian Sentencing Commission report on sentencing reform:

- (a) The paramount principle governing the determination of a sentence is that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender for the offence.
- (b) Second, the emphasis being on the accountability of the offender rather than punishment, a sentence should be the least onerous sanction appropriate in the circumstances and the maximum penalty prescribed for an offence should be imposed only in the most serious cases.

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71. *Criminal Code*, RSC 1985, c C-46 (Can) s 718.2.

- (c) Subject to paragraphs (a) and (b) the court in determining the sentence to be imposed on an offender shall further consider the following:
  - i) any relevant aggravating and mitigating circumstances;
  - ii) a sentence should be consistent with sentences imposed on other offenders for similar offences committed in similar circumstances;
  - iii) the nature and combined duration of the sentence and any other sentence imposed on the offender should not be excessive;
  - iv) a term of imprisonment should not be imposed, or its duration determined, solely for the purpose of rehabilitation;
  - v) a term of imprisonment should be imposed only:
    - aa) to protect the public from crimes of violence,
    - bb) where any other sanction would not sufficiently reflect the gravity of the offence or the repetitive nature of the criminal conduct of an offender, or adequately protect the public or the integrity of the administration of justice,
    - cc) to penalize an offender for willful non-compliance with the terms of any other sentence that has been imposed on the offender where no other sanction appears adequate to compel compliance.<sup>72</sup>

3.39 The Canadian Sentencing Commission commented on the incorporation of sentencing principles into statute as follows:

A sentencing rationale supplies the foundation for solutions to unwarranted variation. It is not itself the final answer to disparity because, even when it is carefully worded, a declaration of the purpose and principles of sentencing remains a general statement which must be supplemented by more specific guidance to have an impact on practice. There is, however, another function that is performed by a legislated sentencing rationale. It makes known to the community what are the grounds for imposing penal sanctions and the principles governing the sentencing process.<sup>73</sup>

## New Zealand

3.40 Section 8 of the *Sentencing Act 2002* (NZ) combines a statement of principles and relevant factors in the following provision:

In sentencing or otherwise dealing with an offender the court—

- (a) must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender; and
- (b) must take into account the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalties prescribed for the offences; and

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72. Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1987) 154.

73. Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1987) 133.

- (c) must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
- (d) must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
- (e) must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances; and
- (f) must take into account any information provided to the court concerning the effect of the offending on the victim; and
- (g) must impose the least restrictive outcome that is appropriate in the circumstances, in accordance with the hierarchy of sentences and orders set out in section 10A; and
- (h) must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe; and
- (i) must take into account the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; and
- (j) must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case (including, without limitation, anything referred to in section 10).<sup>74</sup>

### Other Australian states

- 3.41 The *Criminal Law (Sentencing) Act 1988* (SA)<sup>75</sup> requires a court, when determining the sentence for an offence, to have regard to “such of the ... factors and principles as may be relevant”, in which are also included matters that might more accurately be described as “purposes” of sentencing.<sup>76</sup>
- 3.42 An even more extensive statement can be seen in the statement of “sentencing guidelines” contained in the *Penalties and Sentences Act 1992* (Qld) which combines purposes, principles and factors that have both a general application and, in some instances, a specific application to a defined category of offences.<sup>77</sup>

74. *Sentencing Act 2002* (NZ) s 8.

75. *Criminal Law (Sentencing) Act 1988* (SA) s 10.

76. For example, the need to ensure that the defendant is adequately punished for the offence and the need to protect the community: *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(j) and (2)(a).

77. *Penalties and Sentences Act 1992* (Qld) s 9.

## Key principles to be included in a revised Crimes (Sentencing) Act

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- 3.43 We consider it desirable to include, as general statements in a revised Crimes (Sentencing) Act, a list of the key sentencing principles that a court must consider when determining the appropriate sentence for an offender. Such an approach is consistent with the current inclusion in the CSPA of the purposes of sentencing and of the factors to be taken into account on sentencing.<sup>78</sup> Although it is not intended that this be an exhaustive list, we consider that the statutory statement of the key principles will assist in achieving a greater level of consistency and transparency, and in informing the community.
- 3.44 The statement of these key principles in general terms will leave their application to the common law, according to the varying factual scenarios that arise in individual cases. This is consistent with the ALRC's approach discussed above and is also consistent with the approach of the *Sentencing Act 2002* (NZ).
- 3.45 Submissions generally supported the sentencing principles identified above and opposed codifying them or attempting to give them greater definition, chiefly on the grounds that this might:
- result in undue complexity;
  - bring about unintended consequences; or
  - needlessly constrain the development of the principles at common law.<sup>79</sup>
- 3.46 We agree that codification would be inappropriate if it was to incorporate every aspect of the way in which the common law has given content to the principles. Having regard to the volume of the case law that exists, we doubt that it would be sensible to attempt a comprehensive statutory restatement of any of the principles. Even if it were possible to do so, this would be likely to result in an unduly complex and potentially inflexible Act. That is not the case with our favoured course of including in the new Act a provision that lists the key principles that a court is required to take into account as broad principles, together with separate statements of the purposes of sentencing (Chapter 2) and the factors to be taken into account (Chapter 4).
- 3.47 We consider that the principles emerge clearly from the case law and can be stated at a level of generality that will not disturb the existing case law. This is how the statutory formulation has been treated in New Zealand and how we would expect it to be treated in NSW.
- 3.48 There is considerable value in making these principles transparent to the public in statutory form. The principles express fundamental values that, in our view,

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78. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A, s 21A.

79. Law Society of NSW, *Submission SE7*, 8-10; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 13-15; G Henson, *Submission SE10*, 3-4; NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 6-8; Legal Aid NSW, *Submission SE11*, 12-16; NSW Bar Association, *Submission SE9*, 10-15; The Public Defenders, *Submission SE2*, 5-7; NSW Police Force, *Submission SE14*, 1-4; Children's Court of NSW, *Submission SE4*, 6-8.

command widespread support. In many ways, they reflect common sense and are an expression of basic fairness. Including them in legislation would make their pivotal role in the sentencing process much clearer to the public.

- 3.49 We recognise that there are a number of other principles under the CSPA that require specific attention, for example, the way in which pleas of guilty and assistance should be taken into account and the manner in which allowance is to be made for additional offences listed on a Form 1. As we propose replicating these provisions in a revised Crimes (Sentencing) Act elsewhere in this report,<sup>80</sup> there is no reason to include them in a statutory list of key principles.
- 3.50 In the paragraphs that follow we briefly consider whether any of the key principles require modification if included in legislation.

### Recommendation 3.1: Key principles of sentencing

A revised Crimes (Sentencing) Act should provide:

- (1) The court, when imposing a sentence, must apply (although not to the exclusion of any other relevant principles) the common law concepts reflected in the following key principles:
  - (a) proportionality;
  - (b) parity;
  - (c) totality; and
  - (d) the rule that an offender is only to be sentenced for an offence of which he or she has been convicted (the rule in *De Simoni*).
- (2) The court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate (imprisonment as a last resort).

## Proportionality

- 3.51 Submissions generally supported the statement of the principle of proportionality that is currently contained in s 3A(a) of the CSPA, as a “purpose” of sentencing.<sup>81</sup>
- 3.52 We consider that it is preferable to include it in a statement of the key sentencing principles rather than as a purpose. As it implicitly assumes the sentence will be adequate for the case at hand, we do not consider it necessary to add a requirement that the sentence be adequate or just, although the latter concept is reflected in the proposed objectives of a revised Crimes (Sentencing) Act.<sup>82</sup>

80. See Recommendations 5.1-5.3 and Appendix D.

81. The Public Defenders, *Submission SE2*, 2; NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 3; Children’s Court of NSW, *Submission SE4*, 3; Police Association of NSW, *Submission SE6*, 7; Law Society of NSW, *Submission SE7*, 3; G Henson, *Submission SE10*, 1; Legal Aid NSW, *Submission SE11*, 4; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 6; NSW Police Force, *Submission SE14*, 3; Corrective Services NSW, *Submission SE51*, 2.

82. Recommendation 1.1.

## Parity

- 3.53 While not in favour of a statutory statement, the Public Defenders submitted that if this was to occur then, “it might be helpful to make it clear that the principles of parity apply to all offenders in the same criminal enterprise, even if they have been charged with different offences”.<sup>83</sup>
- 3.54 Two submissions identified the desirability of ensuring that an application of the principle does not result in a manifestly inadequate sentence.
- 3.55 The NSW Police Force<sup>84</sup> suggested that this could be dealt with both in relation to offenders’ sentence appeals and Crown appeals by adopting, where parity is an issue, a “manifestly excessive difference” test, in which the court would be allowed to intervene on that ground “in the interests of justice”.<sup>85</sup>
- 3.56 The Office of the Director of Public Prosecutions (ODPP) submitted that the parity principle should be amended to “provide that a sentence which would otherwise be appropriate cannot be reduced on the ground of disparity to a level which, had there been no disparity, would be regarded as erroneously lenient”.<sup>86</sup>
- 3.57 The recent cases of *Jimmy*<sup>87</sup> in the CCA and *Green*<sup>88</sup> in the High Court have helped to clarify the operation of the parity principle. It needs to be applied in the light of the various circumstances which may arise. Sometimes some differences in sentencing outcomes will be justified where there are a number of co-offenders or parties to a criminal enterprise, who have different roles and who, as a result, may be charged with quite different offences or levels of offending. We do not consider it feasible to attempt a comprehensive legislative statement that could embrace all possible factual situations.
- 3.58 However we see merit in the suggestions that a legislative provision should be introduced to prevent an otherwise appropriate sentence from being reduced on appeal, because of the parity principle, to a level that would have been regarded as outside the range of appropriate sentences. The existence of one erroneous sentence should not be the cause of another erroneous sentence. As Justice Brennan observed in *Lowe v The Queen*:
- To say that an appellate court is bound to take the lesser sentence as the norm even though it is inappropriately lenient is tantamount to saying that “where you have one wrong sentence and one right sentence [the] Court should produce two wrong sentences” – a proposition that cannot be accepted.<sup>89</sup>
- 3.59 This addresses the concern raised by the NSW Police Force without having to make any fundamental changes to the law. We therefore recommend inclusion, in the *Criminal Appeal Act 1912* (NSW) of a statutory statement, to the effect

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83. The Public Defenders, *Submission SE2*, 6. See also Homicide Victims’ Support Group, *Submission SE8*, 9.

84. NSW Police Force, *Submission SE14*, 2-3.

85. As articulated in *Lowe v The Queen* (1984) 154 CLR 606, 624 (Dawson J).

86. NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 7.

87. *Jimmy v R* [2010] NSWCCA 60; 77 NSWLR 540.

88. *Green v The Queen* [2011] HCA 49; 244 CLR 462.

89. *Lowe v The Queen* (1984) 154 CLR 606, 617.

suggested, for the purpose of clarifying any residual doubt arising from the decisions in *Jimmy* and *Green*.

### Recommendation 3.2: Dealing with parity on appeal

The *Criminal Appeal Act 1912* (NSW) should be amended to provide that the parity principle, in relation to an appeal by an offender against the severity of a sentence, is not to be applied in a way that would result in a sentence that, in all of the circumstances of the case, would be manifestly inadequate.

## Totality

- 3.60 We did not receive any submissions that questioned the appropriateness of the totality principle as developed by the High Court in *Mill v The Queen*<sup>90</sup> and *Postiglione v The Queen*.<sup>91</sup> As we note elsewhere in this report, the introduction of aggregate sentencing has facilitated its application and we consider that it should be stated as a key principle. We do not see any need to modify the way in which it has come to be understood in the case law.

## The De Simoni principle

- 3.61 The Chief Magistrate saw “significant value” in addressing issues arising from the application of the *De Simoni* principle in the Local Court. The Chief Magistrate identified two common examples where he considered the need to conform to the *De Simoni* principle could compromise the sentencing exercise:

- The Court is presented with charges that have been split so an offender is to be sentenced in relation to multiple offences that would together constitute the elements of a more serious offence, despite the facts disclosing no temporal hiatus between the offences. For example, the Court frequently encounters matters in which a robbery charge is later converted by the prosecuting authority to two separate charges – assault and steal from the person - in return for a plea of guilty to each. The question of how to reflect the principle of totality while sentencing in respect of the offences charged in this manner is a vexed one.
- The agreed facts disclose a more serious element than the conduct charged. For instance, an offender may stand for sentence in relation to a charge of actual bodily harm where the facts disclose injuries more properly described as grievous bodily harm. In this instance, questions arise as to whether a permissible approach is to find that the conduct is a more serious or worst-case instance of the lesser offence, or whether the extent of the injuries might legitimately allow a finding that “the injury, emotional harm, loss or damage caused by the offence was substantial” pursuant to s 21A(2)(g) [of the CSPA].<sup>92</sup>

- 3.62 We do not see any need to modify the principle to accommodate the situations cited. The proposal for modification does not identify any lack of clarity in the

90. *Mill v The Queen* (1988) 166 CLR 59, 62-63.

91. *Postiglione v The Queen* (1997) 189 CLR 295, 301.

92. G Henson, *Submission SE10*, 5.

application of the principle. Rather the solution lies in applying the prosecutorial discretion correctly in framing an appropriate charge and in electing whether to proceed in the Local Court or the District Court. The prosecutorial authorities are responsible for ensuring that the facts tendered at sentencing are consistent with the offence(s) charged and that the proceedings are brought in the appropriate court. The way to avoid the problem identified by the Chief Magistrate is ongoing professional education within the prosecution service.

### **Imprisonment as a last resort**

- 3.63 Some submissions suggested a change to the principle of imprisonment as a last resort in order to emphasise the need to use imprisonment in particular circumstances or for particular crimes. The Homicide Victims' Support Group suggested that legislation stipulate that imprisonment is presumed to be an appropriate sentencing option for serious crimes (including but not limited to unlawful killing) and the offender can only escape a sentence of imprisonment through mitigating factors.<sup>93</sup> The Police Association of NSW suggested that the principle be amended to give "weight to the argument that prison is an effective general deterrent for some crimes or some offenders".<sup>94</sup>
- 3.64 It is true that, for the most serious of crimes, including serious crimes of violence, imprisonment is likely to be the only appropriate outcome. However, creating presumptions of imprisonment for some crimes would, in our view, overly complicate the law. The use of presumptions in bail law has not proved effective.<sup>95</sup> In the case of bail, and in sentencing generally, it is more helpful to focus on the individual circumstances of the offending and the offender.
- 3.65 Imprisonment as a last resort has long been a feature of the CSPA, and we do not propose any change.

### **Matters not included as principles**

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- 3.66 We have considered several other matters that have elsewhere been suggested to be principles of sentencing, that we do not propose for inclusion in a revised Crimes (Sentencing) Act. In one case, parsimony, this is because it has not been accepted as a relevant principle in NSW. In the other cases we regard them to be either unnecessary or more appropriately regarded as procedural in nature, or as an objective or purpose of the Act, or as a subset of the key principles otherwise identified.

### **Individualised justice**

- 3.67 In Chapter 1 we recommended that an objective of a revised Crimes (Sentencing) Act should be to "promote the imposition of just sentences having regard to all of

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93. Homicide Victims' Support Group, *Submission SE8*, 8.

94. Police Association of NSW, *Submission SE6*, 17.

95. NSW Law Reform Commission, *Bail*, Report 133 (2012) ch 8.



the circumstances of the offending, the offender and the impact on the victim". This is intended to have effect both generally and in relation to an individual case. As it is part of the courts' process that requires attention to be given to the purposes of sentencing (Chapter 2) and principles of sentencing (Chapter 3) as well as the relevant factors (Chapter 4) that are to be taken into account, we prefer that it be expressed as an objective of the Act, rather than as a principle in its own right.

### Aggravating and mitigating circumstances

- 3.68 We have not included in any general statement of the principles a requirement to take into account the aggravating and mitigating factors. The need to do so is inherent in the principles of proportionality and totality as well as in the general purposes of sentencing (Chapter 2) and the factors (Chapter 4).

### Consistency

- 3.69 Although consistency was included as a principle (in conjunction with parity) in the set of principles recommended by the ALRC for statutory statement, and in the principles specified in the Canadian *Criminal Code* and the *Sentencing Act 2002* (NZ), we do not consider that it should be expressed in statutory form as a principle in a revised Crimes (Sentencing) Act.
- 3.70 We do not suggest that the objective of securing an overall reasonable consistency in sentencing should be diluted in any respect. It is an important objective that is reflected in the "equal justice" norm that is expressed in the term "equality before the law".<sup>96</sup> Its retention is critical for the maintenance of public confidence in the criminal justice system, and it is a factor that underpins the existence of the guideline judgment scheme.
- 3.71 However there is a danger that, if it is stated as a principle that is applicable to an individual sentencing exercise, then it could be seen as introducing an extended version of the parity principle; in which case it might invite error of the kind that is well identified in the authorities.<sup>97</sup>
- 3.72 Those authorities acknowledge that sentences imposed on people who have been dealt with for similar offences arising out of unrelated events do have a proper role in sentencing practice. However, that does not arise by reference to parity considerations. Rather it can assist through identifying a general pattern of sentences that have been passed and hence a range of sentences that are available to a court.
- 3.73 Justice Hunt made this point well in *R v Morgan*:

It is quite wrong to compare the sentence under challenge directly with that imposed upon another offender (who is not a co-offender) simply because the two offenders may have similar characteristics and may have committed similar

96. *Green v The Queen* [2011] HCA 49; 244 CLR 462 [28].

97. *R v Morgan* (1993) 70 A Crim R 368; *R v Salameh* (Unreported, NSW CCA, 9 June 1994); *R v Fong* [2002] NSWCCA 320; 132 A Crim R 308; *R v George* [2004] NSWCCA 247; 149 A Crim R 38; *Jimmy v R* [2010] NSWCCA 60; 77 NSWLR 540 [131]-[133], [137]-[140].

crimes. What must be looked at is whether the challenged sentence is within the *range* appropriate to the objective gravity of the particular offence and to the subjective circumstances of the particular offender, and not whether it is more severe or more lenient than some other sentence (other than that of a co-offender) which merely forms part of that range.<sup>98</sup>

Justice Simpson also made the point in *R v F*:

Consistency in sentencing may be achieved by the slavish adoption, by a subsequent court, of a sentence selected by an earlier court when the facts are comparable. However, that would be consistency purchased at the cost of the sacrifice of the proper exercise of judicial discretion. Within the bounds of the appropriate range of sentences, each sentencing judge (either at first instance or following appeal) must bring to bear his or her own independent assessment of the particular case.

I do not find the argument in relation to the desirability of consistency in sentencing persuasive in this case. Consistency is not derived from a single case. Consistency in sentencing will be achieved from a range of cases involving similar features, and also variables. It depends upon the accumulated wisdom and experience of sentencing judges. In my opinion a single case is inadequate to enable a principled consistent approach. ...

Moreover, while consistency in sentencing is, no doubt, an important goal, equally important for the administration of justice is the public perception that sentences imposed by criminal courts are appropriate to the nature and seriousness of the crime committed.<sup>99</sup>

- 3.74 The High Court discussed concepts of systematic and reasonable consistency in *Hili v The Queen*.<sup>100</sup> Although that case was concerned with the federal criminal justice system, the observations about the application of these concepts to offenders charged with similar offences arising out of unrelated events are equally applicable to the NSW criminal justice system. As was pointed out, they require “consistency in the application of the relevant legal principles, not some numerical and mathematical equivalence”.<sup>101</sup> The decisions of intermediate courts of appeal maintain that consistency, whereas the parity principle is focused on the particular case.<sup>102</sup>
- 3.75 It is implicit that, while reference to a sentencing pattern can assist in the individual case, it is the consistent application of the key sentencing principles noted above, in the light of the relevant facts and recognised sentencing factors, that has primacy and that drives consistency. An attempt to secure consistency through a slavish search for a correlation between the case at hand and individual unrelated cases risks ignoring the inevitable differences in their objective and subjective

98. *R v Morgan* (1993) 70 A Crim R 368, 371 (Hunt CJ at CL, Allen J and Loveday AJ agreeing).

99. *R v Fong* [2002] NSWCCA 320; 132 A Crim R 308 [38]-[39], Meagher JA, at [41] and Howie J, at [52] preferred the words “more important” to “equally important” in the last quoted passage. See also *DPP (Cth) v De La Rosa* [2010] NSWCCA 194; 79 NSWLR 1 [303]-[304] as to the use to which sentencing patterns are to be put.

100. *Hili v The Queen* [2010] HCA 45; 242 CLR 520 [47]-[56]; *Green v The Queen* [2011] HCA 49; 244 CLR 462 [29].

101. *Hili v The Queen* [2010] HCA 45; 242 CLR 520 [18]; *Green v The Queen* [2011] HCA 49; 244 CLR 462 [29].

102. *Green v The Queen* [2011] HCA 49; 244 CLR 462 [29].

circumstances, the exercise of judicial discretion that was involved in each instance, and the need for individualised justice.<sup>103</sup>

- 3.76 Upon that basis, consistency (outside cases that attract the parity principle) can be better addressed as a general objective of a revised Crimes (Sentencing) Act, rather than as a principle that requires separate statement.

### Parsimony

- 3.77 Apart from the recognition that imprisonment is a sentence of last resort, the principle of parsimony is not currently part of NSW sentencing law.

- 3.78 Victoria has, however, recognised parsimony by providing that a court “must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed”.<sup>104</sup>

- 3.79 The *Sentencing Act 2002* (NZ) requires that, in sentencing an offender, the court “must impose the least restrictive outcome that is appropriate in the circumstances, in accordance with the hierarchy of sentences and orders set out in section 10A”.<sup>105</sup> This hierarchy is as follows:

- (a) discharge or order to come up for sentence if called on:
- (b) sentences of a fine and reparation:
- (c) community-based sentences of community work and supervision:
- (d) community-based sentences of intensive supervision and community detention:
- (e) sentence of home detention:
- (f) sentence of imprisonment.<sup>106</sup>

- 3.80 A Canadian academic has said in relation to the New Zealand provision:

The language of the provision could not be clearer, or more directive. By eschewing the term “sentence” or sanction in favour of “outcome” the provision also clears the way for courts to consider alternative measures.<sup>107</sup>

- 3.81 The ALRC, in its report on the sentencing of federal offenders, proposed the statutory recognition of parsimony. It noted that parsimony allows for recognition of the inherent dignity and worth of offenders by mandating concern for their welfare, acknowledges that some sentences may have devastating consequences for both

103. *R v Todoroski* [2010] NSWCCA 75 [26].

104. *Sentencing Act 1991* (Vic) s 5(3).

105. *Sentencing Act 2002* (NZ) s 8(g).

106. *Sentencing Act 2002* (NZ) s 10A.

107. J V Roberts, “Sentencing Reform in New Zealand: An Analysis of the Sentencing Act 2002” (2003) 36 *Australian and New Zealand Journal of Criminology* 249, 263.

- the individual offender and wider community, as well as ensuring that courts exercise restraint when punishing those who violate laws of the state.<sup>108</sup>
- 3.82 There was a divergence of views in submissions on the issue of parsimony. Some stakeholders supported the introduction of the principle in NSW in similar terms to that expressed in Victoria,<sup>109</sup> while some stakeholders were opposed to any such change.<sup>110</sup>
- 3.83 For example, the NSW Bar Association, in support of parsimony, submitted that the Victorian legislation, in directing the court's consideration to the purposes for which a sentence is being imposed, focuses its attention on the question of whether a more severe sentence was "necessary". The Bar Association pointed to the significantly more severe pattern of sentencing in NSW compared with Victoria, and commented that "[t]his has nothing to do with the severity of offending, and all to do with the basis (including the sentencing statutes) upon which courts are required to sentence offenders". The introduction of the parsimony principle in NSW it suggested would "go some way" to addressing the differences.<sup>111</sup>
- 3.84 The Law Society<sup>112</sup> and the Criminal Law Committee of the NSW Young Lawyers<sup>113</sup> did not support the introduction of the principle on the basis that it was likely to fetter the discretion of the court to impose a sentence within the range of sentences fairly available.
- 3.85 Attempts to introduce parsimony as a principle of sentencing in NSW have been "authoritatively rejected".<sup>114</sup> The notion that the sentence that should be imposed is the minimum sentence that reflects the objective and subjective features of a case and satisfies the purposes of sentencing has been held to be incompatible with the recognised and well entrenched principle that a range of appropriate sentences exists for any given case.<sup>115</sup>
- 3.86 The need to preserve flexibility in sentencing that underpins the rejection of parsimony, and its focus on a single correct sentence as a sentencing principle, is consistent with the following fundamental statement of the process of sentencing in the High Court's majority judgment in *Markarian v The Queen*:

Express legislative provisions apart, neither principle, nor any of the grounds of appellate review, dictates the particular path that a sentencer, passing sentence in a case where the penalty is not fixed by statute, must follow in reasoning to

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108. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [5.10].

109. The Public Defenders, *Submission SE2*, 7; NSW Bar Association, *Submission SE9*, 14; Legal Aid NSW, *Submission SE11*, 16. The Children's Court supported introducing the parsimony principle in relation to juvenile offenders: Children's Court of NSW, *Submission SE4*, 8.

110. NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 8; Law Society of NSW, *Submission SE7*, 10; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 15; NSW Police Force, *Submission SE14*, 4.

111. NSW Bar Association, *Submission SE9*, 14.

112. Law Society of NSW, *Submission SE7*, 10.

113. NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 15.

114. *Foster v R* [2011] NSWCCA 285 [4] (McClellan CJ at CL), citing *Blundell v R* [2008] NSWCCA 63; 70 NSWLR 660 [38]-[48] (Simpson J, Grove and Hulme JJ agreeing). See also *Kelly v R* [2007] NSWCCA 357 [28]-[31] (Basten JA).

115. *Blundell v R* [2008] NSWCCA 63; 70 NSWLR 660 [39], [47].

the conclusion that the sentence to be imposed should be fixed as it is. The judgment is a discretionary judgment and, as the bases for appellate review reveal, what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) in forming the conclusion reached. As has now been pointed out more than once, there is no single correct sentence. And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies.<sup>116</sup>

- 3.87 While the enactment of a principle of parsimony in NSW might result in the imposition of lower sentences, this could be at the cost of limiting the well-established judicial discretion to impose a sentence within the range of appropriate sentences, having regard to all of the objective and subjective circumstances of the case.
- 3.88 We consider that an application of the principle of proportionality and the principle of treating imprisonment as a last resort adequately addresses the sentencing exercise consistently with the High Court’s statement in *Markarian*. The introduction of a principle of parsimony would not seem to advance the process in a beneficial way, would risk adding to its complexity, and would potentially require a significant departure from established sentencing practice in NSW.

### Instinctive synthesis

- 3.89 The concept of “instinctive synthesis” is fundamental to the way in which courts are now required to approach sentencing.
- 3.90 In *Muldock v The Queen*,<sup>117</sup> the High Court unanimously endorsed Justice McHugh’s statement (in the earlier decision of *Markarian*) as to what is involved in the “instinctive synthesis approach” that is to be used instead of the two-tier, or two-step, approach that had previously been used. As Justice McHugh explained in that case:

By two-tier sentencing, I mean the method of sentencing by which a judge first determines a sentence by reference to the “objective circumstances” of the case. This is the first tier of the process. The judge then increases or reduces this hypothetical sentence incrementally or decrementally by reference to other factors, usually, but not always, personal to the accused. This is the second tier. By instinctive synthesis, I mean the method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence.<sup>118</sup>

- 3.91 In terms of transparency of sentencing, some commentators have suggested that the instinctive synthesis approach renders the reasoning process less open to scrutiny and is more likely to produce inconsistency. It has also been suggested that

116. *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

117. *Muldock v The Queen* [2011] HCA 39; 244 CLR 120.

118. *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 [51].

it does not sit comfortably with the quantification of discounts such as for a plea of guilty or assistance to authorities.<sup>119</sup>

- 3.92 This approach does rely on the capacity of the court to reconcile all of the relevant factors, and to impose a just and appropriate sentence without being required to disclose the precise manner in which it reconciled all of those factors. But this is not to say that the process is completely mysterious or exempt from review. As Justices Adam and Crockett had earlier explained in *R v Williscroft*:

Now, ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process. ... Indeed, in *R v Geddes* (1936) 36 SR (NSW) 554, Sir Frederick Jordan ... [observed] it is not sufficient for a sentence to avoid subsequent review that it can be said of it that it is the product of what is admittedly a wide discretion conferred upon a judge who can be shown to have given some consideration to all relevant elements. There must be some recognition of and accord with "the moral sense of the community" in the selection of the appropriate penalty. No matter how ephemeral that phrase may be or how elusive the task of evaluation of such a concept may prove in a given case, the task must nevertheless be essayed. The problem really is little different from and no less difficult than that of ascertaining "community standards" for the purposes of assessing damages in a civil case.<sup>120</sup>

- 3.93 The exception recognised by the High Court to the one-step instinctive synthesis approach relates to the fact that some scope needs to be preserved for arithmetic adjustments, for example, in relation to discounts for a guilty plea or for assistance given by the offender to the authorities, and for totality when the offender is to be sentenced for multiple offences. As the majority of the Court said in *Markarian*:

[I]t cannot now be doubted that sentencing courts may not add and subtract item by item from some apparently subliminally derived figure, passages of time in order to fix the time which an offender must serve in prison. That is not to say that in a simple case, in which, for example, the circumstances of the crime have to be weighed against one or a small number of other important matters, indulgence in arithmetical deduction by the sentencing judges should be absolutely forbidden. An invitation to a sentencing judge to engage in a process of "instinctive synthesis", as useful as shorthand terminology may on occasions be, is not desirable if no more is said or understood about what that means. The expression "instinctive synthesis" may then be understood to suggest an arcane process into the mysteries of which only judges can be initiated. The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public. There may be occasions when some indulgence in an arithmetical process will better serve these ends.<sup>121</sup>

- 3.94 There appears to be a general acceptance in other Australian jurisdictions of the instinctive synthesis approach to sentencing and it seems to have become embedded in sentencing practice in NSW. We do not propose any legislative change. As it concerns a process by which a court balances the various purposes,

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119. D Brown and others (ed), *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (5th ed, Federation Press, 2011) [12.4.1].

120. *R v Williscroft* [1975] VR 292, 300-301.

121. *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

principles, and factors that are to be taken into account, we do not see a case to include it in the general list of principles.

### Sentencing guideposts

- 3.95 In Chapter 18, we support retaining in a revised Crimes (Sentencing) Act the guideline judgement provisions that are currently contained in the CSPA. We do not consider it necessary to add, as a key principle of sentencing, a requirement to take those judgments into account. That this is required is implicit in the legislation and in the decisions that relate to their proper use.<sup>122</sup>
- 3.96 For similar reasons we do not consider it necessary to add as a sentencing principle, a requirement that the court take into account the available maximum sentence for an offence when setting a sentence for the offence. It is similarly implicit in the fact that a maximum sentence has been fixed, that it is reserved for the worst case, and otherwise its relevance is well-established in the common law.

### Double punishment and double-counting

- 3.97 It is a recognised rule that an offender should not be punished twice for the commission of offences with common elements.<sup>123</sup> In an appropriate case, a court can comply with this rule by requiring that an offender serve the sentences concurrently. This rule is well-recognised and can be treated as a subset of the principles of proportionality and totality. In our view, it does not require separate treatment as a principle of sentencing.
- 3.98 The rule against double counting is reflected in s 21A of the CSPA, although as we discuss in Chapter 4 this provision has proved particularly problematic. In substance it has precluded the court from taking into account an “aggravating factor”, within the meaning of that section when that factor is also an element of the offence. Having regard to the approach taken in relation to this provision in Chapter 4 we do not see any need for inclusion of a principle that would preclude double-counting. It is sufficiently catered for within the principles of proportionality and totality.

### Reasons for sentence

- 3.99 The common law requires courts to give adequate reasons when imposing a sentence, including the findings of fact in relation to the offending, the characteristics of the offender that are taken into account, and the reasoning process that they apply.<sup>124</sup> It is important for the offender, the community, and an appeal court to know the basis upon which a court imposes a sentence, and we do not suggest that there should be any retreat from this requirement.
- 3.100 In some instances specific legislative requirements supplement the common law requirement. For example, for standard non-parole period offences, the CSPA

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122. Para [18.41]-[18.43].

123. *Pearce v The Queen* [1998] HCA 57; 194 CLR 610 [40].

124. See, eg: *R v Lesi* [2010] NSWCCA 240 [37].

requires the court to give reasons for departing from the standard non-parole period including where it imposes a non-custodial sentence.<sup>125</sup> The High Court stressed recently in *Muldrock v The Queen* that this obligation encompasses a requirement to “identify fully the facts, matters and circumstances which the judge concludes bear upon the judgment that is reached about the appropriate sentence to be imposed”.<sup>126</sup> The CSPA also requires that a court, if it imposes a sentence of six months or less, record its reasons for deciding that no other sentence but imprisonment is appropriate.<sup>127</sup>

- 3.101 In its 2005 report, the ALRC recommended a legislative requirement for a court to state its reasons when sentencing a federal offender for an indictable or summary offence.<sup>128</sup> The ALRC observed that the giving and recording of reasons is likely to lead to better sentencing over time, require a more structured and considered approach, provide evidence that the court has considered and applied the correct principles and has the potential to promote consistency. The ALRC also noted that transparency in judicial decision making is related to public confidence in the judiciary and the criminal justice system.<sup>129</sup>
- 3.102 The majority of stakeholders considered it unnecessary to codify a general duty of a court to give reasons for its sentence because it is well-established in common law. However, there was also strong support for the continuation of requirements in the CSPA for the court to give reasons in specific situations, such as imposing a sentence of less than six months.<sup>130</sup> The Law Society of NSW submitted that the requirement to give reasons promotes transparency.<sup>131</sup> The Police Association of NSW submitted that legislation should require a court to “enunciate the principles applied as relevant and the factors considered in applying those principles” in order to ensure the court considered such principles and factors and to increase transparency.<sup>132</sup> However, the ODPP did not support the introduction of a statutory requirement to give reasons for doing certain things, as this “invites error in the sentencing task”. It suggested that judicial education could adequately address any difficulties with the imposition of sentences of less than six months.<sup>133</sup>
- 3.103 We consider that the common law requirement for a court to give reasons for its sentence is sufficient and that no general statutory statement is required. This does not preclude parliament expressly requiring the delivery of reasons in relation to specific instances, although in these cases the failure to do so should not invalidate the sentence.

125. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(4), s 54C.

126. *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120 [29].

127. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(2).

128. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) rec 19-1.

129. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [19.11].

130. The Public Defenders, *Submission SE2*, 7; Children’s Court of NSW, *Submission SE4*, 7; Law Society of NSW, *Submission SE7*, 9; NSW Bar Association, *Submission SE9*, 13; G Henson, *Submission SE10*, 5; Legal Aid NSW, *Submission SE11*, 15; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 14; NSW Police Force, *Submission SE14*, 4; Corrective Services NSW, *Submission SE51*, 8.

131. Law Society of NSW, *Submission SE7*, 9.

132. Police Association of NSW, *Submission SE6*, 21.

133. NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 8.



- 3.104 As Justice Basten has suggested,<sup>134</sup> there would be merit in adopting an expression such as “judgment on sentence” or “reasons for sentence”, rather than “remarks on sentence”, to reflect more accurately the nature of the judicial act of sentencing an offender. However we see this as a matter for the courts. We note that the CSPA already refers to courts giving “reasons” rather than making “remarks” and it would therefore be consistent with its provision for the expression “remarks on sentence” to fall into disuse.

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134. *Hendricks v R* [2011] NSWCCA 203 [9]. The proposal is supported by NSW Bar Association, *Submission SE46*, 6-7. See also *Turner v R* [2011] NSWCCA 189 [1]; and *R v Windle* [2012] NSWCCA 222 [3].



## 4. Relevant factors on sentencing

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### In brief

Section 21A currently lists 22 aggravating and 13 mitigating factors that courts must take into account when formulating an appropriate sentence, even though many of these are already addressed by common law. The proliferation of s 21A factors and their binary division into “aggravating” and “mitigating” has made them difficult to apply and they have become a frequent source of appeals. We propose replacing them with six general factors that courts should consider in sentencing and recommend that the detail be left to the common law. We also propose a set of separate provisions to deal with discrete issues that arise in particular cases.

<b>History of s 21A aggravating and mitigating factors</b> .....	70
Section 21A – version 1.....	70
Section 21A – version 2.....	71
<b>Aggravating and mitigating factors in other jurisdictions</b> .....	72
<b>Should s 21A be retained, abolished or reformed?</b> .....	74
Advantages and disadvantages of s 21A .....	74
Our previous view, and the views of other law reform commissions.....	78
Our current view .....	79
<b>General structure of the proposed new provision</b> .....	81
<b>Sentencing factors included in the proposed new provision</b> .....	82
(a) The nature, circumstances and seriousness of the offence .....	84
(b) The personal circumstances and vulnerability of any victim.....	85
(c) The extent of any injury, emotional harm, loss or damage resulting from the offence or any significant risk or danger created by the offence, including any risk to national security .....	86
(d) The offender’s character, general background, offending history, age, and physical and mental condition (including any cognitive or mental health impairment) .....	88
(e) The extent of the offender’s remorse for the offence.....	90
(f) The prospects of the offender’s rehabilitation .....	91
<b>Other factors we recommend not be included</b> .....	91
Provocation .....	92
Other offences that are required or permitted to be taken into account.....	92
Offence forming part of a course of conduct and representative offences.....	93
Deterrence and the need for adequate punishment .....	93
Effect on offender’s family or dependants .....	94
Deportation and foreign nationals.....	94
<b>Factors to be addressed by separate provisions</b> .....	96
Pleas of guilty, assistance to the authorities, and facilitating the interests of justice .....	96
Time spent in custody, etc.....	96
Sex offender restrictions.....	96
Confiscation of assets or forfeiture of proceeds of crime.....	98
Good character in sexual offences against children .....	102
Offence committed while the offender was unlawfully at large or on conditional liberty.....	105
Hate crimes .....	107
Criminal organisations.....	113

- 4.1 In this chapter we deal with the linked questions:
- what are the factors that the court should take into account when deciding on a sentence; and
  - whether those factors should be derived according to the common law or be stated or restated in statutory form in whole or in part.
- 4.2 The factors to be taken into account on sentence are distinct from the purposes of sentencing discussed in Chapter 2 and the guiding principles of sentencing discussed in Chapter 3, however a court must balance all of these considerations in sentencing using the instinctive synthesis approach discussed in Chapter 3.

## History of s 21A aggravating and mitigating factors

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- 4.3 Traditionally the courts looked to the common law for the subjective and objective factors that need to be taken into account when imposing a sentence. This was the case in NSW until 15 April 2002 when the first version of s 21A of the *Crimes (Sentencing Procedure) Act 1999 (NSW) (CSPA)* came into force.<sup>1</sup>

### Section 21A – version 1

- 4.4 Section 21A of the CSPA originated in a private member’s Bill that was introduced to increase the penalties for the assault of aged people.<sup>2</sup> However it was amended to have a much wider reach.<sup>3</sup> In its initial formulation, it provided that:
- the court was required, in determining the sentence, to impose a sentence of a severity that was appropriate in all the circumstances of the case;<sup>4</sup>
  - for that purpose, the court was required to take into account certain specified factors that were relevant and known to it, as well as three purposes of sentencing - general and specific deterrence, protection of the community and the need to ensure the offender is adequately punished for the offence;<sup>5</sup>
  - the specified factors were in addition to any other factors that the court was required or permitted to take into account “under this Act or any other law”;<sup>6</sup>
  - the specified factors included objective circumstances relating to the offence, and subjective circumstances personal to the offender which were not divided into aggravating and mitigating factors.

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1. *Crimes (Sentencing Procedure) Amendment (General Sentencing Principles) Act 2002 (NSW)*.  
2. *Crimes (Sentencing Procedure) Amendment (Assaults on Aged Persons) Bill 2000 (NSW)*. See NSW, *Parliamentary Debates*, Legislative Council, 26 September 2001, 17133-17136.  
3. *Crimes (Sentencing Procedure) Amendment (General Sentencing Principles) Bill 2001 (NSW)*. See NSW, *Parliamentary Debates*, Legislative Council, 29 November 2001, 19114-19116.  
4. *Crimes (Sentencing Procedure) Act 1999 (NSW)* s 21A(1) as in force 15 April 2002–31 January 2003.  
5. *Crimes (Sentencing Procedure) Act 1999 (NSW)* s 21A(2)(f)-(h) as in force 15 April 2002–31 January 2003.  
6. *Crimes (Sentencing Procedure) Act 1999 (NSW)* s 21A(4) as in force 15 April 2002–31 January 2003.

- 4.5 The provision was substantially based on s 16A of the *Crimes Act 1914* (Cth), which still applies to the sentencing of offenders convicted of offences arising under Commonwealth laws.

### Section 21A – version 2

- 4.6 The *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW) introduced a new s 21A which commenced on 1 February 2003. Apart from specifying the factors that a court is required to take into account, this Act introduced a more extensive statutory statement of the purposes of sentencing in a separate section.<sup>7</sup> It also introduced the standard non-parole period (“SNPP”) regime.<sup>8</sup>
- 4.7 The current version of s 21A (which has been the subject of a number of amendments since its first enactment) has the following features:
- It divides the specified factors into a binary list comprising 22 aggravating and 13 mitigating factors that the court is required to take into account.<sup>9</sup>
  - It specifies that the court is not to have additional regard to any such aggravating factor if it is an element of the offence (s 21A(2)).
  - It specifies that the court is to take into account “any other objective or subjective factor that affects the relative seriousness of the offence” (s 21A(1)(c)).
  - It provides that the matters specified are “in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law” (s 21A(1)).
  - It provides that the court is not to have regard to any of the specified aggravating or mitigating factors in sentencing an offender “if it would be contrary to any Act or rule of law to do so” (s 21A(4)).
  - It provides that the fact that any of the specified aggravating or mitigating factors is relevant and known to the court does not require it to increase or reduce the sentence for the offence (s 21A(5)).
- 4.8 Additionally, it provides a special rule for child sexual offences in stating that “the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence”.<sup>10</sup>

7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.

8. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A. See Chapter 7.

9. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)-(3). Eight of the aggravating factors were added in subsequent amendments after 1 February 2003.

10. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5A).

- 4.9 Section 21A applies to all sentencing exercises irrespective of whether a custodial or non-custodial sanction is imposed. The weight that is attached to any particular factor is a matter to be determined by the court in each case.<sup>11</sup>
- 4.10 Most of the factors referred to in s 21A reflect principles that courts routinely took into account as part of the common law. The courts have accepted that s 21A was not intended to operate as “an exhaustive or exclusive code”, and that they may still properly take into account other statutory and common law factors.<sup>12</sup> The courts have also accepted that parliament did not intend to overrule or disturb the body of principle that the courts had developed, nor to restrict its application.<sup>13</sup> In providing that the court is not to have regard to any of the specified aggravating or mitigating factors if it would be contrary to any Act or rule of law to do so,<sup>14</sup> the legislation clarified that the listed factors cannot be taken into account in a way that would be inconsistent with general sentencing principle and policy.<sup>15</sup>
- 4.11 Although s 21A has general application, it is particularly relevant for sentencing offences (including “Table” offences<sup>16</sup>) that are subject to the SNPP regime.<sup>17</sup> This is because the CSPA provides that the reasons listed in s 21A are the *only* reasons for which a court may set a non-parole period that is longer or shorter than the SNPP.<sup>18</sup>

## Aggravating and mitigating factors in other jurisdictions

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- 4.12 In addition to s 16A of the *Crimes Act 1914* (Cth), there are other examples in comparable jurisdictions of provisions that list the factors that are to be taken into account on sentence. They vary in the level of detail provided, although most do not divide the factors into separate categories of aggravating and mitigating factors. Instead, they tend to express the factors under unclassified, neutral headings.<sup>19</sup>
- 4.13 Although Queensland<sup>20</sup> and the ACT<sup>21</sup> list some specific factors to which the court must have regard, the NSW provision contains the greatest specificity among Australian jurisdictions. The *Sentencing Act 2002* (NZ) is closer to the NSW provision as it lists a number of specific factors that are designated as either aggravating or mitigating.<sup>22</sup> Canada and England and Wales adopt a similar

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11. *R v Wickham* [2004] NSWCCA 193 [24].

12. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168 [104].

13. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168 [56].

14. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(4).

15. *R v Wickham* [2004] NSWCCA 193 [23]-[26].

16. *Criminal Procedure Act 1986* (NSW) sch 1 Table 1, Table 2.

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

18. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(3).

19. See, eg: *Crimes (Sentencing) Act 2005* (ACT) s 33; *Sentencing Act* (NT) s 5, s 6, s 6A; *Penalties and Sentences Act 1992* (Qld) s 9; *Criminal Law (Sentencing) Act 1988* (SA) s 10.

20. *Penalties and Sentences Act 1992* (Qld) s 9.

21. *Crimes (Sentencing) Act 2005* (ACT) s 33-36.

22. *Sentencing Act 2002* (NZ) s 9, s 9A.

approach but to a lesser extent.<sup>23</sup> Legislation in the Northern Territory lists aggravating factors under one heading while the other factors are listed in neutral terms simply as factors to which a court must have regard.<sup>24</sup>

- 4.14 The *Sentencing Act 1991* (Vic) lists a number of specified factors in neutral terms that “a court must have regard to” in sentencing an offender, and includes in this list “the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances”; without seeking to divide them into binary lists.<sup>25</sup>
- 4.15 In Tasmania, s 389(3) of the *Criminal Code* (Tas) provides that the punishment for any crime shall be such as the judge shall “think fit in the circumstances of each particular case”. Apart from stating that the parties may address the court on any “aggravating” or “extenuating circumstances”, the *Sentencing Act 1997* (Tas) does not list the factors the court should take into account in determining a sentence.<sup>26</sup>
- 4.16 Although Western Australia gives some additional legislative guidance, the process is largely left to the common law. Section 6(1) of the *Sentencing Act 1995* (WA) provides that the sentences imposed must be “commensurate with the seriousness of the offence”, which courts must determine by taking into account:
- (a) the statutory penalty for the offence; and
  - (b) the circumstances of the commission of the offence, including the vulnerability of any victim of the offence; and
  - (c) any aggravating factors; and
  - (d) any mitigating factors.<sup>27</sup>

Further content is not given to the expression “the circumstances of the commission of the offence”. However, “aggravating factors” are defined as “factors which, in the court’s opinion, increase the culpability of the offender”; while “mitigating factors” are defined as “factors which, in the court’s opinion, decrease the culpability of the offender or decrease the extent to which the offender should be punished.”<sup>28</sup> The Act specifies a limited number of factors that are *not* to be considered as aggravating an offence.<sup>29</sup> It identifies expressly or by implication two factors that are mitigating factors<sup>30</sup> and one factor that is not a mitigating factor.<sup>31</sup>

23. *Criminal Code*, RSC 1985, c C-46 (Can) s 718.2; *Criminal Justice Act 2003* (UK) s 143, s 145-146.

24. *Sentencing Act* (NT) s 5(2), s 6A.

25. *Sentencing Act 1991* (Vic) s 5(2AC).

26. *Sentencing Act 1997* (Tas) s 80.

27. *Sentencing Act 1995* (WA) s 6(2).

28. *Sentencing Act 1995* (WA) s 7(1), s 8(1).

29. *Sentencing Act 1995* (WA) s 7(2): an offence is not aggravated because an offender pleaded not guilty or has a criminal record, or because a previous sentence has not achieved its purpose.

30. *Sentencing Act 1995* (WA) s 8(3a), (5): facilitation by the offender of criminal property confiscation and assistance to law enforcement.

31. *Sentencing Act 1995* (WA) s 8(3): the fact that criminal confiscation has occurred.

## Should s 21A be retained, abolished or reformed?

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- 4.17 We sought specific comment from stakeholders on three options for reform of s 21A:
- abolish s 21A and return to the common law;
  - retain s 21A in its current form; and
  - reform s 21A by providing a single list of factors without a division into aggravating and mitigating factors.
- 4.18 There was broad support from stakeholders for repeal of the section in its current form.<sup>32</sup> In substance the reasons advanced for its repeal were based on the argument that it has made the process of sentencing more complex without significantly adding to the common law and that it has caused an excessive number of appeals.<sup>33</sup>

### Advantages and disadvantages of s 21A

#### *Transparency and guidance*

- 4.19 The principal argument offered in support of s 21A, or some simplified version, is that it:
- provides a transparent set of factors that can be understood by the public as the values that underlie sentencing;<sup>34</sup> and
  - gives guidance for the courts.
- 4.20 Transparency can assist those involved in the criminal justice system. For example, Corrective Services NSW advised that it helps staff to understand the reasons for sentences imposed on individual offenders, which improves the way their issues are addressed.<sup>35</sup> There is force in this argument. It is a legitimate role of legislation to make values transparent and to establish frameworks that the public can understand.
- 4.21 The number of potentially relevant (particularly mitigating) factors that are left unstated in s 21A qualify the strength of this argument to a degree. These factors

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32. The Public Defenders, *Submission SE2*, 8; NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 9; Law Society of NSW, *Submission SE7*, 11; Legal Aid NSW, *Submission SE11*, 18; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 16-17; I Temby, *Preliminary submission PSE2*, 1; R Blanch, *Preliminary submission PSE3*, 1; Crime and Justice Reform Committee, *Preliminary submission PSE12*, 2; Probation and Parole Officers' Association of NSW, *Preliminary submission PSE20*, 8.

33. NSW Young Lawyers Criminal Law Committee, *Preliminary submission PSE11*, 2-3; District Court of NSW, *Preliminary submission PSE3*, 1; Legal Aid NSW, *Preliminary submission PSE18*, 1, referring to Judicial Commission of NSW, *Sentencing Bench Book* [11-020].

34. Homicide Victims' Support Group, *Submission SE8*, 11-12.

35. Corrective Services NSW, *Submission SE51*, 9.



include extra-curial punishment,<sup>36</sup> loss of reputation, exceptional harm or hardship to third parties,<sup>37</sup> special hardship<sup>38</sup> where associated with illness,<sup>39</sup> loss of employment or future superannuation benefits,<sup>40</sup> past sexual assault of the offender (where it has a causal link to the offence),<sup>41</sup> involuntary drug addiction (such as from pain or injury, from prescribed medication or occurring from a very early age), intoxication (which might be aggravating, mitigating or neutral depending on the circumstances),<sup>42</sup> delay in prosecution or sentencing<sup>43</sup> and entrapment.<sup>44</sup>

### *Binary approach of s 21A to sentencing factors*

4.22 The division of factors under s 21A into a binary list of aggravating or mitigating circumstances has been criticised.<sup>45</sup>

4.23 The Judicial Commission of NSW's *Sentencing Bench Book* describes the characterisation of a sentencing factor as either aggravating or mitigating as being "too simplistic and sometimes unhelpful".<sup>46</sup> As was observed in *Weininger v The Queen*:

Many matters that must be taken into account in fixing a sentence are matters whose proper characterisation may lie somewhere along a line between two extremes. That is inevitably so. The matters that must be taken into account in sentencing an offender include many matters of and concerning human behaviour. It is, therefore, to invite error to present every question for a sentencer who is assessing a matter which is to be taken into account as a choice between extremes, one classified as aggravating and the opposite extreme classified as mitigating. Neither human behaviour, nor fixing of sentences is so simple.<sup>47</sup>

4.24 Similarly in *Wong v The Queen*, the High Court cautioned against labelling circumstances as either "aggravating" or "mitigating" where this leads to automatic

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36. See, eg, *R v Hannigan* [2009] QCA 40; 193 A Crim R 399 [25]; *Clinton v R* [2009] NSWCCA 276 [31]; *Silvano v R* [2008] NSWCCA 118; 184 A Crim R 593 [29]; *Sharpe v R* [2006] NSWCCA 255 [61]-[67]; *Alameddine v R* [2006] NSWCCA 317; *Lancaster v R* (1991) 58 A Crim R 290; *R v Huang* [2000] NSWCCA 238; 113 A Crim R 386.
37. See, eg, *R v T* (Unreported, NSWCCA 15 March 1990); *R v Edwards* (1996) 90 A Crim R 510; *R v Togias* [2001] NSWCCA 522; 127 A Crim R 23 [69]-[79].
38. See, eg, *R v Totten* [2003] NSWCCA 207 [43]; *R v Scott* [2003] NSWCCA 28 [34]; *R v Mostyn* [2004] NSWCCA 97; 145 A Crim R 304 [179]; *RWB v R* [2010] NSWCCA 147; 202 A Crim R 209 [192]-[195].
39. See, eg, *R v Achurch* [2011] NSWCCA 186; 216 A Crim R 152.
40. See, eg, *Crimes (Superannuation Benefits) Act 1989* (Cth) s 43.
41. See, eg, *R v Cunningham* [2006] NSWCCA 176 [67]; *Dousha v R* [2008] NSWCCA 263 [47].
42. See, eg, the cases reviewed by the Judicial Commission of NSW, *Sentencing Bench Book* [10-480], [50-150].
43. See, eg, *R v Borkowski* [2009] NSWCCA 102; 195 A Crim R 1 [37]-[40]; *Blanco v R* [1999] NSWCCA 121; 106 A Crim R 303 [16]. Delay may also require the sentence to be imposed by reference to pre-existing sentencing patterns: *R v MJR* [2002] NSWCCA 129; 54 NSWLR 368.
44. See, eg, *Taouk v R* (1992) 65 A Crim R 387; *R v Lipton* [2011] NSWCCA 247 [68].
45. Legal Aid NSW, *Submission SE11*, 17.
46. Judicial Commission of NSW, *Sentencing Bench Book* [9-720].
47. *Weininger v The Queen* [2003] HCA 14; 212 CLR 629 [22].

consequences.<sup>48</sup> As pointed out in *Einfeld*,<sup>49</sup> some examples of the difficulty associated with the binary approach in s 21A include:

- the offence was “part of a planned or organised criminal activity” is an aggravating factor<sup>50</sup> and that it was “not part of a planned or organised criminal activity” is a mitigating factor;<sup>51</sup> and
- “the injury, emotional harm, loss or damage caused by the offence was substantial” is an aggravating factor<sup>52</sup> but, if “not substantial”, then it is a mitigating factor.<sup>53</sup>

4.25 In contrast, the common law has recognised that the absence of a factor that would elevate the seriousness of the offending is not a matter of mitigation, and vice versa.<sup>54</sup> There is also something of an anomaly in that an offender’s plea of guilty, pre-trial disclosure and assistance to law enforcement authorities are listed as mitigating factors,<sup>55</sup> yet they are dealt with separately, and noted as such, as discounting factors in other sections of the Act.<sup>56</sup>

4.26 In each of its 1988 and 2006 reports on sentencing, the Australian Law Reform Commission (ALRC) recommended against adopting any distinction between aggravating and mitigating factors.<sup>57</sup>

#### *Interaction of s 21A with common law*

4.27 A number of the submissions asserted that s 21A does little more than replicate parts of the common law,<sup>58</sup> or alternatively that their interrelationship creates unwarranted complexity<sup>59</sup> and leads to a risk of error.<sup>60</sup>

4.28 Difficulties have arisen in relation to the way in which the court should take into account some of the specified aggravating factors where the common law has qualified the weight to be given to them. For example, courts have read down the requirement to take into account an offender’s record of previous convictions<sup>61</sup> to

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48. *Wong v The Queen* [2001] HCA 64; 207 CLR 584 [129]; R G Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, Oxford UP, 1999) [3.103].

49. *Einfeld v R* [2010] NSWCCA 87; 200 A Crim R 1 [74].

50. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(n).

51. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(b).

52. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(g).

53. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(a).

54. *Saddler v R* [2009] NSWCCA 83; 194 A Crim R 452 [4].

55. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(k)-(m).

56. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22, s 22A, s 23.

57. Australian Law Reform Commission, *Sentencing*, Report 44 (1988) rec 94; Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [6.150]-[6.159], rec 6-4.

58. The Public Defenders, *Submission SE2*, 8; NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 9; Law Society of NSW, *Submission SE7*, 11; Legal Aid NSW, *Submission SE11*, 17; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 16-17; I Temby, *Preliminary submission PSE2*, 1; R Blanch, *Preliminary submission PSE3*, 1.

59. Legal Aid NSW, *Submission SE11*, 17; The Public Defenders, *Submission SE2*, 7.

60. Law Society of NSW, *Submission SE7*, 10.

61. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(d).

ensure that it is only used in a way that is consistent with the proportionality principle.<sup>62</sup>

### *Problems with the “checklist” approach of s 21A*

4.29 Another criticism raised in the submissions is that courts “often ... feel obliged to go through the various factors mentioned as a checklist”,<sup>63</sup> in order to ensure that the sentence is not vulnerable to the argument on appeal that the court failed to consider a relevant factor.

4.30 The NSW Court of Criminal Appeal (CCA) has recently observed that while it is necessary that courts take aggravating and mitigating factors into account to the extent that they are relevant, there is no requirement for a court to refer to every s 21A factor as though running through a “checklist”.<sup>64</sup> There are potential dangers in following the checklist approach without regard to the qualifications necessarily expressed in the section<sup>65</sup> or without an explanation of how they were used.<sup>66</sup>

### *Double counting of aggravating factors*

4.31 A particular problem that has emerged in the application of s 21A has been that courts have double counted aggravating factors that are elements of the offence<sup>67</sup> or inherent characteristics of the class of offences in which it is included.<sup>68</sup> Although s 21A(2) makes it clear that courts cannot give “additional regard” to a factor that is an element of the offence, or an inherent characteristic of it, double counting has been found to be a source of error in a number of appeals to the CCA.<sup>69</sup>

4.32 The prohibition on double counting does not preclude courts from considering the nature of the offence and assessing the seriousness of the conduct giving rise to its commission.<sup>70</sup> Courts have recognised there are circumstances where the conduct giving rise to the offence is so heinous or egregious that it is more than an “inherent characteristic” of the offence, in which case additional effect can be given to the aggravating factor.<sup>71</sup> However in practice this can give rise to difficult decisions in determining whether that threshold has been passed.

62. *R v McNaughton* [2006] NSWCCA 242; 66 NSWLR 566 [15], [32], [70]-[76], acknowledging and distinguishing the proportionality principle in *Veen v The Queen [No 2]* (1988) 164 CLR 465.

63. R Blanch, *Preliminary submission PSE3*, 1; NSW, Office of the Director of Public Prosecutions, *Preliminary submission PSE10*, 4.

64. *JB v R* [2012] NSWCCA 12 [67], [69].

65. *R v Kelly* [2005] NSWCCA 280; 155 A Crim R 499 [40]; NSW, Office of the Director of Public Prosecutions, *Preliminary submission PSE10*, 4; R Blanch, *Preliminary submission PSE3*, 1; Legal Aid NSW, *Preliminary submission PSE18*, 1.

66. *Aslett v R* [2006] NSWCCA 49 [120].

67. See, eg, *R v Cramp* [2004] NSWCCA 264; *R v Williams* [2005] NSWCCA 99; *R v Johnson* [2005] NSWCCA 186 [22]; *R v Ibrahim* [2005] NSWCCA 153 [17].

68. See, eg, *Elyard v R* [2006] NSWCCA 43; *R v Solomon* [2005] NSWCCA 158; 153 A Crim R 32 [19]-[20]; *R v Yildiz* [2006] NSWCCA 97; 160 A Crim R 218 [37]-[39].

69. See, eg, *Elyard v R* [2006] NSWCCA 43 [8]; *R v Johnson* [2005] NSWCCA 186 [22].

70. See, eg, *R v Way* [2004] NSWCCA 131; 60 NSWLR 168 [106]-[107]; *Hamze v R* [2006] NSWCCA 36 [37].

71. See, eg, *Elyard v R* [2006] NSWCCA 43 [10], [43].

- 4.33 The risk of double counting is potentially increased in cases in which a guideline judgment is applicable (particularly a quantitative guideline), since it is likely that a number of factors that are listed in s 21A were taken into account in that judgment.<sup>72</sup>
- 4.34 This risk is also compounded by the fact that some of the factors that are designated in s 21A(2) as aggravating factors, if present, allow the offender to be charged with, and convicted of, an aggravated or specially aggravated form of the offence thereby attracting a higher maximum penalty. Specially aggravated offences have been a growing feature of the criminal law over the last decade and there are many illustrations in the *Crimes Act 1900* (NSW) where the presence of a s 21A factor will be a circumstance that gives rise to an aggravated form of an offence.<sup>73</sup> Additionally, there are offences which attract a higher maximum penalty, where the victim occupied one of the positions referred to in s 21A(2)(a) of the CSPA.<sup>74</sup>
- 4.35 In such cases, the increase in the maximum penalty has already addressed the aggravating factor. The increased penalty is recognised as a legislative statement of the perceived seriousness of the offence and as a marker of an appropriate level of sentence.

### Our previous view, and the views of other law reform commissions

- 4.36 In our 1996 report on sentencing we concluded that a statutory list of factors to be taken into account in sentencing would serve no obvious purpose in terms of law reform and ran a real risk of obfuscating the law. We considered that it was better to leave it for the common law to identify them, free from the constraints of statute.<sup>75</sup> The reasons we gave for this conclusion were:
- Such a provision is likely to stultify development of the common law.
  - The common law of sentencing does not need restatement and any attempt is likely to fail.
  - Legislative attempts by other jurisdictions have not added anything to the common law.
  - A statutory list is likely to make sentencing a more time consuming exercise and may increase the grounds on which the sentence may be appealed.<sup>76</sup>
- 4.37 Although the Tasmania Law Reform Institute in its 2008 review of sentencing considered that a list of factors could provide useful guidance to the courts and

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72. Criminal justice system stakeholders, *Consultation SEC3*. See also *R v Street* [2005] NSWCCA 139 [35].

73. They include the fact that the offence was committed in company (eg, sexual assault offences: *Crimes Act 1900* (NSW) s 61J, s 61JA, s 61M, s 61O, s 66A(2)-(3); and aggravated housebreaking offences: *Crimes Act 1900* (NSW) s 109, s 111-113).

74. See, eg, *Crimes Act 1900* (NSW) s 58 (various officers including correctional officers), s 60 and s 60A (police and law enforcement officers), s 60E (teachers) and s 322 and s 326 (judicial officers) and see also the mandatory life sentence for murder that applies where the victim is a police officer, s 19B.

75. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [14.16].

76. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [14.15].

promote consistency in sentencing,<sup>77</sup> ultimately it agreed with the views expressed in our report and recommended against introducing a list.<sup>78</sup>

4.38 In its 2006 report on sentencing federal offenders, the ALRC concluded that:

Federal sentencing legislation should specify non-exhaustive factors that are relevant to sentencing and that may be applicable in a particular case, depending on the circumstances. If any specified factor is applicable to the case and known to the court, it must be considered, but if the factor has no application to the case it will not need to be considered.<sup>79</sup>

It also observed that:

An exhaustive list of factors would be problematic because it is not possible to specify in advance every factor that might conceivably be relevant to sentencing, given the diversity of facts in individual matters. ... A non-exhaustive specification provides for flexibility in sentencing ... and allows courts to develop jurisprudence in relation to additional sentencing factors.<sup>80</sup>

### Our current view

4.39 We have concluded that a revised Crimes (Sentencing) Act should replace the current s 21A with a simplified section that provides appropriately framed and broadly worded guidance on the relevant factors for sentencing. It should not divide those factors into aggravating and mitigating factors.

4.40 In reaching this conclusion we are influenced by the problems that can arise when the courts apply s 21A. These problems include the risks of appeal that arise where there has been a double-counting or where a court has overlooked or not mentioned a relevant factor, or applied a factor contrary to the common law. The binary approach creates unnecessary complexity in requiring some factors to be considered from different perspectives, according to its weight.

4.41 The rationale for retaining s 21A becomes even more questionable once it is appreciated that it uses the expression “aggravating factor” indiscriminately to embrace both factors that can increase the objective seriousness of the offence and also factors that are subjective in the sense that they relate to the characteristics of the offender. For example, an aggravating factor that is relevant to the objective seriousness of an offence is that it “involved gratuitous cruelty”; while an aggravating factor that relates to the offender as a *subjective* matter is that the offence was “committed by the offender while on conditional liberty”.<sup>81</sup> Similar considerations arise in relation to the expression “mitigating factor” where used in s 21A. For example, the factor that the offence was “provoked by the victim” potentially reduces its *objective* seriousness, while the factor that the offender “was

77. Tasmania Law Reform Institute, *Sentencing*, Final Report 11 (2008) [7.1.41].

78. Tasmania Law Reform Institute, *Sentencing*, Final Report 11 (2008) rec 89.

79. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [6.12].

80. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [6.13].

81. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(f), (j).

a person of good character”<sup>82</sup> is a purely *subjective* factor unrelated to the circumstances in which the offence was committed.

4.42 A further problem is that, although the list of factors might appear to be comprehensive, the factors are subject to unstated qualifications or limitations that arise under the common law. Additionally, s 21A recognises the continued relevance of an undefined body of common law factors that a court may need to take into account.

4.43 Finally, appeals based on asserted error in the application of s 21A take up the CCA’s time without impact on the outcome of the case. Justice Simpson made this point in a recent appeal:

Section 21A of the *Crimes (Sentencing Procedure) Act 1999* ... identifies “aggravating” and “mitigating” factors that a judge is obliged to take into account, where relevant. Item by item, these are the basis of repeated, and often arid argument in this Court. It can sometimes be seen that technical error, such as the present, is made, but with no perceptible impact on the outcome.<sup>83</sup>

4.44 However, we recognise that simply abolishing s 21A, without leaving something in its place, risks undermining the objectives of transparency and consistency of approach that are necessary for a fair sentencing system. This is important for matters that are dealt with in busy courts, particularly the Local Court, where the accused may be unrepresented or represented by a practitioner who is not a criminal law specialist.

4.45 Accordingly, we are persuaded that there is value in including in a revised Crimes (Sentencing) Act a statement of certain key factors that the court should take into account in sentencing. This statement should be neutral, non-exhaustive and stated at a general level. Its purpose would be to provide a clear and transparent statement of key factors that courts take into account in sentencing that, for the most part, would reflect the longstanding approach and flexibility of the common law.

4.46 Our view remains that it is undesirable to attempt an exhaustive statement of the factors that are to be taken into account. The nature of criminal offending changes and new circumstances may arise that a static exhaustive list could not sufficiently address. It is important to allow sentencing practice to adjust to changing social conditions and values and technological advances, in the manner recognised by the common law.

4.47 This option, which avoids the overly prescriptive and binary approach of s 21A, would significantly simplify the exercise of judicial discretion while leaving room for legislative guidance on the factors to be taken into account. It would, to a large extent, reflect the structure seen in s 16A of the *Crimes Act 1914* (Cth); and in the previous s 21A of the CSPA.

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82. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(c), (f).

83. *Mapp v R* [2010] NSWCCA 269; 206 A Crim R 497 [6].

- 4.48 There was wide support in the submissions and consultations for redrafting s 21A as a neutral, unclassified and non-exhaustive list of factors. This was the preferred option of a number of stakeholders,<sup>84</sup> and received the least criticism of those who would prefer that s 21A simply be abolished.<sup>85</sup> The Office of the Director of Public Prosecutions, for example, advised that it preferred the abolition of s 21A, but added that, if legislative guidance is to be given to the relevant factors, “then care must be taken to ensure that it is not a check list, [and] that the drafting is very general and not overly prescriptive”.<sup>86</sup>
- 4.49 The NSW Police Force accepted that s 21A “provides appropriate guidance to courts”, particularly the Local Court which deals with high volumes of criminal matters. However, it submitted that s 21A should not be retained in its current form, because the “opportunity now exists to make sentencing law less technical whereby the interplay between the common law and statute is less ambiguous”.<sup>87</sup>
- 4.50 We do not expect our recommended approach to result in sentencing becoming more lenient or more severe. Instead, the purpose of the reform is to replace a much criticised provision with one that provides a simpler, clearer and more transparent framework for sentencing law.

#### Recommendation 4.1: Replacement of s 21A

Section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should not be replicated in a revised Crimes (Sentencing) Act. Instead, a new provision should include a non-exhaustive list of a number of factors a court must take into account on sentencing. This list should not be categorised into “aggravating” and “mitigating” factors.

### General structure of the proposed new provision

- 4.51 Our proposed new provision would take its place in the context of an Act that also specifies the purposes of sentencing and the principles of sentencing. Drawing on provisions in the current and original versions of s 21A and reflecting the existing common law, we consider that the section should state that:
- (1) The matters referred to are not exhaustive and are in addition to any other matters that the court is required or permitted to take into account under any Act or rule of law.
  - (2) The court is not to have regard to any factor in sentencing if it would be contrary to any Act or rule of law to do so.

84. NSW Bar Association, *Submission SE9*, 16; Legal Aid NSW, *Submission SE11*, 18; G Henson, *Submission SE10*, 6. The Chief Magistrate viewed the impact of s 21A as being “largely positive” from the Local Court’s point of view, because it provided a useful guide to magistrates and practitioners, but also acknowledged criticisms that the section created complexity and the risk of double counting: G Henson, *Preliminary submission PSE5*, 4.

85. NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 17-18; Law Society of NSW, *Submission SE7*, 11.

86. NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 9-10.

87. NSW Police Force, *Submission SE14*, 1-2.

- (3) The fact that any such factor is relevant and known to the court does not require the court to increase or reduce the sentence for the offence.
- 4.52 Point number three is included to ensure that any particular factor is taken into account but only in conjunction with the other factors and in accordance with the purposes and general principles.
- 4.53 Subject to the exception noted below, we have not included any considerations that might be described as “purposes” or “principles” of sentencing in the list of proposed factors. These are better addressed in the separate provisions that are proposed in Chapters 2 and 3. The provision we propose is concerned with the specific offence and the individual offender. Hence we have included the prospects of that offender’s rehabilitation as a matter to be taken into account, although that is also included as a purpose of sentencing.
- 4.54 We have moved into separate provisions certain of the factors that are currently included as aggravating factors, or as factors that are not to be taken into account as operating for the benefit of the offender. The purpose of this move is to clarify the way in which they are to operate.
- 4.55 Finally, in light of the High Court’s decision in *Muldrock v The Queen*,<sup>88</sup> we do not see any difficulty for the operation of the SNPP scheme in moving away from the binary approach in the current s 21A. *Muldrock* effectively breaks the nexus between the nominated SNPPs and the enumerated factors in s 21A because the courts must adopt an instinctive synthesis approach to sentencing and not the staged approach that *R v Way* mandated.<sup>89</sup> We have recommended separately that the SNPP provisions be amended so that the factors listed in the current s 21A are not the “only” reasons to depart from the nominated SNPP.<sup>90</sup>

### Sentencing factors included in the proposed new provision

- 4.56 We favour the enactment of a provision that would list in a non-exhaustive way the factors to be taken into account in broad terms in accordance with Recommendation 4.2.
- 4.57 Framed in this way, the proposed provision would amalgamate some of the factors listed in s 21A, remove the factors that are better dealt with separately as discounting factors or otherwise, and more clearly delineate between matters going to the objective criminality of the offence and matters going to the subjective circumstances of the offender. It would leave for separate consideration questions of accumulation and concurrency and the capacity for the court to take other offences into account in accordance with the Form 1 procedure.<sup>91</sup>

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

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

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

91. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 3 div 3; para [6.15]-[6.16].



- 4.58 This would reflect a similar approach to that recommended by the ALRC in its 2006 report.<sup>92</sup> The generality of the provision we propose would discourage the checklist approach that has been criticised in the application of s 21A.

#### **Recommendation 4.2: Sentencing factors to be included in a revised Act**

A revised Crimes (Sentencing) Act should provide that:

- (1) When imposing a sentence, the court must take into account such of the factors as are known to the court that relate to the following matters:
  - (a) the nature, circumstances and seriousness of the offence
  - (b) the personal circumstances and vulnerability of any victim arising because of the victim's age, occupation, relationship to the offender, disability or otherwise
  - (c) the extent of any injury, emotional harm, loss or damage resulting from the offence or any significant risk or danger created by the offence, including any risk to national security
  - (d) the offender's character, general background, offending history, age, and physical and mental condition (including any cognitive or mental health impairment)
  - (e) the extent of the offender's remorse for the offence, taking into account, in particular, whether:
    - (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 voluntarily made reparation for such injury, loss or damage (or both)
  - (f) the offender's prospects of rehabilitation.
- (2) These matters are in addition to any other matters that the court is required or permitted to take into account under any Act or rule of law.
- (3) The court is not to have regard to any factor in sentencing if it would be contrary to any Act or rule of law to do so.
- (4) The fact that any such factor is relevant and known to the court does not require the court to increase or reduce the sentence for the offence.
- (5) The following definitions apply:
  - (a) **Cognitive impairment** means an ongoing impairment in comprehension, reason, adaptive functioning, judgement, learning or memory that is the result of any damage to, dysfunction, developmental delay, or deterioration of the brain or mind. Such cognitive impairment may arise from, but is not limited to, the following:

92. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [6.150]-[6.159], rec 6-1, 6-4.

- (i) intellectual disability;
- (ii) borderline intellectual functioning;
- (iii) dementias;
- (iv) acquired brain injury;
- (v) drug or alcohol related brain damage;
- (vi) autism spectrum disorders.

(b) **Mental health impairment** means a temporary or continuing disturbance of thought, mood, volition, perception, or memory that impairs emotional wellbeing, judgement or behaviour, so as to affect functioning in daily life to a material extent. Such mental health impairment may arise from but is not limited to the following:

- (i) anxiety disorders;
- (ii) affective disorders;
- (iii) psychoses;
- (iv) severe personality disorders;
- (v) substance induced mental disorders (which include ongoing mental health impairments such as drug-induced psychoses, but exclude substance abuse disorders (addiction to substances) or the temporary effects of ingesting substances).

(6) In assessing the nature, circumstances and seriousness of the offence, the court must have regard to the matters personal to the offender that are causally connected with, or materially contributed to, the commission of the offence including, for example, the offender's motivation in committing the offence, as well as the degree to which the offender participated in its commission.

### (a) The nature, circumstances and seriousness of the offence

4.59 This factor is deliberately broad and would take into account all circumstances relevant to the seriousness of the offence, and the degree of the offender's participation and motivation. It would include the following factors currently listed in s 21A:

- the offence involved the actual or threatened use of violence (s 21A(2)(b));
- the offence involved the actual or threatened use of a weapon (s 21A(2)(c));
- the offence involved the actual or threatened use of explosives or a chemical or biological agent (s 21A(2)(ca));
- the offence involved causing the victim to take, inhale or be affected by a narcotic drug, alcohol or other intoxicating substance (s 21A(2)(cb));
- the offence was committed in company (s 21A(2)(e));
- the offence was committed in the presence of a child under 18 years of age (s 21A(2)(ea) and s 21A(2)(p));

- the offence involved gratuitous cruelty (s 21A(2)(f));
- the offence was committed without regard for public safety (s 21A(2)(i));
- the offender’s actions posed a risk to national security (s 21A(2)(ia));
- the offender’s actions involved a grave risk of death to one or more people (s 21A(2)(ib));
- the offence involved multiple victims or a series of criminal acts (s 21A(2)(m));
- the offence was part of a planned or organised criminal activity (aggravating: s 21A(2)(n); mitigating: s 21A(3)(b)); and
- the offence was committed for financial gain (s 21A(2)(o)).

4.60 The expression “nature and circumstance of the offence” should be taken to include not only the bare acts or omissions that constitute the offence, but also matters personal to the offender that are causally connected with, or that materially contributed to its commission including matters such as motive.<sup>93</sup>

4.61 The traditional common law approach has been to consider the offender’s motive when considering the culpability, or to use another term, the objective gravity or seriousness of the offence. However for more abundant certainty, we consider that a provision should be included in a revised Crimes (Sentencing) Act in the form of Recommendation 4.2(6) to make this clear.

### (b) The personal circumstances and vulnerability of any victim

4.62 The *Crimes Act 1914* (Cth) includes as a factor “the personal circumstances of any victim of the offence”<sup>94</sup> without listing examples or referring to the vulnerability of the victim. We believe it is important to include in this grouping “the vulnerability of any victim” as this is often a factor in assessing the objective seriousness of an offence (for example, an offence of violence or fraud where the victim is elderly or has a cognitive impairment, or is working at night in a convenience store, or where the offence involves the sexual assault of a child).

4.63 The proposed factor, which is similar to the one contained in the original s 21A, is framed widely to embrace a range of the victim’s personal circumstances that may give rise to vulnerability, including the victim’s age, occupation, relationship to the offender or disability. It would include a number of current s 21A factors that relate to:

- offences arising because of the victim’s occupation or performance of voluntary work (s 21A(2)(a));

93. This is consistent with our recommendation in NSW Law Reform Commission, *Sentencing: Interim Report on Standard Minimum Non-parole Periods*, Report 134 (2012).

94. *Crimes Act 1914* (Cth) s 16A(2)(d).

- the offence being committed in the home of the victim or any other person (s 21A(2)(eb));<sup>95</sup> and
- offences where the offender abused a position of trust or authority in relation to the victim (s 21A(2)(k)).<sup>96</sup>

4.64 The proposed factor is sufficiently wide to encompass the above factors. We prefer to draft the provision in general terms, rather than attempting to articulate in statutory form a number of more specific factors or examples. However, a note to the provision could identify categories of victims who might be in a position of vulnerability.

4.65 This is an area where the potential vulnerability of the victim has, on some occasions, already been factored into the offence either as an element or as giving rise to an aggravated form of the offence. For example, specific offences with increased penalties are available in relation to:

- the murder of a police officer;<sup>97</sup>
- assaults on police;<sup>98</sup>
- assaults on law enforcement officers other than police;<sup>99</sup>
- assaults on a person in a domestic relationship with a law enforcement officer;<sup>100</sup>
- assaults on school students or staff members;<sup>101</sup> and
- sexual assaults where the victim is aged under 16 years, has a serious physical disability or cognitive impairment, or is under the authority of the offender.<sup>102</sup>

However, we do not see the simplified form that we propose as giving rise to the double counting risk that exists under the current s 21A.<sup>103</sup>

### (c) The extent of any injury, emotional harm, loss or damage resulting from the offence or any significant risk or danger created by the offence, including any risk to national security

4.66 Most Australian jurisdictions require the courts to consider the consequences of the offence for the victim:

- The *Crimes Act 1914* (Cth) includes as a factor to be taken into account “any injury, loss or damage resulting from the offence”.<sup>104</sup>

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95. This factor could also be considered as part of the nature and circumstances of the offence.

96. This factor could also be considered as part of the nature and circumstances of the offence.

97. *Crimes Act 1900* (NSW) s 19B.

98. *Crimes Act 1900* (NSW) s 60(1)-(3A).

99. *Crimes Act 1900* (NSW) s 60A(1)-(3).

100. *Crimes Act 1900* (NSW) s 60B(1)-(2).

101. *Crimes Act 1900* (NSW) s 60E(1)-(2).

102. *Crimes Act 1900* (NSW) s 61J, s 61M, s 61O, s 66C, s 80A.

103. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A.

- In the ACT, a court must consider “the effect of the offence on the victims of the offence, the victims’ families and anyone else who may make a victim impact statement”.<sup>105</sup>
  - In Victoria, “the impact of the offence on any victim of the offence”<sup>106</sup> is included in the list of factors to which a court must have regard in sentencing<sup>107</sup> and provision is made for the use of victim impact statements.<sup>108</sup>
  - In the NT, a court must have regard to “the nature of the offence and how serious the offence was, including any physical, psychological or emotional harm done to a victim”.<sup>109</sup>
  - In Queensland, a court must have regard to “the nature of the offence and how serious the offence was”, including “any physical, mental or emotional harm done to a victim” including that mentioned in a victim impact statement.<sup>110</sup>
  - In WA, a court is required to take into account “the circumstances of the commission of the offence, including the vulnerability of any victim of the offence”.<sup>111</sup>
  - There is no legislative list of factors to be taken into account on sentencing in Tasmania, however there are provisions for the use of victim impact statements.<sup>112</sup>
- 4.67 The ALRC also included in its proposed list “factors relating to the impact of the offence”.<sup>113</sup>
- 4.68 The CSPA allows the court to receive and consider a victim impact statement “if it considers it appropriate to do so”.<sup>114</sup> A victim impact statement can be used to prove the existence of the aggravating factor under the current s 21A of “substantial” injury, emotional harm, loss or damage caused to the victim by the offence.<sup>115</sup>
- 4.69 The occasioning of injury, loss or damage will commonly be an element of an offence, but the extent of that injury, loss or damage can be a relevant factor in sentencing depending on where it sits along a spectrum of seriousness. Therefore, the proposed provision refers to the “extent of any” injury, emotional harm, loss or damage, instead of the current s 21A which requires a court to consider whether the injury, emotional harm, loss or damage caused by the offence was “substantial”<sup>116</sup>

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104. *Crimes Act 1914* (Cth) s 16A(2)(e).

105. *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(f).

106. *Sentencing Act 1991* (Vic) s 5(2)(daa).

107. *Sentencing Act 1991* (Vic) s 5(2).

108. *Sentencing Act 1991* (Vic) pt 3 div 1C.

109. *Sentencing Act* (NT) s 5(2)(b).

110. *Penalties and Sentences Act 1992* (Qld) s 9(2)(c).

111. *Sentencing Act 1995* (WA) s 6(2)(b).

112. *Sentencing Act 1997* (Tas) s 81A.

113. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) rec 6-1(V).

114. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(1).

115. *Aguirre v R* [2010] NSWCCA 115 [73]-[77].

116. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(g).

and hence an aggravating factor, or “not substantial”<sup>117</sup> and hence a mitigating factor.

- 4.70 The CCA has held that “the court is only to have regard to the consequences of an offence that were intended or could reasonably have been foreseen”.<sup>118</sup> We assume that this common law principle would continue to govern the application of the factor both in relation to physical injury and emotional harm.
- 4.71 Apart from actual injury, emotional harm, loss or damage, the proposed factor would embrace the existing s 21A factors concerned with risk or danger including those concerned with use of explosives or a chemical or biological agent,<sup>119</sup> risk to national security<sup>120</sup> or grave risk of death to another person or persons.<sup>121</sup>

#### (d) The offender’s character, general background, offending history, age, and physical and mental condition (including any cognitive or mental health impairment)

- 4.72 This proposed factor would cover a number of the subjective factors currently included in s 21A(3), specifically that the offender:
- does not have a record (or significant record) of previous convictions (s 21A(3)(e));
  - is of good character (s 21A(3)(f));
  - is unlikely to reoffend (s 21A(3)(g));
  - has good prospects of rehabilitation (s 21A(3)(h)); and
  - was not fully aware of the consequences of his or her actions because of age or any disability (s 21A(3)(j)).
- 4.73 The expression “offending history” is intended to include not only recorded convictions and sentences but also charges that result in non-conviction orders or discharges under s 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW). This could be addressed through a definition provision in a revised Crimes (Sentencing) Act.
- 4.74 The reference in s 21A to the offender having a record of previous convictions “particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence

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117. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(a).

118. *R v Wickham* [2004] NSWCCA 193 [25]; *Josefski v R* [2010] NSWCCA 41 [21]-[38].

119. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(ca) (aggravating).

120. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(ia) (aggravating).

121. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(ib) (aggravating).

offences”<sup>122</sup> does not need further articulation as the relevance of that circumstance is sufficiently covered in case law.<sup>123</sup>

### *Cognitive and mental health impairments*

4.75 A mitigating factor under the current s 21A involves the offender not being “fully aware of the consequences of his or her actions because of the offender’s age or any disability”,<sup>124</sup> an expression that has been held to encompass mental illness,<sup>125</sup> but would also include cognitive impairment. As currently framed this factor requires that there be a connection between the “disability” and the offender’s awareness of the consequences of his or her actions. The common law however is broader in its reach in treating mental illness and cognitive impairment as relevant for sentencing in the following ways:

- The offender’s moral culpability may be reduced where it contributed to the commission of the offence in a material way.
- It may render the offender an inappropriate vehicle for general deterrence.
- It may mean that a custodial sentence will weigh more heavily on the offender.
- It may reduce or eliminate the significance of specific deterrence or, conversely, it may heighten the level of danger that the offender presents to the community, increasing the need for special deterrence and the imposition of a longer sentence.<sup>126</sup>

4.76 The wording that we propose, namely the “mental condition of the offender, including any cognitive or mental health impairment” more accurately reflects the case law in removing any requirement for the disability to impact on the offender’s awareness of the consequences of his or actions, without excluding consideration of that circumstance where relevant.

4.77 We consider it desirable to define the terms “cognitive impairment” and “mental health impairment”. The definitions incorporated in Recommendation 4.2(5) are taken from our Report 135 on *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*.<sup>127</sup>

### *Age*

4.78 Age has been included in this grouping to recognise the manner in which the common law has approached the sentencing of young offenders, where the interest

122. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(d).

123. See above at para [4.32].

124. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(j).

125. *Morse v Chan* [2010] NSWSC 1290 [56].

126. *R v Hemsley* [2004] NSWCCA 228 [33]-[36]; *DPP (Cth) v De La Rosa* [2010] NSWCCA 194; 79 NSWLR 1 [177]-[178]; *Beldon v R* [2012] NSWCCA 194 [33]; *Muldock v The Queen* [2011] HCA 39, 244 CLR 120 [54].

127. NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, Report 135 (2012) rec 5.1, 5.2.

of rehabilitation is to the forefront of the sentencing considerations.<sup>128</sup> Additionally youth and immaturity can be a factor in the commission of the offence that will reduce the level of criminality involved.<sup>129</sup>

- 4.79 The common law in this respect is also well settled in recognising that general deterrence and retribution cannot be completely ignored when sentencing young offenders, and that the leniency that might otherwise be extended will not be available where the offender behaved in an particularly serious way or in the way that an adult might behave.<sup>130</sup>
- 4.80 It is also settled case law that advanced age can be taken into account as part of the sentencing exercise.<sup>131</sup> In some cases advanced age may be associated with ill health or cognitive or mental health impairment, so that imprisonment may give rise to a particular hardship or threat to life (for example, where the offender needs intensive treatment that cannot be provided in prison). However, as a general proposition, age of itself will usually not excuse the offending behaviour or exclude the imposition of a custodial sentence if it “were otherwise warranted”.<sup>132</sup>

#### (e) The extent of the offender’s remorse for the offence

- 4.81 Remorse is currently a mitigating factor under s 21A only if each of the conditions specified in s 21A(3)(i)(i) and (ii) exist. The original s 21A was not so restrictive, and allowed the court to consider the degree to which the offender had shown “contrition” (which is the same as remorse in this context) by “taking action to make reparation for any injury, loss or damage resulting from the offence” or “in any other manner”.
- 4.82 The provision relating to remorse was amended in 2008. In the second reading speech it was observed that the purpose of the amendment was “to tighten the law to make it harder for a criminal to use remorse as a mitigating factor”. It was stated that it is “reasonable to expect that where claims of remorse are made in mitigation there is some relevant and identifiable action by an offender demonstrating an acceptance of responsibility for his or her behaviour”.<sup>133</sup>
- 4.83 The provision that we propose would provide the courts with a wider discretion. Our proposed provision still refers to “the extent” of the offender’s remorse and also makes reference to two matters: whether the offender has acknowledged any injury, loss or damage caused by his or her actions and whether the offender has or voluntarily made reparation for such injury, loss or damage. The onus of proving

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128. *Children (Criminal Proceedings) Act 1987* (NSW) s 6; and see *KT v R* [2008] NSWCCA 51; 182 A Crim R 571 [22].

129. *KT v R* [2008] NSWCCA 51; 182 A Crim R 571 [23].

130. *R v Pham* (1991) 55 A Crim R 128, 135; *R v Tran* [1999] NSWCCA 109 [9]-[10].

131. *Des Rosiers v R* [2006] NSWCCA 16; 159 A Crim R 549 [32].

132. *R v Sopher* (1993) 70 A Crim R 570, 573-574; *R v McLean* [2001] NSWCCA 58; 121 A Crim R 484 [44].

133. NSW, *Parliamentary Debates*, Legislative Council, 17 October 2007, 2668, 2669; S Odgers, *Sentence: the Law of Sentencing in NSW Courts for State and Federal Offences* (2012) [4.183]. However, as Odgers states, as a practical matter the provision will rarely limit the circumstances in which a sentencing court can take remorse into account.



these matters would remain on the offender, encouraging critical examination of any claim to remorse. It is implicit in this formulation that the remorse taken into account is genuine remorse.

### (f) The prospects of the offender’s rehabilitation

- 4.84 This proposed factor is articulated in general terms in the same way as the equivalent Commonwealth provision<sup>134</sup> and the original s 21A.<sup>135</sup>
- 4.85 Section 21A lists good prospects of rehabilitation as a mitigating factor, “whether by reason of the offender’s age or otherwise”.<sup>136</sup> It is not necessary to list the offender’s age as being relevant to the prospects of rehabilitation since it is otherwise noted as a factor. The present factor is stated as broadly as possible in order to leave it to the court to assess the prospects of rehabilitation on a case-by-case basis.
- 4.86 Current s 21A factors that may be relevant to the prospects of rehabilitation of the offender include:
- the offender’s record of previous convictions (s 21A(2)(d));
  - the offender’s character (s 21A(3)(f));
  - the offender’s likelihood of reoffending (s 21A(3)(g));
  - the offender’s remorse (s 21A(3)(i));
  - whether there was a plea of guilty (s 21A(3)(k));
  - the degree of pre-trial disclosure (s 21A(3)(l)); and
  - the degree of the offender’s assistance to authorities (s 21A(3)(m)).
- 4.87 We have recommended the retention of a provision that identifies the promotion of rehabilitation as a purpose of sentencing.<sup>137</sup> This recognises the public interest in rehabilitation as a general proposition, and there is no difficulty in the repetition of the individual’s prospects of rehabilitation as a sentencing factor.

### Other factors we recommend not be included

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- 4.88 Since we do not consider it sensible or feasible to establish an exhaustive and static list of factors, there are some factors that courts currently take into account that may not fall within the general headings in the proposed new provision.. We expect that the courts will continue to take these factors into account and have included Recommendation 4.2(2) to ensure that this occurs. In the following section we deal with some specific matters, in order to clarify the approach that we have taken.

134. *Crimes Act 1914* (Cth) s 16A(2)(n).

135. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(j) in force 15 April 2002–31 January 2003.

136. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(h).

137. Recommendation 2.1(1)(f).

## Provocation

- 4.89 During the course of our review, a Select Committee of the NSW Legislative Council conducted an inquiry into the partial defence of provocation.<sup>138</sup> The defence of provocation is only available to reduce a charge of murder to manslaughter. The inquiry drew attention to the fact that, where the defence of provocation is successfully established, the resulting sentence is often criticised as being unduly lenient.
- 4.90 The Select Committee concluded that the partial defence of provocation should be amended. The recommended amendments included increasing the threshold for the defence to “gross provocation” and preventing the defence being successfully used by defendants who kill their partners in response to the partner’s wish to end the relationship. The Select Committee also recommended that the defence be unavailable where the provocation was a non-violent sexual advance.<sup>139</sup> The report was tabled in April 2013 and the government has not yet formally responded to the recommendations, although the Premier has announced plans to accept the majority of them.<sup>140</sup>
- 4.91 At present, a mitigating factor listed under s 21A(3)(c) is that “the offender was provoked by the victim”. This factor is general in its application and is not confined to murder. Provocation of the offender would continue to be relevant to sentencing under our proposed revision, as it could be taken into account as part of grouping (a) “the nature, circumstances and seriousness of the offence”. Provocation would be a matter of direct relevance to the offender’s motivation for the offence and his or her mental state at the time.
- 4.92 We have not included provocation as a separate factor because it would currently fall within the proposed grouping (a).

## Other offences that are required or permitted to be taken into account

- 4.93 The *Crimes Act 1914* (Cth) provides that a court must take into account “other offences (if any) that are required or permitted to be taken into account.”<sup>141</sup> It is a provision that, in the NSW context, is potentially ambiguous and also unnecessary. Applying the principle of totality provides sufficiently for this as does the Form 1 procedure that allows a court to “take into account” further offences for which the offender admits guilt, when he or she is sentenced for a principal offence,<sup>142</sup> which we would replicate in a revised Crimes (Sentencing) Act.

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138. NSW, Legislative Council Select Committee on the Partial Defence of Provocation, *The Partial Defence of Provocation* (2013).

139. NSW, Legislative Council Select Committee on the Partial Defence of Provocation, *The Partial Defence of Provocation* (2013) rec 4, 5, 6, 7.

140. NSW, *Parliamentary Debates*, Legislative Assembly, 22 May 2013, 35 (B O’Farrell).

141. *Crimes Act 1914* (Cth) s 16A(2)(b).

142. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 3 div 3.

### Offence forming part of a course of conduct and representative offences

- 4.94 The *Crimes Act 1914* (Cth) requires the court “if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character” to take into account “that course of conduct”.<sup>143</sup>
- 4.95 The original s 21A contained a similar provision that referred to “a series of criminal acts”, although that was not limited to offences of the same or similar character.<sup>144</sup> The current s 21A includes as an aggravating factor that the offence involved “multiple victims or a series of criminal acts”.<sup>145</sup> Such factors are in our view adequately encompassed in the proposed grouping (a) that deals with “the nature, circumstances and seriousness of the offence”, as well as in grouping (c) that deals with the extent of any injury, emotional harm, loss or damage resulting from the offence.
- 4.96 The ALRC recommended adding to the list in the *Crimes Act 1914* (Cth) “[f]actors relating to the conduct of the offender other than the specific conduct constituting the charged offence”. The purpose was to provide for cases “where an offender has pleaded guilty to charges and has acknowledged that they are representative of criminality comprising uncharged conduct as well as the charged offences”.<sup>146</sup>
- 4.97 This approach is unnecessary. The Form 1 procedure and the common law adequately recognise that the court can take into account uncharged conduct, which the offender admits, or accepts to be representative of his or her behaviour, for example, to rebut any suggestion that leniency should be given because the charged conduct was an isolated event or was out of character.<sup>147</sup> This does not permit additional punishment to be imposed for the uncharged acts.<sup>148</sup> Provision is also made for the use of random sample evidence in child abuse material cases, where there is a large amount of such material.<sup>149</sup> This effectively permits representative conduct to be taken into account within the offence charged, although not in a way that results in a more severe sentence.

### Deterrence and the need for adequate punishment

- 4.98 The *Crimes Act 1914* (Cth) requires the court to consider “the deterrent effect that any sentence or order under consideration may have on the person”<sup>150</sup> and “the need to ensure that the person is adequately punished for the offence”.<sup>151</sup> Our proposed statement of the purposes of sentencing embraces these considerations.

143. *Crimes Act 1914* (Cth) s 16A(2)(c).

144. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(b) in force 15 April 2002-31 January 2003.

145. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(m).

146. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [6.59]-[6.66], rec 6-1.

147. *R v JCW* [2000] NSWCCA 209; 112 A Crim R 466.

148. *R v H* (1980) 3 A Crim R 53, 59, 62; although see *Giles v R* [2009] NSWCCA 308; 198 A Crim R 395.

149. *Criminal Procedure Act 1986* (NSW) s 289A, s 289B; *R v Fitzgerald* [2004] NSWCCA 5; 59 NSWLR 493.

150. *Crimes Act 1914* (Cth) s 16A(2)(j).

151. *Crimes Act 1914* (Cth) s 16A(2)(k).

### Effect on offender's family or dependants

- 4.99 The *Crimes Act 1914* (Cth) requires the court to consider “the probable effect that any sentence or order under consideration would have on any of the person’s family or dependants”.<sup>152</sup>
- 4.100 The common law position is that a court should not give substantial weight to the effect of any sentence on third parties unless the circumstances are exceptional.<sup>153</sup> This is founded on the observation that hardship to spouse, family and friends is the “tragic, but inevitable, consequence of almost every conviction and penalty recorded in a criminal court”.<sup>154</sup> Courts applying the Commonwealth provision have read down the provision to include the common law limitation that the circumstances should be exceptional.<sup>155</sup>
- 4.101 The common law in NSW on this matter is well known and including this factor in the proposed provision would be redundant and could cause confusion.

### Deportation and foreign nationals

- 4.102 The common law provides that the deportation of an offender as a consequence of committing an offence is irrelevant as a sentencing consideration.<sup>156</sup> This is because the court cannot predict the making of any deportation decision which is the exclusive province of the Executive.
- 4.103 The High Court has also held that the possible deportation of a foreign national should not be used as a reason for declining to fix a non-parole period and parole period.<sup>157</sup> The offender should receive the benefit of a parole period being fixed in the usual way if this is otherwise appropriate, even if it eventually transpires that he or she is deported upon being released from custody.<sup>158</sup>
- 4.104 The conditions of custody for the offender may be relevant at common law as a sentencing consideration. Imprisonment can be more difficult for a foreign offender isolated within the Australian prison system with limited English skills, and without friends or family in the country who are able to visit or provide any form of support. The CCA has accepted this consideration as justifying “some, though not much, recognition” on sentence.<sup>159</sup> However, it has also been held that an offender who comes to Australia “specifically and quite deliberately to commit a serious crime ...

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152. *Crimes Act 1914* (Cth) s 16A(2)(p).

153. *R v Edwards* (1996) 90 A Crim R 510.

154. *R v Edwards* (1996) 90 A Crim R 510, 516 (Gleeson CJ).

155. See, eg, *R v El Hani* [2004] NSWCCA 162 [55].

156. *R v Pham* [2005] NSWCCA 94 [13]-[14]; *R v Latumetan* [2003] NSWCCA 70 [19].

157. *R v Shrestha* (1991) 173 CLR 48, 71-72. See also *Crimes Act 1914* (Cth) s 19AK.

158. See *Yow v R* [2010] NSWCCA 251 [21]; *R v Nguyen* [2005] NSWSC 600 [58]; *R v Mirzaee* [2004] NSWCCA 315 [19]-[20].

159. *Huang v R* [2000] NSWCCA 238; 113 A Crim R 386 [18]-[19], cited in *Yang v R* [2007] NSWCCA 37 [25]. See also *Nguyen v R* [2009] NSWCCA 181 [21]-[27].

has no justifiable cause for complaint” if caught and incarcerated in an environment in which the language and culture are foreign to him or her.<sup>160</sup>

4.105 The NSW Bar Association supported the common law approach to the relevance of deportation and did not propose any legislative change.<sup>161</sup> The Public Defenders submitted that “the fact of likely deportation as a result of the commission of the offence should be taken into account in the same way that extra-curial punishment is taken into account”.<sup>162</sup> The Law Society of NSW submitted that possible deportation should be taken into account “in appropriate circumstances”.<sup>163</sup> The Public Interest Advocacy Centre argued that the “reasonable prospect of the Australian government seeking deportation of an offender” should be a relevant sentencing consideration and submitted that “the failure of courts to consider the impact of deportation as an extra-curial punishment often results in offenders being doubly punished for their crimes”.<sup>164</sup>

4.106 Legal Aid NSW also submitted that the possibility of deportation should be a relevant sentencing consideration:

where an accused person runs the risk of personal physical or psychological danger upon returning to their country of origin. It may also be relevant in cases where a person is returned to a country where they have not lived since they were a child, in circumstances where they may have no support from family and no formal supervision by the NSW State Parole Authority.<sup>165</sup>

4.107 It noted that possible deportation becomes relevant to whether or not parole is granted to offenders, arguing that the possibility of deportation may result in offenders not being granted parole and thus serving longer periods in custody.<sup>166</sup>

4.108 We recognise that the possibility of deportation may lead to the State Parole Authority refusing to make a parole release order for an offender, with the result that they may serve a longer period in custody than the court may have envisaged or than would be the case for a comparable offender who was not liable to deportation. However, this is not something that can be predicted at the time of sentencing.

4.109 Despite the submissions to the contrary, we are not persuaded that there is any need to move away from the established case law and, accordingly, we do not recommend the inclusion of any specific provision to deal with this issue.

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160. *R v Ferrer-Esis* (1991) 55 A Crim R 231, 239; see also *Van Eeden v R* [2012] NSWCCA 18 [32]-[42].

161. NSW Bar Association, *Submission SE9*, 18.

162. The Public Defenders, *Submission SE2*, 11.

163. Law Society of NSW, *Submission SE7*, 14.

164. Public Interest Advocacy Centre, *Submission SE5*, 7.

165. Legal Aid NSW, *Submission SE11*, 24.

166. Legal Aid NSW, *Submission SE11*, 24.

## Factors to be addressed by separate provisions

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- 4.110 There are some specific sentencing factors that the CSPA provides for separately. We consider that these separate provisions should be preserved in a revised Crimes (Sentencing) Act.
- 4.111 There are also some factors that are not currently the subject of express provisions that we consider should be included in stand-alone provisions in a revised Crimes (Sentencing) Act in order to provide a coherent statutory statement of the relevant factors.

### Pleas of guilty, assistance to the authorities, and facilitating the interests of justice

- 4.112 We have not included the discounting factors relating to pleas of guilty, assistance to law enforcement and facilitating the interests of justice (currently s 21A(3)(k)-(m)) in the proposed provision. Their presence in s 21A(3) and separately in s 22, s 22A and s 23 of the CSPA is potentially confusing and could lead to double counting. We prefer to include them in a revised Crimes (Sentencing) Act as stand-alone provisions. These factors are the subject of recommendations made in Chapter 5.<sup>167</sup>

### Time spent in custody, etc

- 4.113 The common law has traditionally taken into account any time that an offender spends in pre-sentence custody in order to avoid double punishment. Similar considerations apply to periods when an offender complied with orders for community service, intervention program orders and good behaviour bonds. This is reflected in s 24 of the CSPA and should be included in a revised Crimes (Sentencing) Act.

#### **Recommendation 4.3: Retain s 24 in a revised Act**

A revised Crimes (Sentencing) Act should contain a stand-alone provision in the general terms of s 24 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (time in custody, etc).

### Sex offender restrictions

- 4.114 Section 24A of the CSPA provides that the registration and supervision requirements and the prohibitions against child-related employment that apply to convicted sex offenders are not to be taken into account as factors operating in mitigation of sentence.
- 4.115 The requirements to disregard the consequences of these requirements and restrictions were introduced in 2009 and 2010 following reports of the NSW

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<sup>167</sup> Recommendations 5.1-5.3.

Sentencing Council.<sup>168</sup> The NSW Sentencing Council had recommended that the legislation be introduced after the CCA held that the registration requirements could constitute extra-curial punishment that a sentencing court could take into account in certain situations.<sup>169</sup>

- 4.116 The NSW Sentencing Council described the rationale of the prohibitions on child-related employment under the *Commission for Children and Young People Act 1998* (NSW) as being “directed at the safety of the community, and in circumstances where the offender should have no expectation of any possibility of working with or pursuing a close association with children”.<sup>170</sup> It also stated that these prohibitions<sup>171</sup> as well as orders under the *Crimes (Serious Sex Offenders) Act 2006* (NSW) were not intended to be punitive.<sup>172</sup>
- 4.117 Some stakeholders have supported retaining the exclusions specified under s 24A.<sup>173</sup> However, there was also some support for reserving a discretion for the courts to take into account the fact that a sex offender may become subject to registration requirements, orders and prohibitions.<sup>174</sup> Of particular concern to some stakeholders was the position of young offenders.<sup>175</sup> The NSW Young Lawyers Criminal Law Committee also referred to the lack of discretion in cases where offenders have been placed on the register for less serious crimes or crimes that do not pose a risk to children,<sup>176</sup> while the NSW Bar Association noted that the legislation could have “the extra-curial impact of persons being effectively prohibited from their trained profession”.<sup>177</sup>
- 4.118 We are not persuaded that there is any reason to retreat from s 24A. The restrictions that attach to those convicted of sexual offences are directed towards the protection of the community and are not intended to be punitive. We do not consider that they should be regarded as a form of extra-curial punishment. If it were thought appropriate to relax their application in the case of children then this should be achieved by amending the relevant legislation under which the restrictions and prohibitions arise rather than by amending sentencing law.
- 4.119 Accordingly our view is that a provision in the terms of s 24A should be included in a revised Crimes (Sentencing) Act. The new provision should continue to prevent a

168. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Report (2008) vol 1, rec 40; NSW Sentencing Council, *Reduction in Penalties at Sentence*, Report (2009) rec 9, [4.51], [8.77]-[8.80].

169. *R v KNL* [2005] NSWCCA 260; 154 A Crim R 268 [50]; *TMTW v R* [2008] NSWCCA 50.

170. NSW Sentencing Council, *Reduction in Penalties at Sentence*, Report (2009) [8.80].

171. NSW Sentencing Council, *Reduction in Penalties at Sentence*, Report (2009) [4.51].

172. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Report (2008) vol 1 [6.64].

173. NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 13; NSW Police Force, *Submission SE14*, 5.

174. Law Society of NSW, *Submission SE7*, 14; NSW Bar Association, *Submission SE9*, 17; Legal Aid NSW, *Submission SE11*, 24; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 22; Criminal justice system stakeholders, *Consultation SEC5*.

175. NSW Bar Association, *Submission SE9*, 17; Children's Court of NSW, *Submission SE4*, 11; Corrective Services, *Submission SE51*, 12-13.

176. NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 22.

177. NSW Bar Association, *Submission SE9*, 17.

court from taking into account as extra-curial punishment the possibility of the offender becoming subject to an order for continuing detention or extended supervision,<sup>178</sup> or to a child protection prohibition order.<sup>179</sup> The proposed provision also caters for the position of the high risk offender who may become liable to an order for extended supervision or continuing detention.

**Recommendation 4.4: Irrelevance of certain offender restrictions to be addressed separately**

A revised Crimes (Sentencing) Act should contain a stand-alone provision in the general terms of the current s 24A of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

### Confiscation of assets or forfeiture of proceeds of crime

- 4.120 Section 24B of the CSPA precludes the court from taking into account, as a mitigating factor, “the consequences for the offender of any order of a court imposed because of the offence under confiscation or forfeiture legislation”.<sup>180</sup> It was introduced in response to a recommendation by the NSW Sentencing Council.<sup>181</sup>
- 4.121 The reach of the confiscation and forfeiture legislation is potentially broad and includes both property used in connection with the commission of a serious offence as well as what might in broad terms be described as the proceeds of the offence, collectively referred to as “tainted property”. The orders available under the legislation include:
- confiscation and forfeiture orders;
  - pecuniary penalty orders, the quantum of which is calculated by reference to the value of the benefits believed to have been gained; and
  - drug proceeds orders, the quantum of which is assessed by reference to the value of the benefits believed to have been received.
- 4.122 In some instances the orders made are automatic or mandatory,<sup>182</sup> while in other instances there is an area for discretion as well as a capacity to make allowance for the interests of innocent third parties.
- 4.123 The CCA has held that confiscation and forfeiture were not to be taken into account in sentencing unless there were exceptional or unusual circumstances.<sup>183</sup> In *R v Kalache* it was said that generally the forfeiture of “ill-gotten gains” and the

178. Under the *Crimes (High Risk Offenders) Act 2006* (NSW).

179. Under the *Children Protection (Offenders Prohibition Orders) Act 2004* (NSW).

180. The relevant legislation being defined as the *Confiscation of Proceeds of Crime Act 1989* (NSW); *Criminal Assets Recovery Act 1990* (NSW); and *Proceeds of Crime Act 2002* (Cth).

181. NSW Sentencing Council, *Reduction in Penalties at Sentence*, Report (2009) rec 10 [8.81]-[8.82].

182. For example, under the *Proceeds of Crime Act 2002* (Cth).

183. *Ha v R* [2008] NSWCCA 141 [47] referring to *R v Kalache* [2000] NSWCCA 2; 111 A Crim R 152 [74]-[77].



punishment of imprisonment should be regarded as “complementary sanctions intended to strengthen each other, rather than as alternative sanctions which a resourceful offender can juggle in a way that effectively causes the one to weaken, rather than to strengthen, the other”.<sup>184</sup>

4.124 The NSW Sentencing Council recommendation on forfeiture was confined to the proceeds of crime. It did not refer to the forfeiture of property that had been used in the commission of an offence. Neither the report nor the second reading speech<sup>185</sup> drew a distinction between forfeiture of the ill-gotten gains of an offence and the forfeiture of the property used in the commission of an offence, which can be valuable (as is the case, for example, of a farming property used for the cultivation of cannabis).

4.125 The New Zealand Court of Appeal drew the distinction in *R v Brough* where it observed:

First, there may be exceptional or unusual circumstances where orders made, particularly orders to forfeit valuable property used in the commission of an offence, may have a disproportionate or exceptional effect on the offender, sufficient for some regard to be had to it when imposing sentence. Secondly, recognising that one of the purposes of the sentence to be imposed is to deter others who may be minded to commit like offences, if forfeiture orders of property used in the commission of offences are particularly severe, some adjustment to the sentence may be appropriate because the deterrent effect of the forfeiture orders may lessen the need for the deterrent element in the sentence. But it is difficult to conceive of circumstances where orders to forfeit the proceeds of the offence or for a pecuniary penalty order reflecting the benefit derived from the commission of an offence, should have any relevance to an appropriate sentence. These reflect the offender's ill-gotten gains which, in accordance with the policy of the Act, and irrespective of sentencing for offences, the offender should be required to disgorge.<sup>186</sup>

4.126 Some of the other Australian jurisdictions do draw this distinction in legislation.

#### *Confiscation of assets as a sentencing factor in other jurisdictions*

4.127 In Victoria, a sentencing court can have regard to the consequences of a forfeiture order<sup>187</sup> regarding property that was used in connection with the commission of an offence, if it is satisfied that the property was acquired lawfully.<sup>188</sup> However, it cannot have regard to a forfeiture order in respect of property “derived or realised, or substantially derived or realised, directly or indirectly, by any person as a result of the commission of the offence”.<sup>189</sup> It can also have regard to a pecuniary penalty order<sup>190</sup> “to the extent to which it relates to benefits in excess of profits derived from

184. *R v Kalache* [2000] NSWCCA 2; 111 A Crim R 152 [77] (Sully J).

185. NSW, *Parliamentary Debates*, Legislative Council, 23 November 2010, 27868-27869.

186. *R v Brough* [1995] 1 NZLR 419, 424.

187. Made under the *Confiscation Act 1997* (Vic).

188. *Sentencing Act 1991* (Vic) s 5(2A).

189. *Sentencing Act 1991* (Vic) s 5(2A)(b).

190. Made under the *Confiscation Act 1997* (Vic).

- the commission of the offence” but not to the extent to which it relates to “profits (as opposed to benefits) derived from the commission of the offence”.<sup>191</sup>
- 4.128 In the NT, a court can have regard to “any co-operation by the offender in resolving any action taken against the offender under the *Criminal Property Forfeiture Act* in relation to the offence or offences for which the offender is being sentenced”.<sup>192</sup> It can also have regard to the consequences of a forfeiture order<sup>193</sup> to the extent that the order relates to “crime-used property” in relation to the offence or offences for which the offender is being sentenced.<sup>194</sup> “Crime-used” property includes property that is used in connection with the commission of a “forfeiture offence”,<sup>195</sup> or used for storing property unlawfully acquired in the commission of a forfeiture offence, and property in or on which an act or omission was done, omitted to be done or facilitated in connection with the commission of a forfeiture offence.<sup>196</sup>
- 4.129 In WA, the fact that criminal property confiscation has occurred or may occur is identified as not being a mitigating factor. However, except in the case of derived property (that is, property derived or realised or subject to the control of the offender, as a result of the offence), the offender’s facilitation of the confiscation is a mitigating factor.<sup>197</sup>
- 4.130 Sentencing legislation in SA requires that a court have regard to the nature and extent of a forfeiture of property (other than a forfeiture that merely neutralises a benefit that has been obtained through the commission of the offence) that is to be imposed as a result of the commission of the offence.<sup>198</sup>
- 4.131 Under Queensland legislation, a court cannot have regard to whether a forfeiture order or automatic forfeiture may occur in sentencing an offender for a “confiscation offence”,<sup>199</sup> which includes a serious criminal offence or indictable offence.<sup>200</sup>
- 4.132 The Tasmanian sentencing legislation is silent on this topic. However, the Tasmanian Court of Criminal Appeal has held that the wording of confiscation legislation<sup>201</sup> did not preclude a sentencing court from taking into account the consequences of confiscation orders made in relation to an offence.<sup>202</sup>
- 4.133 In its 2006 report, the ALRC stated that the nature and extent of confiscation orders made as a result of the commission of an offence should be a legislated sentencing

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191. *Sentencing Act 1991* (Vic) s 5(2A)(c), (d).

192. *Sentencing Act* (NT) s 5(4)(a).

193. Under the *Criminal Property Forfeiture Act* (NT).

194. *Sentencing Act* (NT) s 5(4)(b).

195. *Criminal Property Forfeiture Act* (NT) s 6.

196. *Criminal Property Forfeiture Act* (NT) s 11(1).

197. *Sentencing Act 1995* (WA) s 8.

198. *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(k).

199. *Criminal Proceeds Confiscation Act 2002* (Qld) s 260.

200. *Criminal Proceeds Confiscation Act 2002* (Qld) s 99.

201. *Crimes (Confiscation of Profits) Act 1993* (Tas).

202. *Stocks v R* [2000] TASSC 106; 9 Tas R 210 [13], [64].

factor,<sup>203</sup> but recommended that confiscation orders that neutralise benefits obtained by the commission of the offence should not mitigate the sentence.<sup>204</sup>

*Prohibition on considering confiscation or forfeiture as a sentencing factor*

- 4.134 Some stakeholders supported the retention of the current s 24B,<sup>205</sup> although not all adverted to the possible distinction between forfeiture of proceeds of crime and confiscation of any property used in the commission of an offence. Other stakeholders supported the notion that a distinction should be drawn between the two forms of order. This distinction would allow courts to take into account, as a matter that could justify a lesser sentence, the confiscation or forfeiture of property used in the commission of the offence, but not the proceeds of crime.<sup>206</sup>
- 4.135 Otherwise there was some support for the reservation of a discretion that would allow courts to take such orders into account as a form of extra-curial punishment<sup>207</sup> that would justify a reduction in a sentence. The NSW Young Lawyers' Criminal Law Committee submitted<sup>208</sup> that s 24B should be repealed, reverting to the common law position as stated in *Kalache*;<sup>209</sup> or that s 24B be reframed in accordance with the decision in *Brough*.<sup>210</sup>
- 4.136 Our view is that s 24B should be included in a revised Crimes (Sentencing) Act in its current form. It seems to be commonly agreed that sentencing courts should not consider the confiscation or forfeiture of the proceeds of crime or of a property acquired through those proceeds. The position is more difficult with respect to confiscation or forfeiture of property used in connection with the commission of an offence. We recognise that there may be circumstances where the loss of property used in connection with the commission of an offence could impose a degree of "extra-curial" punishment, particularly if there was a substantial difference between the value of that property and the actual or prospective gains from the offence.
- 4.137 In practice, however, it may be difficult to distinguish between confiscated property that was the proceeds of crime and property that was used in connection with a crime. For example, a farming property used for the cultivation of cannabis may have been purchased with the proceeds of crime. More importantly, we see a significant deterrent value in the risk of forfeiting property used in connection with a crime.
- 4.138 If confiscation was relevant to sentencing, practical difficulties might also arise for courts as confiscation proceedings may not necessarily be finalised before the

203. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [6.147].

204. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) rec 6-6.

205. NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 13; Police Association of NSW, *Submission SE6*, 37; NSW Police Force, *Submission SE14*, 5.

206. Legal practitioners, *Consultation SEC24*.

207. Law Society of NSW, *Submission SE7*, 14; Legal Aid NSW, *Submission SE11*, 24.

208. NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 22.

209. *R v Kalache* [2000] NSWCCA 2; 111 A Crim R 152 [74]-[77].

210. *R v Brough* [1995] 1 NZLR 419, 424.

person is sentenced. As a general rule, events that occur after sentencing are irrelevant to the exercise of the court's sentencing discretion, and the court's sentencing order could be frustrated if the possibility was taken into account as a form of extra-curial punishment yet it did not occur, and vice versa if it was not taken into account yet it did eventuate.

- 4.139 Where, however, an offender cooperates in the surrender of property that was used in connection with the commission of a crime but that was itself obtained lawfully (the onus of proving which should rest on the offender), then we see no harm in a court taking that into account in favour of the offender in accordance with the current discount on sentence which may be obtained for assistance to law enforcement authorities.
- 4.140 Similarly, under that provision allowance could be made where an offender identifies or surrenders property that the authorities might otherwise have not located or spent considerable time and resources in locating.
- 4.141 Accordingly we consider that a revised Crimes (Sentencing) Act should include s 24B of the CSPA. The provision should also state that it has effect despite any rule of law to the contrary.

**Recommendation 4.5: Irrelevance of confiscation of assets to be addressed separately**

A revised Crimes (Sentencing) Act should contain a stand-alone provision in the general terms of the current s 24B of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (confiscation of assets, etc). The provision should state that it has effect despite any Act or rule of law to the contrary.

### Good character in sexual offences against children

- 4.142 The CSPA provides that in sentencing for a child sexual offence, “good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence”.<sup>211</sup> The provision was added to s 21(A), in 2008, on the recommendation of the NSW Sentencing Council.<sup>212</sup>
- 4.143 The reason for this amendment is that, in cases of sexual offences against children, “‘good character’ may be the critical factor that enabled the offence to be committed, or repeated”.<sup>213</sup> In the second reading speech introducing the provision, it was observed:

211. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5A).

212. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Report (2008) vol 1, rec 38, 39.

213. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Report (2008) vol 1 [5.51].

Any offender who has misused his or her perceived trustworthiness and honesty in this way cannot use his or her good character and clean record as a mitigating factor in sentencing.<sup>214</sup>

- 4.144 A number of stakeholders support the retention of the factor as it stands in relation to child sexual offending,<sup>215</sup> although it was also suggested during consultations that sentencing courts would act in the same way in the absence of the provision and it may be desirable to leave this exclusion to the common law.<sup>216</sup>
- 4.145 Some stakeholders considered that the current law should be changed to give the courts a discretion to apply this provision.<sup>217</sup> The Children’s Court of NSW argued that the exclusion should not apply to juvenile offenders, as the legislation is “primarily intended to protect children from adults where a significant discrepancy in power exists”, a factor that is often not a primary concern in matters involving juvenile offenders.<sup>218</sup>
- 4.146 In its report, the NSW Sentencing Council acknowledged that an offender’s good character can also assist the commission of other types of offences such as white collar crime and drug importations involving couriers. However, it considered that sexual offences against children deserve a special approach because history regrettably shows that people in authority, and those who are in a position to win the confidence of parents, have used their positions to commit those offences.<sup>219</sup>
- 4.147 The NSW Sentencing Council report stated that, in relation to other types of offences, in some circumstances, good character may indicate that the offending behaviour was out of character. However, for child sexual offences, such a conclusion would be dangerous “where a person has been convicted of repeated child sexual abuse or is found to have paedophilic tendencies, or to have an obsession with child pornography”.<sup>220</sup> Further, the report referred to empirical research indicating that such offenders resist participating in sexual offending rehabilitation programs, and those who do participate have limited success.<sup>221</sup>
- 4.148 We believe that the common law approach, as confirmed in numerous appellate decisions, is adequate in relation to the sentencing of white collar criminals and drug couriers, who are able to take advantage of their perceived good character and absence of a criminal record.<sup>222</sup>

214. NSW, *Parliamentary Debates*, Legislative Council, 26 November 2008, 11707.

215. NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 13; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 22; NSW Police Force, *Submission SE14*, 5.

216. Criminal justice system stakeholders, *Consultation SEC5*.

217. Law Society of NSW, *Submission SE7*, 14; Legal Aid NSW, *Submission SE11*, 24.

218. Children’s Court of NSW, *Submission SE4*, 11.

219. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Report (2008) vol 1 [5.57].

220. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Report (2008) vol 1 [5.58], referring to *R v Gent* [2005] NSWCCA 370; 162 A Crim R 29; and *R v Jones* [1999] WAsCA 24; 108 A Crim R 50.

221. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Report (2008) vol 1 [5.59].

222. As to white collar, crime see: *R v El-Rashid* (Unreported, NSWCCA, 7 April 1995); *R v Houghton* [2000] NSWCCA 62 [18]; *R v Smith* [2000] NSWCCA 140; 114 A Crim R 8 [20]-[24]; *R v Boughen*

- 4.149 We support retention of the current exclusion of good character as drafted in s 21A(5A) to (6) for child sexual offences and do not believe that it should be extended to other offences. We do, however, accept the submission from the Children's Court that sentencing of juvenile offenders should not be subject to this provision. This would be consistent with the rehabilitative approach that has primacy in sentencing juvenile offenders and with their exclusion from the operation of the SNPP scheme.
- 4.150 In our view the provisions currently contained in s 21A(5A) to (6) would sit better as stand-alone provisions. Logically they have a similar status to the provisions that require the court to disregard the supervision and other requirements that apply to sex offenders and the consequences of the confiscation of assets and forfeiture of the proceeds of crime.
- 4.151 The NSW Police Force has submitted that this provision should be extended to preclude the court from taking into account as a mitigating factor the fact that the offender had a paedophilic disorder (including those cases where it was associated with an anti-social personality disorder, anxiety disorder, or depressive disorder) at least where there is no possibility of that disorder being 'cured'. It referred to the classification of paedophilia in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)<sup>223</sup> as a high level mental disorder, and submitted that the interests of protecting the community should take precedence over the unlikely rehabilitation of those with this condition.
- 4.152 We accept the general correctness of this proposition. It accords with the views that Justice McHugh expressed, obiter, in *Ryan v The Queen*,<sup>224</sup> in which the Court reserved for another day the question of whether it should develop special principles for sentencing paedophiles.
- 4.153 It is important to note that repeat sexual offenders who present as a danger to the community and who resist treatment, can become subject to continuing detention or extended supervision orders,<sup>225</sup> an approach that we consider superior to disproportionate or indefinite sentencing.<sup>226</sup>
- 4.154 In a practical sense, it would be seriously counterproductive for any person, who is charged with the sexual assault of children, to argue for a reduction in objective criminality because their paedophilic disorder reduced their ability to control or redress their sexual impulses, or led to disordered thinking in their dealings with children. This would inevitably justify the court giving a greater emphasis to the interests of community protection, and to the need for general deterrence, which

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[2012] NSWCCA 17, 215 A Crim R 476. As to drug couriers, see: *R v Leroy* [1984] 2 NSWLR 441, 446-447; *R v Gent* [2005] NSWCCA 370; 162 A Crim R 29 [55].

223. Now replaced by *Diagnostic and Statistical Manual of Mental Disorders DSM-5*, 302.2.

224. *Ryan v The Queen* [2001] HCA 21; 206 CLR 267 [40]-[51]; supported by Hayne J, [155]-[156]; Kirby J disagreeing, [126]-[130].

225. Under, eg, *Crimes (High Risk Offenders) Act 2006* (NSW).

226. See, eg, *Sentencing Act 1991* (Vic) s 18A-18P; *Penalties and Sentences Act 1992* (Qld) s 162-179; and *Criminal Law Amendment Act 1945* (Qld).

would outweigh any argument for a reduction of penalty on the basis of a reduced moral culpability.<sup>227</sup>

- 4.155 The CCA has given limited weight to the explanation offered by some sexual offenders that they themselves have a history of being sexually abused as children.<sup>228</sup> It can be expected that, in accordance with this approach, the interests of retribution and community protection will prevail over mitigation arguments based on impaired volition, both at the time of sentencing and when approaching parole release.<sup>229</sup> In any event implementing the submission, in a jurisdiction that permits the continuing detention or extended supervision of high risk sexual offenders, could be an overreaction. The courts also need some room to deal with those cases where paedophilic tendencies can be linked with a co-morbid but treatable mental illness or cognitive impairment, where there is a case for giving greater emphasis to the rehabilitative purpose of a sentence.

**Recommendation 4.6: Sexual offences against children facilitated by good character to be addressed separately**

- (1) A revised Crimes (Sentencing) Act should contain stand-alone provisions in the general terms of the current *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5A) to (6) (child sexual offences).
- (2) The provisions should not apply to juvenile offenders convicted of sexual offences.

**Offence committed while the offender was unlawfully at large or on conditional liberty**

- 4.156 The common law has treated the fact that an offence was committed by an offender who is subject to conditional liberty as a circumstance that operates adversely to the offender on sentence.<sup>230</sup> Paragraph 21A(2)(j) of the CSPA gives effect to the common law in this respect.

- 4.157 As Justice Lee pointed out in *R v Vranic*:

The commission of offences on parole demonstrates that the expectation of rehabilitation of the prisoner has not been realised and that through his own conduct the substantial mechanism designed for rehabilitation, ie parole has failed to achieve its purpose. The Court in such circumstances cannot proceed on the same expectation of rehabilitation that is open in other circumstances.<sup>231</sup>

- 4.158 The common law takes a similar approach to an offender committing an offence while “unlawfully at large”. In *R v King* it was observed that the fact that a person

227. *Ryan v The Queen* [2001] HCA 21; 206 CLR 267 [40], [46]-[47].

228. *R v Cunningham* [2006] NSWCCA 176; *Dousha v R* [2008] NSWCCA 263.

229. Even assuming that expert evidence could be called to support such an impairment to the point where it might impact on moral culpability – a proposition that was questioned in *Ryan v The Queen* [2001] HCA 21; 206 CLR 267; and see I Freckelton, “Good Character, Paedophilia and the Purposes of Sentencing” (2001) 8 *Psychiatry, Psychology and Law* 202, 210-211.

230. *R v Ponfield* [1999] NSWCCA 435; 48 NSWLR 327; *R v Tran* [1999] NSWCCA 109 [15].

231. *R v Vranic* (Unreported, NSWCCA, 7 May 1991) 4; a principle cited with approval in *R v Cicekdag* [2004] NSWCCA 357; 150 A Crim R 299 [7], [52].

who was unlawfully at large committed the offence elevates its seriousness above that of an offence committed by a person who was lawfully at liberty.<sup>232</sup>

- 4.159 Accordingly, a court can properly take each situation into account as a factor particularly requiring specific deterrence, denunciation, and protection of the community (subject to the *Veen [No 2]* approach to proportionality) as well as showing that the offender's prospects of rehabilitation are reduced. The courts must consider the fact of reoffending in light of these purposes of sentencing, consistently with the approach taken in *R v McNaughton*,<sup>233</sup> rather than by elevating the objective seriousness of the new offence. That this is the proper approach further demonstrates the failure of s 21A to differentiate factors of "aggravation" between those facts that relate to the "nature, circumstances and seriousness" of the offence, viewed objectively, and matters personal to the offender that operate adversely for sentencing purposes.
- 4.160 Courts have taken the same approach against those who reoffend while subject to a community service order that has been taken against those who offend on conditional release on parole or on bail, on the basis that although it is a sentence imposed instead of imprisonment, it is subject to revocation upon breach.<sup>234</sup> Courts have also considered this approach can apply to those who reoffend while subject to a suspended sentence of imprisonment.<sup>235</sup>
- 4.161 To provide more certainty, our view is that the question of reoffending while on conditional liberty or while unlawfully at large is best dealt with by way of a separate section.

**Recommendation 4.7: Reoffending while on conditional liberty or unlawfully at large to be addressed separately**

- (1) A revised Crimes (Sentencing) Act should contain a stand-alone provision to the effect that the court, when sentencing for an offence that was committed while on conditional liberty or while unlawfully at large, should take the fact it was so committed into account when assessing the need for the sentence to contain an additional element of specific deterrence, denunciation and/or community protection, and also when assessing the offender's prospects of rehabilitation.
- (2) There should be a definition of the expressions "conditional liberty" and "unlawfully at large" to take into account the sentences that become available under a revised Crimes (Sentencing) Act, as well as circumstances involving escape or failure to comply with any conditions imposed under any sentence that allows the offender to serve a sentence in the community.

232. *R v King* [2003] NSWCCA 352 [38].

233. *R v McNaughton* [2006] NSWCCA 242; 66 NSWLR 566.

234. *R v Cicekdag* [2004] NSWCCA 357; 150 A Crim R 299 [7], [52]-[53].

235. *R v Drew* [2005] NSWCCA 50 [16].



## Hate crimes

- 4.162 Section 21A of the CSPA currently includes, as an aggravating factor, that the offence was:

motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability).<sup>236</sup>

- 4.163 The extent to which the common law regarded a motivation of this kind as a factor elevating the seriousness of an offence is not entirely clear, although some Australian decisions appear to have accepted it as a relevant consideration going either to the objective criminality of the offending, or to deterrence.<sup>237</sup>

- 4.164 Arguably the common law in Australia would have regarded this form of offending as justifying special consideration, by reference to foreseeability of harm and general deterrence factors, without the need to resort to racial or group hatred reasoning. To a significant extent, however, legislative intervention, similar to that in place in NSW, has put to rest any such issue in the other Australian jurisdictions.

- 4.165 Hate legislation of this kind has tended to fall into three separate models.<sup>238</sup>

### *Aggravating factor model*

- 4.166 This is the approach adopted in NSW. It is mirrored in the legislation in force in the Northern Territory which provides that the circumstances relating to the commission of an offence that can be regarded as an aggravating factor include that “the offence was motivated by hate against a group of people”.<sup>239</sup>

- 4.167 Although not specifically described as an aggravating factor, Victorian legislation requires the court, when sentencing an offender, to have regard to whether the offence was:

motivated (wholly or partly) by hatred for or prejudice against a group of people with common characteristics with which the victim was associated or with which the offender believed the victim was associated.<sup>240</sup>

- 4.168 The sentencing legislation of several other jurisdictions treats hostility bias or hatred towards a group with a common characteristic (for example of race, colour, nationality, religion, gender identity, sexual orientation, age or disability) as an

236. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h).

237. See, eg, *R v Palmer* (Unreported, Victoria, Court of Appeal, 13 September 1996); *R v Chong* [2008] VSCA 119 [29]; *Tasmania v Bigwood* (Unreported, Supreme Court of Tasmania, Evans J, 31 May 2010).

238. See G Mason, “Hate Crime Laws in Australia: Are they Achieving their Goals?” (2009) 33 *Criminal Law Journal* 326. See also Victoria, Sentencing Advisory Council, *Sentencing for Offences Motivated by Hatred or Prejudice* (2009); Tasmania Law Reform Institute, *Racial Vilification and Racially Motivated Offences*, Final Report 14 (2011).

239. *Sentencing Act* (NT) s 6A(e).

240. *Sentencing Act 1991* (Vic) s 5(2)(daaa) which was inserted in the response to Victoria, Sentencing Advisory Council, *Sentencing for Offences Motivated by Hatred or Prejudice* (2009).

aggravating factor where it was the motivation for committing an offence.<sup>241</sup> The Tasmania Law Reform Institute also recommended the model in relation to racist aggravation.<sup>242</sup>

### *Aggravated offences – sentence enhancement model*

- 4.169 An alternative approach has been to enact an aggravated form of an offence carrying an increased maximum sentence. An example can be seen in the *Crime and Disorder Act 1998* (UK). Under that Act, aggravated forms of the offences of assault, criminal damage, public order or harassment, are available where the offender demonstrates hostility towards the victim based on the victim's membership (or presumed membership) of a racial group, or where the offence, was motivated (wholly or partly) by hostility towards members of a racial group based on their membership of that group.<sup>243</sup>
- 4.170 Similarly the *Criminal Code* (WA) provides for aggravated offences of assault (in its various forms)<sup>244</sup> where the offence is committed in "circumstances of racial aggravation". Similar provisions apply in relation to offences involving threats,<sup>245</sup> and criminal damage.<sup>246</sup> For the purpose of these provisions circumstances of racial aggravation are defined to mean circumstances in which:
- (a) immediately before or during or immediately after the commission of the offence, the offender demonstrates hostility towards the victim based, in whole or part, on the victim being a member of a racial group; or
  - (b) the offence is motivated, in whole or part, by hostility towards persons as members of a racial group.<sup>247</sup>

### *Vilification offences*

- 4.171 In NSW it is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group on the ground of either the race, sexual orientation, or disability of that person or members of that group.<sup>248</sup> Offences of serious vilification have been introduced that will apply where that form of conduct includes threatening or inciting others to threaten physical harm towards, or towards any property of, the person or group.<sup>249</sup>

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241. *Sentencing Act 2002* (NZ) s 9(1)(h); *Criminal Justice Act 2003* (UK) s 145 (offence racially or religiously motivated), s 146 (offence motivated by hostility towards people of a particular sexual orientation or with a disability); *Criminal Code*, RSC 1985, c C-46 (Can) s 718.2(a)(i).

242. Tasmania Law Reform Institute, *Racial Vilification and Racially Motivated Offences*, Final Report 14 (2011) rec 5-7.

243. *Crime and Disorder Act 1998* (UK) s 28-32.

244. *Criminal Code* (WA) s 313, s 317, s 317A.

245. *Criminal Code* (WA) s 338B.

246. *Criminal Code* (WA) s 444.

247. *Criminal Code* (WA) s 80l.

248. *Anti-Discrimination Act 1977* (NSW) s 20C, s 38S, s 49ZT, s 49ZXB.

249. *Anti-Discrimination Act 1977* (NSW) s 20D, s 38T, s 49ZTA, s 49ZXC.

- 4.172 Similar substantive offences of serious vilification have been introduced elsewhere in Australia, either in the form of anti-discrimination legislation;<sup>250</sup> or in the form of racial vilification legislation;<sup>251</sup> or as part of a general criminal code.<sup>252</sup>
- 4.173 These provisions give rise to stand alone offences. Although they may overlap with another offence which was aggravated because of some form of group hatred or prejudice, in accordance with the *De Simoni* principle, these provisions will not of themselves be relevant when the offender is sentenced for that other offence.

*Adoption of a stand-alone provision*

- 4.174 In this report we have confined our attention to the way in which a motivation of hatred for, or prejudice against, a group of which the victim is a member or presumed member, should be taken into account under a revised Crimes (Sentencing) Act. We have not considered the offence of serious vilification, although we note that the Law and Justice Committee of the NSW Legislative Council is conducting an inquiry into racial vilification law. Nor have we considered the introduction of aggravated forms of offences, such as assault, that can be seen in the offence enhancement model.
- 4.175 The reason for singling out hate crime motivation as a sentencing factor is clear. Criminal conduct associated with hostility or hatred towards or prejudice against marginalised or vulnerable or disadvantaged groups deserves special consideration because of:
- the harm and humiliation and reduced self worth experienced by a victim who already feels marginalised and at risk, and to the increased feeling of vulnerability among the community to which that person belongs;
  - its effect in undermining the benefits of a multicultural or diverse society;
  - the need for a public reaffirmation of the values of tolerance and respect, and the unacceptability of irrational prejudices;<sup>253</sup> and
  - the need to denounce and to deter criminal conduct motivated by racism, religious intolerance, homophobia, and other forms of prejudice.
- 4.176 The decisions in relation to the s 21A(2)(h) factor to date suggest that:
- Simple hatred of a victim will not suffice. The provision is concerned with offences that are motivated by hatred or prejudice against a group.<sup>254</sup>
  - The offence must be motivated by actual hatred or prejudice towards a group, and not simply because of an opportunistic belief, for example, that members of

250. See, eg, *Anti-Discrimination Act 1991* (Qld) s 124A, s 131A; *Discrimination Act 1991* (ACT) s 67.

251. *Racial Vilification Act 1996* (SA) s 4; *Racial and Religious Tolerance Act 2001* (Vic) s 24-25.

252. *Criminal Code* (WA) s 77-80D.

253. See generally A Ashworth, *Sentencing and Criminal Justice* (5th ed, Cambridge University Press, 2010) 160; G Mason, "Hate Crime Laws in Australia: Are they Achieving their Goals?" (2009) 33 *Criminal Law Journal* 326, 333, 337, 339.

254. *R v MAH* [2005] NSWSC 871 [32].

a particular group are likely to keep property in their home that is worth stealing.<sup>255</sup>

- Intra-racial or intra-religious group hatred or prejudice will qualify. It is not necessary that the offence be motivated by inter-racial or inter-religious hatred or prejudice.<sup>256</sup>
- The fact that the offence was motivated by hatred for or against a person believed to be a member of a group (paedophiles) that was not one that has traditionally been recognised as a category of vulnerable persons protected under hate laws, does not exclude its application.<sup>257</sup>

There is nothing controversial in the first three decisions, but the fourth is troubling, in giving a broad interpretation to the expression “group” in s 21A(2)(h), that extends beyond those mentioned in parenthesis.<sup>258</sup>

- 4.177 We consider that a revised Crimes (Sentencing) Act should contain a stand-alone provision that requires the court, where appropriate, to take into account the fact that an offence was motivated by, or associated with, a hatred for or prejudice of the kind that has become the subject of hate crime laws. Taking it into account (as elevating the seriousness of the offence, and as justifying additional weight to specific and general deterrence) is in our view preferable to the sentence enhancement model.
- 4.178 In particular, this approach calls for a more direct consideration of the objective culpability, and need for deterrence associated with this form of criminality, than the indirect approach associated with an increase in the maximum available penalty for individual offences. It is a provision that will apply across the board without the need to identify and amend each section that creates an offence which might be committed in circumstances amounting to a hate crime.
- 4.179 Adoption of a provision of this kind in place of s 21A(2)(h), as a stand-alone section, would assist in addressing concerns of the kind that have led to the current inquiry of the Law and Justice Committee of the NSW Legislative Council into racial vilification laws. Although that inquiry is confined to racial vilification, similar considerations apply in relation to the other forms of serious vilification which give rise to offences under the *Anti-Discrimination Act 1977* (NSW), and which might sit more comfortably in the *Crimes Act 1900* (NSW).
- 4.180 As has been noted in several law reform reports, sentencing law needs to provide a response to hate crimes that:
- reinforces the existence of a tolerant multi-cultural society;
  - respects minority groups;

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255. *Aslett v R* [2006] NSWCCA 49 [124].

256. *R v El Mostafa* [2007] NSWDC 219 [16].

257. *Dunn v R* [2007] NSWCCA 312 [32].

258. G Mason, “Hate Crime Laws in Australia: Are they Achieving their Goals?” (2009) 33 *Criminal Law Journal* 326, 336-339.

- recognises the particular form of criminality and harm both direct and indirect that is associated with this form of criminality; and
- makes a public symbolic statement of the abhorrence with which it is viewed and that encourages its denunciation.

### *The test*

- 4.181 The various models of hate crime laws mentioned above employ either a “motive test” or a “group selection test”, or a test that simply depends on a “demonstration of hostility test” that, despite their diversity, are linked by a common purpose to specifically and publicly target crime that is motivated or otherwise shaped by prejudice.<sup>259</sup>
- 4.182 We propose adopting the *motivation test*, as it more precisely focuses attention on the fact that the offending is related to group hatred or prejudice. The *selection test* would extend application of the section to cases where the offending was unrelated to hatred or prejudice, that is to cases where, for example the victim was selected because of a stereotype that a particular group of people was an easy target, being wealthy or being likely to have readily accessible assets worth stealing. Our approach in this respect would accord with that taken in respect of the current s 21A(2)(h);<sup>260</sup> although it would differ from that taken in the Victorian decision of *R v Gouros*.<sup>261</sup>
- 4.183 We do not favour the *demonstration of a hostility test*. In many cases evidence of the demonstration of hostility immediately before, during or immediately after the offending conduct, for example, through speech, will be available to make good the motivation test. In other cases however that behaviour may be unrelated to the reason for the offence, and involve little more than spontaneous insult.
- 4.184 Although it would be possible to introduce a provision that incorporates all three tests, as the Tasmania Law Reform Institute proposed,<sup>262</sup> we prefer to confine the test to that of motivation. This test links the aggravating circumstance directly to the reason for its introduction as a response to hate-motivated crime.
- 4.185 We propose a revision of the formulation in s 21A(2)(h) that would permit courts to apply the provision where the offence was motivated “*wholly or partly*” by the hatred or prejudice. This would facilitate proof and address those cases where there was a mixed motivation for the offence. It would also accord with the approach taken in legislation in Victoria and New Zealand.

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259. G Mason, “Hate Crime Laws in Australia: Are they Achieving their Goals?” (2009) 33 *Criminal Law Journal* 326, 332-333.

260. *Aslett v R* [2006] NSWCCA 49 [123]-[124].

261. *R v Gouros* [2009] VCC 1746; G Mason, “R v Gouros: Interpreting Motivation Under Victoria’s New Hate Crime Laws” (2010) 34 *Criminal Law Journal* 323.

262. Tasmania Law Reform Institute, *Racial Vilification and Racially Motivated Offences*, Final Report 14 (2011) rec 5 and 6.

### *The groups*

- 4.186 In our view the focus of the legislation should be on the minority and vulnerable or subjugated groups in whose interest hate crime laws have traditionally been developed. This would require a departure from the CCA's approach in *Dunn v R*<sup>263</sup> where the interpretation that it gave to s 21A(2)(h) would effectively extend its reach to hatred or prejudice in relation to any group with common characteristics, for example, cyclists or lawyers. On this basis we would confine the provision to those cases where the hatred or prejudice related to "a group of people to which the offender believed or perceived the victim belonged, comprising people of a particular religious belief, racial, ethnic or national origin, age, sexual orientation, transgender status or having a particular disability or illness".
- 4.187 In this formulation we have deleted "language" as a group unifying factor compared to the existing list in s 21A(2)(h). It has an indeterminate reach, it does not necessarily denote minority or vulnerable status, and it is likely to add little to the "racial, ethnic or national" origin criterion. We have added "illness" as well as disability, which is intended to capture issues such as HIV/AIDS status. We have also added "transgender status" on the suggestion of stakeholders and in conformity with the *Anti-Discrimination Act 1977* (NSW).<sup>264</sup>
- 4.188 It is implicit in the foregoing that the fact of simple hatred towards a victim unassociated with that person's perceived membership of a relevant group will not suffice. This is consistent with existing authority in NSW.<sup>265</sup>

### *Extended reach – association*

- 4.189 Potentially there are circumstances in which the victim may be indirectly caught up in a hate-related crime, for example, where that person is assaulted when going to the assistance of another person who would fall directly within the reach of the proposed provision. Similarly the perceived association of the victim with a "protected group", not because of membership of that group, but because the fact that the victim provided advocacy or support services for that group, may have been the factor motivating an attack.<sup>266</sup>
- 4.190 Situations of this kind have been accommodated in the *Sentencing Act 1991* (Vic),<sup>267</sup> and we consider it desirable to revise the formulation contained in s 21A(2)(h) by adding association as a criterion.

#### **Recommendation 4.8: Hate crimes to be addressed separately**

A revised Crimes (Sentencing) Act should contain a stand-alone provision to the effect that the court, when sentencing for an offence that was motivated wholly or partly by hatred for or prejudice against a group

263. *Dunn v R* [2007] NSWCCA 312.

264. *Anti-Discrimination Act 1977* (NSW) pt 3A.

265. *R v MAH* [2005] NSWSC 871 [32].

266. See Victoria, Sentencing Advisory Council, *Sentencing for Offences Motivated by Hatred or Prejudice* (2009) 13-14.

267. *Sentencing Act 1991* (Vic) s 5(2)(daaa).

of people to which the offender believed the victim belonged or with which the offender believed the victim was associated (being people of a particular religious belief, racial, ethnic or national origin, age, sexual orientation, transgender status or having a particular disability or illness), should take that motivation into account when assessing the need for the sentence to contain an additional element of deterrence, denunciation and/or community protection from the offender, and also when assessing the offender's prospects of rehabilitation.

## Criminal organisations

4.191 The *Crimes Act 1900* (NSW) contains a number of offences that carry significant maximum penalties:

- engaging in certain forms of assault or damage or destruction of property (or threats thereof) with the intention of participating in a criminal activity of a criminal group;<sup>268</sup>
- participating in a criminal group, and of directing the activities of a criminal group;<sup>269</sup> and
- receiving from a criminal group a material benefit that is derived from the criminal activities of a criminal group.<sup>270</sup>

4.192 The *Crimes (Criminal Organisations Control) Act 2012* (NSW), which is directed at the control of criminal organisations, supplements these provisions.<sup>271</sup> A court may declare a particular organisation for the purposes of the Act where it is satisfied that its members associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity (as defined) and that the continued existence of the organisation is an unacceptable risk to the safety, welfare or order of the community in NSW.<sup>272</sup>

4.193 The Act also makes provision for:

- the court to issue a final control order in relation to a person who is a member of a declared organisation or is, or purports to be, a former member of such an organisation but who has an ongoing involvement with the organisation and its activities;<sup>273</sup>
- offences concerning the association of people subject to control orders,<sup>274</sup> and such a person recruiting another person to be a member of a declared organisation;<sup>275</sup>

268. *Crimes Act 1900* (NSW) s 93T(2)-(4).

269. *Crimes Act 1900* (NSW) s 93T(1), (1A), (4A).

270. *Crimes Act 1900* (NSW) s 93TA.

271. Recently amended by the *Crimes (Criminal Organisations Control) Amendment Act 2013* (NSW).

272. *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 7.

273. *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 19; an interim order can also be made: s 14.

274. *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 26.

275. *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 26A.

- the suspension or revocation of the authorisation of a person subject to a control order to carry on certain activities, namely those connected with casinos, security, racing, bookmaking, pawn brokering, tow-trucks, tattooing, private inquiry and commercial agents, motor dealers and repairers and from holding a firearm licence;<sup>276</sup>
  - the reciprocal recognition and enforcement of interstate declarations and orders.<sup>277</sup>
- 4.194 Together these provisions provide a comprehensive response to criminal group activities and in particular to those of outlaw motor-cycle gangs.
- 4.195 Section 21A includes, as an aggravating factor, that the offence “was part of a planned or organised criminal activity”,<sup>278</sup> and conversely includes as a mitigating factor that it was “not part of a planned or organised criminal activity”.<sup>279</sup> This juxtaposition illustrates the fundamental difficulty of the binary approach. As we have discussed earlier, we consider it more appropriate for any question as to whether an offence was part of a “planned or organised” criminal activity, and in particular whether it was a spontaneous event, to be taken into account as part of the “nature, circumstance and seriousness of the offence”.
- 4.196 As a consequence we do not see any need to replicate s 21A(2)(n) as a stand-alone provision, or to make any specific provision in a revised Crimes (Sentencing) Act in relation to the sentencing of offenders convicted of offences arising under s 93T and s 93TA of the *Crimes Act 1900* (NSW). The enhanced maximum sentences that apply in relation to those offences provide their own guidepost.
- 4.197 However we do see merit in including a stand-alone provision in a revised Crimes (Sentencing) Act that would permit the court to take into account the fact that a person committed a serious criminal offence (other than those for which provision is made in the *Crimes (Criminal Organisations Control) Act 2012* (NSW)) while subject to a control order. This would add further teeth to that legislation, and it could adopt the same form as that which is recommended above for offences committed while on conditional liberty and for hate crimes.
- 4.198 We have not engaged in any consultation on this subject because of the recent amendment to the *Crimes (Criminal Organisations Control) Act 2012* (NSW) and the fact that interstate recognition is contemplated for the control of criminal organisations. Recommendation 4.9 is, therefore, qualified as one inviting the government to consider introducing a stand-alone provision.

**Recommendation 4.9: Consider addressing existence of control order separately**

The government should consider including in a revised Crimes (Sentencing) Act a stand-alone provision to the effect that the court,

276. *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 27.

277. *Crimes (Criminal Organisations Control) Act 2012* (NSW) pt 3A.

278. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(n).

279. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(b).



when sentencing an offender for a serious criminal offence that was committed by a person who at the time of the offence was subject to a control order under the *Crimes (Criminal Organisations Control) Act 2012* (NSW), should take the fact that it was so committed into account when assessing the need for the sentence to contain an additional element of deterrence, denunciation and/or community protection from the offender, and also when assessing the offender's prospects of rehabilitation.



## 5. Reductions in penalty

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### In brief

Legislation allows the courts to reduce a sentence in certain cases in order to encourage offenders to act in a way that facilitates the administration of justice. We recommend that a revised Crimes (Sentencing) Act replicate the current discounts for guilty pleas, assistance to law enforcement authorities and assistance before and during the trial. We also recommend that the court be required to state the amount of the discount given for the utilitarian value of a guilty plea.

<b>Discount for a plea of guilty</b> .....	<b>117</b>
Current law on guilty plea discounts .....	117
Past NSW schemes for guilty plea discounts .....	121
Quantify the reduction for the utilitarian value of the plea.....	122
Our view.....	125
Alignment of the NSW and Federal approaches .....	126
Our view.....	127
<b>Discount for assistance to law enforcement authorities</b> .....	<b>128</b>
Our view .....	130
<b>Discount for facilitating the conduct of the trial</b> .....	<b>132</b>
Our view .....	133

5.1 The *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA) expressly confers a power on a court to reduce a sentence for:

- a plea of guilty (s 22);
- assistance to the law enforcement authorities (s 23); and
- pre-trial and trial assistance (s 22A).

### Discount for a plea of guilty

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#### Current law on guilty plea discounts

5.2 Section 22 of the CSPA provides:

- (1) In passing sentence for an offence on an offender who has pleaded guilty to the offence, a court must take into account:
  - (a) the fact that the offender has pleaded guilty, and
  - (b) when the offender pleaded guilty or indicated an intention to plead guilty, and
  - (c) the circumstances in which the offender indicated an intention to plead guilty,

and may accordingly impose a lesser penalty than it would otherwise have imposed.

- (1A) A lesser penalty imposed under this section must not be unreasonably disproportionate to the nature and circumstances of the offence.
- (2) When passing sentence on such an offender, a court that does not impose a lesser penalty under this section must indicate to the offender, and make a record of, its reasons for not doing so.
- (3) Subsection (2) does not limit any other requirement that a court has, apart from that subsection, to record the reasons for its decisions.
- (4) The failure of a court to comply with this section does not invalidate any sentence imposed by the court.

5.3 The court may reduce the severity of the type of punishment, not just the term of the sentence.<sup>1</sup>

5.4 There has been strong support for discounts for pleas of guilty in previous reviews of the criminal law in NSW and elsewhere in Australia.<sup>2</sup> There was strong support among stakeholders for continuing this well-established practice;<sup>3</sup> although there was some disquiet in relation to the rationale for the discount.<sup>4</sup>

5.5 In *R v Thomson*<sup>5</sup> the NSW Court of Criminal Appeal (CCA) delivered a guideline judgment in relation to the provision of a discount for the utilitarian value of a plea in accordance with s 22:

- (i) A sentencing judge should explicitly state that a plea of guilty has been taken into account. Failure to do so will generally be taken to indicate that the plea was not given weight.
- (ii) Sentencing judges are encouraged to quantify the effect of the plea on the sentence insofar as they believe it appropriate to do so. This effect can encompass any or all of the matters to which the plea may be relevant — contrition, witness vulnerability and utilitarian value — but particular encouragement is given to the quantification of the last mentioned matter. Where other matters are regarded as appropriate to be quantified in a particular case, eg assistance to authorities, a single combined quantification will often be appropriate.
- (iii) The utilitarian value of a plea to the criminal justice system should generally be assessed in the range of 10–25 per cent discount on sentence. The primary consideration determining where in the range a particular case should fall, is the timing of the plea. What is to be regarded

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1. NSW, *Parliamentary Debates*, Legislative Assembly, 4 April 1990, 1689-1690. The plea can result in a different type of sentence, but the resulting sentence should not be reduced again for the plea: *R v Borkowski* [2009] NSWCCA 102; 195 A Crim R 1 [32](11); *Lo v R* [2003] NSWCCA 313 [31]. See also NSW Sentencing Council, *Reduction in Penalties at Sentence*, Report (2009) [5.22]-[5.23].

2. NSW Sentencing Council, *Reduction in Penalties at Sentence*, Report (2009) [8.2].

3. The Public Defenders, *Submission SE2*, 9; NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 10; Children's Court of NSW, *Submission SE4*, 9; Law Society of NSW, *Submission SE7*, 12; Legal Aid NSW, *Submission SE11*, 20; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 19; NSW Police Force, *Submission SE14*, 1.

4. Criminal justice system stakeholders, *Consultation SEC5*.

5. *R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383.

as an early plea will vary according to the circumstances of the case and is a matter for determination by the sentencing judge.

- (iv) In some cases the plea, in combination with other relevant factors, will change the nature of the sentence imposed. In some cases a plea will not lead to any discount.<sup>6</sup>

5.6 In *R v Borkowski*<sup>7</sup> Justice Howie set out the principles that the CCA has laid down following the delivery of that guideline judgment:

1. The discount for the utilitarian value of the plea will be determined largely by the timing of the plea so that the earlier the plea the greater discount: *Thomson* at [154]; *Forbes* [2005] NSWCCA 377 at [116].
2. Some allowance may be made in determining the discount where the trial would be particularly complicated or lengthy: *Thomson* at [154].
3. The utilitarian discount does not reflect any other consideration arising from the plea, such as saving witnesses from giving evidence but this is relevant to remorse: *Thomson* at [119] to [123]; nor is it affected by post-offending conduct: *Perry* [2006] NSWCCA 351.
4. The utilitarian discount does not take into account the strength of the prosecution case: *Sutton* [2004] NSWCCA 225.
5. There is to be no component in the discount for remorse nor is there to be a separate quantified discount for remorse: *MAK and MSK* [2006] NSWCCA 381; *Kite* [2009] NSWCCA 12 or for the “Ellis discount”; *Lewins* [2007] NSWCCA 189; *S* [2008] NSWCCA 186.
6. Where there are multiple offences and pleas at different times, the utilitarian value of the plea should be separately considered for each offence: *SY* [2003] NSWCCA 291.
7. There may be offences that are so serious that no discount should be given: *Thomson* at [158]; *Kalache* [2000] NSWCCA 2; where the protection of the public requires a longer sentence: *El-Andouri* [2004] NSWCCA 178.
8. Generally the reason for the delay in the plea is irrelevant because, if it is not forthcoming, the utilitarian value is reduced: *Stambolis* [2006] NSWCCA 56; *Giac* [2008] NSWCCA 280.
9. The utilitarian value of a delayed plea is less and consequently the discount is reduced even where there has been a plea bargain: *Dib* [2003] NSWCCA 117; *Ahmad* [2006] NSWCCA 177; or where the offender is waiting to see what charges are ultimately brought by the Crown: *Sullivan and Skillin* [2009] (sic [2008]) NSWCCA 296; or the offender has delayed the plea to obtain some forensic advantage: *Stambolis* [2006] NSWCCA 56; *Saad* [2007] NSWCCA 98, such as having matters put on a Form 1: *Chiekh and Hoete* [2004] NSWCCA 448.
10. An offer of a plea that is rejected by the Crown but is consistent with a jury verdict after trial can result in a discount even though there is no utilitarian value: *Oinonen* [1999] NSWCCA 310; *Johnson* [2003] NSWCCA 129.

6. *R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383 [160].

7. *R v Borkowski* [2009] NSWCCA 102; 195 A Crim R 1.

11. The discount can result in a different type of sentence but the resulting sentence should not again be reduced by reason of the discount: *Lo* [2003] NSWCCA 313.
12. The amount of the discount does not depend upon the administrative arrangements or any practice in a particular court or by a particular judge for the management of trials or otherwise.

The last of these principles is derived from the present judgment and is included for completeness.<sup>8</sup>

- 5.7 While the courts give a discount for a guilty plea in almost all instances, there can be exceptional cases which involve offending that is so serious that no discount should be allowed.<sup>9</sup>
- 5.8 The provision of a discount for the plea by reference to its utilitarian value is in conflict with the approach that is permitted in relation to sentencing federal offenders following the decision of the High Court in *Cameron v The Queen*.<sup>10</sup> In that case it was held that the rule that permits the plea to be taken into account should be expressed in terms of a “willingness to facilitate the course of justice and not on the basis that the plea has saved the community the expense of a contested hearing”. The majority judgment of Justices Gaudron, Gummow and Callinan explains the reasons for this approach:

Although a plea of guilty may be taken into account in mitigation, a convicted person may not be penalised for having insisted on his or her right to trial. The distinction between allowing a reduction for a plea of guilty and not penalising a convicted person for not pleading guilty is not without its subtleties, but it is, nonetheless, a real distinction, albeit one the rationale for which may need some refinement in expression if the distinction is to be seen as non-discriminatory.

It is difficult to see that a person who has exercised his or her right to trial is not being discriminated against by reason of his or her exercising that right if, in otherwise comparable circumstances, another's plea of guilty results in a reduction of the sentence that would otherwise have been imposed on the pragmatic and objective ground that the plea has saved the community the expense of a trial. However, the same is not true if the plea is seen, subjectively, as the willingness of the offender to facilitate the course of justice.

Reconciliation of the requirement that a person not be penalised for pleading not guilty with the rule that a plea of guilty may be taken into account in mitigation requires that the rationale for that rule, so far as it depends on factors other than remorse and acceptance of responsibility, be expressed in terms of willingness to facilitate the course of justice and not on the basis that the plea has saved the community the expense of a contested hearing.<sup>11</sup>

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8. *R v Borkowski* [2009] NSWCCA 102; 195 A Crim R 1 [32].

9. *R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383 [158]; *R v Kalache* [2000] NSWCCA 2; 111 A Crim R 152 [38].

10. *Cameron v The Queen* [2002] HCA 6; 209 CLR 339.

11. *Cameron v The Queen* [2002] HCA 6; 209 CLR 339 [12]-[14]. McHugh J at [44] considered that it is “at least arguable that it is relevantly discriminatory to treat convicted persons differently when the *only* difference in their circumstances is that one group has been convicted on pleas of guilty and the other group has been convicted after pleas of not guilty”. This approach reflects some concerns in Criminal justice system stakeholders, *Consultation SEC5*.

## Past NSW schemes for guilty plea discounts

- 5.9 Between 1993 and 1996 there was a procedure available in the District Court of NSW allowing an offender to explore the possible benefit to be gained through a plea by seeking a sentence indication from the Court.<sup>12</sup> An offender seeking an indication was not bound to adhere to a plea, nor was the Court necessarily confined to passing a sentence in accordance with the sentence indication, although it was expected that this would occur. The scheme was discontinued after an evaluation found it had not materially increased the number of early guilty pleas.<sup>13</sup>
- 5.10 Subsequently, in 2008, a trial for the codification of the quantum of the discount for guilty pleas was introduced under the *Criminal Case Conferencing Trial Act 2008* (NSW) but repealed in 2012. The legislation applied only to indictable matters for which committal proceedings were listed in the Downing Centre or Central Local Court and involved the convening of a compulsory conference for the purpose of determining whether there was any offence or offences to which the accused was prepared to plead guilty.<sup>14</sup>
- 5.11 The Act prescribed levels of discounts for guilty pleas that were related to the time when the plea was taken to be entered. There was a mandatory discount of 25% as an upper limit if an offender pleaded guilty at any time before committal in the Local Court. There was also a limited discount of up to 12.5% (being a discount that was proportionate to the remaining benefit of the plea), if an offender pleaded guilty at any time after being committed for trial, subject to an exception if the offender could show “substantial grounds” for allowing a greater discount, for example, where:
- the prosecution had refused an offer to plead guilty before committal to an alternative offence (that was recorded in a compulsory conference certificate), but after committal for trial the offender was found guilty of that offence or the prosecutor accepted a guilty plea to that offence,
  - the offender had no reasonable opportunity to offer to plead guilty to the offence before the committal, or
  - the offender was found unfit to be tried for the offence after committal for trial, but pleaded guilty to the offence after later being found fit to be tried.<sup>15</sup>
- 5.12 The legislation stated that the discount for the plea of guilty was a discount for:
- (a) the saving in resources and time that would otherwise be expended in a trial for the offence but for the guilty plea, and
  - (b) the avoidance of the additional trauma to the victim that might be caused by a trial for the offence, and

12. *Criminal Procedure (Sentence Indication) Amendment Act 1992* (NSW).

13. D Weatherburn, E Matka and B Lind, *Sentence Indication Scheme Evaluation* (NSW Bureau of Crime Statistics and Research, 1995).

14. *Criminal Case Conferencing Trial Act 2008* (NSW) s 6(3) (repealed).

15. *Criminal Case Conferencing Trial Act 2008* (NSW) s 17 (repealed)

- (c) the contrition that the sentencing court considers that the offender demonstrates by pleading guilty, and
  - (d) any other benefit associated with or demonstrated by the guilty plea.<sup>16</sup>
- 5.13 It was possible for the prosecution to exclude an offence from this scheme if it was satisfied that the level of culpability involved was so extreme that the community interest in retribution, punishment and community protection could only be met by the imposition of a penalty that did not contain an allowance for a discount, and that it was highly probable that a reasonable jury would convict the accused person.<sup>17</sup>
- 5.14 Various difficulties arose under the legislation. There were a number of sentence appeals to the CCA on the ground that effect had not been given to the scheme.<sup>18</sup> The case of *Passaris v R*<sup>19</sup> in particular highlighted some of the practical difficulties that arose in applying the scheme to a case where there had been protracted plea negotiations. The NSW Sentencing Council also drew attention to the fact that the capacity of accused people to offer an early plea may be out of their hands and that relating this discount to an inflexible timetable could work an injustice.<sup>20</sup>
- 5.15 This scheme was terminated in 2012,<sup>21</sup> following an assessment that it had not materially reduced the incidence of late pleas.<sup>22</sup> We now have a reference to consider ways that early guilty pleas can be encouraged. We will give further attention to s 22 as part of this reference. In this report, we confine our attention to the way in which s 22 has been applied and whether it should be amended in any way.

### Quantify the reduction for the utilitarian value of the plea

- 5.16 There is no specific requirement in s 22 of the CSPA for a court to quantify the reduction in penalty for a guilty plea, unlike the requirement that arises under s 23 in relation to assistance to the authorities.<sup>23</sup>
- 5.17 There is, however, no prohibition on quantifying the discount. Judges commonly express the reduction that is given in percentage terms. There are advantages in doing so since this will provide transparency for victims, and for offenders who may otherwise be unsure whether they have received an appropriate reduction.<sup>24</sup> It also

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16. *Criminal Case Conferencing Trial Act 2008* (NSW) s 16(2) (repealed).

17. *Criminal Case Conferencing Trial Act 2008* (NSW) s 18(3) (repealed).

18. See, eg, *Tran v R* [2010] NSWCCA 183; *Do v R* [2010] NSWCCA 182; *Williams v R* [2011] NSWCCA 244; *Greer v R* [2011] NSWCCA 40; *Chompeay v R* [2011] NSWCCA 96.

19. *Passaris v R* [2011] NSWCCA 216; 213 A Crim R 281.

20. NSW Sentencing Council, *Reduction in Penalties at Sentence*, Report (2009) [8.6].

21. *Criminal Case Conferencing Trial Repeal Act 2012* (NSW).

22. W Y Wan, C Jones, S Moffatt and D Weatherburn, *The Impact of Criminal Case Conferencing on Early Guilty Pleas in the NSW District Criminal Court*, Bureau Brief No 44 (NSW Bureau of Crime Statistics and Research, 2010); and see NSW, *Parliamentary Debates*, Legislative Council, 16 February 2012, 8401-8402.

23. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23(4). See para [5.39]-[5.48].

24. See *Lawrence v R* [2005] NSWCCA 91 [14]-[15].



counters any perception that it does not make much difference whether one enters an early plea or not. Justice Howie has observed:

While there is no obligation on a sentencer to nominate the utilitarian value for the plea, I cannot personally understand why certain judges seek to avoid doing so in simple cases, such as the present. But if judges are not prepared to make the discount clear by quantifying it or indicating the starting point of the sentence before the application of the discount, then with respect, they should carefully and correctly enunciate the factors taken into account and the principles being applied in determining the discount which they are applying. As Dunford J noted in *R v Mako* [2004] NSWCCA 90 at [21]:

In all cases the important consideration is to expose the transparency of the process so that it can be seen that an appropriate discount has been allowed.

Time and again this Court is left to try to fathom what discount was given, either for pure utilitarian value or in combination with contrition, in cases where the judge has not referred to the fact that a discount was given or the value of it, when a simple statement of the percentage value of the discount or the starting point of the undiscounted sentence would have revealed whether the sentencing discretion miscarried on that account.<sup>25</sup>

- 5.18 In Victoria, the *Sentencing Act 1991* (Vic) requires the court, if it imposes a custodial order or a fine in excess of 10 penalty units or if it imposes a non-custodial order, to state the penalty that it would have imposed but for a guilty plea.<sup>26</sup> In Western Australia, the *Sentencing Act 1995* (WA) requires the court to state any reduction for a plea and its extent. It also provides that the earlier the plea the greater can be the reduction. A fixed sentence may not be reduced by more than 25%.<sup>27</sup>
- 5.19 The *Criminal Law (Sentencing) Act 1988* (SA) makes provision for a range of discounts (between 10% and 40%) depending on how early the plea is entered.<sup>28</sup> The statutes in Queensland<sup>29</sup> and in the Northern Territory<sup>30</sup> each require a guilty plea to be taken into account but do not specify a discount. The *Crimes (Sentencing) Act 2005* (ACT) provides that a sentence can be reduced for a plea of guilty if there is a real likelihood of the offender being sentenced to imprisonment.<sup>31</sup> It provides additionally that:
- the court must not make any significant reduction if the prosecution case was “overwhelmingly strong”;
  - the earlier the plea is entered the lesser the penalty; and

25. *Sutton v R* [2004] NSWCCA 225 [16]-[17].

26. *Sentencing Act 1991* (Vic) s 6AAA, introduced in response to Victoria, Sentencing Advisory Council, *Sentence Indication and Specified Sentence Discounts*, Final Report (2007) rec 1.

27. *Sentencing Act 1995* (WA) s 9AA.

28. *Criminal Law (Sentencing) Act 1988* (SA) s 10B, s 10C.

29. *Penalties and Sentences Act 1992* (Qld) s 13.

30. *Sentencing Act* (NT) s 5(2)(j).

31. *Crimes (Sentencing) Act 2005* (ACT) s 35(1), (3).

- the reduction must not be unreasonably disproportionate to the nature and circumstances of the offence.<sup>32</sup>
- 5.20 There was general support for requiring courts to quantify the reduction in penalty,<sup>33</sup> on the basis that this promotes transparency<sup>34</sup> and consistency,<sup>35</sup> and makes it clear to offenders that they are receiving a tangible benefit.<sup>36</sup> However, a number of stakeholders opposed legislation prescribing levels of discount that were pegged to various stages of the proceedings.<sup>37</sup>
- 5.21 The Chief Magistrate and the NSW Bar Association did not favour any further legislation in relation to a discount for a guilty plea, preferring that this remain an area for the common law.<sup>38</sup> One stakeholder expressed a concern that any requirement to quantify the discount would complicate the sentencing process and lead to an increase in appeals. While supporting a requirement for quantification, the Public Defenders agreed that the common law should govern the method for fixing the quantum of the discount, as it would be difficult to legislate in a simple way that covers all possibilities.<sup>39</sup>
- 5.22 The NSW Police Force was the only stakeholder in favour of a legislative prescription of the levels of discounts. It proposed a relatively complex scheme that would set varying levels of discount by reference to the stage when the plea was entered in the Local Court, namely when:
- a brief of evidence had been prepared;
  - witnesses had attended court;
  - witnesses had given evidence;
  - the prosecution case had closed; and
  - the magistrate had found a *prima facie* case.<sup>40</sup>
- 5.23 Some stakeholders opposed limiting the discount to represent only the utilitarian value of the plea but did not expand on what else the discount for the plea should encompass.<sup>41</sup> While the Public Defenders were among these stakeholders, they

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32. *Crimes (Sentencing) Act 2005* (ACT) s 35(4)-(6).

33. Children's Court of NSW, *Submission SE4*, 9; The Public Defenders, *Submission SE2*, 9; Legal Aid NSW, *Submission SE11*, 20; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 19; Law Society of NSW, *Submission SE7*, 12; NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 11; NSW Police Force, *Submission SE14*, 2.

34. NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 19; Law Society of NSW, *Submission SE7*, 12; NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 11.

35. NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 19.

36. The Public Defenders, *Submission SE2*, 9; Legal Aid NSW, *Submission SE11*, 20.

37. Children's Court of NSW, *Submission SE4*, 9; Public Defenders, *Submission SE2*, 9; Legal Aid NSW, *Submission SE11*, 20; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 19; Law Society of NSW, *Submission SE7*, 12; NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 11.

38. G Henson, *Submission SE10*, 6; NSW Bar Association, *Submission SE9*, 17.

39. The Public Defenders, *Submission SE2*, 9.

40. NSW Police Force, *Submission SE14*, 1-2.

41. The Public Defenders, *Submission SE2*, 9; NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 11; Law Society of NSW, *Submission SE7*, 12; NSW Young Lawyers Criminal Law

submitted that the requirement to quantify the discount allowed for a plea should be confined to its utilitarian value.<sup>42</sup> Legal Aid NSW submitted that the discount for a plea of guilty should encompass the utilitarian value of a plea as well as any other matters for which the plea may be relevant, including remorse.<sup>43</sup>

- 5.24 Most of the stakeholders recognised the relevance of remorse as a mitigating factor, as is currently reflected by s 21A of the CSPA, although some differences did emerge in the submissions in relation to the manner in which remorse should be taken into account.

### *Our view*

- 5.25 The reduction in penalty for the utilitarian value of a guilty plea is the most frequent form of discount in sentencing. Although quantification of the benefit given is not required at common law, the introduction of a legislative requirement to this effect could improve both the transparency and consistency of sentencing for the benefit of all stakeholders.

- 5.26 Early guilty pleas are important for the efficiency of the court system and, in our view, they should receive due recognition in the reasons for sentence, by making clear the extent of the benefit that is given.<sup>44</sup>

- 5.27 Consistently with this view, the Australian Law Reform Commission (ALRC) has recommended that federal sentencing legislation require the court to specify the discount given for a guilty plea, whether it reduces the quantum of the sentence or imposes a less severe sentencing option.<sup>45</sup> Similarly, Justice McClellan has given strong support to the quantification of discounts:

Having an identifiable and easily understood parameter for guilty plea discounts has had enormous benefit for the administration of criminal justice. One only has to compare the state of the criminal lists in countries where a plea brings no discount to understand the benefits of a structured sentencing approach. ... Quantified discounts make the reasoning of sentencing judges more comprehensible to offenders, victims, the public, and the appellate courts.<sup>46</sup>

- 5.28 We agree with the observation of Justices Howie and McClellan noted above, and consider that there should be a provision in a revised Crimes (Sentencing) Act in the general terms of s 22 of the CSPA, with an additional requirement that the court quantify the discount for the utilitarian value of the plea.

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Committee, *Submission SE12*, 19. The ODPP submitted to the Sentencing Council that the Act should require courts to quantify the discount given for the utilitarian value of the plea alone to avoid the risk of double counting where the plea is treated additionally as an indicator of remorse or contrition: NSW Sentencing Council, *Reduction in Penalties at Sentence*, Report (2009) [8.12].

42. The Public Defenders, *Submission SE2*, 9.

43. Legal Aid NSW, *Submission SE11*, 21.

44. *Dib v R* [2003] NSWCCA 117 [3]-[6].

45. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [11.42], rec 11-1.

46. P McClellan, "Sentencing in the 21st Century" (Paper presented at the Crown Prosecutors' Conference, Pokolbin, 10 April 2012) 17-18.

- 5.29 We will consider other possible schemes to support early guilty pleas more fully as part of our new reference to review ways of encouraging appropriate early guilty pleas.<sup>47</sup>

**Recommendation 5.1: Quantification of discount for a guilty plea**

- (1) A revised Crimes (Sentencing) Act should provide for discounts for guilty pleas in similar terms to s 22 of the *Crimes (Sentencing Procedure) Act 1999* (NSW). The provision should clarify that the lesser penalty imposed must reflect the utilitarian value of the plea.
- (2) The provision should also require the court to quantify the reduction in penalty given for the utilitarian value of a guilty plea, unless there are reasons for not doing so which the court must record in its reasons for sentence.

### Alignment of the NSW and federal approaches

- 5.30 The second possibility for reform that we considered was the alignment of the NSW approach with that which the High Court held in *Cameron* to be appropriate for federal offences, in permitting a discount for a plea of guilty to the extent that it reflects the offender's "willingness to facilitate the course of justice"; and not by reference to its utilitarian value, or the extent to which it saves the community the expense of a contested hearing.<sup>48</sup> The CCA has distinguished *Cameron* on the basis that s 22 of the CSPA is framed in "mandatory terms", and must be applied whether or not by doing so the court can be seen to "discriminate" in the sense that the word was used in the joint judgment in *Cameron*.<sup>49</sup>
- 5.31 The sentencing of offenders in NSW who have committed a mixture of state and federal offences can be complicated because of this difference in approach:
- For state matters, the focus is on the utilitarian value of the plea, including a consideration of the timing of the plea.<sup>50</sup> As discussed above, the utilitarian value is not qualified by the strength of the Crown case or by saving witnesses from the need to give evidence; although these are relevant factors when considering separately the remorse of the offender.<sup>51</sup>
  - For federal matters, the strength of the Crown case is relevant to the quantum of the discount as it may reveal whether the guilty plea was "motivated by a

47. Terms of reference received 1 March 2013.

48. *Cameron v The Queen* [2002] HCA 6; 209 CLR 339 [11]-[15]. See also NSW Sentencing Council, *Reduction in Penalties at Sentence*, Report (2009) [2.11]-[2.12]; Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [11.19]-[11.22].

49. *R v Sharma* [2002] NSWCCA 142; 54 NSWLR 300 [50]-[68].

50. *R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383 [160]; *R v Borkowski* [2009] NSWCCA 102; 195 A Crim R 1 [32]; see also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(1)(b)-(c).

51. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(i), subject to the offender meeting the threshold test in s 21A for remorse to be taken into account by providing evidence of acceptance of responsibility and acknowledged any injury, loss or damage and/or made reparation. *Sutton v R* [2004] NSWCCA 225 [12].

willingness to facilitate the course of justice” or was simply a “recognition of the inevitable”.<sup>52</sup>

5.32 The NSW Sentencing Council has observed in this respect that:

The plea is of itself equivocal with respect to remorse. It may be entered because it is an acceptance of the inevitable, or in order to obtain an advantage. In such cases it does not indicate genuine remorse or contrition. The bare fact of a plea is at best a very simple expression of remorse, the strength of which may better be displayed by the words and actions of the offender over time. When it is taken into account, any reduction in sentence is given for the contrition exhibited, and not for the plea of guilty itself.<sup>53</sup>

5.33 In its review of federal sentencing law the ALRC recommended that courts should be required under federal sentencing legislation to consider “the degree to which the plea of guilty facilitates the administration of the federal criminal justice system”,<sup>54</sup> the assessment of which it explained should include a consideration of the savings in “judicial and court resources; prosecutorial operations; the provision of legal aid to accused persons; witness fees; and the fees paid to jurors”,<sup>55</sup> as well as whether the guilty plea spared any victims of the offence from the trauma of giving evidence.<sup>56</sup>

5.34 The possibility of aligning the state and Commonwealth approaches was raised during our consultations. Two views emerged. The first was that there should be no change from the position that has been established in relation to offences under NSW law. The opposing view was that, in principle, it would be preferable to align the two approaches.

### *Our view*

5.35 Harmonising the NSW and federal approaches would overcome the difficulty that NSW courts can face at present when it becomes necessary to sentence an offender for a mixture of Commonwealth and state offences. This can result in different levels of discount being applied, an outcome that is not easy to justify to the offender or an external observer.

5.36 We are unaware of any imminent plan by the federal government to implement the recommendation of the ALRC. It is perhaps unlikely that it will do so when faced by a decision of the High Court that turns largely upon an assumption that giving a discount for the utilitarian value of a plea can give rise to discrimination. This is particularly so in the light of the following observation of Justice McHugh:

52. *Tyler v R* [2007] NSWCCA 247; 173 A Crim R 458 [114]; *Lee v R* [2012] NSWCCA 123 [59]; see also the cases cited in NSW Sentencing Council, *Reduction in Penalties at Sentence*, Report (2009) [2.46].

53. NSW Sentencing Council, *Reduction in Penalties at Sentence*, Report (2009) [2.5], paraphrasing *R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383 [117]-[118] (Spigelman CJ).

54. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [11.52], rec 11-2.

55. As outlined in *Cameron v The Queen* [2002] HCA 6; 209 CLR 339 [66] (Kirby J): Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [11.52], rec 11-2.

56. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [11.52].

If there is one principle that lies at the heart of the judicial power of the Commonwealth, it is that courts, exercising federal jurisdiction, cannot act in a way that is relevantly discriminatory. To deny that proposition is to deny that equal justice under the law is one of the central concerns of the judicial power of the Commonwealth.<sup>57</sup>

- 5.37 We do not support harmonisation for harmonisation's sake and, as a consequence, we would need to be satisfied of the existence of substantial reasons before proposing a departure from the NSW approach.<sup>58</sup>
- 5.38 We are not persuaded that such reasons exist. The current approach in this state permits a discount to be given for the utilitarian value of the plea which is capable of ready assessment, and still permits genuine remorse to be taken into account as a subjective factor in the instinctive synthesis process.

## Discount for assistance to law enforcement authorities

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- 5.39 Section 23 of the CSPA provides that a court may impose a lesser penalty than it would otherwise impose on an offender due to the degree to which the offender has assisted, or undertaken to assist, law enforcement authorities in the prevention, detection or investigation of, or in proceedings relating to, the offence concerned or any other offence. The Sentencing Council has noted that the rationale for this discount arises as a matter of public policy due to the clear benefits of encouraging bringing others to justice, saving costs in the investigation and prosecution of other matters, improving the clear up rate for crimes and public confidence in the administration of justice, as well as giving recognition to the offender's remorse (if relevant) and encouraging his or her rehabilitation.<sup>59</sup> Additionally, it has been recognised that it has a value in weakening the trust that offenders might otherwise have in each other.<sup>60</sup>
- 5.40 Assistance can take several forms including most commonly that which is given after arrest where the offender, in conjunction with a plea of guilty, agrees to provide information concerning co-offenders or those who may be involved in other offences. This may extend to agreeing to give evidence in any prosecution of those people, or it may be useful simply by way of providing general intelligence. Otherwise, it can involve an offender's voluntary disclosure of otherwise unknown guilt, commonly known as an *Ellis* discount,<sup>61</sup> the quantum of which will vary depending on the likelihood of the offender's guilt being discovered and proved.
- 5.41 In determining the level of discount to be given the court must take into account a range of matters, such as:

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57. *Cameron v The Queen* [2002] HCA 6; 209 CLR 339 [44].

58. See *R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383.

59. NSW Sentencing Council, *Reduction in Penalties at Sentence*, Report (2009) [3.3]; and see *R v Perez-Vargas* (1986) 8 NSWLR 559, 562-565, citing *R v Lowe* (1977) 66 Cr App R 122, 125 in which a gang member gave assistance in relation to dozens of "persons of interest".

60. *Isaac v R* [2012] NSWCCA 195 [46].

61. *R v Ellis* (1986) 6 NSWLR 603.

- the significance and usefulness of the assistance or undertaking to assist;
  - the truthfulness and timeliness of the assistance;
  - any benefits that the offender gained or may gain from assisting;
  - whether the offender will suffer harsher custodial conditions as a consequence of the assistance;
  - any injury suffered or any danger or risk of injury to the offender or the offender’s family arising from the assistance; and
  - whether the assistance relates to the offence for which the offender is being sentenced or to an unrelated offence.<sup>62</sup>
- 5.42 The range of the discount has not been prescribed in legislation, and the CCA has held that there is no “standard deduction”.<sup>63</sup> Section 23 does however provide that the lesser penalty that is imposed as a result of the assistance must not be “unreasonably disproportionate” to the nature and circumstances of the offence.<sup>64</sup> The discount is to be applied to the overall sentence, and not just to individual sentences where the offender is sentenced for multiple offences;<sup>65</sup> or to the non-parole period alone.<sup>66</sup>
- 5.43 The section was amended in 2011 to require the court to disclose to the offender that the lesser penalty is imposed for the assistance or undertaking to assist, and to make a record of that fact. The court must also state what penalty would otherwise have been imposed. Where an offender is given a discount for past assistance and for an undertaking to give future assistance, the court must state the amount by which the penalty has been reduced for each type of assistance.<sup>67</sup>
- 5.44 The case law indicates that the discount for assistance and for a plea of guilty should generally be expressed as a combined discount.<sup>68</sup> While there is no “fixed tariff”, combined discounts for a plea of guilty and for assistance to authorities have customarily ranged between 20-50%; a discount of 50% generally being reserved for “assistance of a very high order”.<sup>69</sup> A combined discount (for plea and assistance) exceeding 40% will only be allowed in exceptional circumstances.<sup>70</sup> The CCA has held that, where both discounts apply and combine to create an unreasonably disproportionately sentence, the court should reduce the amount

62. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23(1)-(2).

63. *FS v R* [2009] NSWCCA 301; 198 A Crim R 383 [22]; *R v Ehrlich* [2012] NSWCCA 38 [6].

64. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23(3); *R v Sukkar* [2006] NSWCCA 92; 172 A Crim R 151 [54]; *SZ v R* [2007] NSWCCA 19; 168 A Crim R 249 [8].

65. *Felton v R* [2010] NSWCCA 79 [45].

66. *R v MacDonnell* [2002] NSWCCA 34; 128 A Crim R 44 [48]; *SZ v R* [2007] NSWCCA 19; 168 A Crim R 249 [11].

67. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23(4).

68. *R v Pang* [1999] NSWCCA 4; 105 A Crim R 474; *SZ v R* [2007] NSWCCA 19; 168 A Crim R 249 [52]-[53]; *R v El Hani* [2004] NSWCCA 162 [69]; *R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383 [160](ii); *R v Gallagher* (1991) 23 NSWLR 220, 228.

69. *R v Sukkar* [2006] NSWCCA 92; 172 A Crim R 151 [54] (Latham J); *SZ v R* [2007] NSWCCA 19; 168 A Crim R 249 [52]-[53].

70. *R v Sukkar* [2006] NSWCCA 92; 172 A Crim R 151 [3]-[5].

allocated to each discount individually, rather than compressing the overall value of the combined discount given.<sup>71</sup>

- 5.45 Traditionally the discount recognised the hardship the offender was likely suffer in custody, for example, because of the conditions associated with strict protective custody. However, the courts have noted more recently that it should not be assumed that offenders who have provided assistance will be disadvantaged while serving a custodial sentence and evidence will be required if an offender wishes to assert otherwise.<sup>72</sup>
- 5.46 If an offender fails to comply wholly or partly with the undertaking to provide future assistance, the prosecution may appeal to the CCA which may rescind the discount in part or in full.<sup>73</sup> The CCA can exercise its discretion to dismiss the appeal, notwithstanding a failure to provide the assistance, if the failure is due to threats to the offender or others (such as family members),<sup>74</sup> or if an offender is placed at risk because of the actions of authorities, such as inappropriate custodial arrangements.<sup>75</sup>
- 5.47 Submissions strongly supported the continuation of appropriate reductions for assistance to the authorities, and the current requirement that the court quantify the past and future components of the discount that is given.<sup>76</sup>
- 5.48 The Chief Magistrate suggested a possible procedural modification to address the difficulty in articulating the reasons for the discount, without compromising the sensitive nature of the material that may be provided to the court, observing that:

One possibility might be to require the parties to consult on the issue and jointly identify a proposed discount or range that they propose may be appropriate.<sup>77</sup>

## Our view

- 5.49 We are strongly of the view that discounts for past and future assistance should be retained, as should the current requirements for disclosure of the penalty that would otherwise have been imposed and of the amount by which it has been reduced.
- 5.50 We see some merit in the development of a practice that can provide for the resolution, at first instance, of any dispute in relation to the nature and extent of the assistance provided; and that can also provide transparency in relation to the giving

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71. *LB v R* [2013] NSWCCA 70.

72. *R v Sukkar* [2006] NSWCCA 92; 172 A Crim R 151 [5] (Howie J), referring to *R v Cartwright* (1989) 17 NSWLR 243, 250.

73. *Criminal Appeal Act 1912* (NSW) s 5DA.

74. *R v Vincent* (Unreported, NSW CCA, 27 July 1995).

75. *R v Bagnall* (Unreported, NSW CCA, 10 June 1994).

76. The Public Defenders, *Submission SE2*, 10; NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 11-12; Children's Court of NSW, *Submission SE4*, 10; Law Society of NSW, *Submission SE7*, 12-13; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 20; NSW Police Force, *Submission SE14*, 3-4; Legal Aid NSW, *Submission SE11*, 22 questioned the need for quantification in the light of the instinctive synthesis approach.

77. G Henson, *Submission SE10*, 6-7.



of a discount that does not compromise the potentially sensitive nature of the material provided, or place the offender at risk. We are not persuaded that any difficulty that arises in this respect can be resolved simply by expecting the parties jointly to identify a proposed discount or range of discounts.

5.51 Ultimately the fixing of a discount is a decision for the court, which is not bound by any agreement that the parties make, even assuming that they will reach agreement on a matter of some significance that has commonly given rise to an appeal.

5.52 The decision in *R v Bourchas* has, to some extent, addressed this problem. Justice Giles summarised the relevant principles as follows:

1. The offender carries the burden of proving assistance to the authorities, as a matter going to mitigation.
2. The Crown should assist the offender in the discharge of that burden.
3. The assistance may extend to the Crown tendering the evidence of assistance to the authorities, but the Crown should not do so over the objection of the offender.
4. A statement made by way of assistance to the authorities on an undertaking that the information in it will not be used against the offender may properly be admitted on the basis that the information in it will not be used against the offender, and with its use restricted accordingly.
5. When the offender tenders a statement made by way of assistance to the authorities, or accepts the Crown's assistance in tendering such a statement, it is prudent that the basis of the tender be agreed and stated showing any restriction on the use of the information in the statement; if there is disagreement, a ruling can be made in the normal way.
6. In the absence of an agreed basis of tender or a ruling at the time of admission, whether use of a statement made by way of assistance to the authorities is restricted will depend on the circumstances, but normally the information in the statement cannot be used against the offender.<sup>78</sup>

5.53 In practice the law enforcement officer-in-charge of a case takes the leading role in providing information to the court about the offender's assistance and about its perceived truthfulness and value. The Office of the Director of Public Prosecutions (ODPP) is often not in a position to evaluate that material. Its role in such a case is effectively confined to tendering the document that summarises the assistance, which is often contained in a sealed envelope that is tendered in open court and becomes a confidential exhibit.

5.54 A difficulty can, however, emerge where the offender disagrees with the accuracy or sufficiency of the material that is contained in the document or with the evaluation of its worth, or wishes to provide supplementary material over the objection of the prosecution.<sup>79</sup> Essentially this involves a question for the court to resolve in

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78. *R v Bourchas* [2002] NSWCCA 373; 133 A Crim R 413 [99].

79. Prosecution Guideline 28 refers to the police providing an "affidavit of assistance", and indicates that the offender's assistance may be tested at the time of sentencing, but does not otherwise expand on the ODPP representative's role.

accordance with its usual fact finding and procedural processes. It is however a matter that could be usefully addressed by way of a practice note prepared by the courts; and/or by a revision of the ODPP's *Prosecution Guidelines* that could draw on those guidelines that are now in place in relation to principled charge negotiations and the settling of an agreed statement of facts.

**Recommendation 5.2: Reduction in penalty for assistance to authorities**

A revised Crimes (Sentencing) Act should provide for discounts for assistance to law enforcement authorities in terms similar to s 23 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

## Discount for facilitating the conduct of the trial

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5.55 Section 22A of the CSPA provides that where an offender is tried on indictment, a court may impose a lesser penalty than it would have otherwise imposed having regard to the degree to which the defence has facilitated the administration of justice (whether by disclosures made pre-trial or during the trial or otherwise). The section does not require the court to quantify any such discount. The lesser penalty must not be unreasonably disproportionate to the nature and circumstances of the offence.<sup>80</sup> As was noted in the second reading speech:

Cooperation may be in the form of admissions or disclosures in the course of the trial but may also encompass behaviour such as agreement to limit the facts in issue during a trial and hence reduce the number of witnesses required where the court is of the view that such behaviour is sufficient to justify a reduction of the sentence.<sup>81</sup>

5.56 Several stakeholders strongly supported the continuation of the s 22A discount. Some also supported the court disclosing the sentence that it would otherwise have imposed, in order to promote transparency.<sup>82</sup> However, defence representatives expressed concern that this provision may:

- add to the complexity of sentencing;
- compromise the accused's right to silence and entitlement to put the prosecution to proof; and
- place defence representatives in a difficult position when advising their clients whether to make a disclosure which may be against their interests.<sup>83</sup>

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80. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22A(2).

81. NSW, *Parliamentary Debates*, Legislative Council, 23 November 2010, 27868.

82. NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 12; Children's Court of NSW, *Submission SE4*, 10-11; Law Society of NSW, *Submission SE7*, 13; NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 21; NSW Police Force, *Submission SE14*, 4-5.

83. Criminal justice system stakeholders, *Consultation SEC5*; The Public Defenders, *Submission SE2*, 10-11; Legal Aid NSW, *Submission SE11*, 22-23.

## Our view

- 5.57 Section 22A was inserted into the CSPA in 2001<sup>84</sup> and amended in 2010<sup>85</sup> to make it clear that the assistance was not confined to that given pre-trial but also extended to that given during the trial.<sup>86</sup>
- 5.58 In *R v Abou-Chabake* Justice Howie expressed some reservations about the justification for the discount, noting that it might discriminate in favour of accused people who were charged with more complex offences and who would, therefore, have a greater opportunity to make concessions that could limit the issues in dispute and hence the length and complexity of the trial.<sup>87</sup> His Honour also noted that it was somewhat inconsistent with the observation in *Siganto v The Queen* that a “person charged with a criminal offence is entitled to plead not guilty, and defend himself or herself, without thereby attracting the risk of the imposition of a penalty more serious than would otherwise have been imposed”.<sup>88</sup>
- 5.59 There is limited precedent for the provision of a discount for the efficient way in which an accused has conducted a defence, for example, in making admissions and in refraining from dilatory and technical objections of no merit.<sup>89</sup> The authorities do however suggest that the courts need to take care in allowing a discount for assistance of this kind, and they should not give it where it relates to matters that were never in dispute.<sup>90</sup> Otherwise, we see the provision as beneficial in assisting in efficient trial management. We do not share the concerns of defence representatives since the decision whether or not to make admissions or to dispense with unnecessary cross-examination remains voluntary. In any event, this is the kind of decision that defence representatives regularly make.
- 5.60 The Chief Magistrate has submitted that this discount should apply to all indictable offences, not just to those tried on indictment in the higher courts. It was not an issue raised by any other stakeholder. We see merit in this proposal as a means of advancing the objective of efficient trial management.
- 5.61 We are not persuaded that there is any reason to repeal the provision, and we recommend that the section be amended in a revised Crimes (Sentencing) Act to apply to all indictable offences, not just those tried on indictment.

### Recommendation 5.3: Reduction for facilitating the administration of justice

A revised Crimes (Sentencing) Act should provide for discounts for facilitating the administration of justice in terms similar to s 22A of the

84. *Criminal Procedure Amendment (Pre-trial Disclosure) Act 2001* (NSW) sch 3[1].

85. *Crimes (Sentencing Procedure) Amendment Act 2010* (NSW) sch 1.2[3].

86. In response to NSW Sentencing Council, *Reduction in Penalties at Sentence*, Report (2009) rec 8.

87. *R v Abou-Chabake* [2003] NSWSC 125 [23].

88. *Siganto v The Queen* [1998] HCA 74; 194 CLR 656 [22].

89. *R v Doff* [2005] NSWCCA 119 [58].

90. *R v Christoff* [2003] NSWCCA 52; 140 A Crim R 45 [65]; *R v Janceski* [2005] NSWCCA 288 [36]; *Choi v R* [2007] NSWCCA 150 [152].

*Crimes (Sentencing Procedure) Act 1999* (NSW). The provision should be extended to apply to all indictable offences, whether tried summarily or on indictment.

## 6. Full-time imprisonment

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### In brief

The rules that courts must follow when setting a term of imprisonment have become overly complicated and difficult to implement. We recommend five improvements to simplify these rules. We do not support the abolition of short sentences of imprisonment or the combination of imprisonment with community-based sentences. We will further consider back-end home detention as part of our review of the parole system.

<b>The current law on full-time imprisonment</b> .....	136
Head sentences – setting the non-parole period and the parole period .....	136
Fixed terms.....	137
Commencement of the sentence.....	138
Accumulation or concurrency .....	138
Aggregate sentences.....	139
Taking offences into account on a Form 1.....	139
<b>Proposals to change the way terms of imprisonment are set</b> .....	140
“Bottom up” or “top down” approach to imposing the sentence .....	140
Our view.....	142
The ratio between the non-parole period and the head sentence .....	143
<i>The history of the statutory ratio in NSW</i> .....	143
<i>Other jurisdictions</i> .....	146
<i>Options for reform</i> .....	147
<i>Stakeholder views</i> .....	149
Our view.....	151
Fixed terms.....	153
Accumulated sentences and the statutory ratio .....	154
Our view.....	155
Aggregate sentencing.....	156
Our view.....	157
Aggregate sentencing in the Local Court.....	159
Aggregation or accumulation of sentences of six months or less .....	160
<b>Short sentences of imprisonment</b> .....	161
Retention of short sentences of imprisonment .....	161
<i>Short sentences in other jurisdictions</i> .....	163
Our view.....	164
Possibility of a parole period for short sentences of imprisonment.....	165
Our view.....	166
<b>Combining sentences of imprisonment with other options</b> .....	167
Short periods of imprisonment in combination with other options.....	167
Our view.....	170
Back-end home detention as part of sentence of imprisonment.....	171
Our view.....	175

- 6.1 In this chapter we discuss a number of issues relating to the structure of full-time imprisonment under the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA). We use the term “full-time imprisonment” to distinguish this form of imprisonment

from existing custodial sentences that are served in the community such as home detention, intensive correction orders (ICOs) and suspended sentences.

## The current law on full-time imprisonment

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- 6.2 Section 5(1) of the CSPA contains the fundamental requirement that before a court can sentence an offender to imprisonment, it must first decide that no sentence other than imprisonment is appropriate. This reflects the established common law principle that imprisonment is a sentence of “last resort”,<sup>1</sup> which we recommend should be retained as a statutory principle in a revised Crimes (Sentencing) Act.<sup>2</sup>
- 6.3 Having determined that some form of imprisonment is the only appropriate penalty, the court is currently required to determine the length of the imprisonment without having regard to what form it ultimately will take.<sup>3</sup> In fixing the term of imprisonment, the court is guided by the maximum penalty stated for the offence,<sup>4</sup> noting that the imposition of the maximum penalty is reserved for the worst examples of the offence.<sup>5</sup> The court then determines what form the imprisonment will take: full-time imprisonment or a community-based custodial alternative.
- 6.4 Full-time imprisonment can take one of two forms:
- a term of imprisonment, often referred to as a *head sentence*, comprised of a *non-parole period* and a *parole period*,<sup>6</sup> or
  - a *fixed term* of imprisonment.<sup>7</sup>

### Head sentences – setting the non-parole period and the parole period

- 6.5 When the court imposes a sentence of full-time imprisonment (apart from a fixed term or an aggregate sentence, which are discussed below), s 44 of the CSPA currently requires the court to impose a non-parole period before imposing the balance of the term of the sentence. The CSPA defines the “non-parole period” to be “the minimum period for which the offender must be kept in detention in relation to the offence”.<sup>8</sup> The expression “balance of the term” is not defined but is the period between the expiry of the non-parole period and the expiry of the sentence as a whole. The CSPA currently specifies that the non-parole period must be at

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1. *Way v R* [2004] NSWCCA 131; 60 NSWLR 168 [115]. This principle is generally supported in other Australian jurisdictions: see para [3.12].

2. Para [3.63]-[3.65] and Recommendation 3.1(2).

3. *R v Zamagias* [2002] NSWCCA 17 [23]-[32]; see also para [9.69].

4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 49(1)(a) and *R v H* (1980) 3 A Crim R 53.

5. *Ibbs v The Queen* (1987) 163 CLR 447.

6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44, the parole period is referred to as “the balance of the term”.

7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 45, 46.

8. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(1). This is consistent with the High Court’s statement in *Power v The Queen* (1974) 131 CLR 623, 628 and more recently in *Muldock v The Queen* [2011] HCA 39; 244 CLR 120 [57].

least three-quarters of the head sentence, unless the court finds special circumstances to reduce that period.<sup>9</sup>

- 6.6 The court is required to make an order directing the release of the offender to parole at the end of the non-parole period if the head sentence is one of three years or less.<sup>10</sup> The offender is automatically released to parole in accordance with the court's order at the expiry of the non-parole period, unless the State Parole Authority (SPA) revokes the parole order made by the court before the person is released.<sup>11</sup> For a head sentence of more than three years, the court sets the non-parole period but does not make a parole release order. Instead, SPA determines whether the prisoner should be released on parole at the expiry of the non-parole period.<sup>12</sup>

### Fixed terms

- 6.7 A court, when sentencing an offender to a term of imprisonment, may decline to impose a non-parole period and instead impose a fixed term of imprisonment, that is, a term of imprisonment which must be served in custody in its entirety. The court is permitted to impose a fixed term where "it appears to the court that it is appropriate to do so":
- (a) because of the nature of the offence to which the sentence, or of each of the sentences to which an aggregate sentence relates, or the antecedent character of the offender, or
  - (b) because of any other penalty previously imposed on the offender, or
  - (c) for any other reason that the court considers sufficient.<sup>13</sup>
- 6.8 A court must set a non-parole period and a balance of term for standard non-parole period offences.<sup>14</sup>
- 6.9 The CSPA requires the court to record its reasons for imposing a fixed term, a requirement that exists independently of its general common law duty to give reasons for any sentencing order.<sup>15</sup> Frequently, the reason for imposing a fixed term for an offence is that the offender is being sentenced for several offences, and the

9. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(2).

10. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 50. Stakeholders notified us that problems sometimes arose when the court did not, for whatever reason, make this parole order and suggested that a parole order should be automatically in place for sentences of 3 years or less unless the court orders otherwise. This issue will be considered as part of our reference to review the parole system.

11. *Crimes (Administration of Sentences) Act 1999* (NSW) s 130 (State Parole Authority's power to revoke a court-made parole order before the release date), s 158 (effect of parole orders made by the court). When a court-made parole order is revoked by SPA prior to the release date, SPA has the power to make a new parole order at a later time before the expiry of the total sentence: *Crimes (Administration of Sentences) Act 1999* (NSW) s 159.

12. *Crimes (Administration of Sentences) Act 1999* (NSW) pt 6 div 2.

13. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 45(1).

14. Under *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A. See Chapter 7.

15. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 45(2); *R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383 [42]-[44]; *Jackson v R* [2011] NSWCCA 124 [26].

sentence for a relatively less serious offence will be entirely subsumed within the non-parole period for a more serious offence.

- 6.10 The CSPA provides that a court must impose a fixed term if the head sentence is six months or less<sup>16</sup> and must give reasons including why it selected imprisonment and not an alternative sentencing option.<sup>17</sup>

### Commencement of the sentence

- 6.11 The court is required to specify the date on which the sentence is to commence.<sup>18</sup> It has the power to backdate the sentence to take into account any time spent in custody in respect of the offence; or to direct that it commence at a later date but only if the sentence is to be served consecutively on another sentence.<sup>19</sup> Where specified to commence at a later date, that date must be the day following the earliest date on which the offender would otherwise be entitled to be released from custody or to be released on parole.<sup>20</sup> Reasons should be provided where the sentence is not backdated to take into account pre-sentence custody.<sup>21</sup>

### Accumulation or concurrency

- 6.12 When a court sentences an offender for multiple offences, the CSPA requires it to impose a separate sentence for each offence,<sup>22</sup> unless it imposes an aggregate sentence.<sup>23</sup> If the court imposes separate sentences then it must consider whether it will *accumulate* any of those sentences and to what degree, or order that they be served concurrently or consecutively. The legislation is consistent with the High Court's approach that had been set out in *Pearce v The Queen*.<sup>24</sup> The High Court there held that a court, when sentencing an offender in respect of multiple offences, must fix an appropriate sentence for each offence and then determine the structure of the overall sentence in terms of the degree of concurrence, accumulation or partial accumulation of the individual sentences, so that the effective sentence appropriately reflects the totality of the offending. In practice, if the court wishes to accumulate or partially accumulate the sentences for different offences, this is done by staggering some or all of the starting dates of the sentences.<sup>25</sup>
- 6.13 Occasionally, the courts overlook the ultimate relationship between the effective non-parole period and the effective head sentence for all of the offences. Although, the court may find special circumstances for the offender<sup>26</sup> and accordingly impose

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16. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 46.

17. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(2)(b).

18. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 47.

19. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 47(2)-(4).

20. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 47(4).

21. *Eldridge v R* [2011] NSWCCA 144 [32]-[35].

22. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 53.

23. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 53A.

24. *Pearce v The Queen* [1998] HCA 57; 194 CLR 610.

25. See para [3.29]-[3.30] for a further discussion of totality.

26. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44.



individual sentences in which the non-parole period for each sentence is less than three-quarters of the head sentence, the effect of the special circumstances finding can be lost in the accumulation of the sentences. This has given rise to numerous appeals to the Court of Criminal Appeal (CCA), which generally considers what the court had intended to be the effective non-parole period. However, on occasions it has been difficult to ascertain the court's intention from the sentencing remarks and the appeal point continues to arise on a relatively frequent basis.<sup>27</sup>

### Aggregate sentences

- 6.14 The enactment of s 53A of the CSPA in March 2011, allowed the court to impose an *aggregate sentence*. This partially overcame some of the technicalities involved in accumulating sentences under *Pearce v The Queen*. It allows a court, when imposing imprisonment for multiple offences, to fix an aggregate head sentence and an aggregate non-parole period for all of the offences, or alternatively to impose an aggregate fixed term if the court considers a fixed term to be appropriate. The court must indicate to the offender, and make a record of, the head sentence that would have been imposed for each offence (but *not* the non-parole period unless it is an SNPP offence).<sup>28</sup> The court does not have to go through the sometimes complex and error-prone process of accumulating individual sentences by staggering their starting dates, or of allowing for partial concurrency and partial accumulation of a number of sentences.

### Taking offences into account on a Form 1

- 6.15 When sentencing an offender for an offence (referred to as the “principal offence” in this context) the Act provides that the court may take into account one or more further offences for which the offender admits guilt.<sup>29</sup> This is commonly referred to as “taking matters into account on a Form 1”. Both parties must agree to the further offences being placed on a Form 1<sup>30</sup> and the procedure is often used to “clean the slate” of all outstanding offences, for which the offender admits guilt, as part of charge negotiations between the prosecution and defence. The further offences are generally of similar or lesser seriousness compared to the principal offence and the court takes them into account with a view to increasing the sentence on the principal offence.<sup>31</sup> Separate sentences are not imposed for the further offences, but the increase in sentence for the principal offence may be significant in some cases, particularly if the matters on the Form 1 are numerous or serious in themselves.<sup>32</sup>

27. See, eg: *Rios v R* [2012] NSWCCA 8 [31]-[39] (in which the ground of appeal was successful) and *O'Neill v R* [2012] NSWCCA 22 [17]-[23] (in which the ground was rejected).

28. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(4A).

29. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 33.

30. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 32.

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

32. The CCA has issued a guideline judgment on the appropriate way for courts to take into account matters on a Form 1: *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 1 of 2002)* [2002] NSWCCA 518; 56 NSWLR 146, which builds on earlier decisions such as *R v Barton* [2001] NSWCCA 63.

The court can refuse to take another offence into account (and it must then be dealt with separately) if, in its opinion, it is not appropriate to be dealt with in this way.<sup>33</sup>

- 6.16 There is a statutory requirement for the prosecution to consult with the victim of an offence and with the officer in charge of the case before placing an offence on a Form 1, or to give reasons to the court why such consultation has not taken place.<sup>34</sup>

## Proposals to change the way terms of imprisonment are set

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### “Bottom up” or “top down” approach to imposing the sentence

- 6.17 Except if the court imposes a fixed term, s 44(1) of the CSPA requires the court to set the non-parole period first, followed by the parole period. This is the “bottom up” approach. The alternative is for the head sentence to be set first followed by the non-parole period, the “top down” approach. Over the years the legislation has shifted between these approaches.<sup>35</sup> The CSPA returned to the bottom up approach in 2003 with the introduction of the SNPP scheme.<sup>36</sup>
- 6.18 Strictly, s 44(1) only applies to the order of pronouncement of the non-parole period and parole period. This is because the courts have held consistently that the determination of an appropriate overall sentence and the proportions that represent the parole and non-parole period are part of the overall process of sentencing. To some extent, therefore, it could be argued that the choice between a top down or bottom up approach has no practical consequence. However, there is a risk that the section, as it is currently drafted, can mislead judicial officers into placing undue weight on determining the non-parole period at the expense of imposing a sentence as a whole that is appropriate in the circumstances of the case.<sup>37</sup>
- 6.19 In 1996, when the *Sentencing Act 1989* (NSW) mandated the bottom up approach,<sup>38</sup> we recommended that this approach be abandoned in favour of the top down approach.<sup>39</sup> We noted that a sentence should embody all the purposes of punishment and also reflect proportionality, as the prisoner remains liable to serve

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33. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 33(2)(b); see also NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines*, Guideline 20.

34. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 35A; see also NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines*, Guideline 20.

35. *Sentencing Act 1989* (NSW) s 5(1) also required courts to impose a non-parole period first before setting the balance of term, but the top down approach was adopted in the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44 when it was first enacted.

36. A return to bottom up sentencing was thought necessary under the SNPP scheme in order to be consistent with the focus on the non-parole period under the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW): see NSW, *Parliamentary Debates (Hansard)*, Legislative Assembly, 23 October 2002, 5813-5819. However, s 44 applies generally to any sentence of imprisonment in which a non-parole period and parole period is imposed.

37. See the discussion in *Musgrove v R* [2007] NSWCCA 21; 167 A Crim R 424 [44] (Simpson J). See also *Muldock v The Queen* [2011] HCA 39; 244 CLR 120 [17] in which the High Court unanimously observed: “the fixing of a non-parole period is but one part of the larger task of passing an appropriate sentence upon the particular offender”.

38. *Sentencing Act 1989* (NSW) s 5(1) (repealed).

39. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) rec 42.

the whole of the sentence if parole is not granted or is revoked.<sup>40</sup> Our view was that “the mere statement of a minimum term and additional term cannot effectively convey all the purposes of punishment. It is only once a head sentence has been set that the court can determine the minimum term, that is, the period which the offender must, in justice, serve in gaol”.<sup>41</sup>

- 6.20 On its face, the SNPP scheme was intended to place the focus on fixing the appropriate non-parole period and was compatible with a bottom up approach. The High Court’s decision in *Muldrock*, however, clarified the sentencing exercise as one whereby the court is obliged to “take into account the full range of factors in determining the appropriate sentence for the offence.....mindful of two legislative guideposts: the maximum sentence and the standard non-parole period”.<sup>42</sup> This is compatible with a return to the top down approach.
- 6.21 There was close to unanimous support amongst those who made submissions on this topic for a return to the top down approach.<sup>43</sup> The reasons advanced for making this change include that:
- The sentence should be seen as a whole inclusive of the head sentence.<sup>44</sup>
  - The top down approach provides a clearer statement of the total sentence, thus advancing transparency and public confidence.<sup>45</sup>
  - It is conceptually easier to determine the length of the sentence as a whole and to then state the non-parole period component within that sentence.<sup>46</sup>
  - Occasionally some judicial officers make the mistake of applying the section literally and determining the non-parole period first without considering what should be the length of the head sentence.<sup>47</sup>
- 6.22 A clear majority<sup>48</sup> agreed that a top down approach can work for SNPP offences although the NSW Office of the Director of Public Prosecutions (ODPP) expressed

40. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [8.27], citing *R v Moffitt* (1990) 20 NSWLR 114, 118 (Samuels JA) and 134 (Badgery-Parker J).

41. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [8.27].

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

43. G Henson, *Preliminary submission PSE5*, 1-4; Law Society of NSW, *Submission SE16*, 1; Children’s Court of NSW, *Submission SE18*, 3; The Public Defenders, *Submission SE24*, 3-4; NSW Bar Association, *Submission SE27*, 2; The Shopfront Youth Legal Centre, *Submission SE28*, 2-3; and Legal Aid NSW, *Submission SE31*, 2-3; Probation and Parole Officers’ Association of NSW, *Submission SE39*, 5-6. The NSW Office of the Director of Public Prosecutions submitted that the approach that invites least risk of error should be adopted: “Arguably the top-down approach is a more logical and instinctive way to approach the sentencing task, as the penalty as a whole is considered in the first instance with adjustments made according to how long it is necessary for the offender to spend in gaol”: *Submission SE19*, 1.

44. The Shopfront Youth Legal Centre, *Submission SE28*, 2.

45. G Henson, *Preliminary submission PSE5*, 3; Children’s Court, *Submission SE18*, 3; Legal Aid NSW, *Submission SE31*, 2.

46. Law Society of NSW, *Submission SE16*, 1; Public Defenders, *Submission SE24*, 3-4.

47. NSW Bar Association, *Submission SE27*, 2.

48. Law Society of NSW, *Submission SE16*, 1; Public Defenders, *Submission SE24*, 4; NSW Bar Association, *Submission SE27*, 2; Probation and Parole Officers’ Association of NSW, *Submission SE39*, 5-6. The Shopfront Youth Legal Centre submitted that there is now less conceptual difficulty under *Muldrock*, while maintaining its position that SNPPs ought to be repealed: *Submission SE28*, 3; see also Legal Aid NSW, *Submission SE31*, 3.

some reservations in this regard.<sup>49</sup> The NSW Police Force opposed a change from the bottom up approach, believing that it would cause confusion in the context of a two-tiered approach to SNPPs, which it strongly supports.<sup>50</sup> The Police Association also queried whether another change would result in confusion requiring further appellate guidance.<sup>51</sup> The Criminal Law Committee of the NSW Young Lawyers favoured leaving the order of pronouncement to the discretion of the judicial officer.<sup>52</sup>

### *Our view*

- 6.23 We prefer a return to the top down approach. This approach is consistent with an intuitive synthesis of all relevant factors when determining the total sentence. It is conceptually more straightforward, and as such should help to promote transparency, consistency and public confidence in sentencing. It also has the capacity to correct the occasional error of judicial officers fixing a non-parole period, and then inappropriately extending the head sentence in order to create a longer parole period following a finding of special circumstances.
- 6.24 We are not persuaded that a change to a top down approach will cause confusion. It is not evident that there were any conceptual or practical difficulties with the approach that was in place before the 2003 amendments, nor are we persuaded that it is inconsistent with the way in which the SNPP scheme is to be applied.
- 6.25 In redrafting the section the terms commonly used by the courts and practitioners should be adopted for their clarity and simplicity.<sup>53</sup> This would involve using “head sentence” instead of “term of the sentence”<sup>54</sup> or “total sentence”. It would be appropriate to retain the definition that the non-parole period is “the minimum period for which the offender must be kept in detention in relation to the offence”.<sup>55</sup>

### **Recommendation 6.1: Return to the top down approach**

In a revised Crimes (Sentencing) Act:

- (1) There should be a return to top down sentencing. The Act should provide that when a court sentences a person to imprisonment for an offence, unless imposing a fixed term, the court is to impose a head sentence which consists of a non-parole period and a parole period. The court is to pronounce the head sentence first and then the non-parole period.

49. On the basis that this would be “counter-intuitive” to the approach suggested by the SNPP scheme: NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 2. NSW Young Lawyers Criminal Law Committee also dissented from the majority view: *Submission SE38*, 5.

50. NSW Police Force, *Submission SE32*, 1-2, arguing that there should be a two-tiered approach to SNPPs contrary to the High Court’s interpretation in favour of instinctive synthesis in *Muldrock*. In the Police Force’s view, pronouncing the non-parole period first was consistent with that two-tiered approach.

51. Police Association of NSW, *Submission SE21*, 4.

52. NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 5.

53. As used in the *Sentencing Act 1989* (NSW) s 5.

54. As used in the original *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(1).

55. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44.

- (2) The terminology of “non-parole period”, “parole period” and “head sentence” should be used consistently throughout the Act and in all associated legislation.
- (3) The “non-parole period” should be defined as “the minimum period for which the offender must be kept in detention in relation to the offence”.
- (4) A “fixed term” should be defined as “a sentence that requires the offender to serve the entire period of the sentence in detention”.

### The ratio between the non-parole period and the head sentence

- 6.26 The CSPA contains a presumption—commonly referred to as the “statutory ratio”—that the non-parole period must not be less than three-quarters of the head sentence unless the court finds “special circumstances”.<sup>56</sup> As drafted, the relevant subsection<sup>57</sup> states that the parole period “cannot be more than one-third of the non-parole period unless there are special circumstances”. This is easier to understand as giving rise to a presumption that, without special circumstances, the NPP is to be three-quarters of the head sentence.
- 6.27 Three distinct issues arise:
- whether there should be a ratio at all;
  - if there is to be a presumptive ratio, what that ratio should be; and
  - whether departure from it should depend on a “special circumstances” test or some other test.

### *The history of the statutory ratio in NSW*

- 6.28 The origin of the statutory ratio can be traced to public concern about inadequate sentences for serious crimes. The provision is drafted in almost identical terms to the former s 5(2) of the *Sentencing Act 1989 (NSW)*.<sup>58</sup> In 1987, two years before the enactment of that Act, an amendment<sup>59</sup> was made to the *Probation and Parole Act 1983 (NSW)* to provide that non-parole periods for a list of nominated “serious offences” were not to be less than three-quarters of the head sentence unless “the circumstances justify that course”. These serious offences included homicide and other violent offences, sexual assault, robbery and commercial drug trafficking. The court was required to record its reasons for reducing the non-parole period below three-quarters of the head sentence.<sup>60</sup>

56. For convenience, in this discussion we will refer from time to time to the “statutory ratio”, “the ratio” or “a ratio”, noting that we always mean a *presumptive* ratio of the non-parole period to the head sentence from which a court may depart upon some specified basis.

57. *Crimes (Sentencing Procedure) Act 1999 (NSW)* s 44(2).

58. The original form of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* s 44 was in the same substantive terms, although expressed as “not less than three-quarters of the head sentence in the absence of special circumstances” because of the top down approach to sentencing.

59. *Probation and Parole (Serious Offenders) Amendment Act 1987 (NSW)*.

60. *Probation and Parole Act 1983 (NSW)* s 21(3), (4).

6.29 The Judicial Commission of NSW noted that the amendment introduced by the 1987 Act followed public criticism of the sentences that were being imposed for serious crimes, in which non-parole periods were often as low as 50% of the head sentence.<sup>61</sup> The then Premier, who gave the second reading speech, said the legislation was:

... concerned with the punishment of serious offenders and the protection of the community. Recent events in New South Wales have heightened our awareness of serious crimes of violence. The sentencing of such offenders has been subject to a deal of public debate. The sentences handed down to such serious offenders and the sentences actually served have been questioned. The punishment of offenders is traditionally justified by a number of principles: deterrence, rehabilitation, denunciation, regard to public attitudes, willful default, retribution of just deserts, and incapacitation. ... It is the last two principles with which the Government is concerned in these reforms.<sup>62</sup>

6.30 Justice Badgery-Parker said in *R v Moffitt* that while the 1987 amendment to the *Probation and Parole Act 1983* (NSW) was intended to “toughen up” sentences for serious crimes, s 5(2) was “engrafted” onto an existing sentencing system, one of whose purposes was to allow prisoners to be considered for parole at the end of their non-parole periods and thus “special circumstances” should not be read restrictively in light of the rehabilitative purpose of parole.<sup>63</sup>

6.31 What may amount to “special circumstances” under the current Act has been the subject of much debate in the case law. While Justice Hunt has observed that special circumstances must be “something more than those matters which may be taken into account by way of mitigation of the total sentence”,<sup>64</sup> the CCA has confirmed that a finding of special circumstances involves a discretionary finding of fact,<sup>65</sup> and as such the categories of special circumstances are not closed.

6.32 In practice, special circumstances are very frequently found, often by reference to mitigating factors that have already been taken into account. The Judicial Commission of NSW has published research that demonstrates an increase in special circumstances findings. For example, it has reported that in 1992, two years after the decision in *Moffitt*, the higher courts imposed sentences in which the non-parole period was less than three-quarters of the head sentence (consistent with at least an implicit finding of “special circumstances”) in about 47% of cases.<sup>66</sup> A decade later in 2002 this figure had risen to about 87% and non-parole periods

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61. Judicial Commission of NSW, “*Special Circumstances*” under the Sentencing Act 1989 (NSW), Monograph 7 (1993) 2.

62. NSW, *Parliamentary Debates*, Legislative Assembly, 12 November 1987, 15914. Some of those “principles” now would be described as “purposes” under *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.

63. *R v Moffitt* (1990) 20 NSWLR 114, 135-136.

64. *R v Lett* (unreported, NSWCCA, 27 March 1995). See also Judicial Commission of NSW, *Sentencing Robbery Offenders since the Henry Guideline Judgment*, Monograph 30 (2007) [3.7.6]; NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [8.22].

65. *R v El-Hayek* [2004] NSWCCA 25; 144 A Crim R 90 [103].

66. Judicial Commission of NSW, “*Special Circumstances*” under the Sentencing Act 1989 (NSW), Monograph 7 (1993) 3.

were often between a half to two-thirds of the head sentence.<sup>67</sup> Similarly, in 2010 the Judicial Commission found that in over 87% of cases involving SNPPs between 2000 and 2003, the non-parole periods were less than three-quarters of the head sentence, up from 80% for these offence categories in 2000 to 2003.<sup>68</sup>

- 6.33 Table 6.1 contains an extract of a Judicial Commission study of 276 cases of armed robbery and robbery in company, which shows that courts treated many different circumstances as “special” even though they were factors that fall within s 21A(3) of the CSPA.

**Table 6.1: Special circumstances for armed robbery and robbery in company offences (12 May 1999 to 11 May 2002) in a study sample by the Judicial Commission of NSW**

Special circumstance	Number of offenders	%
Need for lengthy period of supervision in community after release	206	74.6
Good prospects of rehabilitation (capacity to reform)	151	54.7
Age of offender	101	36.6
Prior criminal record (lack of)	89	32.2
Hardship	74	26.8
Other extraordinary subjective features	20	7.2
Effect of cumulative sentences	18	6.5
Demonstrated remorse and contrition (including assistance to the authorities)	7	2.5
Ward off institutionalisation	7	2.5
Issues of parity	1	0.4

*Source: Judicial Commission of NSW, Sentencing Robbery Offenders since the Henry Guideline Judgment, Monograph 30 (2007) Table 16, 107.*

- 6.34 The high frequency of special circumstances findings suggests a need for reform. In 2004 Chief Justice Spigelman cautioned courts against excessive findings of special circumstances.<sup>69</sup> He observed that there was “evidence that findings of special circumstances have become so common that it appears likely that there can be nothing ‘special’ about many cases in which the finding is made”. His Honour queried whether the “provision is perhaps being utilised far more than was anticipated by Parliament”.<sup>70</sup> He also noted that the presence of a factor that is capable of constituting a special circumstance did not mean that a judge is obliged

67. Judicial Commission of NSW, *Common Offences and the Use of Imprisonment in the District and Supreme Courts in 2002*, Sentencing Trends and Issues No 30 (2004) (references omitted); also cited in *Fidow v R* [2004] NSWCCA 172 [21] (Spigelman CJ).

68. Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010) 55.

69. *Fidow v R* [2004] NSWCCA 172 [22].

70. *Fidow v R* [2004] NSWCCA 172 [20]-[21].

to vary the statutory ratio, as a circumstance must be sufficiently special to justify such a departure.<sup>71</sup>

- 6.35 Moreover, it has been observed that when determining whether special circumstances do or do not exist, a court must be careful not to double count factors that mitigate the total sentence and non-parole period by using them again as special circumstances.<sup>72</sup>

### Other jurisdictions

- 6.36 The following table summarises in broad terms some of the relevant provisions in other jurisdictions relating to the ratio between non-parole periods and head sentences.

**Table 6.2: Provisions in other jurisdictions in relation to the statutory ratios between non-parole periods and head sentences**

Vic	<ul style="list-style-type: none"> <li>Non-parole period (NPP) <b>must</b> be at least 6 months less than the head sentence (for head sentences of more than 2 years).<sup>73</sup></li> </ul>
Qld	<ul style="list-style-type: none"> <li>NPP of 50% of the head sentence where the head sentence exceeds three years and the court does not set a parole eligibility date (or in other specified circumstances, such as imprisonment arising from the breach of a suspended sentence, cancelled parole or imprisonment for a sexual offence where the head sentence is not more than 3 years),<sup>74</sup> or</li> <li>80% of the head sentence for serious violence offences (or a minimum of 15 years, whichever is the lesser).<sup>75</sup></li> </ul>
WA	<ul style="list-style-type: none"> <li>NPP generally 50% of the head sentence if the head sentence is 4 years or less, or</li> <li>2 years less than the head sentence if the head sentence is greater than 4 years.<sup>76</sup></li> </ul>
SA	<ul style="list-style-type: none"> <li>NPP of 80% of the head sentence for serious offences against the person,<sup>77</sup> or for a serious offence where the offender is, or has been, declared to be a serious repeat offender<sup>78</sup> or a recidivist young offender.<sup>79</sup></li> </ul>
Tas	<ul style="list-style-type: none"> <li>NPP of not less than 50% of the head sentence.<sup>80</sup></li> </ul>
NT	<ul style="list-style-type: none"> <li>NPP of not less than 70% of the head sentence for the offences of sexual intercourse without consent, certain other sexual and violent offences, and certain offences committed against people under 16 years of age,<sup>81</sup> or</li> </ul>

71. *Fidow v R* [2004] NSWCCA 172 [22].

72. *R v Simpson* [2001] NSWCCA 534; 53 NSWLR 704 [47].

73. *Sentencing Act 1991* (Vic) s 11.

74. *Corrective Services Act 2006* (Qld) s 184; Queensland Sentencing Advisory Council, *Minimum Standard Non-parole Periods*, Final Report (2011) xvii, 36.

75. *Penalties and Sentences Act 1992* (Qld) pt 9A; Queensland Sentencing Advisory Council, *Minimum Standard Non-parole Periods*, Final Report (2011) xvii, 36.

76. *Sentencing Act 1995* (WA) s 93 (for aggregate sentences see s 94).

77. *Criminal Law (Sentencing Act) 1988* (SA) s 32(5)(ba).

78. *Criminal Law (Sentencing Act) 1988* (SA) s 20B(4)(b).

79. *Criminal Law (Sentencing Act) 1988* (SA) s 20C(3)(b).

80. *Sentencing Act 1997* (Tas) s 17(3).

81. *Sentencing Act* (NT) s 55, s 55A, unless the court considers it would be “inappropriate” to fix it at that level.



	<ul style="list-style-type: none"> <li>▪ NPP of not less than 50% of the head sentence for other offences where a term of imprisonment of 12 months or longer is imposed.<sup>82</sup></li> </ul>
NZ	<ul style="list-style-type: none"> <li>▪ In broad terms, NPP generally of 33.3% of the head sentence and generally not in excess of 66.6% of the head sentence if the head sentence is 2 years or more (and further provided the non-parole period will not be in excess of 10 years) but subject to exceptions for serious violent offending, including murder and repeat offending.<sup>83</sup></li> </ul>

- 6.37 We note that the Queensland Sentencing Advisory Council reported in 2011 that it favoured incorporating a “standard percentage scheme” into a Serious Violent Offenders sentencing model<sup>84</sup> requiring offenders to serve a minimum of between 65% and 80% of the total sentence imposed before being eligible to apply for parole. A different period could be imposed if it would be unjust to impose the “standard percentage” period.<sup>85</sup>
- 6.38 The *Crimes Act 1914* (Cth) does not make provision for a statutory ratio in relation to sentences for federal offences. In *Hili v The Queen*, the High Court rejected the contention (supposedly based on common practice of the courts) that the “norm” for the non-parole period for a federal offence was between 60% and 66% of the head sentence.<sup>86</sup> The majority rejected the notion that the common law prescribed any “mechanistic or formulaic” approach of that kind. It held that if such a prescriptive “norm” was to apply to a sentencing process, then it must have a “statutory root”,<sup>87</sup> and in the absence of such legislation, there is no “normal” ratio between the non-parole period and head sentence for a federal offence.

### *Options for reform*

- 6.39 We have examined various options for reform.
- 6.40 **Abolition.** The first option would be to abolish the ratio and the special circumstances test, leaving the determination of the non-parole period to the discretionary judgment of the sentencing court. This was the approach that was favoured in our 1996 report, in relation to the *Sentencing Act 1989* (NSW) on the basis that s 5 of that Act gave rise to an “unnecessary and arbitrary restraint” on the exercise of judicial discretion.<sup>88</sup>
- 6.41 Arguments in favour of the repeal of the ratio include that a majority of cases involve a finding of special circumstances in the form of mitigating factors and that the current scheme contributes to the complexity of judicial reasoning without adding

82. *Sentencing Act* (NT) s 54, unless the court considers it would be “inappropriate” to fix it at that level.

83. *Parole Act 2002* (NZ) s 84; *Sentencing Act 2002* (NZ) s 86 (but see exceptions in s 86A-86I, 103 and 104).

84. Queensland Sentencing Advisory Council, *Minimum Standard Non-parole Periods*, Final Report (2011) xvi.

85. Queensland Sentencing Advisory Council, *Minimum Standard Non-parole Periods*, Final Report (2011) xvii, 37.

86. *Hili v The Queen* [2010] HCA 45; 242 CLR 520 [36]-[44].

87. *Hili v The Queen* [2010] HCA 45; 242 CLR 520 [37].

88. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [8.22]-[8.24].

anything meaningful. Arguments against repeal include the possibility that it might lead to an erosion of consistency in sentencing, and that a presumptive ratio provides an anchoring point for the imposition of an adequate sentence.

6.42 **Reduction of the ratio.** An alternative approach that would bring the provision more in line with actual practice would be to reduce the ratio to somewhere between 50% and 66% of the head sentence. If that was to occur then it is likely that the courts would not need to find special circumstances as often; and the reasons for any further reduction of the non-parole period should then meet the description of being truly “special”.

6.43 **An amended test.** Other options identified include changing the special circumstances test to an “appropriate reason” test of the kind suggested by the Chief Magistrate:

Sentencing legislation should continue to provide a consistent starting point or guidepost for the relationship between the non-parole period and the parole period, from which departure may be made in order to either increase or decrease the ratio if **appropriate reason** to do so is identified. There is no need for a requirement that a reason for so finding should be “special” in the sense of it being particularly exceptional or uncommon.<sup>89</sup>

6.44 **A range of ratios.** A more complex model could involve the prescription of differing ratios that would apply according to the category of offence or the class of offender involved.

6.45 For example, a court could be required to have regard to:

- a lower ratio for younger offenders or for offenders with cognitive or mental health impairments – placing greater emphasis on their rehabilitation,
- a higher ratio for those convicted of serious personal violence and sexual offences, or of offences with relatively high rates of recidivism such as break and enter and motor vehicle theft<sup>90</sup> – placing greater emphasis on denunciation and retribution,
- a lower ratio for offences carrying a maximum penalty of up to three years imprisonment emphasising the desirability of rehabilitation of offenders convicted of less serious offences, and
- a default ratio for all other offences.

6.46 An example of this kind of approach can be seen in South Australia. If the offender is declared to be a “serious repeat offender”, then the non-parole period must be set

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89. G Henson, *Submission SE22*, 1.

90. D Weatherburn and others, *Rates of Participation in Burglary and Motor Vehicle Theft*, Contemporary Issues in Crime and Justice 130 (NSW Bureau of Crime Statistics and Research, 2009) noted relatively high recidivism rates in these offence categories: at 1.

at least 80% of head sentence<sup>91</sup> and the court is not required to ensure that the sentence is proportional to the gravity of the offence.<sup>92</sup>

- 6.47 Alternatively, the legislature could specify (in a way similar to the standard non-parole period scheme) a presumptive non-parole period for selected groups of offences that is expressed as a proportion of the head sentence or as a term of years. This would need to be accompanied by a requirement for the supply of reasons for any departure from the specified period, and possibly by the introduction of a test specifying in a limited way the matters that could be taken into account.

### *Stakeholder views*

- 6.48 Submissions were broadly split between those who favoured the abolition of a statutory ratio and those who preferred that it be retained. Divergent views were also expressed about the retention or abolition of the special circumstances test. There was however a majority view that if a statutory ratio of some sort is retained then it should be a single ratio.
- 6.49 **Abolition or reduction of ratio.** The Bar Association proposed abolition of the ratio. It pointed out that there is no ratio in the *Crimes Act 1914* (Cth), and that the ratio that the NPP bears to the head sentence is generally not as high as 75% in the other Australian jurisdictions. It suggested that the commonly observed association of special circumstances with “a need for a longer period on parole to assist the offender’s rehabilitation” can lead to persons who are not rehabilitated receiving lower non-parole periods than those who are rehabilitated. It preferred leaving it to the courts to determine the appropriate balance between the non-parole and parole periods on a case by case basis. If a presumptive ratio is to be retained, then it submitted, the ratio should be the same for all offences.<sup>93</sup>
- 6.50 The Law Society also submitted that consideration should be given to abolishing the ratio as this “would increase the court’s discretion and remove the need for ‘special circumstances’”. If it is retained, it favoured a single ratio of 50%.<sup>94</sup> Legal Aid similarly supported a single ratio of 50%.<sup>95</sup>
- 6.51 The ODPP submitted that the special circumstances test “has effectively become meaningless because of overuse” and suggested, as a possible solution, a reduction of the statutory ratio to a range of 50% to 66% of the head sentence. The ODPP opposed different ratios for different situations “as this would introduce undue complexity”.<sup>96</sup> The NSW Police Force did not support treating offenders

91. *Criminal Law (Sentencing) Act 1988* (SA) s 20B.

92. *Criminal Law (Sentencing) Act 1988* (SA) s 20B.

93. NSW Bar Association, *Submission SE27*, 1-2.

94. Law Society of NSW, *Submission SE16*, 1.

95. Legal Aid NSW, *Submission SE31*, 2.

96. NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 1.

- differently based on the category of offence committed and submitted that a single ratio should be retained.<sup>97</sup>
- 6.52 NSW Young Lawyers did not favour an outright abolition of the ratio, but noted the problems with the special circumstances test, given the frequency of findings in practice. It also submitted that if a statutory ratio is retained, it should be a single ratio as multiple ratios are likely to lead to complexity.<sup>98</sup>
- 6.53 The Probation and Parole Officers' Association of NSW preferred abolishing the ratio in order "to better reflect sentencing practice", to reduce reliance on incarceration and to promote the exercise of judicial discretion. However, to overcome any community impression that abolition would mean "going soft on crime", it favoured the retention of a single presumptive ratio of 50% to 33%. It suggested that the legislation could specify the reasons that could be taken into account in determining whether to depart from the ratio. It supported the fixing of different presumptive ratios for different categories of offenders.<sup>99</sup>
- 6.54 One possibility for reform offered by the Public Defenders would be to reduce the ratio to 50% for offenders with a cognitive impairment.<sup>100</sup> The Crime and Justice Reform Committee made a similar submission noting that offenders with cognitive and mental health impairments "would be better served by a lesser period in custody and a longer time being supported and supervised in the community".<sup>101</sup> The Shopfront Youth Legal Centre strongly opposed specifying different ratios for different offences because they "could become highly politicised". It also opposed specifying different ratios for different offenders, although, if this was to occur then, it gave qualified support to "a different ratio (say 50%) for offenders aged 25 and under".<sup>102</sup> The Homicide Victims' Support Group (HSVSG) submitted that an 80% presumptive ratio should apply for homicide cases "emphasising deterrence, denunciation [and] retribution...[for] these offences".<sup>103</sup>
- 6.55 The Children's Court submitted that juvenile offenders should be exempted from the application of any statutory ratio, because of the primacy given to rehabilitation in the sentencing of young offenders, whereas the statutory ratio "contemplates the purposes of sentencing applicable to adults and appears to be focused on punishment".<sup>104</sup>
- 6.56 **Retention of the special circumstances test.** The Public Defenders noted that "[a]lthough special circumstances are found in the majority of cases, the test provides an 'anchoring point' for courts to consider how far they depart from the

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97. NSW Police Force, *Submission SE32*, 1.

98. NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 4.

99. Probation and Parole Officers' Association of NSW, *Submission SE39*, 1-5.

100. The Public Defenders, *Submission SE24*, 2.

101. Crime and Justice Reform Committee, *Preliminary submission PSE12*, 3.

102. The Shopfront Youth Legal Centre, *Submission SE28*, 2.

103. Homicide Victims' Support Group, *Submission SE23*, 3-4, 7.

104. Children's Court of NSW, *Submission SE18*, 2-3.

ratio in any given case”. They suggested that its abolition could lead to an erosion of consistency.<sup>105</sup>

- 6.57 The Shopfront Youth Legal Centre submitted that it is “vital that judicial officers continue to have the discretion to order relatively short non-parole periods and longer parole periods under parole supervision in appropriate cases”. The frequency of special circumstances findings it suggested was “not surprising” because it reflected the composition of the NSW prison population, including the very high proportion of prisoners with disadvantaged backgrounds, mental illness, cognitive impairment, alcohol and other drug dependence and homelessness issues. However, they submitted that the test might usefully be reformulated as one depending on a finding of “good reasons to depart from the statutory ratio”.<sup>106</sup>
- 6.58 The NSW Police Force favoured rewording the test as one requiring a finding of “exceptional circumstances”.<sup>107</sup> Otherwise, there was some support for retaining the test to ensure that courts appropriately take into account the subjective circumstances of the offender.<sup>108</sup>

### *Our view*

- 6.59 There are two competing views on the need for statutory guidance on setting non-parole periods. The first, as we argued in our 1996 report, is that any statutory ratio is an “unnecessary and arbitrary restraint on the ability of a court to fix a sentence appropriate to the offence in question”.<sup>109</sup> This is consistent with the fact, as held by the High Court, that the common law does not embrace the notion of a norm between the non-parole period and the head sentence.<sup>110</sup>
- 6.60 The alternative view is that parliament is entitled to provide guideposts for the courts, not only by fixing the maximum penalty for any given offence; but also by specifying a general presumptive ratio of the non-parole period to the head sentence, provided that a court is allowed sufficient scope to depart from that ratio if the justice of the case demands. This is because parliament expresses the community’s view about appropriate sentencing standards. As Justice McClellan has observed, “[w]hen the issue at stake is the length of time that a person should serve as ‘punishment’ for an offence, it was always likely that the parliament would intervene to ensure that the sentencing process is transparent and sentences adequate and consistent”.<sup>111</sup> We recognise the public interest in the provision of legislative guidance in relation to the fixing of non-parole periods, and for that reason we depart from the position that we adopted in 1996.

105. The Public Defenders, *Submission SE24*, 2.

106. The Shopfront Youth Legal Centre, *Submission SE28*, 2.

107. NSW Police Force, *Submission SE32*, 1 quoting *Fidow v R* [2004] NSWCCA 172 [20]-[22].

108. Public Interest Advocacy Centre, *Submission SE29*, 2-4; Police Association of NSW, *Submission SE21*, 4; NSW, Department of Family and Community Services, *Submission SE48*, 3-4.

109. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [8.24].

110. *Hili v The Queen* [2010] HCA 45; 242 CLR 520 [36]-[44].

111. P McClellan, “Sentencing in the 21st Century” (Paper presented at the NSW Crown Prosecutors’ Conference, Pokolbin, 10 April 2012) 6.

- 6.61 We do not favour the introduction of multiple ratios applicable for different circumstances and/or offenders. This would have a very real capacity to create confusion and difficulty in its application. Moreover, fixing the ratio by reference to offence types could work an injustice since any one offence can embrace a significant range of objective criminality. To the contrary, we support the use of a single ratio that can serve as an anchoring point for the sentence.
- 6.62 A crucial issue is the quantum of the presumptive ratio. In setting a term of imprisonment, there is a balance to be achieved between the purposes of punishment, deterrence and denunciation, on the one hand, and the need, on the other hand, to promote rehabilitation by providing for an adequate level of supervision to assist in the offender's reintegration into the community. There is a strong argument for the offender having the opportunity of a sufficient period of supervised release on parole following a period of imprisonment. This period of parole supervision is an integral part of the sentence, and may be onerous. While parole is certainly not the constraint on personal liberty of prison, the offender is subject to supervision and may be returned to prison at any time if conditions are not met, or if he or she reoffends. For sentences of 1-2 years, the current statutory ratio suggests that the parole period might be set at 3-6 months. In many cases, this may not be sufficient to satisfy the objective of rehabilitation.
- 6.63 There was considerable support in submissions for adopting a single ratio that would prescribe a NPP equivalent to 50% of the head sentence. However, we believe that a ratio of two-thirds of the head sentence would be appropriate, and more closely reflect current practice.
- 6.64 We are strongly of the view that the current special circumstances test should be replaced. The courts have not interpreted "special" in the sense that is usually attributed to that expression, of being "exceptional in character, quality or degree" or of being "in excess of that which is usual or common".<sup>112</sup> It has been invoked so often and in such a wide variety of circumstances that the purpose of its introduction has been lost. A circuit breaker is needed that would require the court to find, and explain, why it finds that a departure from the ratio is warranted.
- 6.65 The Australian Law Reform Commission preferred a "less prescriptive approach" of having a "reference point" of two-thirds of the head sentence from which the court could depart without giving reasons.<sup>113</sup> However, in our view, a test should be adopted that would only permit the court to depart from the ratio if it is satisfied that there are *good reasons* to do so after having regard to all the purposes of sentencing, including but not confined to the promotion of the rehabilitation of the offender. This "good reasons" test should be interpreted as setting a higher barrier than the current special circumstances test. The court should be required to record

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112. *Shorter Oxford Dictionary* (3rd edition) 2066.

113. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [9.40]-[9.42].

its reasons for departing from the ratio,<sup>114</sup> although a failure to do so need not invalidate the sentence.

- 6.66 We accept the submission made by the Children’s Court that juvenile offenders should be exempted from the statutory ratio.<sup>115</sup> A provision that the statutory ratio does not apply “if the offender was under the age of 18 years at the time the offence was committed” would be consistent with the 2008 amendment of the SNPP system, which exempted juvenile offenders.<sup>116</sup> The NSW Sentencing Council has recommended that the SNPP scheme should not apply to juvenile offenders because of their developmental stage and the emphasis placed on their rehabilitation by the sentencing law.<sup>117</sup>

### **Recommendation 6.2: The “statutory ratio” and the test to depart from the ratio**

A revised Crimes (Sentencing) Act should continue to provide guidance about the ratio between the non-parole period and the head sentence as follows:

- (1) The presumptive ratio of the non-parole period to the head sentence should be two-thirds.
- (2) The “special circumstances” test should be replaced. A new test should allow the court to depart from the presumptive ratio only if, having regard to all the purposes of sentencing, it is satisfied that there are good reasons for such a departure.
- (3) The court must record its reasons for any departure from the presumptive ratio, but a failure to do so would not invalidate the sentence.
- (4) The presumptive ratio should not apply to any offender who was under the age of 18 years at the time the offence was committed.

### **Fixed terms**

- 6.67 Section 45 of the CSPA allows a court to decline to set a non-parole period in relation to an offence, resulting in a fixed term even though the sentence is longer than six months. SNPP offences are currently excluded from this provision.<sup>118</sup>
- 6.68 It appears that fixed terms of imprisonment have been imposed erroneously in respect of SNPP offences<sup>119</sup> and we can see no reason to continue this exclusion. Recommendation 6.3 has been included to allow the court to impose a fixed term

114. See the structure of the original *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(2) which said that the non-parole period “must not be less than three-quarters” of the head sentence unless special circumstances were found and the court recorded its reasons for that decision.

115. Children’s Court of NSW, *Submission SE18*, 2-3,

116. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D(3), inserted by the *Crimes Amendment (Sexual Offences) Act 2008* (NSW).

117. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Report (2008) vol 1 [3.60]-[3.61] and rec 23.

118. *SGJ v R* [2008] NSWCCA 258 [76]-[78].

119. *Collier v R* [2012] NSWCCA 213 [53].

for an SNPP offence. This does not preclude the court from taking into account the SNPP and maximum penalty as guideposts.

- 6.69 A further question has arisen as to whether the court should set the fixed term by reference to the non-parole period that it would have otherwise imposed, the legislation being silent on the matter.<sup>120</sup> Some appeals appear to have proceeded on the basis that the fixed term represented the total term of the sentence which the court would otherwise have imposed.<sup>121</sup> The CCA has said that:

In accordance with sentencing principle, where a fixed term of imprisonment is imposed the fixed term will be equivalent, not to the total term of a sentence containing a non-parole period and a parole period, but merely to the non-parole period of such a sentence.<sup>122</sup>

- 6.70 In order to avoid doubt, we consider that a revised Crimes (Sentencing) Act should include a provision to the effect of s 45 of the CSPA. The provision should be amended to make clear that the fixed term that the court imposes should be not less than that which it would have set as the non-parole period for the offence.

### **Recommendation 6.3: Fixed terms and the SNPP scheme**

A revised Crimes (Sentencing) Act should contain a provision amending s 45 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) that would:

- (1) permit the court to impose a fixed term for an offence included in the SNPP Table; and
- (2) specify that the sentence imposed must not be less than that which the court would have set as the non-parole period for the offence.

## Accumulated sentences and the statutory ratio

- 6.71 Courts may impose multiple terms of imprisonment on an offender either through accumulating sentences or imposing an aggregate sentence. The CSPA as it is currently drafted does not direct the court's attention to the proportion between the effective non-parole period and parole period when sentences are accumulated.
- 6.72 Problems can arise under this procedure when "special circumstances" are found for the individual sentences but the court does not sufficiently address the way in which such a finding is reflected in the overall sentencing order. Working on the assumption that the special circumstances test (or a test involving "good reasons") remains part of the law, we have considered whether the court should be required to state its reasons if a finding in accordance with such a test is not translated into the effective overall sentence.

120. *Collier v R* [2012] NSWCCA 213 [55]-[62].

121. See, eg, *Forbes v R* [2009] NSWCCA 292; *Amacha v R* [2010] NSWCCA 180; and *Smaragdīs v R* [2010] NSWCCA 276.

122. *R v Dunn* [2004] NSWCCA 346 [161] (Handley JA, James and Howie JJ).



- 6.73 There was support for the provision of legislative guidance in this respect. The ODP and the Law Society proposed that any such finding should apply to the effective (overall) sentence as opposed to the individual sentences.<sup>123</sup> Several other submissions suggested that, if there is a finding of special circumstances in respect of individual sentences, then the court should be required to give reasons if the effective (overall) sentence does not reflect that finding.<sup>124</sup>
- 6.74 The ODP also suggested that the “slip rule”<sup>125</sup> could be used to correct an error where it is clear that the court has made an error in effecting an accumulation of sentences (other than by way of an aggregate sentence), on the application of one of the parties, or on its own motion, without the need for an appeal.<sup>126</sup>

### *Our view*

- 6.75 The traditional procedure that involves the setting of individual sentences with their own non-parole periods (or fixed terms), followed by determination of the extent to which they are to be served consecutively or concurrently or partly consecutively and partly concurrently, and of their respective commencement dates, can be unduly complex and lend itself to error. However, if the court elects to employ this procedure rather than the aggregate sentencing approach considered below, then the process could be simplified by following the course that is permitted when sentencing federal offenders.<sup>127</sup>
- 6.76 This means that the court would impose a head sentence for each offence. It would then specify the extent to which those sentences are to be served consecutively or concurrently or partly consecutively and partly concurrently, resulting in an overall effective head sentence. Finally, the court would impose a single non-parole period for the overall effective term. Any finding of special circumstances (or good reasons) for a departure from the statutory ratio should be taken into account when setting the non-parole period against the overall effective term. The court should be required to provide reasons for any departure from that ratio.
- 6.77 Once the court has formulated an overall effective term and single non-parole period (or, alternatively, a total effective fixed term), it should be able to order the term of imprisonment be served by way of a single home detention order or single ICO. If our preferred new sentencing options are adopted, the court should be able

123. NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 3; Law Society of NSW, *Submission SE16*, 4.

124. NSW Bar Association, *Submission SE27*, 4; The Public Defenders, *Submission SE24*, 6-7; The Shopfront Youth Legal Centre, *Submission SE28*, 5; Legal Aid NSW, *Submission SE31*, 5; Police Association of NSW, *Submission SE21*, 7; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 8; Public Interest Advocacy Centre, *Submission SE29*, 5-6; Homicide Victims' Support Group, *Submission SE23*, 8-10.

125. The procedure available in *Crimes (Sentencing Procedure) Act 1999* (NSW) s 43.

126. NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 3. Homicide Victims' Support Group, *Submission SE23*, 10 pointed out that sometimes only a relatively small reduction is made to the effective non-parole period on appeal to the CCA and such relatively minor reductions in penalty “do not warrant the intervention of the [CCA's] resources and the prolonged exposure to the court processes to the families of victims”.

127. *Crimes Act 1914* (Cth) s 19A.

to order that the total effective accumulated term be served by a single community detention order (CDO).

- 6.78 We also see merit in the ODPP's suggestion in relation to the use of the "slip rule", and consider that a revised Crimes (Sentencing) Act should permit the court, on the application of the parties or on its own motion, to make an adjustment to the effective non-parole period if it is persuaded that it made an error in accumulating the sentences. This could be done by an amendment of a provision to be included in a revised Crimes (Sentencing) Act to the effect of the current s 43 of the CSPA, the retention of which we otherwise support.

#### **Recommendation 6.4: Accumulation of sentences**

- (1) A revised Crimes (Sentencing) Act should provide that the court, when accumulating sentences:
  - (a) must state the term of each sentence, without specifying a non-parole period or a fixed term;
  - (b) must state whether the sentences (including the sentences already being served), are to be served concurrently or consecutively or partly concurrently and partly consecutively and state an overall effective term;
  - (c) must specify whether the overall effective term is a fixed term, or set a single non-parole period;
  - (d) when setting the single non-parole period, may depart from the presumptive ratio only if, having regard to all of the purposes of sentencing, it is satisfied that there are good reasons to do so and must provide reasons for the departure.
- (2) A court should be able to order that the offender serve accumulated sentences by way of a single home detention or intensive correction order (if these sentences are retained) or a single community detention order (if this order is adopted).
- (3) A court should have the power, on the application of the parties, or on its own motion, to make any adjustment to the effective non-parole period if it made an error in the way in which the individual sentences were translated into the effective overall sentence. This amendment could be incorporated into a restated s 43 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

### **Aggregate sentencing**

- 6.79 Aggregate sentencing has been authorised under s 53A of the CSPA since 2011. It has the advantage of freeing courts from "the laborious and complicated task of creating a cascading or 'stairway' sentencing structure" as was required before its introduction.<sup>128</sup> However, some stakeholders have expressed concerns that s 53A remains unduly complicated because of the requirement to state the individual head sentences, as well as the aggregate head sentence and aggregate non-parole

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128. *R v Rae* [2013] NSWCCA 9 [45].

period.<sup>129</sup> Although the section could be amended to remove that requirement, the High Court pointed out in *Pearce v The Queen* (a case decided prior to the introduction of aggregate sentencing) that a sentencing technique that looks only to the effective sentence is “likely to mask error”.<sup>130</sup> The Court observed: “A Judge sentencing an offender for more than one offence must fix an appropriate sentence for each offence and then consider questions of cumulation or concurrence, as well, of course, on questions of totality”.<sup>131</sup>

- 6.80 An issue that was raised is whether s 53A applies to custodial alternatives to full-time imprisonment. The courts have not considered this question and it was not addressed in the Explanatory Notes to the amending Bill.<sup>132</sup>
- 6.81 Some submissions expressed the view that s 53A is working well;<sup>133</sup> while others suggested that it has not been used very often,<sup>134</sup> or that it has not been in force long enough to fully assess its effectiveness.<sup>135</sup> Several submissions supported retention of the requirement for the court to state the sentence considered appropriate for each of the individual offences, although not the non-parole periods for those sentences,<sup>136</sup> on the basis that this assists to promote transparency and consistency; aids appellate review; maintains consistency with *Pearce* and promotes public confidence in the courts.<sup>137</sup>
- 6.82 The Chief Magistrate supported allowing the Local Court to impose a single total sentence “rather than requiring ponderous articulation of separate sentences for each individual offence”.<sup>138</sup>

### *Our view*

- 6.83 We acknowledge that the requirement under the aggregate sentencing procedure to state the individual head sentences places a burden on the court, particularly if it is

129. R Blanch, *Preliminary submission PSE3*, 2.

130. *Pearce v The Queen* [1998] HCA 57; 194 CLR 610 [45] (McHugh, Hayne and Callinan JJ).

131. *Pearce v The Queen* [1998] HCA 57; 194 CLR 610 [116].

132. Explanatory Notes, Crimes (Sentencing Procedure) Amendment Bill 2010.

133. Law Society of NSW, *Submission SE16*, 3; Children’s Court of NSW, *Submission SE18*, 5; Homicide Victims’ Support Group, *Submission SE23*, 7; NSW Bar Association, *Submission SE27*, 3. See also the summary of submissions on totality at para [3.60].

134. NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 2; Legal Aid NSW, *Submission SE31*, 5.

135. Police Association of NSW, *Submission SE21*, 6-7; Homicide Victims’ Support Group, *Submission SE23*, 7; Public Defenders, *Submission SE24*, 6; The Shopfront Youth Legal Centre, *Submission SE28*, 4; Legal Aid NSW, *Submission SE31*, 5; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 7 (but noting that the provision is useful). The Police Association submitted it is important that s 53A provides “an appropriate balance between the aim of allowing courts to impose a ‘bottom line’ for the aggregate sentence in a straight-forward way, against the related aim of the courts providing enough detail about the individual sentences”: SE21, 6

136. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(2C).

137. Law Society of NSW, *Submission SE16*, 3; Homicide Victims’ Support Group, *Submission SE23*, 7-8 (noting that the absence of such a requirement may increase the risk of sentence appeals, thus prolonging the court process for the relatives and friends of a deceased victim in homicide cases); The Public Defenders, *Submission SE24*, 6; NSW Bar Association, *Submission SE27*, 4; The Shopfront Youth Legal Centre, *Submission SE28*, 4-5; NSW Police Force, *Submission SE32*, 4; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 7.

138. G Henson, *Submission SE10*, 5. See also Children’s Court of NSW, *Submission SE18*, 5-6.

sentencing an offender for a large number of sentences. However this is offset by the court not having to state the commencement dates of the individual sentences or the individual non-parole periods (unless it is for an SNPP offence). Abolishing the requirement may be undesirable for the reasons given by Justice R A Hulme in *R v Nykolyn*:

The importance of proper compliance with the requirement to indicate the separate sentences that would have been imposed arises for at least four reasons. First, it assists a sentencing judge in application of the totality principle, an important factor in the assessment of the aggregate sentence to be imposed. Secondly, it exposes for appellate review how it is that the aggregate sentence was arrived at. Thirdly, it allows victims of crime and the public at large to understand the level of seriousness with which a court has regarded an individual offence. Fourthly, it assists this Court to assess an appropriate new aggregate sentence if one or some of the underlying convictions are quashed on appeal.<sup>139</sup>

- 6.84 Justice RA Hulme further noted that the requirement for the court to indicate the sentence that would have been imposed for each offence, had separate sentences been imposed, means that it must “give consideration to the criminality involved in each offence and, where appropriate, have regard to any matters on a Form 1 when defining the sentence that would have been imposed for an individual offence”.<sup>140</sup>
- 6.85 We are not persuaded at this stage that there should be any change to the requirement to state the individual head sentences where the aggregate sentencing procedure is employed. In the light of the decision in *Muldrock v The Queen*, however, we do not see any need for the non-parole period to be stated in the case of a sentence for a standard non-parole period that is included in an aggregate sentence.
- 6.86 In our opinion s 53A would apply to ICOs and home detention as these, while alternatives to full time imprisonment, are currently “sentences of imprisonment”.<sup>141</sup> However we consider that it would be advisable that this be made clear in a revised Crimes (Sentencing) Act if these sentencing options are retained. Similar provision would need to be made for the proposed CDO if our recommendations in Chapter 11 are adopted.
- 6.87 The position with respect to suspended sentences is not quite as clear. Justice Howie stated in *R v JRD* that suspended sentences could *not* be accumulated when first imposed, as the offender is to be released immediately under a bond in respect of each offence and the bond dates from the day the offender is sentenced. His Honour did not however rule out the possibility of accumulated sentences if the offender subsequently breaches those bonds and is sentenced to imprisonment on

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139. *R v Nykolyn* [2012] NSWCCA 219 [58] (citations omitted). Hulme J, at [60], quoted from the second reading speech for the introduction of s 53A which contains similar reasoning.

140. *R v Nykolyn* [2012] NSWCCA 219 [32].

141. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 66(1) provides that an ICO may not be made in respect of a sentence of imprisonment for a prescribed sexual offence “or with respect to an aggregate sentence of imprisonment with respect to 2 or more offences, any one of which is a prescribed sexual offence”. The existence of such an exclusionary statement implies that it was intended that the aggregate sentencing scheme can apply to ICOs for other offences.

the breach.<sup>142</sup> The difficulty with construing s 53A as including suspended sentences is that Part 4 of the Act, including the setting of a non-parole period, does not apply to a suspended sentence unless and until the offender breaches the bond and the court resentsences the offender.<sup>143</sup>

- 6.88 For these reasons, we do not see any difficulty in confirming that aggregate sentencing can apply to the new CDOs, if our recommendations are adopted, or, if our recommendations are not adopted, to ICOs for a total of up to two years and home detention for up to 18 months (or longer if those ceilings are to be lifted). However, aggregate sentencing should not apply to suspended sentences (subject to their retention as sentencing options).
- 6.89 Consistently with our earlier recommendations about adopting the top down approach, a similar approach would need to apply to aggregate sentencing. For greater certainty we conclude that, in the interests of flexibility, the traditional accumulation approach should also be maintained as an alternative to aggregate sentencing. This would leave it to the court to employ whichever method is best suited to the immediate case.

#### Recommendation 6.5: Aggregate sentences

In a revised Crimes (Sentencing) Act:

- (1) Aggregate sentencing (as provided for in s 53A of the *Crimes (Sentencing Procedure) Act 1999* (NSW)) should be preserved.
- (2) The court should be required to state the individual head sentences (but not the non-parole periods) that would have been imposed for each offence had the court not imposed an aggregate sentence.
- (3) A court should be able to order that the offender serve an aggregate sentence by way of a single home detention or intensive correction order (if these sentences are retained) or a single community detention order (if this order is adopted).
- (4) If suspended sentences are retained, they should be excluded from aggregate sentencing.
- (5) When a court is specifying the non-parole period for an aggregate sentence, the top down approach should apply and the court should be required to record its reasons for departing from the presumptive ratio between the non-parole period and the head sentence.

### Aggregate sentencing in the Local Court

- 6.90 The CSPA allows the Local Court to accumulate multiple sentence of imprisonment up to five years.<sup>144</sup> In our consultations with the Local Court, we were advised that there is some doubt about whether aggregate sentencing can also be employed as an alternative to accumulation to permit imposition of an aggregate sentence of up to five years.

142. *R v JRD* [2007] NSWCCA 55 [34].

143. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(5), s 12, s 99.

144. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 58.

- 6.91 This issue was not given express attention when s 53A of the CSPA was enacted. We favour an interpretation of s 53A that would permit its use in the Local Court. In our view, the CSPA should be immediately amended to clarify that the Local Court may impose an aggregate sentence of up to five years imprisonment. A similar provision should also be included in a revised Crimes (Sentencing) Act.
- 6.92 Any amendment should make clear that a power to impose an aggregate sentence does not enlarge the jurisdictional sentencing limit that applies in the Local Court in relation to a single offence.

**Recommendation 6.6: Aggregate sentencing in the Local Court**

- (1) The *Crimes (Sentencing Procedure) Act 1999* (NSW) should be immediately amended to clarify that the Local Court may impose an aggregate sentence of up to five years imprisonment.
- (2) A revised Crimes (Sentencing) Act should permit the Local Court to impose an aggregate sentence of up to five years imprisonment.
- (3) The Local Court's power to impose an aggregate sentence does not increase the jurisdictional limit that applies when sentencing for individual offences.

**Aggregation or accumulation of sentences of six months or less**

- 6.93 The Chief Magistrate identified one other issue in relation to aggregating and accumulating sentences that has particular relevance for the Local Court, but that also applies more broadly. When imposed individually, any sentence of six months or less must be a fixed term sentence with no non-parole period. It is not clear whether, when such sentences are accumulated or combined into an aggregate sentence, the court may set a non-parole period for the resulting sentence.
- 6.94 Our current view is that it is at least arguably not permissible for the court in these circumstances to do other than construct a sentencing order that would take effect as a fixed term. However, this could have a very significant impact on an offender, which may be disproportionate to the total criminality involved.
- 6.95 We discuss the policy considerations behind requiring all sentences of six months or less to be fixed terms in the next section of this chapter. Our view is that these considerations lose their force in a situation where such sentences are being accumulated or combined into a new aggregate sentence that is longer than six months. In principle, we favour the introduction of a power that would permit a non-parole period to be set where fixed term sentences are accumulated or combined into an aggregate sentence of more than six months.

**Recommendation 6.7: Accumulating or aggregating fixed term sentences**

The government should consider including in a revised Crimes (Sentencing) Act a provision that permits a single non-parole period to be set where fixed term sentences are accumulated or combined into an aggregate sentence of more than six months imprisonment.

## Short sentences of imprisonment

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- 6.96 Short sentences of imprisonment (normally defined as six months or less) have a number of problems, including:
- they provide limited opportunity for Corrective Services NSW to work with the offender while in prison;
  - they preclude the offender from receiving the kind of supervision on release into the community that might assist his or her reintegration;
  - they can cause a significant disruption in employment, and family and support relationships, including the loss of public housing, without providing any significant degree of community protection or any opportunity for rehabilitative programs;
  - they can expose a first offender to undesirable influences that can set the person on the path of further offending.
- 6.97 In some situations, in spite of these disadvantages, courts feel obliged, through lack of other options, to impose a short term of imprisonment because of the need for punishment, denunciation and general deterrence. Some jurisdictions including WA have abolished short sentences of imprisonment.

## Retention of short sentences of imprisonment

- 6.98 Any proposal to abolish sentences of imprisonment for less than six months would need to take into account the availability of alternatives to full-time custody and the possible disproportionate impact on particular groups of offenders. The proportion of offenders who receive a fixed term sentence of imprisonment of six months or less as their principal penalty has steadily declined since 2001, but these sentences still form a large proportion of all the sentences of imprisonment imposed. In the Local Court in 2012, 34% of all offenders sentenced to a term of imprisonment received a fixed term sentence of six months or less (2377 out of 6901 offenders). The proportion is much lower in the higher courts at only 0.8% in 2012. Across all adult courts, however, the proportion was still 27% in 2012.<sup>145</sup>
- 6.99 The Women's Advisory Council of Corrective Services NSW has noted that female offenders typically spend less than 12 months in custody, with the majority serving sentences of five months or less. It also suggested that the percentage of female offenders receiving short sentences was higher for indigenous than for non-indigenous offenders.<sup>146</sup>
- 6.100 NSW Bureau of Crime Statistics and Research data indicates that female offenders who are sentenced to full-time imprisonment are slightly more likely to receive a sentence of six months or less compared to male offenders. In the NSW Local,

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145. NSW Bureau of Crime Statistics and Research, unpublished data (ref: HcLc1311319dg). See also NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) figure 3.8.

146. Corrective Services NSW Women's Advisory Council, *Preliminary submission PSE19*, 8; see also Women in Prison Advocacy Network, *Submission SE17*, 4-6.

District and Supreme Courts combined in 2012, 31% of female offenders and 27% of male offenders sentenced to a term of full-time imprisonment received a fixed term of six months or less.<sup>147</sup> Aboriginal and Torres Strait Islander offenders (both male and female) who are sentenced to a term of imprisonment are also slightly more likely to receive a sentence of six months or less, compared to offenders overall. In 2012, 29% of Aboriginal and Torres Strait Islander offenders sentenced to full-time imprisonment in the NSW adult courts received a fixed term sentence of six months or less, compared to 27% of offenders overall.<sup>148</sup>

- 6.101 The forerunner of s 46 of the CSPA was contained in the *Parole of Prisoners Act 1966* (NSW), which provided that a non-parole period of not less than six months had to be imposed whenever a court imposed full-time imprisonment.<sup>149</sup> The Minister stated when introducing the Bill that “[p]rison authorities are generally agreed that it is impossible to assess parole potential in a period of imprisonment of less than six months”.<sup>150</sup>
- 6.102 The concern with the abolition of sentences of imprisonment for six months or less is that this might give rise to “sentence creep”, through the imposition of sentences of imprisonment for seven months or longer. Similar considerations potentially arise in relation to the retention of the current fixed term requirement for sentences of imprisonment of six months or less, for example if the court decides to impose a sentence of seven or eight months in order to fix a non-parole period of less than six months, potentially exposing the offender to a longer period of custody in the event of parole being revoked.
- 6.103 In August 2004, the NSW Sentencing Council published a report on abolishing prison sentences of six months or less in which it detailed its concerns about sentence creep.<sup>151</sup> While the report recommended that consideration could be given to their abolition (either wholly or partially) in the future, it did not recommend that course in circumstances where the alternatives to full-time custody were not uniformly available throughout NSW. The Council referred to further difficulties in defining possible exceptions to the abolition of short sentences of imprisonment, as there was a lack of agreement concerning the offences for which they should continue to be available.<sup>152</sup>
- 6.104 The Council recommended the introduction of a trial period for abolishing short sentences confined to Aboriginal female offenders. That recommendation was not implemented, the government announcing that it would “not be proceeding with the proposal”, citing a number of concerns including the possibility of sentence creep.<sup>153</sup>

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147. NSW Bureau of Crime Statistics and Research, unpublished data (ref: HcLc1311319dg). See also NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) figure 7.22.

148. NSW Bureau of Crime Statistics and Research, unpublished data (2013). See also NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) figure 7.5.

149. *Parole of Prisoners Act 1966* (NSW) s 4(2).

150. NSW, *Parliamentary Debates*, Legislative Assembly, 20 September 1966, 973. See also the now repealed *Probation and Parole Act 1983* (NSW) s 5, s 6 and *Sentencing Act 1989* (NSW) s 7.

151. NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less* (2004) 4.

152. NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less* (2004) 4, 15-16.

153. NSW, *Parliamentary Debates*, Legislative Assembly, 17 November 2004, 13056.



*Short sentences in other jurisdictions*

- 6.105 In 2003, WA introduced legislation prohibiting the imposition of sentences of imprisonment of less than six months that came into effect in 2004.<sup>154</sup> Previously, sentences of imprisonment of less than three months had been precluded.<sup>155</sup> A 2005 Discussion Paper by the Law Reform Commission of WA noted that the abolition of sentences of three months or less had not reduced imprisonment rates. It also observed that the abolition of sentences of six months or less had not shown a positive impact.<sup>156</sup>
- 6.106 In 2002 the Victorian Sentencing Review considered the abolition of short sentences to be “undesirable because it leaves too large a gap in the sentencing continuum”.<sup>157</sup>
- 6.107 Scotland introduced a presumption against sentences of three months or less for low-level offenders in 2010.<sup>158</sup> Although a proposal for extending the presumption to terms of imprisonment of six months or less was not supported, future consideration of the issue was not ruled out.<sup>159</sup>
- 6.108 A UK Ministry of Justice consultation paper in 2010 noted that two-thirds of custodial sentences passed each year in England and Wales were of the order of six months or less. It observed that recidivism rates were higher for offenders sentenced to these short sentences than for offenders sentenced to longer terms. It offered the view that the courts should be able to impose such sentences, particularly in circumstances where recidivist offenders have not responded to community sentences or fines.<sup>160</sup> However, as part of an ongoing initiative to reduce reoffending, the government introduced a new Bill in 2013 to provide for at least 12 months of community supervision for all offenders released after a fixed term prison sentence of less than two years.<sup>161</sup> We will consider this model in more detail in our review of the parole system in NSW.
- 6.109 Stakeholders generally did not support the abolition of sentences of imprisonment for six months or less.<sup>162</sup> The concerns in doing so included that it would unduly fetter judicial discretion and break the necessary continuum of sentences that

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154. *Sentencing Legislation Amendment and Repeal Act 2003* (WA) s 33, amending *Sentencing Act 1995* (WA) s 86.

155. Australian Law Reform Commission, *Sentencing of Federal Offenders*, Issues Paper 29 (2005) 29.

156. Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Discussion Paper, Project 94 (2005) 96.

157. Australian Law Reform Commission, *Sentencing of Federal Offenders*, Issues Paper 29 (2005) [1.28], referring to A Freiberg, *Pathways to Justice: Sentencing Review 2002* (2002) 136.

158. *Criminal Justice and Licensing (Scotland) Act 2010* (UK).

159. Scottish Government, “Community Punishments to Replace Shortest Prison Sentences” (News Release, 23 June 2010).

160. England and Wales, Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, Cm 7972 (2010).

161. Offender Rehabilitation Bill 2013 (UK).

162. Law Society of NSW, *Submission SE16*, 1-2; NSW Bar Association *Submission SE27*, 3; Children’s Court of NSW, *Submission SE18*, 4; NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 2; G, *Submission SE22*, 2-3; The Shopfront Youth Legal Centre, *Submission SE28*, 5, 4; Public Interest Advocacy Centre, *Submission SE19*, 4-5; Legal Aid NSW, *Submission SE31*, 3-4; NSW Police Force, *Submission SE32*, 2-3; Corrective Services NSW, *Submission SE52*, 2.

should be available; that there were insufficient custodial alternatives available in some parts of the state, and that it might give rise to sentence creep.<sup>163</sup> Another concern expressed was that non-custodial alternatives may not be available for offenders who are homeless, suffer from drug and/or alcohol abuse, or have a mental illness or a chronic disability, and that the abolition of short sentences could place them at a risk of receiving unduly lengthy full-time sentences.<sup>164</sup>

- 6.110 Juvenile Justice NSW noted that, while it would prefer diversionary programs to the incarceration of young offenders, nonetheless it did not support the abolition of short sentences of imprisonment, stating that “[w]here detention is the only sentencing option, young offenders should be granted the shortest appropriate period of detention”.<sup>165</sup> The Children’s Court submitted that the Act should contain a presumption that a child offender, especially a first-time offender, who is facing a sentence of six months or less “is best served by a community-based order which addresses his/her offending behaviour or circumstances”.<sup>166</sup>
- 6.111 The Women in Prison Advocacy Network (WIPAN) submitted that a pilot scheme involving the abolition of short terms of imprisonment applicable to women should be introduced, despite the risk of sentence creep, as short sentences “do not adequately achieve the purposes of punishment and ultimately infringe on the rehabilitation prospects of female offenders”.<sup>167</sup> A pilot program for abolition also received support from the Criminal Law Committee of the NSW Young Lawyers<sup>168</sup> and the Public Defenders.<sup>169</sup>

### *Our view*

- 6.112 Our view is that short sentences of full-time imprisonment should not be abolished. They are a necessary part of the continuum of sentencing discretion, and they can constitute an appropriate sentencing disposition for some cases. While abolition could advance some objectives of this reference, including encouraging the greater use of alternatives to imprisonment as a means of reducing reoffending, it could also conflict with “the need to ensure that sentencing courts are provided with adequate options and discretions”.

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163. The Local Court, while maintaining that short sentences should not be abolished, submitted that sentence creep would not be likely and rather that the courts would be more likely to be lenient “to avoid unfairly punishing an offender” based on the offender’s geographical location. The Local Court cited a report that found that “despite the assumption magistrates may have no option but to impose full-time custodial sentences where community-based options are not available, offenders in regional NSW are actually less likely than their city counterparts to receive a sentence of full-time imprisonment, a likely reason being that courts are sensitive to the issue and react by being more sparing in ordering full-time imprisonment”: G Henson, *Submission SE22*, 2-3, citing L Snowball, *Does a Lack of Alternatives to Custody Increase the Risk of a Prison Sentence?*, Crime and Justice Bulletin No 111 (NSW Bureau of Crime Statistics and Research, 2008) 4.

164. Public Interest Advocacy Centre, *Submission SE29*, 4-5; NSW, Department of Family and Community Services, *Submission SE48*, 4-5.

165. Juvenile Justice, *Submission SE20*, 1.

166. Children’s Court of NSW, *Submission SE18*, 4-5.

167. Women in Prison Advocacy Network, *Submission SE17*, 6-8.

168. NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 6.

169. The Public Defenders, *Submission SE24*, 5.

- 6.113 We note that the conditions on which the NSW Sentencing Council had, in 2004, favoured abolishing short sentences have not yet been met. These conditions were that:
- alternatives to full-time custody should be available uniformly across NSW;
  - the impact of their abolition in WA should be assessed positively,
  - any exceptions to abolition should be settled; and
  - a trial should be successfully conducted for Aboriginal female offenders across NSW.
- 6.114 We also note the protection that already exists in s 5 of the CSPA (the retention of which we support), which confirms the common law position that a sentence of full-time imprisonment is a sentence of “last resort”, and additionally requires the court to record its reasons for not selecting an alternative to full-time imprisonment. We are not persuaded that while this principle is preserved there is any need to abolish sentences of imprisonment of six months or less.
- 6.115 We are also not persuaded of the merits of a trial for abolition of short sentences for female offenders. This could give rise to a possible objection as being discriminatory as well as to a risk of sentence creep. There are preferable approaches. For example, we understand that Corrective Services NSW uses transitional centres as a form of low-security incarceration for a limited number of female offenders.<sup>170</sup> There are two transitional centres in NSW: Bolwara Transitional Centre and Parramatta Transitional Centre.<sup>171</sup> Similarly, Corrective Services NSW might use program release or similar options to allow some offenders to serve a portion of a short sentence of six months or less outside a custodial environment.

#### **Recommendation 6.8: Retention of sentences of six months or less**

A revised Crimes (Sentencing) Act should allow courts to impose sentences of six months imprisonment or less.

### Possibility of a parole period for short sentences of imprisonment

- 6.116 There was more support for preserving head sentences of imprisonment of six months or less subject to a discretion to impose a non-parole period.<sup>172</sup> Legal Aid

170. The Commissioner for Corrective Services can issue a local leave permit under *Crimes (Administration of Sentences) Act 1999* (NSW) s 26 to enable an inmate to reside at a transitional centre, which s 3 defines as “premises managed or approved by the Commissioner for the purpose of accommodating certain inmates prior to their release from custody”, or “in the case of a female inmate who is the mother of a young child or young children, enabling the inmate to serve her sentence with her child or children in an appropriate environment”.

171. The Parramatta Transitional Centre provides “a minimum security, community-based facility to prepare selected female inmates of NSW correctional centres for their post-release responsibilities in a safe, drug and alcohol free environment”: NSW, Department of Corrective Services, Women’s Services Unit, *Management Plan for the Parramatta Transitional Centre*. (1995) 5.

172. Legal Aid NSW, *Submission SE31*, 4; Law Society of NSW, *Submission SE16*, 3; NSW Bar Association, *Submission SE27*, 3; The Shopfront Youth Legal Centre, *Submission SE28*, 4; Children’s Court of NSW, *Submission SE18*, 5 (in respect of juvenile offenders).

submitted that the court should have the discretion to dispense with supervision as a condition of parole in this situation,<sup>173</sup> as did the Law Society and the Bar Association.<sup>174</sup>

6.117 By contrast, the Shopfront Youth Legal Centre submitted that “many offenders require a period of supervision to assist with rehabilitation and reintegration into the community” and suggested that this was the case even with relatively short sentences. It saw little utility in a non-parole period of less than three months, although it supported a model that could provide for some period of supervision and intervention.<sup>175</sup>

6.118 Corrective Services NSW (CSNSW) pointed out the limitations inherent in a short period on parole:

CSNSW does not oppose *per se* the idea of allowing non-parole periods to be set for sentences of imprisonment of six months or less, but reiterates that short terms (whether of incarceration or supervised parole) allow little opportunity for CSNSW to assist the individual to address their offending behaviour. For example, during a supervised parole period of three months, CSNSW would be unable to address an individual’s criminogenic needs, but could provide some support and assistance with resettlement and reintegration needs that are linked to further offending.<sup>176</sup>

6.119 The Probation and Parole Officers’ Association of NSW similarly submitted that:

Parole periods of less than six months provide for initial re-settlement but limit re-integration issues being addressed. It is possible to re-connect offenders to community-based counseling, drug and alcohol service, etc within the early weeks of parole supervision, but not to effectively deal with the various hurdles, setbacks and failures that inevitably occur ...

Many revocations occur during the first three to six months of parole after which time, the breach rate tapers off. This has important implications both for sentencing and supervision practice. Early support, monitoring and resource allocation is warranted to maintain and improve survival rates.<sup>177</sup>

6.120 The ODPP supported fixed terms only for sentences of six months or less.<sup>178</sup> The NSW Police Force submitted that “[t]he status quo should remain”.<sup>179</sup>

### *Our view*

6.121 We are not persuaded of the need or desirability of allowing a non-parole period to be set for sentences of six months or less. The potential period for release is too

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173. Legal Aid NSW, *Submission SE31*, 4. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 51(1AA) for the presumption in favour of a supervision condition as part of parole.

174. Law Society of NSW, *Submission SE16*, 3; NSW Bar Association, *Submission SE27*, 3.

175. The Shopfront Youth Legal Centre, *Submission SE28*, 4.

176. Corrective Services NSW, *Submission SE52*, 3.

177. Probation and Parole Officers’ Association of NSW, *Submission SE39*, 3-4.

178. NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 2.

179. NSW Police Force, *Submission SE32*, 3.

short to serve any useful purpose; while the risk of reoffending in the absence of the pre-release preparation and supervision that is provided for prisoners who receive longer non-parole periods is, in our view, unacceptable.

- 6.122 We are not persuaded by an alternative approach that was suggested, during consultations, of precluding the possibility of release on parole for sentences of less than six months, but allowing the setting of a non-parole period for sentences of six months. The impact of a change of this kind on sentencing practice is uncertain and it does not address the problems associated with short periods of release on parole. We recognise that short sentences of imprisonment can serve a useful purpose in some cases, for example, where an offender has served a significant period of pre-sentence custody or where he or she is committing repeat minor property offences. However, we expect that in a significant number of cases the CDO that we propose later in this report, which combines punishment with a rehabilitative focus, will be a more effective solution both for the first-time offender and for other offenders for whom full-time imprisonment is unlikely to advance their reform.

**Recommendation 6.9: Parole not available for short terms of imprisonment**

A revised Crimes (Sentencing) Act should continue to preclude the fixing of a non-parole period where the head sentence is six months or less.

## Combining sentences of imprisonment with other options

- 6.123 Combining full-time imprisonment and other sentencing options is not permitted as a general rule under the Act. There is an exception that permits full-time imprisonment to be combined with a fine where an offence is dealt with on indictment<sup>180</sup> or where the legislation creating an offence expressly specifies that a fine, imprisonment or both may be imposed. Otherwise except in special circumstances<sup>181</sup> combining custodial and non-custodial sentences is not possible.

### Short periods of imprisonment in combination with other options

- 6.124 We have given consideration to the possible introduction of a scheme that would allow short sentences of full-time imprisonment to be combined with other penalties. Its purpose would be to promote the offender's prospects of rehabilitation and to reduce the length and costs of their imprisonment.
- 6.125 If combinations of sentencing options were available, then instead of imposing a sentence of imprisonment containing a non-parole period and a balance of term that might be served on parole, a court could impose a sentence comprising a short

180. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 15.

181. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 200(s) provides that a home detainee, when not otherwise employed, must undertake up to 20 hours of community service work a week as directed by a supervisor. Also see the Judicial Commission of NSW, *Sentencing Bench Book* [6-130].

fixed term of full-time imprisonment followed, for example, by a period of home detention and then a supervised bond.

- 6.126 Both Tasmania and the ACT allow community-based sentences to be combined with full-time imprisonment.<sup>182</sup> Victoria previously allowed the combination of full-time imprisonment with a supervised drug rehabilitation program,<sup>183</sup> but this was repealed in 2011 as part of the move towards community correction orders.<sup>184</sup>
- 6.127 In England and Wales a sentence was proposed that would have involved a combination of custody and a community-based order. This was called “custody plus” and was to be available where the sentence imposed had a duration of 28-51 weeks. It involved a custodial period of between two weeks and 13 weeks followed by release on licence subject to conditions<sup>185</sup> for at least 26 weeks (“the licence period”). The licence conditions would have resulted in the custody plus sentence being similar to an ICO, or a combination of a community service order (CSO) and supervised bond. The legislation introducing this sentence was passed in 2003, but was repealed in 2012 without coming into effect.<sup>186</sup>
- 6.128 The “custody plus” sentence was accompanied by a further sentence of “custody minus”, in operation from 2005. It is essentially the equivalent of a NSW suspended sentence of imprisonment, but with a broader range of possible conditions.<sup>187</sup>
- 6.129 The submissions were generally supportive of the idea of combining full-time imprisonment with other sentencing options, although subject to some important caveats.<sup>188</sup> The Law Society noted that it supported “using combinations of sentences, provided that appropriate safeguards are implemented to avoid net-widening”.<sup>189</sup> Similarly, the Bar Association advised that it “generally supports the availability of combined sentencing options”, including imprisonment.<sup>190</sup> The Public Defenders were in favour of making sentencing more flexible by allowing the combination of sentences provided that “the ultimate sentence must remain proportionate to the offence”. In particular, they submitted that:

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182. Under *Sentencing Act 1997* (Tas) s 8 the court can impose a variety of combinations including combining full-time imprisonment with one or more of: a community service order, probation order, fine, rehabilitation program order or driving disqualification. Under *Crimes (Sentencing) Act 2005* (ACT) s 29 a court may impose a “combination sentence” consisting of two or more of: imprisonment (whether full-time, periodic or a combination of these), a suspended sentence order, a good behaviour order, fine, driver disqualification order, reparation order, non-association order, place restriction order or any other available penalty.

183. *Sentencing Act 1991* (Vic) s 18Q-18W.

184. *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic) s 12.

185. Including: an unpaid work requirement; an activity requirement; a program requirement; a prohibited activity requirement; a curfew requirement; an exclusion requirement; a supervision requirement; and in a case where the offender is aged under 25, an attendance centre requirement; and electronic monitoring: *Criminal Justice Act 2003* (UK) s 181-182.

186. *Criminal Justice Act 2003* (UK) s 181-188 repealed in December 2012 by the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK) s 89.

187. *Criminal Justice Act 2003* (UK) s 189-194.

188. We will discuss combining other types of sentencing options and orders in Chapter 13 and Chapter 14.

189. Law Society of NSW, *Submission SE43*, 2.

190. NSW Bar Association, *Submission SE46*, 2.

A community-based sentence in conjunction with a period of imprisonment should only be available if the total appropriate sentence of imprisonment exceeds the current maximum sentence of imprisonment that can attract a community-based sentence.

Otherwise, the point of community-based sentences (permitting the offender to retain community ties including work-place and family support continuity) would be lost.<sup>191</sup>

- 6.130 Although the Shopfront Youth Legal Centre saw some merit in an approach of this kind, it also cautioned that there was a potential for net widening and would require careful consideration. In principle, the Centre supported a “relatively short fixed term of imprisonment followed by a section 9 bond” because:

[t]his would allow the court to impose a short custodial period where it is thought that custody is absolutely necessary for the purposes of punishment or deterrence, or to allow the offender to stabilise and make proper arrangements for [his or her] release into the community. This would be followed by a section 9 bond, which would allow the offender to be subject to a longer period of supervision than would be permissible under a parole order. It would also provide much greater flexibility and fairness in the event of a breach.<sup>192</sup>

However, it did not support the combination of imprisonment with other sentencing options whose purpose is primarily punitive (for example, a fine or a CSO).

- 6.131 The NSW Police Force generally supported the introduction of a sentencing approach of this kind. It did not see a need to place restrictions on combining full-time imprisonment with other sentencing options, observing that:

In appropriate circumstances, a combination of a swift term of imprisonment, with an intensive correction order ... community service then a bond and/or other conditions will have a greater deterrence effect than simply placing an offender on a bond.<sup>193</sup>

- 6.132 The NSW Department of Family and Community Services submitted that for some offenders with cognitive and mental health impairments, a “short sentence followed by a more lengthy and continuous community program that is not a specific part of a sentence might better meet the[ir] needs”. This was because many such offenders have been excluded in the past from rehabilitation programs while in custody (although the Department noted recent indications of an improvement in this regard).<sup>194</sup>

- 6.133 Juvenile Justice NSW expressed support for a sentencing option which, in the case of young offenders, could combine a custodial sentence with a community-based sentence, on the basis that this might enhance their prospects of successful

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191. The Public Defenders, *Submission SE36*, 1-2.

192. The Shopfront Youth Legal Centre, *Submission SE37*, 2-3.

193. NSW Police Force, *Submission SE45*, 2. We note that, in this example, the imposition of a bond alone appears to be too lenient in any event, as the combined sentence suggested seems to be appropriate for a much more serious offence than one that would generally attract a bond.

194. NSW, Department of Family and Community Services, *Submission SE48*, 4-5.

reintegration into the community.<sup>195</sup> The Children’s Court supported the use of a combination of the existing options that might include a term of detention under a control order, or compulsory drug treatment detention, followed by home detention or a CSO, and/or a good behaviour bond.<sup>196</sup> It acknowledged that intensive community-based supervision could create resource issues for Juvenile Justice, but pointed out that the daily cost for community-based services for a juvenile offender in 2011 was \$17, compared with \$652 per day for detention. The Court observed that this:

provides scope for redistribution of funds into more intensive supervision and is likely to result in cost savings to the government, particularly over the longer term, if criminogenic behaviours are effectively addressed.<sup>197</sup>

- 6.134 The Aboriginal Legal Service suggested that the capacity to combine sentences could be useful in a case where an offender had spent a considerable period on remand before being sentenced. In such a case, it suggested, a sentence of imprisonment could be backdated to the time when the offender went into custody to expire at the date the sentence was imposed, followed by a bond or some other community-based order.
- 6.135 However Legal Aid opposed the combination of imprisonment with any other sentencing option, on the basis that supervised release on parole should provide a sufficient form of transition to the community. It suggested that adding further sentencing options would potentially increase the burden on offenders, could lead to net widening and potentially duplicate conditions of the kind that are set by the Parole Authority.<sup>198</sup> Similarly, the ODPP did not favour combining imprisonment with other sentencing options “as imprisonment should be seen as sufficient punishment”. It was concerned that there might be “adverse resource implications” and unless the court was completely up to date with available programs, it “might inadvertently be exposing the prisoner to unnecessarily repetitive programs or conversely the prisoner may miss out on appropriate programs”.<sup>199</sup>

### *Our view*

- 6.136 We acknowledge that a sentence that combines a short period of full-time imprisonment with other sentencing options where it is designed to *reduce* the length of full-time imprisonment and to assist the offender’s rehabilitation, can be of benefit. It could reduce the negative effects of incarceration, whilst still delivering an adequate overall sentence that would be graduated in its consequences through a progressive reduction in the level of punishment and supervision. A further advantage is that the court would have a greater flexibility in tailoring a sentence to the individual needs or interests of the offender and in dealing with breaches of any

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195. Juvenile Justice, *Submission SE30*, 1.

196. Children’s Court of NSW, *Submission SE40*, 2-3.

197. Children’s Court of NSW, *Submission SE40*, 3.

198. Legal Aid NSW, *Submission SE50*, 3.

199. NSW, Office of the Director of Public Prosecutions, *Submission SE41*, 1-2.



good behaviour bond that followed imprisonment, unlike the current approach to breaches of parole.

- 6.137 The arguments against the introduction of a system of this kind are that:
- If the imposition of a sentence of imprisonment is justified then that should be a sufficient sanction in itself.
  - Any period of imprisonment, no matter how short, is likely to disrupt employment, housing and social and community relationships, that in themselves can be factors in preventing reoffending.
  - Such a system may lead to net widening either through the imposition of short terms of imprisonment in cases that would not normally attract imprisonment, or to longer terms in actual custody where the bond or other order that takes effect later in the sentence is breached.
  - Combined sentences are unlikely to offer anything that is not already available through a conventional sentence that provides for a potential period of release on supervised parole.
  - There is a practical difficulty in imposing a sentence that contemplates a period in custody followed by release into some lesser form of sanction when it cannot be predicted with any degree of certainty, at the time when the sentence is imposed, whether the offender's behaviour in custody would justify such release.
- 6.138 In our view, the benefits of short periods of imprisonment are limited, except in the case of repeat offenders who have resisted all attempts at rehabilitation and continue to commit lesser offences that carry imprisonment as an available sentence. The preferable approach for other offenders is that which we advocate later in this report, in the form of a CDO, that can be served wholly in the community, that is severe enough to constitute adequate punishment, and that is intensive enough to provide an intervention more likely to reduce reoffending.
- 6.139 As a general proposition, we do not support introducing combinations of short periods of imprisonment with other sentencing options, although we recognise that a case can be made for a limited form of back-end detention after a period of full-time imprisonment.

### Back-end home detention as part of sentence of imprisonment

- 6.140 Currently the CSPA permits "front end" home detention; that is, home detention that is imposed by the court as a stand-alone sentence. "Back-end" home detention involves the use of home detention as a component of a sentence of full-time imprisonment under which an offender will serve part of their non-parole period in home detention before being released to the community on parole.
- 6.141 Although back-end home detention does not exist in NSW, it is currently used in South Australia and England and Wales. It was used until recently in Victoria and New Zealand.

6.142 In South Australia, back-end home detention is an administrative arrangement imposed at the discretion of correctional services. Offenders are eligible to apply if they have served at least half of their non-parole period or fixed term and are in the final 12 months of their sentence, or, if sentenced to 12 months or less, have completed half of their sentence.<sup>200</sup> To be eligible for back-end home detention, current requirements are:

- the prisoner must have, or soon be eligible for, a low-security rating,
- the prisoner must not be serving a sentence in relation to homicide, sex offences or terrorist offences, and
- the prisoner must be able to nominate an appropriate address where he or she will reside.<sup>201</sup>

6.143 When making the decision to release an offender to back-end home detention, SA Correctional Services takes into account:

- any positive urinalysis in the last three months;
- behaviour while in prison;
- the original sentencing remarks;
- the risk to the community; and
- any other relevant matter.<sup>202</sup>

Between 10% and 15% of the offenders released from full-time custody in SA each year are released to back-end home detention.<sup>203</sup>

6.144 In England and Wales, an offender serving a sentence of between 12 weeks and four years may be eligible to be released on licence to back-end home detention.<sup>204</sup> Prisoners are eligible to be considered for release to back-end home detention from the point in time 135 days before they have served the requisite custodial period, the length of which varies depending on the length of the sentence.<sup>205</sup> The offender is then subject to home detention conditions from the time of release until the date on which the requisite custodial period expires.<sup>206</sup> An offender is not eligible for release to back-end home detention if he or she has previously been returned to

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200. *Correctional Services Act 1982* (SA) s 37A(2)(b)-(c).

201. South Australia, *Parliamentary Debates*, House of Assembly, 30 September 2010, 1531.

202. South Australia, *Parliamentary Debates*, House of Assembly, 30 September 2010, 1531.

203. SA, Department for Correctional Services, *Annual Report 2010-2011* (2011), 39, 100.

204. *Criminal Justice Act 2003* (UK) s 246, as amended by the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK).

205. *Criminal Justice Act 2003* (UK) s 243A, 244, 246, as amended by the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK).

206. *Criminal Justice Act 2003* (UK) s 253, as amended by the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK).

prison for breach of licence or home detention curfew, or if he or she belongs to one of several classes of serious offender.<sup>207</sup>

6.145 Back-end home detention existed as a pilot program in Victoria until 2011. It was only available to offenders residing within 40km of central Melbourne and offenders were ineligible if serving a sentence for:

- a sexual offence, violent offence, serious violent offence or drug offence,<sup>208</sup>
- an offence which the court believes was committed in circumstances involving behaviour of a sexual nature;
- an offence involving the use of a firearm or a prohibited weapon; or
- a stalking offence.<sup>209</sup>

6.146 There were also eligibility restrictions relating to an offender's previous convictions (including prior sexual offences, violent offences or serious violent offences).<sup>210</sup> Offenders could apply to the Adult Parole Board of Victoria for back-end home detention if they were held under minimum security conditions, had served at least two-thirds of their sentence and would be eligible for parole or release in six months or less.<sup>211</sup> An offender had to be assessed as being suitable for home detention and any co-residents had to consent to the order.<sup>212</sup> The Victorian back-end home detention scheme was abolished in 2011 in order to "ensure truth in sentencing and restore the community's confidence that jail means jail".<sup>213</sup>

6.147 In New Zealand until 2007, offenders serving sentences of two years or more could apply to the Parole Board for back-end home detention five months before their parole eligibility date. If granted, they were not released until three months before their parole eligibility date.<sup>214</sup> The Parole Board was required to be satisfied that the offender would not pose an undue risk to community safety.<sup>215</sup> The New Zealand

207. *Criminal Justice Act 2003* (UK) s 246(4), as amended by the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK). Classes of serious offender excluded are: violent and sexual offenders serving a sentence under *Criminal Justice Act 2003* (UK) s 226A, 227 or 228; prisoners subject to orders under the *Mental Health Act 1983* (UK); prisoners subject to the notification requirements of *Sexual Offences Act 2003* (UK) pt 2. Prisoners liable to removal from the UK and those with less than 14 days between the date of passing of sentence and expiry of the requisite custodial period.

208. As defined under *Sentencing Act 1991* (Vic) sch 1.

209. *Sentencing Act 1991* (Vic) s 26N(1)(a)-(c), (f) (now repealed) and *Corrections Act 1986* (Vic) s 60A(1)(a)-(c), (f) (now repealed). In certain circumstances, offenders serving a sentence for breach of a family violence order or a stalking intervention order were also ineligible: *Sentencing Act 1991* (Vic) s 26N(1)(d), (e) (now repealed) and *Corrections Act 1986* (Vic) s 60A(1)(d), (e) (now repealed).

210. *Sentencing Act 1991* (Vic) s 26N(2) (now repealed) and *Corrections Act 1986* (Vic) s 60A(2) (now repealed).

211. *Corrections Act 1986* (Vic) s 59(1) (now repealed).

212. *Sentencing Act 1991* (Vic) s 26P-26Q (sections now repealed) and *Corrections Act 1986* (Vic) s 60, 60B (sections now repealed).

213. Victoria, *Parliamentary Debates*, Legislative Assembly, 16 June 2011, 2199.

214. Under *Parole Act 2002* (NZ) s 33(2) and 35(4), now repealed.

215. Under *Parole Act 2002* (NZ) s 35(2)(a), now repealed.

Law Commission recommended that the scheme be abolished on the basis that it undermined the credibility of the sentence imposed by the judge.<sup>216</sup>

- 6.148 We considered back-end home detention in our 1996 report on sentencing but concluded that it should not be introduced, partly because of the divergence of opinions that emerged in submissions.<sup>217</sup> Now, most of the submissions to this review suggested that the concept should at least be considered.<sup>218</sup> The NSW Police Force was the only stakeholder completely opposed to such a scheme while Corrective Services NSW strongly supported it.<sup>219</sup> The Public Defenders submitted that such a model might particularly benefit female prisoners and mothers with children who could resume a relationship with their family outside of the custodial setting.<sup>220</sup>
- 6.149 However, there was considerable variability in the models that were proposed in submissions, principally in relation to whether the decision to allow back-end home detention should be made by the court at the time of sentencing or by SPA at a later date. The ODPP submitted that Corrective Services NSW should assess an offender's suitability for back-end home detention at the time of sentencing. The sentencing court would then determine what part, if any, of the offender's non-parole period should be served by way of home detention.<sup>221</sup> The Children's Court of NSW proposed that the sentencing court be solely responsible for assessing an offender's suitability, based on factors such as level of remorse, subjective characteristics, the availability of a stable, supportive and functional home environment and the willingness of family and/or supervisors to commit to assisting the offender comply with the program.<sup>222</sup>
- 6.150 NSW Young Lawyers suggested that SPA should be tasked with assessing an offender's suitability for back-end home detention after the offender had served an appropriate proportion of the non-parole period.<sup>223</sup>
- 6.151 Corrective Services NSW submitted that, at sentencing, the court should indicate whether an offender would later be eligible to serve part of the sentence as home detention.<sup>224</sup> In substance, the court would set an overall non-parole period, and a date during that period when the offender's suitability for release to home detention would be assessed by SPA. SPA would either allow or refuse access to the scheme in a way that would mirror the processes by which it already decides the suitability

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216. New Zealand, Law Commission, *Sentencing Guidelines and Parole Reform*, Report 94 (2006) [201].

217. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [7.30].

218. NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 3; The Shopfront Youth Legal Centre, *Submission SE28*, 6; Legal Aid NSW, *Submission SE31*, 6; Law Society of NSW, *Submission SE16*, 4. See also Police Association of NSW, *Submission SE21*, 5-6; NSW Bar Association, *Submission SE27*, 4; The Public Defenders, *Submission SE24*, 7-8; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 8-9; Probation and Parole Officers' Association of NSW, *Preliminary submission PSE20*, 19.

219. NSW Police Force, *Submission SE32*, 4-5; Corrective Services NSW, *Submission SE52*, 4-5.

220. The Public Defenders, *Submission SE24*, 8.

221. NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 3.

222. Children's Court of NSW, *Submission SE18*, 6-7.

223. NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 8-9.

224. Corrective Services NSW, *Submission SE52*, 4-5.

of an offender for release to parole. In a 2006 report, the Standing Committee on Law and Justice recommended a similar model, with one difference, in requiring the matter to be returned to the court before the offender could be released to home detention.<sup>225</sup> The Public Defenders proposed a similar model.<sup>226</sup>

### *Our view*

- 6.152 The key advantage of back-end home detention is that it could help prisoners reintegrate into the community by providing them with more supervision and support than is available as part of parole when they first leave full-time custody.<sup>227</sup> A back-end home detention scheme could provide an incentive for good behaviour while in custody<sup>228</sup> and be of particular value for female prisoners with young children at home. Any scheme which allows part of a non-parole period to be served in home detention rather than in full-time custody is also likely to provide costs savings for the correctional system.
- 6.153 Any model of back-end home detention where suitability is determined and an order made at the time of sentencing is unlikely to be workable in practice. Home detention depends on the offender having access to stable accommodation and it would be difficult to predict what the offender's housing and domestic situation would be like after a (possibly lengthy) period in full-time custody. The offender's other circumstances may also have changed by the time the date for release to back-end home detention arrives.
- 6.154 On the other hand, a model under which suitability is determined at some point after sentencing risks violating the principle of "truth in sentencing". In order to maintain truth in sentencing, an offender should serve the sentence that was set by the court, including serving the entire non-parole period in full-time custody. If an offender could be released to back-end home detention during the non-parole period through a process managed by Corrective Services NSW or SPA, the sentence served by the offender would not be entirely true to the sentence originally imposed by the sentencing court (although the home detention period would still constitute a form of imprisonment). This was a material factor in the Victorian and New Zealand decisions to discontinue the model.<sup>229</sup>
- 6.155 Another possible obstacle is that the model could give rise to sentence creep if the sentencing court lengthened the non-parole period that was imposed to accommodate the possibility that part of that period will be served in home detention.<sup>230</sup> The scheme would need to coexist with the other temporary release

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225. NSW, Legislative Council Standing Committee on Law and Justice, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) rec 44.

226. The Public Defenders, *Submission SE24*, 8.

227. NSW, Legislative Council Standing Committee on Law and Justice, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) xviii.

228. NSW, Legislative Council Standing Committee on Law and Justice, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) 219.

229. Victoria, *Parliamentary Debates*, Legislative Assembly, 16 June 2011, 2199; New Zealand, Law Commission, *Sentencing Guidelines and Parole Reform*, Report 94 (2006) [201].

230. The Shopfront Youth Legal Centre, *Submission SE28*, 6; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 8-9.

programs currently in place, which allow offenders to be released from custody in the later part of a sentence for work, study and other reasons.<sup>231</sup> Consideration would also need to be given to the interaction between back-end home detention and parole, and in particular whether breaches of home detention conditions would affect an offender's subsequent eligibility for consideration for release on parole.<sup>232</sup>

- 6.156 A back-end home detention scheme could be more compatible with truth in sentencing if the home detention conditions were in place as part of the parole period, rather than the non-parole period. The offender would then serve the whole non-parole period in full-time custody, being released to back-end home detention as a condition of parole either for part or all of the parole release period. However, this could have the effect of extending the period that an offender's liberty was constrained beyond the non-parole period that was set by the court, an outcome that was specifically opposed in some submissions.<sup>233</sup>
- 6.157 NSW Young Lawyers suggested that such a scheme might be more palatable if it were only available for offenders who would otherwise be refused parole and detained in full-time custody.<sup>234</sup> However it is not clear whether in practice there are likely to be many offenders who are unsuitable for parole but who would be suitable for a period of home detention pending a later consideration of their readiness for release on parole.
- 6.158 In our 1996 report, we concluded that it was not possible to formulate a satisfactory back-end home detention scheme without compromising the concept of truth in sentencing.<sup>235</sup> We have modified this opinion to some degree, but in the light of the practical difficulties mentioned above, and in the absence of a consensus among stakeholders, we prefer not to advance a recommendation for its adoption at this time. We consider that it is an option that would justify further consultation and development, and we plan to undertake this work as part of our reference to review the parole system in NSW.

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231. Legal Aid NSW, *Submission SE31*, 6. See the range of purposes available for local leave permits from custody under the *Crimes (Administration of Sentences) Act 1999* (NSW) s 26.

232. Probation and Parole Officers' Association of NSW, *Submission SE39*, 10-11.

233. NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 8-9.

234. NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 8-9.

235. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [7.31].

## 7. Standard minimum non-parole period scheme

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### In brief

The standard minimum non-parole period (SNPP) scheme is controversial and has created difficulties in practice. We recommend that the government retain the scheme but implement the recommendations from our interim SNPP report. We also recommend that the government consult with stakeholders and the community about which offences should be included in the scheme, at what level the SNPPs should be set, and what the process should be for adding or omitting offences from the scheme.

Background .....	177
Our view .....	181
Review of pre-Muldrock error cases .....	182

### Background

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- 7.1 In early 2012, the Attorney General asked us to deliver an interim report on the standard minimum non-parole period (SNPP) scheme. We provided our interim report<sup>1</sup> to the Attorney General in May 2012 and it was tabled in parliament in August 2012.
- 7.2 This report should be read in conjunction with the interim report in which we made the following recommendation:<sup>2</sup>

#### Chapter 2 – Reform of the SNPP scheme page

On an interim basis, pending monitoring and review of the standard minimum non-parole period scheme and consideration of our final report, we recommend the amendment of s 54A and s 54B of the *Crimes (Sentencing Procedure) Act 1999* (NSW) as follows:

#### 54A What is the standard non-parole period?

- (1) For the purposes of this Division, the standard non-parole period for an offence is the non-parole period set out opposite the offence in the Table to this Division.
- (2) For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence **which, by reference to the nature and circumstances of its commission, is** in

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

2. NSW Law Reform Commission, *Sentencing: Interim Report on Standard Minimum Non-parole Periods*, Report 134 (2012) xi-xii, [2.67]-[2.79] and recommendation.

the middle of the range of objective seriousness for offences in the Table to this Division.

**54B Sentencing procedure**

- (1) This section applies when a court imposes a sentence of imprisonment for an offence, or an aggregate sentence of imprisonment with respect to one or more offences, set out in the Table to this Division.
- (2) When determining the sentence for the offence (not being an aggregate sentence), **including the non-parole period the court is to have regard to:**
  - (a) **the standard non-parole period for the offence, and**
  - (b) **the matters referred to in section 21A, as they apply to the offence.**
- (3) **(Deleted)**
- (4) The court must make a record of its reasons for increasing or reducing the standard non-parole period. The court must identify in the record of its reasons each factor that it took into account, **but is not required to classify the offence by reference to its position in a range of objective seriousness.**
- (4A) When determining an aggregate sentence of imprisonment for one or more offences, the court is to indicate, for those offences to which a standard non-parole period applies, the standard non-parole period (or a longer or shorter non-parole period) that it would have set in accordance with **subsection (2)** for each such offence to which the aggregate sentence relates had it set a separate sentence of imprisonment for that offence.
- (4B) If the court indicates that it would have set a longer or shorter non-parole period for an offence under subsection (4A), it must make a record of the reasons why it would have increased or reduced the standard non-parole period. The court must identify in the record each factor that it would have taken into account.
- (5) The failure of a court to comply with this section does not invalidate the sentence.

7.3 Two earlier High Court authorities, *Neal v The Queen*<sup>3</sup> and *Cheung v The Queen*,<sup>4</sup> that were not cited in *Muldrock*, support the approach that we took in the interim report, namely that matters personal to the offender, that are causally connected with or materially contributed to the commission of the offence, should be considered as part of its objective seriousness.

7.4 We have not attempted to monitor any change in sentencing levels since *Muldrock*, although we have continued to review the decisions of the Court of Criminal Appeal

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3. *Neal v The Queen* (1982) 149 CLR 305.

4. *Cheung v The Queen* [2001] HCA 67; 209 CLR 1.



(CCA) in which the possibility of *Muldrock* error has been raised as a ground of appeal. Although the CCA has allowed an appeal or argument based on a *Muldrock* error in at least 15 cases since we prepared our interim report,<sup>5</sup> it has rejected such an argument in a similar number of other cases.<sup>6</sup>

7.5 It is clear that judges in NSW have continued to be split on whether *Muldrock* should be understood to have changed the fundamental approach to assessing the objective seriousness of the offence.<sup>7</sup> In addition to the decisions noted in the interim report where differences of opinion had emerged as to the way in which *Muldrock* should be applied,<sup>8</sup> we draw attention to the following decisions:

- *Badans v R* where Justice Meagher observed that the assessment of objective seriousness is not to take account of circumstances personal to the offender even if they were causally related to the commission of the offence.<sup>9</sup>
- *Williams v R* where Justice Price said “I do not think that the nature of the offending is to be confined to the ingredients of the crime, but may be taken to mean the fundamental qualities of the offence”, such as the provocation of the offender.<sup>10</sup>
- *GN v R* where Justice Beech-Jones said that *Muldrock* “did not overturn the principles usually applied in this state to dealing with offenders who suffer from mental disorder or an intellectual disability” and “[t]o the contrary it confirmed their application”.<sup>11</sup>
- *Stewart v R* where Justice Button observed that personal factors were to be excluded from the assessment of the objective seriousness of the offence, but added “so long as sentencing is founded on instinctive synthesis, whereby all relevant objective and subjective features will be accorded appropriate weight, that approach disadvantages neither the Crown nor an offender”.<sup>12</sup>

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5. *Aitchison v R* [2012] NSWCCA 82 [6]-[12]; *Bolt v R* [2012] NSWCCA 50 [35]-[38]; *Christie v R* [2012] NSWCCA 228 [47]-[48]; *GN v R* [2012] NSWCCA 96 [33]-[37]; *Mendes v R* [2012] NSWCCA 103 [57]-[63]; *NM v R* [2012] NSWCCA 215 [65]-[66]; *Ross v R* [2012] NSWCCA 161 [22]; *ZZ v R* [2013] NSWCCA 83; *Truong v R* [2013] NSWCCA 36; *KW v R* [2013] NSWCCA 31; *Essex v R* [2013] NSWCCA 11; *Devaney v R* [2012] NSWCCA 285 [91]; *PK v R* [2012] NSWCCA 263; *Jones v R* [2012] NSWCCA 262; *Christie v R* [2012] NSWCCA 228 [46]. See also R A Hulme, “After Muldrock – Sentencing for Standard Non-parole Period Offences in NSW” (2012) 24(10) *Judicial Officers’ Bulletin* 81, 82.
  6. *Aldous v R* [2012] NSWCCA 153 [29]-[35]; *Aslett v R* [2012] NSWCCA 235 [34]-[39]; *Beldon v R* [2012] NSWCCA 194 [70]-[80]; *Collier v R* [2012] NSWCCA 213 [29]; *FP v R* [2012] NSWCCA 182 [314]-[321]; *Nanai v R* [2-12] NSWCCA 141 [43]-[49]; *Williams v R* [2012] NSWCCA 172 [22]-[33]; *Badans v R* [2012] NSWCCA 97; *Filippou v R* [2013] NSWCCA 92; *Buksh v R* [2013] NSWCCA 60; *Ward v R* [2013] NSWCCA 46; *Shortland v R* [2013] NSWCCA 4; *Qian v R* [2012] NSWCCA 283; *McLaren v R* [2012] NSWCCA 284; *Aslett v R* [2012] NSWCCA 235.
  7. NSW Law Reform Commission, *Sentencing: Interim Report on Standard Minimum Non-parole Periods*, Report 134 (2012) [2.25]-[2.29].
  8. NSW Law Reform Commission, *Sentencing: Interim Report on Standard Minimum Non-parole Periods*, Report 134 (2012) [2.25]-[2.27].
  9. *Badans v R* [2012] NSWCCA 97 [53].
  10. *Williams v R* [2012] NSWCCA 172 [42].
  11. *GN v R* [2012] NSWCCA 96 [73].
  12. *Stewart v R* [2012] NSWCCA 183 [25]-[26], [37].

- *R v Murrell* where Justice Latham commented that *Muldrock* had “left somewhat opaque the meaning of the term ‘objective seriousness’”.<sup>13</sup>

7.6 Justice RA Hulme writing extra-judicially has observed:

what the High Court said in *Muldrock* about the relevance to the objective seriousness of an offence of matters personal to an offender has posed difficulties. The judgment referred to the CCA’s fairly precise characterisation in *Way*<sup>14</sup> of the “circumstances personal to the offender” being relevant to objective seriousness where they “are causally connected to the commission of the offence”. In contrast, the prescription [in *Muldrock*] that objective seriousness is to be assessed “without reference to matters personal to a particular offender or class of offenders” and is to “be determined wholly by reference to the nature of the offending” is, with respect, opaque. Rhetorically, how can the “nature of the offending” be assessed without reference to matters causally connected to it?<sup>15</sup>

7.7 The continuing division of opinion about the application of *Muldrock* reinforces the view expressed in the interim report that there is a need to clarify the scheme’s operation; and, if it is to be retained, that a more substantial review should be conducted of the offences that should be included in the Table and of the relevant SNPP levels.

7.8 Although there was some support in the submissions for a general repeal of the SNPP scheme,<sup>16</sup> there was also support, on the one hand, for confining its reach to selected serious offences;<sup>17</sup> and, on the other hand, for extending its application.<sup>18</sup>

7.9 Among those who favoured retention of the scheme there was almost unanimous agreement that there was a need for greater transparency, and for a review of the levels at which the SNPPs have been set. As we noted in the interim report there is an absence of any consistent pattern in the relationship between the maximum penalties for the offences that are included in the SNPP Table and the SNPPs nominated for these offences.<sup>19</sup>

7.10 As we also noted in that report, the proximity of the SNPP to the maximum sentence for some offences causes problems in applying the scheme, and can

13. *R v Murrell* [2012] NSWCCA 90 [36]. RA Hulme J noted that *Muldrock* “appears to have rejected” that matters personal to an offender, including a mental illness, can affect the objective seriousness of the offence, but said that he used the phrase “appears to have rejected” deliberately “because it has not been universally accepted” and cited the diversity of approaches in the Supreme Court: *Yang v R* [2012] NSWCCA 49 [28]-[37].

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

15. R A Hulme, “After Muldrock – Sentencing for Standard Non-parole Period Offences in NSW” (2012) 24(10) *Judicial Officers’ Bulletin* 81, 84 (end notes omitted).

16. R O Blanch, *Submission SES1*, 2; Probation and Parole Officers’ Association of NSW, *Submission SES8*, 3; The Shopfront Youth Legal Centre, *Submission SES10*. The repeal of the scheme received qualified support from NSW, Office of the Director of Public Prosecutions, *Submission SES7*, 1. Legal Aid NSW submitted that the SNPP system needs to be reviewed with an option to abolish the scheme if it is found to detract from the principles underlying it”: *Preliminary submission* PSE18, 9.

17. NSW, Office of the Director of Public Prosecutions, *Submission SES7*, 2, 5; R O Blanch, *Submission SES1*, 2.

18. Police Association of NSW, *Submission SES9*, 7; NSW Police Force, *Submission SES11*, 7-8.

19. NSW Law Reform Commission, *Sentencing: Interim Report on Standard Minimum Non-parole Periods*, Report 134 (2012) [2.5], [2.34].

result in sentencing outcomes that would be inconsistent with general sentencing practice.<sup>20</sup>

- 7.11 Concern has been expressed by the NSW Police Force about the extent to which the sentences that have been imposed in SNPP cases have deviated from the legislative ratios. The NSW Police Force has questioned whether the scheme has been applied as parliament intended or the community expects. At least by implication, it supports narrowing the judicial discretion in the application of the scheme.

## Our view

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- 7.12 We do see a benefit in the retention of an SNPP scheme that provides a guidepost for sentencing in relation to serious offences, provided the legislation is amended in the way proposed in the interim report. However, this is conditional on a separate review being undertaken that involves community and stakeholder consultation. Its purpose would be to give further consideration to:
- the offences to be included in the SNPP Table;
  - the levels at which the SNPP should be set in relation to each offence; and
  - the process by which future offences should be considered for inclusion in the Table and SNPPs set for those offences.
- 7.13 This was the approach that we favoured in the interim report,<sup>21</sup> in which we noted both the apparent lack of any consistent basis or transparency of the method employed for selecting offences for the scheme or for setting the SNPPs, and also the fact that a number of offences of equivalent or greater seriousness than those included in the scheme were not the subject of SNPPs.
- 7.14 In favouring the retention of the scheme, subject to the safeguards mentioned above, we recognise the advantages that it presents compared with the introduction of the more rigid mandatory sentencing laws that have been introduced in some jurisdictions. The benefits that it provides are essentially the guidance that it gives to sentencing courts and the preservation of a sentencing discretion that accords with the purposes and principles discussed elsewhere in this report.
- 7.15 In response to the concerns of the NSW Police Force but also having regard to the importance of consistent and appropriate application of the SNPP scheme, we recommend that the NSW Sentencing Council continue to monitor its operation. If any pattern of inconsistency emerges, the Council could report to the Attorney General on the advisability of seeking a further guideline judgment.

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20. NSW Law Reform Commission, *Sentencing: Interim Report on Standard Minimum Non-parole Periods*, Report 134 (2012) [2.11]-[2.13].

21. NSW Law Reform Commission, *Sentencing: Interim Report on Standard Minimum Non-parole Periods*, Report 134 (2012) [2.87]-[2.110].

**Recommendation 7.1: Implementation of the Commission's interim report recommendations on the standard non-parole period scheme**

- (1) The recommendations in the NSW Law Reform Commission's report, *Sentencing: Interim Report on Standard Minimum Non-parole Periods*, Report 134 (2012) should be implemented, taking into account our recommendations for reform of s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) in Recommendations 4.1-4.2 of this report.
- (2) The government should consult further with stakeholders and the community about the following aspects of the standard minimum non-parole period (SNPP) scheme:
  - (a) the offences which should be included in the SNPP Table;
  - (b) the SNPPs for those offences; and
  - (c) the process by which any further offences should be considered for inclusion in the Table and any further SNPPs should be set.
- (3) The NSW Sentencing Council should monitor patterns of sentencing under the SNPP scheme in order to detect any inconsistencies.

## Review of pre-Muldrock error cases

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- 7.16 In the Interim Report, we made references to the need for an efficient mechanism for the review of sentences affected by pre-*Muldrock* error. In particular, we discussed the possibility of the court or the parties seeking to correct such error through s 43 of the *Crimes (Sentencing Procedure) Act 1999* (NSW). Since the Interim Report was published, the CCA has considered the potential reach of s 43.<sup>22</sup> The CCA held that, while the section should continue to be given a broad interpretation it remains subject to some limitations. It held that s 43 does not provide an appropriate mechanism for the review of pre-*Muldrock* cases, save possibly when that error was made in a sentence imposed by the CCA.<sup>23</sup> Rather such cases should be dealt with as conventional appeals under the *Criminal Appeal Act 1912* (NSW).
- 7.17 We do not consider it necessary or appropriate to introduce any legislative reform in this respect. However, in light of the issues identified by the CCA about s 43, and in particular those expressed by Justice Johnson,<sup>24</sup> we will give further consideration to the issue in our current reference on criminal appeals.

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22. *Achurch v The Queen (No 2)* [2013] NSWCCA 117.

23. *Achurch v The Queen (No 2)* [2013] NSWCCA 117 [67].

24. *Achurch v The Queen (No 2)* [2013] NSWCCA 117 [160].

## 8. Life sentences and parole

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### In brief

A court cannot currently set a non-parole period when imposing a life sentence. Unlike other Australian jurisdictions, offenders sentenced to life imprisonment in NSW must spend their entire lives in custody without possibility of release on parole. We recommend that courts, when imposing a life sentence, be able, but not required, to set a non-parole period.

<b>Life sentences in NSW</b> .....	<b>183</b>
Past provisions .....	<b>183</b>
Reforms in 1989 .....	<b>184</b>
Offences currently subject to life imprisonment .....	<b>184</b>
Redetermination of sentences imposed before 12 January 1990.....	<b>186</b>
Statistics .....	<b>189</b>
<b>Proposals for reform</b> .....	<b>190</b>
<b>Our view</b> .....	<b>192</b>

### Life sentences in NSW

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- 8.1 The availability of a sentence of imprisonment for life for offences under the laws of NSW has varied considerably over the years, as have the consequences of such a sentence.

#### Past provisions

- 8.2 Between 1955 (when the death penalty for murder was abolished)<sup>1</sup> and 1982, s 19 of the *Crimes Act 1900* (NSW) specified that the sentence for murder was a mandatory sentence of life imprisonment. In 1982, the *Crimes (Homicide) Amendment Act 1982* (NSW) introduced an exception for murder where “it appears to the Judge that the person’s culpability for the crime is significantly diminished by mitigating circumstances, whether disclosed by the evidence in the trial or otherwise”.<sup>2</sup>
- 8.3 Until 11 January 1990 offenders sentenced to life imprisonment could be released in accordance with the ticket-of-leave provisions contained in s 463 of the *Crimes Act 1900* (NSW) (referred to commonly as “release on licence”). This involved a form of executive release which permitted the offender to return to the community subject to the conditions of a life-time licence which could be revoked at any time.

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1. *Crimes (Amendment) Act 1955* (NSW) s 5.

2. On the application of this proviso, see *R v Bell* (1985) 2 NSWLR 466.

Commonly prisoners were released on licence after serving 11 to 12 years of their sentence in custody, depending on their behaviour while in prison.

- 8.4 Otherwise release could only be obtained if the conviction and sentence were quashed on appeal, or if the offender was given a pardon under the prerogative of mercy.<sup>3</sup>

### Reforms in 1989

- 8.5 In 1989 “truth in sentencing” was introduced in NSW under the *Sentencing Act 1989* (NSW) which commenced on 25 September 1989. Three months later provisions dealing with life sentences were introduced (commencing on 12 January 1990) as follows:

- Section 431A was inserted in the *Crimes Act 1900* (NSW) making all offences, that attracted sentences of penal servitude for life (under an Act,<sup>4</sup> an Imperial Act in so far as it applied to NSW, or a rule of law) now liable to penal servitude for 25 years, except for the offence of murder or an offence carrying that punishment under the *Drug Misuse and Trafficking Act 1985* (NSW).
- Section 19 of the *Crimes Act 1900* (NSW) was repealed by the *Crimes (Life Sentences) Amendment Act 1989* (NSW) and replaced by s 19A which provides that a life sentence for the crime of murder is to be served for the term of the offender’s life.
- Section 33A was inserted into the *Drug Misuse and Trafficking Act 1985* (NSW) which similarly provides that where a life sentence is imposed for an offence under that Act it is to be one for the term of the offender’s life.
- The Ticket-of-leave provisions formerly contained in the *Crimes Act 1900* (NSW) were repealed by the *Prisons (Serious Offenders Review Board) Amendment Act 1989* (NSW).
- As discussed later in this chapter, s 13A was inserted into the *Sentencing Act 1989* (NSW) introducing a procedure allowing offenders who had been sentenced to life imprisonment under the previous regime to apply to the Supreme Court to have their sentences redetermined.

### Offences currently subject to life imprisonment

- 8.6 Currently there are a limited number of offences under the laws of NSW for which the maximum available penalty is life imprisonment as shown in the following table:

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3. Which has been retained in current legislation: *Criminal Appeal Act 1912* (NSW) s 27; *Crimes (Appeal and Review) Act 2001* (NSW) s 114; *Crimes Act 1900* (NSW) s 19A(6), 19B(6), 61JA(4), 66A(6); and *Crimes (Sentencing Procedure) Act 1999* (NSW) s 102.

4. See, eg, *Punishment of Piracy Act 1902* (NSW) s 4.

Table 8.1: NSW offences punishable by life imprisonment

Offence	Legislative provision for life sentence
Murder	<i>Crimes Act 1900</i> (NSW) s 19A, s 19B
Aggravated sexual assault in company	<i>Crimes Act 1900</i> (NSW) s 61JA
Sexual intercourse with a child under 10 years in circumstances of aggravation	<i>Crimes Act 1900</i> (NSW) s 66A(2)
Certain drug offences involving the manufacture, cultivation or supply of large commercial quantities	<i>Drug Misuse and Trafficking Act 1985</i> (NSW) s 23-28, s 33(3)(b)
Certain drug offences involving the manufacture or production of drugs in the presence of children, or procuring children to supply drugs, involving not less than large commercial quantities	<i>Drug Misuse and Trafficking Act 1985</i> (NSW) s 25-28, s 33AC(4)

8.7 In accordance with general sentencing principles, the imposition of a sentence of life imprisonment at common law is reserved for cases that fall within the “worst case” category as explained in *Ibbs v The Queen*.<sup>5</sup> The *Crimes Act 1900* (NSW) and the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA) additionally provide for the mandatory imposition of a life sentence where the offender was convicted of:

- the murder of a police officer, if committed while the officer was on duty, or as a consequence of or in relation to actions taken by that officer or any other police officer in the execution of their duty;<sup>6</sup>
- murder, and the court is satisfied that the level of culpability in its commission is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of a life sentence;<sup>7</sup>
- a serious heroin or cocaine trafficking offence (being one to which the provisions of the *Drug Misuse and Trafficking Act 1985* (NSW) s 33 (subsection (2) excepted) apply), if the court is satisfied that the level of culpability involved is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met by the imposition of that sentence, and is also satisfied of certain other matters.<sup>8</sup>

8.8 There are a number of offences arising under Commonwealth laws for which a sentence of life imprisonment is the maximum penalty, including certain drug offences;<sup>9</sup> although in no case is provision made for the mandatory imposition of that sentence.

5. *Ibbs v The Queen* (1987) 163 CLR 447.

6. *Crimes Act 1900* (NSW) s 19B.

7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61(1).

8. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61(2).

9. The following offences under the *Criminal Code* (Cth) carry a potential life sentence: international terrorist activities and terrorist acts (s 72.3, 101.1, 101.6; 103.1, 103.2); murder of a UN or associated

- 8.9 If a court imposes a life sentence for an offence under NSW law, the sentence operates for the remainder of the offender's life, release on parole being unavailable.<sup>10</sup>
- 8.10 Life sentences imposed in NSW for offences under Commonwealth laws operate differently. In such a case (as also applies to any federal sentence that exceeds three years) the court is required to fix a non-parole period or make a recognizance release order,<sup>11</sup> unless, having regard to the nature and circumstances of the offence concerned and to the antecedents of the person concerned, the court is satisfied that neither is appropriate.<sup>12</sup>
- 8.11 The other Australian jurisdictions all have provisions allowing for the fixing of a non-parole period as part of a life sentence,<sup>13</sup> although in some cases, mostly involving murder, the legislation specifies a minimum non-parole period that must be served as part of a life sentence.<sup>14</sup> As a consequence, save in the limited circumstances where a previously imposed life sentence falls within the scope of the redetermination scheme noted below, NSW is alone in excluding the possibility of release on parole or on licence when a life sentence is imposed.

### Redetermination of sentences imposed before 12 January 1990

- 8.12 As originally enacted s 13A of the *Sentencing Act 1989* (NSW) provided that:
- A person serving an "existing life sentence", that is, one imposed before 12 January 1990, could apply to the Supreme Court for the determination of a minimum term and an additional term for the sentence.<sup>15</sup>
  - The person was not eligible to apply unless he or she had served at least 8 years of the sentence.<sup>16</sup>
  - The Court could either set the minimum and additional term or decline to make such a determination.<sup>17</sup>
  - If the application was declined, the person could not apply again for 2 years, or such shorter period as specified by the Court.<sup>18</sup>

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person and an Australian citizen or resident (by conduct outside Australia) (s 71.2, 115.1); treason (s 80.1, 80.1AA); genocide (s 268.3, 268.7); crimes against humanity (s 268.8, 268.9); war crimes (s 268.24, 268.35, 268.37-268.44, 268.47-268.50, 268.65, 268.66, 268.70, 268.71, 268.76-268.79, 268.90-268.93, 268.97-268.98); and drug offences (s 302.2, 303.4, 304.1, 305.3, 307.1, 307.5, 307.8, 309.3, 309.7, 309.10, 309.12, 309.14).

10. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54 which excludes life sentences from pt 4 div 1.

11. *Crimes Act 1914* (Cth) s 19AB(2), s 19AF(2).

12. *Crimes Act 1914* (Cth) s 19AB(3). A power also exists for the release after the grant of a licence of a person serving a federal life sentence: s19AP.

13. *Sentencing Act 1991* (Vic) s 11(1); *Sentencing Act 1997* (Tas) s 18; *Sentencing Act 1995* (WA) s 90, s 96; *Corrective Services Act 2006* (Qld) s 181; *Sentencing Act* (NT) s 53; *Criminal Law (Sentencing) Act 1988* (SA) s 32; *Crimes (Sentencing) Act 2005* (ACT) s 65(5).

14. *Criminal Law (Sentencing) Act 1988* (SA) s 32(5); *Sentencing Act* (NT) s 53A; *Corrective Services Act 2006* (Qld) s 181(2); *Sentencing Act 1995* (WA) s 96.

15. *Sentencing Act 1989* (NSW) s 13A(2).

16. *Sentencing Act 1989* (NSW) s 13A(2).

17. *Sentencing Act 1989* (NSW) s 13A(4).



- In setting the minimum and additional terms, the Court could have regard to any relevant matter including:
    - the knowledge of the original court of the operation of the release on licence scheme;
    - any report of the Serious Offenders Review Board or other reports made available to the Court; and
    - any relevant comments made by the original sentencing court.<sup>19</sup>
  
- 8.13 Life sentences imposed under the newly enacted s 19A of the *Crimes Act 1900* (NSW) and s 33A of the *Drug Misuse and Trafficking Act 1985* (NSW) were not subject to the redetermination provisions.
  
- 8.14 Subsequently, life sentences imposed in relation to offences under the *Crimes Act 1900* (NSW) s 61JA and s 66A(2) have been added to the exceptions from the redetermination scheme.<sup>20</sup> Section 19B of the *Crimes Act 1900* (NSW), which provides for mandatory life sentences for the murder of police officers in certain circumstances, provides that nothing “authorises a court to impose a lesser or alternative sentence”<sup>21</sup> thereby rendering it exempt from the redetermination provisions.
  
- 8.15 A number of amendments have been made to the provisions for the redetermination of life sentences, over the course of the succeeding years, that have progressively limited the application of that scheme.
  
- 8.16 The *Sentencing (Life Sentences) Amendment Act 1993* (NSW) (which commenced on 21 November 1993),<sup>22</sup> provided that:
  - The Court could order, when dismissing an application under the scheme, that the offender never reapply for a determination (in effect confirming the life sentence originally imposed) or not reapply for a specified period.<sup>23</sup>
  - However, the Court could only order that the offender never reapply if he or she was sentenced for murder and that “it is a most serious case of murder and it is in the public interest that the determination be made”.<sup>24</sup>
  
- 8.17 The *Sentencing Legislation Further Amendment Act 1997* (NSW) (which commenced on 9 May 1997) made provision for offenders concerning whom the sentencing court had made a “non-release recommendation”, that is a “recommendation or observation, or an expression of opinion, by the original

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18. *Sentencing Act 1989* (NSW) s 13A(8).

19. *Sentencing Act 1989* (NSW) s 13A(9).

20. *Crimes Amendment (Aggravated Sexual Assault in Company) Act 2001* (NSW) sch 2.3; *Crimes Amendment (Sexual Offences) Act 2008* (NSW) sch 2.4[6].

21. *Crimes Act 1900* (NSW) s 19B(4).

22. *Sentencing (Life Sentences) Amendment Act 1993* (NSW) sch 1[1]-[4].

23. *Sentencing Act 1989* (NSW) s 13A(8) as amended by *Sentencing (Life Sentences) Amendment Act 1993* (NSW).

24. *Sentencing Act 1989* (NSW) s 13A(8C) as amended by *Sentencing (Life Sentences) Amendment Act 1993* (NSW).

sentencing court that (or to the effect that) the person should never be released from imprisonment". As a consequence an offender the subject of a "non-release recommendation" became ineligible to:

- apply for a redetermination until he or she had served at least 20 years of the sentence concerned;<sup>25</sup> or
- have a minimum and additional term imposed in place of the life sentence unless the Court was "satisfied that special reasons exist that justify making the determination".<sup>26</sup>

8.18 Additionally the Court was required, in making a determination, to take into account "the need to preserve the safety of the community".<sup>27</sup>

8.19 As a result of the enactment of the CSPA the provisions previously contained in s 13A of the *Sentencing Act 1989* (NSW) were relocated to Schedule 1 of the CSPA with effect from 3 April 2000. These provisions were in substantially the same terms as s 13A, although adjusted to take account of the requirements of the newly introduced sentencing legislation.

8.20 Provision was made in the Schedule permitting the Court to decline to set a specified term but to set a non-parole period (that is, a sentence of life imprisonment with parole), a provision that had no equivalent in s 13A(4) of the *Sentencing Act 1989* (NSW).<sup>28</sup>

8.21 Further amendments were made by the *Crimes Legislation Amendment (Existing Life Sentences) Act 2001* (NSW) (that commenced on 20 July 2001).<sup>29</sup> These amendments provided that offenders the subject of a non-release recommendation were only eligible to apply for a redetermination after serving 30 years (rather than 20 years) of their sentence;<sup>30</sup> and were denied the possibility of the court setting a specified term of years less than life for their sentence.<sup>31</sup>

8.22 The possibility that the Court, by fixing a non-parole period,<sup>32</sup> could redetermine the sentence for an offender the subject of a non-release recommendation was removed by amendments to the *Crimes (Administration of Sentences) Act 1999* (NSW). The amendments excluded non-release recommendation offenders from automatic consideration for parole and made them eligible for release only if their death was imminent or they were permanently incapacitated to the extent that they

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25. *Sentencing Act 1989* (NSW) s 13A(3) as amended by *Sentencing Legislation Further Amendment Act 1997* (NSW).

26. *Sentencing Act 1989* (NSW) s 13A(3A) as amended by *Sentencing Legislation Further Amendment Act 1997* (NSW).

27. *Sentencing Act 1989* (NSW) s 13A(9)(c) as amended by *Sentencing Legislation Further Amendment Act 1997* (NSW).

28. *Crimes (Sentencing Procedure) Act 1999* (NSW) sch 1 cl 4(1)(b).

29. *Crimes Legislation Amendment (Existing Life Sentences) Act 2001* (NSW) sch 1 [1]-[4].

30. *Crimes (Sentencing Procedure) Act 1999* (NSW) sch 1 cl 2(2)(b) as amended by *Crimes Legislation Amendment (Existing Life Sentences) Act 2001* (NSW).

31. *Crimes (Sentencing Procedure) Act 1999* (NSW) sch 1 cl 4(3) as amended by *Crimes Legislation Amendment (Existing Life Sentences) Act 2001* (NSW).

32. Under *Crimes (Sentencing Procedure) Act 1999* (NSW) sch 1 cl 4(3)(a).

were unable to harm any person (with provision made for their return to prison if they recovered).<sup>33</sup> A small number of offenders fall into this category, some of whom were sentenced at a young age.

- 8.23 Further amendment was made by the *Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Act 2005* (NSW) that commenced on 6 May 2005.<sup>34</sup> This Act ensured that the quashing, or setting aside on appeal, of a non-release recommendation would not remove an offender who had been the subject of a non-release recommendation from the restrictions that had been introduced in 1997 for those within this group.<sup>35</sup>
- 8.24 The most recent amendments to be made to the redetermination scheme were effected by the *Crimes (Sentencing Procedure) Amendment (Life Sentences) Act 2008* (NSW) (that commenced on 1 July 2008),<sup>36</sup> providing that:
- An offender could not make more than one application for a redetermination on or after 17 June 2008. If the application was declined it would in effect result in the pre-existing life sentence becoming a natural life sentence.
  - An offender could withdraw an application but only with the leave of the Court.

## Statistics

- 8.25 Corrective Services NSW has informed us that the current profile of offenders who are in custody in NSW as a result of being sentenced to imprisonment for life, or who (having been sentenced to life imprisonment) are currently released on lifetime parole or licence, is as follows:

**Table 8.2: NSW offenders in custody serving life sentences as at 30 June 2012**

Natural life (imposed since 12 January 1990, or following a redetermination of a sentence imposed before 12 January 1990, or exclusion from a redetermination)	44
Sentenced before 12 January 1990 and still eligible for redetermination, but yet to apply	9
Life with non parole period (following redetermination of a sentence imposed before 12 January 1990)	39
Breach of parole or licence	1
Life sentence for federal offence [see footnote 9 for a list of offences under the <i>Criminal Code</i> (Cth) that carry a life sentence]	2

*Source: Corrective Services NSW, NSW Inmate Census (2012).*

33. *Crimes (Administration of Sentences) Act 1999* (NSW) s 154A inserted by *Crimes Legislation Amendment (Existing Life Sentences) Act 2001* (NSW).

34. *Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Act 2005* (NSW) sch 1 [1], [2].

35. This followed the decision in *R v Blessington* [2005] NSWSC 340; 153 A Crim R 205.

36. *Crimes (Sentencing Procedure) Amendment (Life Sentences) Act 2008* (NSW) sch 1 [1]-[7].

## Proposals for reform

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- 8.26 In its report on *High-Risk Violent Offenders*, the Sentencing Council drew attention to the potential overlap of the worst-case common law approach and the provisions of s 61(1) of the CSPA in relation to sentencing an offender for murder;<sup>37</sup> and to the concerns that have been raised that, for the most part, offenders who are sentenced in NSW to life imprisonment are denied the opportunity of release on parole.<sup>38</sup>
- 8.27 Judges have noted the harsh nature of a life sentence of imprisonment without any possibility of release. For example, in *R v Harris*,<sup>39</sup> reference was made to the concerns that arise in relation to natural life sentences, including the notorious difficulty in predicting the future dangerousness of an offender, and the fact that such a sentence is now potentially harsher than the indeterminate sentence that could previously be terminated by the Executive, or could be redetermined in the light of the manner in which the prisoner had responded while in custody:

The decisions in *Bugmy* (1990) 169 CLR 525 (at 537) and *Mitchell* (1996) 70 ALJR 313 at 320, confirm the notorious inaccuracy of predictions of future dangerousness, yet in a case such as the present that is precisely what is required. It may be that after a lengthy period of imprisonment, counselling and simple maturing, that an offender sentenced to life ceases to be dangerous.

Lengthy experience with the life sentence redetermination procedure has graphically demonstrated that to be the case, and has seen a controlled and safe return to society of offenders once considered hopelessly violent and dangerous. See the observations of Allen J, in *Crump* NSWCCA 30 May 1993:

It is the common experience of judges who have had to consider section 13A applications to note the remarkable effect which imprisonment for a decade or more so often has upon young offenders - notwithstanding how brutally and callously they acted when they committed the crime or crimes. Time and again one wonders: 'how could this apparently well adjusted applicant be the person who committed such a crime?' Gone is the brashness. Gone is the bravado. Spent is the passion. Young offenders can change so much during a very long time in gaol as to present almost as an entirely different sort of person.

His Honour later added:

I appreciate that the legislation in its present form empowers the Supreme Court to throw away the key, to deny to the prisoner any prospect of ever again being free to live a normal life. But in a civilised country only the most extraordinary circumstances would justify that course being taken - and what was said in the Parliament when the legislation was being enacted evinces a recognition of that.

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37. NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options*, Report (2012) [3.14]-[3.35].

38. NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options*, Report (2012) [5.136]-[5.143].

39. *R v Harris* [2000] NSWCCA 469; 50 NSWLR 409.

The concerns that exist in this regard, particularly for those persons who may face potential life sentences in their twenties or early thirties, with the problems of institutionalisation, and the risk of the establishment of a significant population of geriatric prisoners, are such that this area of sentencing, in my view, warrants reconsideration.<sup>40</sup>

8.28 Earlier Justice Hunt had observed, prior to the enactment of s 19A of the *Crimes Act 1900* (NSW):

The indeterminate nature of a life sentence has long been the subject of criticism by penologists and others concerned with the prison system and the punishment of offenders generally. Such a sentence deprives a prisoner of any fixed goal to aim for, it robs him of any incentive and it is personally destructive of his morale. The life sentence imposes intolerable burdens upon most prisoners because of their incarceration for an indeterminate period, and the result of that imposition has been an increased difficulty in their management by the prison authorities.<sup>41</sup>

8.29 There will be cases where a life sentence without parole is appropriate. However, there are also cases where the availability of a possible release on parole would be appropriate, depending on the offender's response to programs, or the acquisition of a better understanding of the reasons for the offending. In such a case, ongoing assessment by the Serious Offenders Review Council and review by the State Parole Authority (SPA) in determining whether the offender could be released to lifetime parole would meet the public interest.

8.30 The Sentencing Council considered the possible amendment of the CSPA to allow the setting of a non-parole period where a life sentence was imposed,<sup>42</sup> and made some limited recommendations in this respect:

- a) The *Crimes (Sentencing Procedure) Act 1999* (NSW) should be amended so as to make it clear that, subject to (d) below, the court can, from the commencement of that amendment, impose a life sentence for any offence that attracts life as a maximum sentence and specify in respect of that sentence, a non-parole period.
- b) The exclusion of life sentences from the general requirement to set a non-parole period under s 54 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should be removed.
- c) Section 44(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should be amended so as to exclude life sentences from its reach.
- d) Provision should be made for the court in appropriate circumstances, including where required by s 19B of the *Crimes Act*, s 61 of the CSPA, or otherwise by law, to impose a 'whole of life sentence', that is, a life sentence without the option of release on parole.

40. *R v Harris* [2000] NSWCCA 469; 50 NSWLR 409 [126]-[131].

41. *R v Petroff* (unreported, NSW SC, Hunt J, 12 November 1991) 1-2.

42. NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options*, Report (2012) [3.10]-[3.36], [5.116]-[5.148].

- e) The offences for which a life sentence may be imposed should not be expanded.<sup>43</sup>

8.31 In our 1996 review of sentencing, we recommended that a court should have the discretion, when imposing a life sentence, to fix a minimum term.<sup>44</sup> In making this recommendation the Commission noted the observation of the Senior Public Defender that allowing the possibility of release on parole for some life sentences was entirely consistent with the concept of truth in sentencing and was useful for cases in the worst category of case where it could not be said that there were no prospects of rehabilitation.<sup>45</sup>

8.32 However, in Discussion Paper 33 we noted that it would be difficult to evaluate the effect that such a reform would have upon new life sentences:

On the one hand, offenders who otherwise would have been sentenced to a natural life sentence might benefit from the prospects of being released on parole during their additional term (which would apply for the remainder of the offender's life). This could provide a powerful incentive for reform for prisoners who would otherwise have no prospect of release.<sup>46</sup> On the other hand, it is possible that sentencers would be encouraged to impose more life sentences, in the knowledge that offenders released on parole during their additional terms would be returned to prison for the remainder of their lives if they breach parole conditions (however unlikely this might be).<sup>47</sup>

## Our view

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8.33 The concerns expressed in the Sentencing Council's report are, in our view, valid concerns. We adopt the recommendation in that report<sup>48</sup> to amend the CSPA to permit, but not require, the court, when it imposes a sentence of imprisonment for life, to set a non-parole period, provided that legislation for particular offences does not otherwise preclude such a course (for example, the offence relating to the murder of police officers in the course of, or in connection with, their duty).

8.34 This would bring this aspect of NSW law more into line with other Australian jurisdictions. It would assist in overcoming the potential complexity that arises in determining whether the facts in an individual case meet the criteria for the mandatory imposition of a life sentence. It might in this respect result in more life sentences for murder being imposed, particularly in cases on the threshold for a mandatory life sentence, where the future dangerousness of the offender is

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43. NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options*, Report (2012) rec 7.

44. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [9.6].

45. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [9.6].

46. See G Zdenkowski, "Contemporary Sentencing Issues" in D Chappell and P Wilson (ed), *The Australian Criminal Justice System: The Mid 1990s* (Butterworths, 1994) 185-186.

47. NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [4.88].

48. NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options*, Report (2012) [5.148].

unpredictable. This would allow a release decision to be deferred until the Serious Offenders Review Council and SPA can make a better assessment.

- 8.35 Additionally, it would better reflect the exercise of discretion in appropriate cases. This is important for the judicial act of sentencing, bearing in mind the heavy burden that attaches to life time incarceration, without any hope of release or encouragement for rehabilitation.
- 8.36 We do not consider that the amendment should have retrospective effect. Rather, if adopted, it should apply to sentences imposed after its commencement and on the understanding that the parole period should continue for the remainder of the offender's life. The mechanism for redetermining life sentences imposed before 1990 was only necessary because the courts imposed these sentences at a time when release on licence was possible. Those sentences imposed since 1990 have been imposed by the courts on the understanding that there was no possibility of parole or release on licence. For this reason, sentences imposed since 1990 should not be redetermined.
- 8.37 The recommendation that follows would not prevent the parliament from specifying individual offences, or circumstances related to their commission, for which the only available sentence is a sentence of imprisonment for the whole of the offender's life without the option of release on parole, such as the murder of a police officer in connection with that officer's duties.

#### **Recommendation 8.1: Life sentences and parole**

In a revised Crimes (Sentencing) Act, subject to any provision to the contrary:

- (1) When imposing a life sentence for any offence that attracts a maximum sentence of life imprisonment, a court should be able either to:
  - (a) impose life imprisonment without the possibility of release on parole; or
  - (b) impose life imprisonment specifying a non-parole period and a parole period that operates for the rest of the offender's life.
- (2) The court should give reasons for setting or declining to set a non-parole period for a life sentence, although failing to do so will not invalidate the sentence.
- (3) This recommended provision should only apply to life sentences imposed for offences committed after the commencement of a revised Crimes (Sentencing) Act.





## 9. Home detention and intensive correction orders (if retained)

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### In brief

Home detention and intensive correction orders are underused sentencing options. They have important advantages in terms of reducing costs, reducing reoffending and keeping offenders out of prison. We recommend six targeted improvements to increase the number of offenders who can be sentenced to home detention or an intensive correction order, although our preferred option is for both orders to be replaced with a new community detention order (see Chapter 11). We do not recommend reintroducing periodic detention.

<b>The current law</b> .....	<b>196</b>
Nature of home detention .....	<b>197</b>
Nature of an ICO .....	<b>198</b>
Requirement for a suitability assessment .....	<b>199</b>
<b>Key advantages of home detention and ICOs</b> .....	<b>199</b>
Importance of increasing the use of community-based alternatives .....	<b>200</b>
<b>Reform of the current legislation to increase use</b> .....	<b>201</b>
Expansion of geographic availability .....	<b>201</b>
Our view .....	<b>202</b>
Reduced exclusion of particular offences .....	<b>203</b>
Our view .....	<b>205</b>
Increase to maximum length of home detention .....	<b>207</b>
Our view .....	<b>208</b>
Increase to maximum length of an ICO and introduction of a non-parole period .....	<b>209</b>
Our view .....	<b>211</b>
Streamlining suitability assessments .....	<b>212</b>
Our view .....	<b>213</b>
Removing current barriers to suitability .....	<b>214</b>
Our view .....	<b>215</b>
ICO breach process .....	<b>217</b>
<b>Reintroduction of periodic detention</b> .....	<b>217</b>
Our view .....	<b>219</b>

9.1 Home detention and intensive correction orders (ICOs) are alternatives to full-time imprisonment available under the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA). They are both ways of serving a term of imprisonment in the community and are classified as “custodial” sentences.

9.2 They are meant to be onerous and intensive. However, in our view, they are currently underused and not targeted to those offenders who might benefit most. For these sentences to be effective, the courts and the community must have confidence that they are serious sentences that can provide interventions that make a difference to an offender’s level of reoffending.

## The current law

- 9.3 A court that imposes a term of imprisonment of up to 18 months can order that it be served by way of home detention.<sup>1</sup> A court that imposes a term of imprisonment of up to two years can order that it be served by way of an ICO.<sup>2</sup> Corrective Services NSW supervises the orders and serious breaches are referred to the State Parole Authority (SPA) rather than to the courts. If an order is breached, SPA can revoke it, resulting in the offender serving the remainder of the sentence in full-time custody unless SPA reinstates the order.<sup>3</sup>

**Table 9.1: Number of home detention and ICO sentences imposed as principal penalty in the Local and Higher Courts**

	Home detention	ICOs
2012	161	898
2011	133	620
2010	205	60
2009	254	
2008	256	
2007	267	
2006	360	
2005	384	
2004	302	
2003	332	
2002	285	
2001	246	
2000	259	
1999	323	
1998	231	
1997	87	

Source: NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics (1997-2012)*. For more information, see NSW Law Reform Commission, *Sentencing: Patterns and Statistics, Report 139-A (2013)*, Figures 4.2 and 4.4.

1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 6.
2. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7.
3. *Crimes (Administration of Sentences) Act 1999* (NSW) s 88-90, s 162-168A.

## Nature of home detention

- 9.4 Home detention involves the offender being detained in his or her home, instead of in a correctional facility. Home detention was first established by the *Home Detention Act 1996* (NSW), the provisions of which were subsequently included in the CSPA.
- 9.5 A court cannot make a home detention order unless it is satisfied that:
- the offender is a suitable person to serve the sentence in that manner;
  - it is appropriate in all the circumstances for the sentence to be served by way of home detention;
  - the people with whom it is likely the offender would reside have consented in writing; and
  - the offender has consented in writing to the conditions of the home detention order.<sup>4</sup>
- 9.6 The standard conditions of a home detention order require the offender to:
- be of good behaviour and not commit an offence;
  - remain in his or her home except when authorised;
  - obey the supervisor's reasonable directions;
  - not consume alcohol or prohibited drugs;
  - submit to electronic monitoring;
  - submit to searches and drug testing;
  - engage in personal development activities or treatment programs if directed by a supervisor; and
  - undertake community service work of up to 20 hours per week when not otherwise employed if directed by a supervisor.<sup>5</sup>
- 9.7 The court can impose additional conditions at the time of making the home detention order.<sup>6</sup> SPA can, from time to time, by notice given to the offender, impose additional conditions or vary or revoke any of the additional conditions that it has imposed. However, SPA cannot impose or vary any conditions in such a way as to be inconsistent with the standard conditions or any additional conditions imposed by the court.<sup>7</sup>

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4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 78.

5. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 200.

6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 82.

7. *Crimes (Administration of Sentences) Act 1999* (NSW) s 103(2), (3).

## Nature of an ICO

- 9.8 An ICO is comprised of community service work, supervision and one or more rehabilitative programs. ICOs were introduced as a sentencing option in October 2010 on the advice of the NSW Sentencing Council and replaced the sentence of periodic detention which was abolished at the same time.<sup>8</sup>
- 9.9 A court cannot impose an ICO unless it is satisfied that:
- the offender is a suitable person to serve the sentence in that manner;
  - it is appropriate in all the circumstances for the sentence to be served by way of an ICO; and
  - the offender has consented in writing to the conditions of the ICO.<sup>9</sup>
- 9.10 The standard conditions of an ICO require the offender to:
- be of good behaviour and not commit an offence;
  - reside at approved premises and receive home visits from a supervisor;
  - not leave NSW without permission;
  - obey the supervisor's reasonable directions;
  - submit to searches, alcohol and drug testing;
  - submit to surveillance and electronic monitoring if directed;
  - submit to a curfew or restricted movement if directed;
  - participate in rehabilitative activities if directed;
  - undertake 32 hours of community service work per month; and
  - submit to medical examination by a specified practitioner.<sup>10</sup>
- 9.11 The court can impose additional conditions such as conditions that prohibit the offender consuming alcohol, non-association and place restriction conditions, as well as any other conditions that the court considers necessary to reduce the likelihood of reoffending.<sup>11</sup> The court can vary the additional conditions later on application by either the offender or Corrective Services NSW.<sup>12</sup> Corrective Services NSW can in exceptional circumstances temporarily excuse an offender from compliance with any condition. It can also apply to the court to extend the ICO for

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8. *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010* (NSW).

9. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67.

10. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 175.

11. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 176; *Crimes (Administration of Sentences) Act 1999* (NSW) s 81.

12. *Crimes (Administration of Sentences) Act 1999* (NSW) s 81(3).

up to six months in order to ensure that the offender makes up for missed work or programs.<sup>13</sup>

- 9.12 Initially, it was not clear as a matter of statutory interpretation whether offenders who did not present with rehabilitation needs were eligible to serve a term of imprisonment by way of an ICO.<sup>14</sup> However, the Court of Criminal Appeal has since confirmed that the ICO is not restricted to any particular class of offender.<sup>15</sup>

### Requirement for a suitability assessment

- 9.13 The requirement that the sentencing court be satisfied that an offender is a suitable person for either home detention or an ICO means that the court must request a suitability assessment report before making the order.<sup>16</sup> The Probation and Parole Service provides assessment reports on suitability for home detention. The Commissioner of Corrective Services NSW provides assessment reports on suitability for ICOs.
- 9.14 The assessment report covers the offender's criminal record, likelihood of reoffending, likelihood of committing a domestic violence offence, any substance dependency, any physical or mental health conditions, the offender's residential and employment circumstances, and whether making the order poses a risk of harm to the offender or another person.<sup>17</sup> The report can also suggest additional conditions that it would be appropriate for the court to impose.<sup>18</sup>
- 9.15 A court can only make a home detention order or an ICO if the assessment report finds that the offender is suitable.<sup>19</sup> The court can refuse to order home detention or an ICO notwithstanding a favourable assessment but must give reasons for its refusal.<sup>20</sup>

### Key advantages of home detention and ICOs

- 9.16 Home detention and ICOs have some significant advantages over full-time imprisonment in that they allow an offender to retain employment and remain in contact with family networks while serving the sentence.<sup>21</sup> The two orders are also much less costly than full-time custody. In 2011-12, the total net operating expenditure and capital cost per NSW prisoner per day was \$292.51. By contrast, the total net operating expenditure and capital cost per offender being supervised in

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13. *Crimes (Administration of Sentences) Act 1999* (NSW) s 85-86.

14. *R v Boughen* [2012] NSWCCA 17; 215 A Crim R 476; *Whelan v R* [2012] NSWCCA 147.

15. *R v Pogson* [2012] NSWCCA 225.

16. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(2), s 78(2).

17. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 70, s 81; *Crimes (Sentencing Procedure) Regulation 2010* (NSW) cl 14.

18. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 70(2)(b), s 81(2)(b).

19. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(4), s 78(4).

20. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(5), s 78(7).

21. Law Society of NSW, *Submission SE16*, 7.

the community by Corrective Services NSW per day was \$28.75.<sup>22</sup> The NSW Auditor-General has found that even home detention, the most expensive and intensive community option available, costs about one quarter of the amount of imprisonment per offender.<sup>23</sup>

- 9.17 Other benefits of home detention and ICOs that were acknowledged in the submissions included:
- they avoid any potential contaminating effects arising from offenders, and particularly first time offenders, being imprisoned with other offenders;<sup>24</sup>
  - offenders who would be at risk of losing public or community housing if they entered a period in full-time custody of more than three months are able to retain their housing;<sup>25</sup> and
  - both orders can combine benefit to the community (through community service work) with rehabilitation and an element of punishment.<sup>26</sup>
- 9.18 Home detention has high completion rates at 90.5% in 2011-12.<sup>27</sup> It has been proven to be cost effective and produces relatively low recidivism rates.<sup>28</sup> No data is yet available on rates of recidivism after completion of an ICO. On the limited data available, ICO completion rates appear to be sufficient but lower than home detention completion rates at 63%.<sup>29</sup>

### Importance of increasing the use of community-based alternatives

- 9.19 Despite their advantages, the courts have not used home detention and ICOs to any significant extent. Together, they made up only 1.09% of sentences imposed in 2012.<sup>30</sup> The use of home detention in NSW has more than halved since 2005. In 2012, 161 offenders received home detention as their principal penalty compared to 384 offenders in 2005.<sup>31</sup> The use of ICOs increased steadily after their introduction

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22. Australia, Productivity Commission, *Report on Government Services* (2013).

23. NSW, Auditor-General, *Home Detention: Corrective Services NSW*, Auditor-General's Report, Performance Audit (2010) 26. See also Law Society of NSW, *Preliminary submission PSE8*, 5; Law Society of NSW, *Submission SE16*, 6; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 10; NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) [2.34].

24. Law Society of NSW, *Preliminary submission PSE8*, 5.

25. Public Interest Advocacy Centre, *Submission SE29*, 7.

26. Law Society of NSW, *Submission SE16*, 6.

27. Australia, Productivity Commission, *Report on Government Services* (2013).

28. Corrective Services NSW, *Submission SE52*, 7; Police Association of NSW, *Submission SE21*, 12-13; NSW, Auditor-General, *Home Detention: Corrective Services NSW*, Auditor-General's Report, Performance Audit (2010) 28. See also NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) [4.15]-[4.17].

29. NSW Sentencing Council, *Sentencing Trends and Practices*, Annual Report 2011 (2012) [3.43].

30. NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics* (2012). See also NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) figures 4.2 and 4.4.

31. Table 9.1, above.

but now seems to have stabilised slightly below the level at which periodic detention was used.<sup>32</sup>

- 9.20 When announcing the terms of reference for this review, the Attorney General said that “[w]e need to encourage the use of more non-custodial and community-based sentences as a viable alternative to full-time incarceration”.<sup>33</sup> The submissions we received supported this objective through the provision of improved and expanded community-based options and expressed concerns about the underuse of home detention and of ICOs.<sup>34</sup>
- 9.21 In this chapter we identify some potential reforms to home detention and ICOs which are likely to be uncontroversial and aim to address these concerns. In our view these recommendations represent a minimum option to improve the operation of these sentences and to increase their use. We also consider whether periodic detention should be reintroduced.
- 9.22 In Chapter 11, we set out our preferred approach: the introduction of a new and more flexible order—a community detention order—that would combine home detention and ICOs.

## Reform of the current legislation to increase use

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### Expansion of geographic availability

- 9.23 A key criticism of periodic detention that led to the introduction of ICOs was that it was never likely to be available state-wide, as it was only viable for offenders living within a reasonable distance of an appropriate correctional facility.<sup>35</sup> ICOs were specifically intended to be accessible across NSW to ensure that the alternatives to full-time imprisonment were available for offenders in rural and remote areas.<sup>36</sup>
- 9.24 The Law Society of NSW, the Public Defenders, Legal Aid NSW and the NSW Bar Association each submitted that notwithstanding this objective, ICOs were still not available in some rural and remote areas.<sup>37</sup> Even in areas where ICOs are

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32. See NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) figures 4.4 and 4.11.

33. G Smith, *Sentencing Laws to be Reviewed* (Media Release, 23 September 2011) 1.

34. Corrective Services NSW, *Submission SE55*, 1-2; Law Society of NSW, *Submission SE16*, 16; Probation and Parole Officers' Association of NSW, *Submission SE49*, 11; Children's Court of NSW, *Submission SE18*, 13; Children's Court of NSW, *Submission SE40*, 2; Public Interest Advocacy Centre, *Submission SE42*, 3; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 20; The Shopfront Youth Legal Centre, *Submission SE28*, 5; Legal Aid NSW, *Submission SE31*, 22; NSW, Department of Family and Community Services, *Submission SE44*, 2; NSW Bar Association, *Submission SE46*, 1; Jumbunna Indigenous House of Learning, *Submission SE54*, 9. On underuse: The Public Defenders, *Submission SE24*, 10; Corrective Services NSW, *Submission SE52*, 7; The Shopfront Youth Legal Centre, *Submission SE28*, 3; Legal Aid NSW, *Submission SE31*, 9-10; Law Society of NSW, *Submission SE16*, 6; NSW Bar Association, *Submission SE27*, 6.

35. NSW Sentencing Council, *Review of Periodic Detention*, Report (2007) 203.

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

37. Law Society of NSW, *Submission SE16*, 7; NSW Bar Association, *Submission SE27*, 6; The Public Defenders, *Submission SE24*, 11; Legal Aid NSW, *Submission SE31*, 11.

technically available, barriers to their use have been experienced due to limited local opportunities for community service work and appropriate rehabilitation programs.<sup>38</sup> Stakeholders reported at consultations that even when an offender in a rural area receives an ICO, compliance may be difficult due to the requirement to travel to a larger town in order to meet with the designated Corrective Services NSW supervisor or to perform community service work.<sup>39</sup> One submission also noted the disproportionate effect that this can have for the sentencing options that are available for Aboriginal and Torres Strait Islander offenders.<sup>40</sup>

- 9.25 Previous reviews of home detention in 1999, 2000, 2006 and 2010 recommended that the geographical availability of home detention be expanded to cover all of NSW.<sup>41</sup> Despite these recommendations, five submissions raised the lack of sufficient geographical coverage of home detention as a current issue.<sup>42</sup> In consultations, Local Court magistrates and other stakeholders also observed that home detention was not available in many regional and remote locations.<sup>43</sup> Among the practical problems identified were those relating to housing, supervision and also telephone monitoring (due to the absence of landlines in the homes of offenders who might be suitable for a community-based sentence).
- 9.26 Corrective Services NSW has informed us that both home detention and ICOs can now be provided through all community corrections offices state-wide. However, it acknowledged that difficulties with electronic monitoring technology in remote areas may prevent the imposition of home detention in some areas.

### *Our view*

- 9.27 If the current sentences of home detention and ICOs are preserved, it is important that they be available on a state-wide basis. It is also important that courts and legal practitioners are provided with current information about local availability, to prevent the current situation where stakeholders are not fully aware that home detention is in fact available.
- 9.28 We acknowledge that the current standard conditions of home detention require an offender to *submit* to electronic monitoring.<sup>44</sup> Before the widespread availability of reliable electronic monitoring devices, the methods of monitoring people subject to home detention included random telephone checks.<sup>45</sup> As the requirement may be preventing access to home detention in remote areas, we recommend that the government amend the *Crimes (Administration of Sentences) Regulation 2008*

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38. Law Society of NSW, *Submission SE16*, 7; G Henson, *Preliminary submission PSE5*, 10; Legal practitioners, Dubbo, *Consultation SEC14*.

39. Legal practitioners, Dubbo, *Consultation SEC14*.

40. Jumbunna Indigenous House of Learning, *Preliminary submission PSE15*, 5.

41. NSW, Auditor-General, *Home Detention: Corrective Services NSW*, Auditor-General's Report, Performance Audit (2010) 19.

42. Law Society of NSW, *Submission SE16*, 6; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 10; NSW Bar Association, *Submission SE27*, 6; Legal Aid NSW, *Submission SE31*, 10; The Shopfront Youth Legal Centre, *Submission SE28*, 2.

43. Local Court practitioners, *Consultation SEC9*; Legal practitioners, Dubbo, *Consultation SEC14*.

44. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 200(h).

45. NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [9.12].



(NSW) to cater to cases where there are adequate alternative methods for supervising compliance.

### Recommendation 9.1: Geographic availability

If home detention and intensive correction orders (ICOs) are retained as sentencing options in a revised Crimes (Sentencing) Act:

- (1) Corrective Services NSW should make home detention and ICOs available across NSW.
- (2) Corrective Services NSW should provide information to the courts and to legal practitioners about the local availability of home detention and ICOs and of the necessary support services and programs.
- (3) The *Crimes (Administration of Sentences) Regulation 2008* (NSW) should be amended to make clear that, where electronic monitoring is not possible and there are adequate alternative methods for supervising compliance, alternative methods of surveillance and supervision may be used.

### Reduced exclusion of particular offences

9.29 Currently, home detention is not available for offenders who are sentenced for:

- (a) murder, attempted murder or manslaughter,
- (b) sexual assault of adults or children or sexual offences involving children,
- (c) armed robbery,
- (d) any offence involving the use of a firearm, or an imitation firearm, within the meaning of the *Firearms Act 1996*,
- (e) assault occasioning actual bodily harm (or any more serious assault, such as malicious wounding or assault with intent to do grievous bodily harm),
- (f) an offence under section 13 of the *Crimes (Domestic and Personal Violence) Act 2007* or section 545AB or 562AB of the *Crimes Act 1900* of stalking or intimidating a person with the intention of causing the person to fear personal injury,
- (g) a domestic violence offence against any person with whom it is likely the offender would reside, or continue or resume a relationship, if a home detention order were made,
- (h) an offence under section 23 (2), 24 (2), 25 (2), 26, 27 or 28 of the *Drug Misuse and Trafficking Act 1985* involving a commercial quantity of a prohibited plant or prohibited drug within the meaning of that Act,
- (i) any offence prescribed by the regulations for the purposes of this paragraph.<sup>46</sup>

9.30 Home detention is also not available if the offender has:

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46. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 76.

- any previous conviction for murder, attempted murder or manslaughter, serious sexual assault, stalking or intimidation;
  - a conviction within the last five years for a domestic violence offence against a likely co-resident; or
  - been subject to an apprehended violence order for the protection of a likely co-resident within the last five years.<sup>47</sup>
- 9.31 No explicit rationale for these offence exclusions was put forward at the time of introduction of the original *Home Detention Act 1996* (NSW) or at the time of the replication of its provisions in the *Crime (Sentencing Procedure) Act 1999* (NSW).<sup>48</sup>
- 9.32 An ICO must not be imposed in relation to a sentence of imprisonment for the following offences:
- (a) an offence under Division 10 or 10A of Part 3 of the Crimes Act 1900, being:
    - (i) an offence the victim of which is a person under the age of 16 years, or
    - (ii) an offence the victim of which is a person of any age and the elements of which include sexual intercourse (as defined by section 61H of that Act), or
  - (b) an offence that includes the commission of, or an intention to commit, an offence referred to in paragraph (a), or
  - (c) an offence that, at the time it was committed, was a prescribed sexual offence within the meaning of this definition, or
  - (d) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in paragraph (a), (b) or (c).<sup>49</sup>
- 9.33 These exclusions were directly carried over from the exclusions that previously applied to periodic detention, against the recommendation of the NSW Sentencing Council.<sup>50</sup>
- 9.34 Several submissions expressed the view that the home detention exclusions apply too broadly and are an unnecessary barrier to its use.<sup>51</sup> Four submissions recommended that assault occasioning actual bodily harm cease to be an excluded

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47. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 77.

48. Explanatory Note, Crimes (Sentencing Procedure) Bill 1999 (NSW); Explanatory Note, Home Detention Bill 1996 (NSW); NSW, *Parliamentary Debates*, Legislative Assembly, 20 June 1996, 3385. The original pilot of home detention (named Intensive Community Supervision) before the enactment of the *Home Detention Act 1996* (NSW) did not automatically exclude some offences but instead required these to be assessed in context: C Costas, *Intensive Community Supervision: An Alternative to Gaol* (NSW, Department of Corrective Services, 1991) 8.

49. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 66(1).

50. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 65B (as at 30 September 2010 – since amended); NSW Sentencing Council, *Review of Periodic Detention*, Report (2007) 157.

51. The Public Defenders, *Submission SE24*, 10; The Shopfront Youth Legal Centre, *Submission SE28*, 2; Public Interest Advocacy Centre, *Submission SE29*, 8; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 10; Probation and Parole Officers' Association of NSW, *Submission SE49*, 4; Corrective Services NSW, *Submission SE52*, 7.

offence except in circumstances where the victim resides with the offender, although the NSW Police Force opposed this.<sup>52</sup> Legal Aid NSW suggested that stalking and other serious assault offences should not be excluded unless the victim is a co-resident.<sup>53</sup> Corrective Services NSW submitted that only serious sexual assault and any offence involving domestic violence against a likely co-resident should be excluded.<sup>54</sup>

- 9.35 The Probation and Parole Officers' Association of NSW opposed blanket exclusions by offence type. Instead it proposed that the nature of the offence for which the offender is being sentenced, and any prior convictions, should be taken into account as part of the home detention suitability assessment.<sup>55</sup> In consultations, several stakeholders supported this proposal.<sup>56</sup>
- 9.36 The NSW Young Lawyers Criminal Law Committee submitted that the offence based exclusions for ICOs were also too broad, suggesting that only the most serious sexual offences should preclude eligibility.<sup>57</sup> The NSW Sentencing Council's review of ICOs in 2011 reported strong support for the removal of blanket exclusions.<sup>58</sup>
- 9.37 Corrective Services NSW proposed that both lists of exclusions should be rationalised so as to apply equally to home detention and ICOs.<sup>59</sup> The Chief Magistrate and other magistrates made the same submission to the NSW Sentencing Council review of ICOs.<sup>60</sup>

### *Our view*

- 9.38 The Commission agrees with the general proposition that the current offence exclusions are too broad, particularly in relation to home detention. Although the rationale for excluding certain offences from ICOs and home detention was not stated at the time of their introduction, presumably it was directed towards:
- protecting the community;
  - preventing perceptions of inappropriate leniency; and
  - ensuring that offenders receive appropriate punishment, commensurate however with not impeding their prospects for rehabilitation.

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52. The Public Defenders, *Submission SE24*, 10; The Shopfront Youth Legal Centre, *Submission SE28*, 2; Public Interest Advocacy Centre, *Submission SE29*, 8; Legal Aid NSW, *Submission SE31*, 10. Objected: NSW Police, *Submission SE32*, 7.

53. Legal Aid NSW, *Submission SE31*, 10.

54. Corrective Services NSW, *Submission SE52*, 7.

55. Probation and Parole Officers' Association of NSW, *Submission SE49*, 4.

56. Local Court practitioners, *Consultation SEC9*; Community Corrections Mt Druitt, *Consultation SEC18*.

57. NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 11-12.

58. NSW Sentencing Council, *Sentencing Trends and Practices*, Annual Report 2011 (2012) 34.

59. Corrective Services NSW, *Submission SE52*, 7. See also Public Interest Advocacy Centre, *Submission SE29*, 8; The Shopfront Youth Legal Centre, *Submission SE28*, QP6, 2.

60. NSW Sentencing Council, *Sentencing Trends and Practices*, Annual Report 2011 (2012) 36; G Henson, *Preliminary submission PSE5*, 9.

- 9.39 With some obvious exceptions, the category of offence for which the offender is being sentenced is not always an accurate indicator of the risk that the offender poses to the community. The mandatory suitability assessment for both home detention and ICOs assesses the *actual* risk that the offender is likely to pose to others, as well as his or her overall risk of reoffending and criminal history. It is likely to provide a more accurate mechanism for screening out high risk offenders for whom a community-based sentence would be inappropriate than an exclusion based on offence category alone.
- 9.40 The court also has a role in screening out high risk offenders when it decides whether it is appropriate to request an ICO or home detention suitability assessment. In addition, it makes the final decision whether a home detention order or ICO should be imposed even when the suitability assessment report is positive.
- 9.41 Broad-based generic exclusions do not seem to be necessary for retaining public confidence in sentencing. More important is the need to provide guidance to the courts through the purposes and principles of sentencing, which will assist in the imposition of sentences that are appropriate in the circumstances of the individual case. Rigid exclusions that pay no regard to the objective circumstances of the case, or to the subjective circumstances of the offender, can operate to inappropriately limit the sentencing discretion that is important for a viable sentencing system. We also recognise that crimes in the most serious category of offending are most unlikely to attract sentences that would be sufficiently short to qualify for an ICO or home detention. As a consequence their generic exclusion is unnecessary.
- 9.42 Notwithstanding this practical reality, we accept that a small number of very serious offences should continue to be specifically excluded. The offences of murder and certain sexual offences (where the victim was under the age of 16 years and the offence carries a maximum penalty of more than 5 years imprisonment) are sufficiently serious to warrant their specific exclusion. These offences can be distinguished from the range of offences that are currently excluded as the seriousness of the other excluded offences can vary significantly depending on the facts of the individual case.
- 9.43 Domestic violence offences also raise particular issues. The confinement of an offender to the home as part of home detention, or as a consequence of restrictions imposed as part of an ICO, can place added pressure on the offender and the offender's family. In the case of a domestic violence offender this may significantly heighten the risk of reoffending. Although the current suitability assessments for home detention and ICOs are specifically required to give consideration to the likelihood of the offender committing a domestic violence offence,<sup>61</sup> our view is that specific exclusions for domestic violence offences should remain where the victim of such an offence is a co-resident or likely co-resident of the offender.

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61. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 81(2)(a)(iii); *Crimes (Sentencing Procedure) Regulation 2010* (NSW) cl 14(1)(c).

**Recommendation 9.2: Exclusion of certain offences**

If ICOs and home detention are retained as sentencing options in a revised Crimes (Sentencing) Act, no offences should automatically exclude an offender from home detention and ICOs except:

- (a) domestic violence offences committed against a likely co-resident;
- (b) murder; and
- (c) offences under Part 3 Divisions 10 and 10A of the *Crimes Act 1900* (NSW) when the victim is under the age of 16 years and the offence carries a maximum penalty of more than 5 years imprisonment.

**Increase to maximum length of home detention**

- 9.44 Home detention is currently only available as a way of serving periods of imprisonment of up to 18 months. Where a non-parole period is set, the offender will serve the non-parole period in home detention. At the end of this period he or she will be released on parole in the same way as prisoners who are released on parole from full-time custody.
- 9.45 If an offender breaches the conditions of a home detention order during the non-parole period, SPA can revoke the order and commit the offender to full-time custody.<sup>62</sup> The offender can apply to SPA for the reinstatement of the revoked order in respect of the remaining balance of the sentence but only after serving at least three months of the sentence in full-time custody.<sup>63</sup>
- 9.46 Breach of the order during the parole period will lead to the offender being returned to full-time custody and not permitted to reapply for parole for 12 months.<sup>64</sup> This limitation can have an unexpected and undesirable effect where a released offender is sentenced to a very short sentence of imprisonment for a minor offence. The length of home detention sentences means in practice that the offender will not be permitted to reapply for parole. It also means that a breach of the order during the parole period can have a more serious consequence than a breach of the order during the non-parole period.
- 9.47 The Public Defenders, the NSW Office of the Director of Public Prosecutions (ODPP) and NSW Police Force each suggested that the 18 month limit on home detention orders be increased to two years.<sup>65</sup> Legal Aid NSW, the Shopfront Youth Legal Centre, the Law Society of NSW and the NSW Bar Association suggested

62. *Crimes (Administration of Sentences) Act 1999* (NSW) s 167.

63. *Crimes (Administration of Sentences) Act 1999* (NSW) s 168A(1).

64. When offenders serving sentences of three years or less (ie, all home detainees) have their court-based parole orders revoked, no parole orders then exist for them. This activates *Crimes (Administration of Sentences) Act 1999* (NSW) s 159, which allows SPA to make new parole orders. Section 159(2) provides that, in such cases, pt 6 div 2 of the Act applies. Pt 6 div 2 governs the parole orders which SPA may make for offenders serving sentences of 3 years or more and specifies that offenders can only reapply for parole after 12 months in custody: s 137 and s 3 (definition of "parole eligibility date"). There are no provisions to allow offenders who are serving sentences of 3 years or less (which includes all home detainees) to reapply for parole after parole is revoked.

65. The Public Defenders, *Submission SE24*, 10; NSW Police, *Submission SE32*, 9; NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 8.

that the maximum period for a home detention order be two years in the Local Court and three years in higher courts.<sup>66</sup> The Chief Magistrate of the Local Court submitted that the maximum be two years, unless the jurisdictional limit of the Local Court was increased to three years, in which case the limit in that court should also be three years.<sup>67</sup> NSW Young Lawyers proposed that the maximum be three years “subject to satisfactory evidence that it is [a] sustainable sentence for an offender to abide by over the required period of time”.<sup>68</sup>

- 9.48 The Probation and Parole Officers’ Association of NSW also suggested that the overall limit be increased to three years although subject to an upper limit of actual home detention of 18 months, with any additional time being served by way of parole.<sup>69</sup> Corrective Services NSW made a similar suggestion, proposing that the limit on actual home detention be two years with an overall maximum sentence length of three years.<sup>70</sup> The Public Defenders suggested that a home detention order should be capable of being combined with a good behaviour bond, which would then have the effect of extending supervision of the offender up to a maximum of five years.<sup>71</sup>

### *Our view*

- 9.49 Our view is that it may not be realistic or reasonable to expect an offender to comply with home detention conditions for much longer than 18 months. The conditions are onerous for both the offender and his or her co-residents and in some cases may be more punitive than full-time custody.<sup>72</sup> However, there is clear stakeholder support for increasing the maximum sentence length which could increase the use of this form of order. The potential for subjecting the offender to a longer period of parole supervision after the home detention period could also be advantageous.
- 9.50 Accordingly, we support an increase in the maximum length of a sentence of home detention from 18 months to three years, subject to a maximum non-parole period of two years. If no non-parole period is set, the maximum term of the sentence should be two years.
- 9.51 Our view is that the two year maximum for the total length of the order should continue to apply in the Local Court where the offender is sentenced for a single offence. The maximum length should be extended to three years in the Local Court

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66. Legal Aid NSW, *Submission SE31*, 10, 15; The Shopfront Youth Legal Centre, *Submission SE28*, 5; Law Society of NSW, *Submission SE16*, 7; NSW Bar Association, *Submission SE27*, 9.

67. G Henson, *Submission SE22*, 5-6. For further discussion on the jurisdictional limit of the Local Court, see Chapter 20.

68. NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 11.

69. Probation and Parole Officers’ Association of NSW, *Submission SE49*, 4, 10.

70. Corrective Services NSW, *Submission SE52*, 15.

71. Public Defenders, *Submission SE36*, 2.

72. NSW, Auditor-General, *Home Detention: Corrective Services NSW*, Auditor-General’s Report, Performance Audit (2010) 14.

where the offender is being sentenced for multiple offences, attracting the extended jurisdiction that the Local Court has in accumulating or aggregating sentences.<sup>73</sup>

- 9.52 Where an offender breaches a home detention order and the order is revoked, the offender should be permitted to apply to SPA to have the order reinstated after one month in full-time custody, instead of three months. This would match the length of time that an offender must spend in custody after revocation of an ICO.
- 9.53 Our view is also that offenders who, having been sentenced to home detention, have been released on parole, but then have had the order revoked should be permitted to apply to SPA for reinstatement of parole after serving a further one month in either full-time imprisonment or in home detention. It is implicit in this observation that, on revocation of parole, SPA should have the power to order that the offender serve the balance of the sentence (subject to reinstatement of parole) either in home detention or in full-time imprisonment, according to the circumstances of the case.

### **Recommendation 9.3: Maximum length of home detention**

If home detention is retained as a sentencing option in a revised Crimes (Sentencing) Act:

- (1) The maximum length of a home detention order should be extended to three years with a maximum non-parole period of two years. If no non-parole period is set, then the maximum period of the order should be two years.
- (2) In the Local Court, the maximum length of a home detention order should continue to be two years, and three years where the offender is sentenced for multiple offences.
- (3) Where the State Parole Authority (SPA) revokes a parole order for a sentence of home detention it should be able to return the offender either to home detention or to full-time imprisonment depending on the circumstances of the case.
- (4) Offenders who have been returned to full-time imprisonment because SPA revoked the home detention order during the non-parole period should be able to apply to SPA for reinstatement of the order after one month.
- (5) Offenders who have been returned to home detention or full-time imprisonment because SPA revoked parole should be able to apply to SPA for reinstatement of parole after one month.

### **Increase to maximum length of an ICO and introduction of a non-parole period**

- 9.54 ICOs are currently available for up to two years, although periodic detention (which this form of sentence replaced) had a maximum length of three years. When

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73. We have recommended that the Local Court's jurisdiction be extended to five years in relation to aggregate sentences imposed for multiple offences, as well as accumulated sentences: Recommendation 6.6.

recommending the introduction of ICOs, the NSW Sentencing Council considered that a two year maximum was appropriate as historically most sentences of periodic detention had been for 12 months or less.<sup>74</sup> The NSW Sentencing Council's 2011 review found that ICOs were being imposed for longer periods than was the case with sentences of periodic detention, with more than half of all ICOs being for more than 12 months and about a quarter being for between 18 months and two years.<sup>75</sup>

- 9.55 The court cannot currently set a non-parole period as part of an ICO.<sup>76</sup> This limitation was introduced on the basis that the purpose of an ICO was to ensure supervision and participation in a rehabilitative program or programs for the full term of the order, so that the “rehabilitative focus of the order is maintained from beginning to end”.<sup>77</sup> If an ICO is breached, SPA may revoke the order and commit the offender either to full-time custody or home detention for the remainder of the term.<sup>78</sup> The offender must spend at least one month in custody before SPA can consider reinstatement of the ICO.<sup>79</sup>
- 9.56 Legal Aid NSW, the Shopfront Youth Legal Centre, the Law Society of NSW, the Public Defenders and the NSW Bar Association each suggested that the maximum length of an ICO remain at two years in the Local Court, but be increased to three years in the higher courts.<sup>80</sup> The Law Society of NSW submitted that this increase “would make the sentence more widely available and permit orders to be of sufficient duration to enable effective rehabilitative or educational program delivery”.<sup>81</sup> NSW Young Lawyers Criminal Law Committee also supported an increase to three years, as had previous submissions to the NSW Sentencing Council.<sup>82</sup> The NSW Police Force however supported retention of the maximum length of an ICO at two years.<sup>83</sup>
- 9.57 Similar to its proposal for home detention, Corrective Services NSW suggested that the overall maximum length of an ICO be increased to three years, with core conditions limited to two years, and any balance of the term to be served on parole.<sup>84</sup> Some submissions to the NSW Sentencing Council review and consultations for this review similarly supported the provision of a non-parole period.<sup>85</sup> Despite differences between stakeholders as to the ideal length of ICOs or

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74. NSW Sentencing Council, *Review of Periodic Detention*, Report (2007) 159.

75. NSW Sentencing Council, *Sentencing Trends and Practices*, Annual Report 2011 (2012) 30.

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

77. NSW Sentencing Council, *Review of Periodic Detention*, Report (2007) 159; NSW, *Parliamentary Debates*, Legislative Council, 22 June 2010, 24426.

78. *Crimes (Administration of Sentences) Act 1999* (NSW) s 163, s 165A.

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

80. Legal Aid NSW, *Submission SE31*, 15; The Shopfront Youth Legal Centre, *Submission SE28*, 5; Law Society of NSW, *Submission SE16*, 6; NSW Bar Association, *Submission SE27*, 9; The Public Defenders, *Submission SE24*, 11-12.

81. Law Society of NSW, *Submission SE16*, 6.

82. NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 12; NSW Sentencing Council, *Sentencing Trends and Practices*, Annual Report 2011 (2012) 29.

83. NSW Police, *Submission SE32*, 9.

84. Corrective Services NSW, *Submission SE52*, 15.

85. NSW Sentencing Council, *Sentencing Trends and Practices*, Annual Report 2011 (2012) 30; Aboriginal Community Justice Group, Western Region, *Consultation SEC15*.



home detention, the submissions generally supported having the same maximum duration for each order.<sup>86</sup>

### *Our view*

- 9.58 The original concerns which led the NSW Sentencing Council to recommend limiting the term of ICOs to two years and prohibiting a non-parole period are today of less relevance in light of the operation of ICOs in practice.
- 9.59 Given the support in the submissions for an increase in the maximum available length of an ICO, and the desirability of aligning home detention and ICOs in this respect, we believe that the maximum term of an ICO should be extended to three years.<sup>87</sup> Our view is that the court should be able to set a non-parole period. As with home detention, the maximum non-parole period should be two years. If no non-parole period is set, the maximum term of the order should be two years.
- 9.60 Our view is that the maximum length of the sentence should remain at two years in the Local Court unless the Court was sentencing an offender for more than one offence, that is, in circumstances where the accumulation or aggregation of sentences would extend its jurisdictional limit to five years.
- 9.61 Current ICO conditions and obligations should continue to apply to the offender during the non-parole period. At the expiry of the non-parole period, the offender should be released to parole supervision for the remainder of the order. If the order is breached and revoked during the non-parole period, SPA should retain its discretion to commit the offender either to full-time custody or to home detention for the remainder of the non-parole period. As is currently the case, offenders should be able to apply for reinstatement of the ICO after one month in either full-time custody or home detention.
- 9.62 Similar to the approach that we outlined in relation to home detention, SPA should have a discretion upon breach during the parole period to determine whether the offender should serve the balance of the sentence in home detention or full-time imprisonment, or whether the offender's obligation to complete 32 hours of community service work per month should be reactivated. Offenders in this situation should be permitted to reapply for parole after serving a similar period of one month in full-time imprisonment, home detention or service of the reactivated community service work.

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86. Law Society of NSW, *Submission SE16*, 11; NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 8; G Henson, *Submission SE22*, 5-6; NSW Bar Association, *Submission SE27*, 9; The Shopfront Youth Legal Centre, *Submission SE28*, 5; Legal Aid NSW, *Submission SE31*, 15; NSW Police Force, *Submission SE32*, 9; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 15; Corrective Services NSW, *Submission SE52*, 15.

87. Although it is outside the scope of this report, consideration should be given to aligning the spent convictions regime for ICOs and home detention. Currently, a conviction can become spent if it results in a sentence of full-time imprisonment of 6 months or less, or a prison sentence of 6 months or less to be served by way of home detention. However, a conviction resulting in a prison sentence of any length that is served by way of an ICO can become spent: *Criminal Records Act 1991* (NSW) s 7.

#### **Recommendation 9.4: Maximum length of ICOs**

If the ICO is retained as a sentencing option in a revised Crimes (Sentencing) Act:

- (1) The maximum allowable length of an ICO should be extended from two to three years.
- (2) In the Local Court, the maximum length of an ICO should continue to be two years, or three years where the offender is sentenced for multiple offences.
- (3) The court should be able to set a non-parole period of up to two years as part of an ICO. If the court does not set a non-parole period, the maximum length of the ICO should continue to be two years.
- (4) Where SPA revokes an ICO during the non-parole period, SPA should be able to commit the offender to either full-time custody or home detention. The offender should be able to apply to SPA for reinstatement of the ICO after one month.
- (5) Where an offender who is serving the parole period of an ICO breaches the conditions of parole, SPA should be able to revoke the parole and order the offender's return to full-time imprisonment or home detention or to order the offender resume 32 hours of work per month. The offender should be able to reapply for parole after one month.

### **Streamlining suitability assessments**

- 9.63 Currently, a court that is considering an ICO must decide that no sentence other than imprisonment is appropriate and indicate that it is contemplating a sentence of imprisonment of two years or less. It must then refer the offender for an ICO suitability assessment, before actually imposing the term of imprisonment.<sup>88</sup> As a consequence Corrective Services NSW is required to complete the suitability assessment without knowledge of the likely term of the ICO. If the offender is found suitable, the court then sets the term of the imprisonment to be served by way of an ICO.
- 9.64 By way of contrast a court considering home detention for an offender must decide that no penalty other than imprisonment is appropriate and then impose a specific term of imprisonment, which may include a non-parole period.<sup>89</sup> The court can then refer an offender for a home detention suitability assessment. If an offender is found unsuitable for home detention, he or she cannot then be assessed for an ICO, due to the drafting of the provision which requires an ICO assessment to be carried out before a term of imprisonment is imposed.<sup>90</sup> An offender who is assessed as unsuitable for an ICO can subsequently be assessed for home detention.<sup>91</sup>

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88. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 69.

89. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 80.

90. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 69.

91. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 80(1A).

- 9.65 The rationale for this difference in procedure is not clear. The Probation and Parole Officers' Association of NSW pointed out that the inability of the court to request each assessment from the outset can give rise to unnecessary delay.<sup>92</sup>
- 9.66 The Chief Magistrate noted problems in assessing an offender for ICO suitability before the term is set.<sup>93</sup> The fact that the offender is found to be unsuitable for an ICO may result in the court imposing a shorter term of imprisonment (to be served in full-time custody or by way of home detention) than it would have imposed if the term had to be set before the ICO suitability assessment. Conversely, availability of an ICO may result in a longer term of imprisonment than would have been imposed if an ICO was unavailable.
- 9.67 Stakeholders were strongly supportive of adopting a streamlined approach, in which a court can refer an offender for a single assessment that considers suitability for either or both orders, according to the court's request.<sup>94</sup>

### *Our view*

- 9.68 We agree that a streamlined approach should be adopted that requires a single assessment for both home detention and ICOs (unless the court specifically requests otherwise). This will eliminate the delay and duplication of effort that can occur if a second assessment is sought. Not being able to consider an ICO after an unfavourable home detention assessment seems to restrict a court's sentencing discretion unnecessarily.
- 9.69 Our view is that the court should first set the term of imprisonment before referring the offender for an assessment for both orders, as is currently the case for home detention. This approach conforms to the principle that the term of a sentence of imprisonment should be set without regard to the manner in which it will be served.<sup>95</sup> The current approach for ICOs allows information from the assessment report, such as the length of relevant intervention programs, to influence the term. While there are some good reasons for this in the case of ICOs, it assumes the sentence will be served in this way. Many are not. The term may need to be served in full-time custody if the order is breached and the sentence should remain proportionate if this occurs.
- 9.70 The court should set any non-parole period of the sentence after the outcome of the assessment is known and a decision is made about how the sentence is to be served. If the offender is assessed as unsuitable for an ICO or home detention, the court would also still have the option (if suspended sentences remain available) of

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92. Probation and Parole Officers' Association of NSW, *Preliminary submission PSE20*, 12.

93. G Henson, *Preliminary submission PSE5*, 10; G Henson, *Submission SE22*, 6; see also *R v Zamagias* [2002] NSWCCA 17 [26].

94. Corrective Services NSW, *Submission SE52*, 8; G Henson, *Preliminary submission PSE5*, 9; Legal Aid NSW, *Preliminary submission PSE18*, 3; Local Court practitioners, *Consultation SEC9*; NSW Sentencing Council, *Sentencing Trends and Practices*, Annual Report 2011 (2012), 35; G Henson, *Submission SE35*, 6; Community Corrections, Mt Druitt, *Consultation SEC18*; Court support services, Dubbo, *Consultation SEC16*.

95. *R v Zamagias* [2002] NSWCCA 17 [26].

imposing a suspended sentence<sup>96</sup> (where a non-parole period is not set) or of sentencing the offender to full-time imprisonment (and setting a non-parole period).

#### **Recommendation 9.5: Timing of suitability assessments**

If home detention and ICOs are retained as sentencing options in a revised Crimes (Sentencing) Act:

- (1) The court should first set the term of imprisonment (the head sentence).
- (2) If the head sentence is of an eligible length, the court should be able to refer the offender for a single suitability assessment for home detention or an ICO or both.
- (3) If the court imposes an ICO or home detention order (after a positive suitability assessment) it should, at that time, either set a non-parole period or decline to do so.

### **Removing current barriers to suitability**

- 9.71 It has been reported that home detention is generally not available for offenders with an unresolved substance dependency or a mental health issue.<sup>97</sup> By its nature, it is also not suitable for homeless offenders or those with unstable housing. Before returning an assessment that an offender is unsuitable for home detention due to housing issues, Corrective Services NSW is required to make all reasonable efforts to find suitable accommodation.<sup>98</sup> However, the submissions indicated that lack of suitable accommodation continues to be a barrier to obtaining a favourable assessment.<sup>99</sup>
- 9.72 Similarly it was reported that ICO suitability assessments tend to exclude offenders who have a cognitive impairment, mental illness, substance dependency, homelessness or unstable housing.<sup>100</sup> The NSW Bureau of Crime Statistics and Research has found that only 55% of ICO assessments actually result in an ICO being imposed. The most common cause recorded of a negative suitability assessment was alcohol or other drug dependency.<sup>101</sup>
- 9.73 We understand that in response to initial concerns Corrective Services NSW has relaxed its approach to some degree. Automatic exclusion for an offender with a substance dependency has been replaced by an assessment that will now look at the subjective impact of the dependency on the offender's ability to meet the

96. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 12(4).

97. The Shopfront Youth Legal Centre, *Submission SE28*, 2.

98. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 81(3).

99. Public Interest Advocacy Centre, *Submission SE29*, 8; The Shopfront Youth Legal Centre, *Submission SE28*, 2-3.

100. Law Society of NSW, *Submission SE16*, 8; The Shopfront Youth Legal Centre, *Submission SE28*, 3; Public Interest Advocacy Centre, *Submission SE29*, 8; the Public Defenders, *Submission SE24*, 11; Legal Aid NSW, *Submission SE31*, 11; Corrective Services NSW, *Submission SE52*, 12; NSW Bar Association, *Submission SE27*, 6; Aboriginal Community Justice Group, Mt Druitt and Aboriginal Legal Service, *Consultation SEC19*.

101. C Ringland, *Sentencing Outcomes for Those Assessed for Intensive Correction Order Suitability*, Bureau Brief No 86 (NSW Bureau of Crime Statistics and Research, 2013).

requirements of an ICO. In addition, mental health issues will only form the basis of an unsuitable assessment if the offender does not comply with or refuses treatment.<sup>102</sup>

- 9.74 In this context we note that the Law Society of NSW and the Shopfront Youth Legal Centre reported that offenders were being required to organise and fund their own psychiatric assessments as part of the assessment process.<sup>103</sup> This practice could seriously disadvantage offenders with limited means. We observe that if this is occurring then Corrective Services NSW should remedy the situation.
- 9.75 The key barrier to ICO suitability for the types of offenders mentioned above has been the mandatory community service work requirement. The existence of a substance dependency or significant mental health issue may disqualify an offender from undertaking such work on the grounds that it might give rise to work safety issues (both for the offender and for co-workers). Additionally any instability—in terms of housing, substance dependency, cognitive impairment or mental health—can mean that the offender will be considered unlikely to comply with the work component. It is worth noting that when it recommended the introduction of ICOs, the NSW Sentencing Council did not envisage that community service work would be a mandatory component of an ICO.<sup>104</sup>
- 9.76 Stakeholders suggested several ways that this situation could be ameliorated, including making community service work an optional condition, giving the court the flexibility to set the number of hours required, and counting hours of attendance at intervention programs or treatment towards work hours.<sup>105</sup>
- 9.77 The Law Society of NSW submitted that the court should be able to impose an ICO even if Corrective Services NSW assesses the offender as unsuitable on the basis that it is “not appropriate for a Corrective Services officer to have a greater level of discretion in the sentencing outcome for an offender than the magistrate”.<sup>106</sup>

### *Our view*

- 9.78 We do not agree that the court should be able to impose an ICO where Corrective Services NSW has assessed an offender as unsuitable for such an order. Corrective Services NSW is better placed than the court to assess offenders in terms of the risks that they pose to the community, and of the likelihood of them successfully completing the sentence. There is no benefit in setting offenders up to fail when they are unlikely to be able to comply with the conditions of a sentence.
- 9.79 Corrective Services NSW is responsible for overseeing and allocating the resources available for offender management. If resources are not available at a particular time, or in a particular area, to supervise the offender or provide a community

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102. NSW Sentencing Council, *Sentencing Trends and Practices*, Annual Report 2011 (2012) 32.

103. Law Society of NSW, *Submission SE16*, 8; The Shopfront Youth Legal Centre, *Submission SE28*, 3.

104. NSW Sentencing Council, *Review of Periodic Detention*, Report (2007) 161-162.

105. Corrective Services NSW, *Submission SE52*, 12-13; Legal Aid NSW, *Submission SE31*, 12; The Shopfront Youth Legal Centre, *Submission SE28*, 3.

106. Law Society of NSW, *Submission SE16*, 8.

service work placement or program, it is pointless to empower the court to impose an ICO. Our view in this respect accords with the conventional reluctance of the courts to assume a role in the administration of sentences by ordering Corrective Services NSW to provide particular services for an offender, or even to make recommendations to that effect, without having information before it as to whether those services can be provided, and whether they might be beneficial.

- 9.80 Rather than enabling a court to override the outcome of the suitability assessment, we consider that the conditions of both home detention and ICOs (if they are to be retained) need to be reworked and made more flexible. The NSW Sentencing Council and Corrective Services NSW have both proposed that “work-ready” programs be created where offenders serving ICOs could, before commencing the community service work requirement, undertake intensive drug treatment, work training or education.<sup>107</sup> Corrective Services NSW has also proposed the establishment of dedicated workshops to enable offenders who would otherwise be unsuitable for community service work to complete work under direct Corrective Services NSW supervision.<sup>108</sup>
- 9.81 We agree with this approach and recommend that a wide variety of activities be permissible in satisfaction of the 32 hour per month ICO requirement. We see a particular value in work ready and literacy or numeracy programs. The high level of illiteracy and innumeracy and consequent marginal histories of employment within the prison population is of serious concern. The provision of basic vocational and pre-vocational training can have a significant rehabilitative effect, not only in improving self-esteem but also in opening the way for employment. Counting participation in intervention programs, educational and literacy/numeracy programs, counselling or drug treatment towards the work hours requirement would, in our view, be an effective and appropriate method of expanding access to ICOs if they are to be retained. Work and Development Orders, which are used as a fine enforcement option under the *Fines Act 1996* (NSW), already provide one example of this in practice.<sup>109</sup>
- 9.82 In some cases, it should also be possible to defer the commencement of the work requirement of an ICO to allow an offender to complete a residential drug or alcohol treatment or other program, without the need to extend the overall length of the ICO. Similarly it should be possible in the case of home detention to defer the requirement for the offender to reside at home until he or she has completed a residential drug or alcohol treatment program.
- 9.83 Implementation of these recommendations should ensure broader access to home detention and ICOs if they are retained.

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107. NSW Sentencing Council, *Sentencing Trends and Practices*, Annual Report 2011 (2012) 32; Corrective Services NSW, *Submission SE52*, 12-13.

108. Corrective Services NSW, *Consultation SEC11*.

109. NSW, State Debt Recovery Office, *Work and Development Order Guidelines 2012* (2012).

**Recommendation 9.6: Removal of barriers to suitability**

If home detention and ICOs are retained as sentencing options in a revised Crimes (Sentencing) Act:

- (1) It should be possible to satisfy the hours of community service work attached to an ICO by a range of activities including engaging in literacy, numeracy, work-ready, educational or other programs according to the needs of the offender.
- (2) It should be possible to serve part of a home detention order in an institution providing residential drug or alcohol treatment. This should not increase the length of the order.
- (3) Corrective Services NSW should be able to defer the offender's commencement of the work hours requirement of an ICO while the offender completes residential drug or alcohol treatment or another program. This should not increase the length of the order.

### ICO breach process

- 9.84 Two submissions suggested that the current procedures for dealing with breaches of ICOs are overly restrictive. Legal Aid NSW reported that SPA frequently revokes ICOs due to breaches, often without adequate notice to the offender and without allowing the offender a right to be heard. Legal Aid NSW also suggested that the approach to breaches was overly inflexible and too often resulted in revocation.<sup>110</sup> The Probation and Parole Officers' Association of NSW similarly submitted that the breach process was convoluted, overly rigid and overly bureaucratic.<sup>111</sup>
- 9.85 Data published in the NSW Sentencing Council's review of ICOs indicates that, of the 269 ICOs that came to an end by December 2011, 169 were successfully completed (63%) and 100 were revoked (37%).<sup>112</sup> Although the incidence of revocation appears to be quite high, we do not have access to sufficient information to determine whether the current breach processes are inappropriate. This issue can be examined in more detail in our separate review of the parole system.

### Reintroduction of periodic detention

- 9.86 There was some support in submissions for the reintroduction of periodic detention. Periodic detention was a sentence of imprisonment that involved the offender remaining in custody two days per week (usually the weekend) and living in the community five days per week. It was intended to provide a punitive sentencing option that allowed offenders to maintain employment and family and community connections.<sup>113</sup> Subject to the offender's compliance, later stages of the sentence

110. Legal Aid NSW, *Submission SE31*, 12.

111. Probation and Parole Officers' Association of NSW, *Submission SE49*, 7.

112. NSW Sentencing Council, *Sentencing Trends and Practices*, Annual Report 2011 (2012) 22.

113. NSW Sentencing Council, *Review of Periodic Detention*, Report (2007) 2.

could involve two days per week of community service work instead of two days detention.<sup>114</sup>

9.87 Periodic detention was abolished—and ICOs were introduced—on the recommendation of the NSW Sentencing Council in October 2010. The Council recommended the abolition of periodic detention because:

- periodic detention had a limited geographic availability, as it could only be imposed on offenders who lived close enough to travel to and from a periodic detention centre;<sup>115</sup>
- it used resources inefficiently, as periodic detention centres were not used every day of the week;<sup>116</sup>
- case management did not exist in any meaningful way for periodic detainees;<sup>117</sup>
- periodic detention had little rehabilitative content, due to the difficulty of offering intervention programs and treatment to offenders who were only under Corrective Services NSW supervision for two days per week, often over short periods; and
- there was a relatively high incidence of non-compliance.<sup>118</sup>

9.88 Despite these difficulties, some submissions supported reintroducing periodic detention;<sup>119</sup> and others submitted that reintroduction should be considered.<sup>120</sup> These stakeholders considered that periodic detention usefully combined a punitive element that reflected deterrence and denunciation while keeping offenders in the community. The sentence was also available to more offenders than ICOs, as there were fewer requirements likely to cause an offender to be unsuitable for periodic detention.

9.89 The stakeholders who supported periodic detention suggested that the sentence could be given a rehabilitative aspect. Legal Aid NSW and the Shopfront Youth Legal Centre proposed that, on the five days out of custody, offenders could be supervised by Corrective Services NSW and possibly directed to participate in intervention programs.<sup>121</sup> The NSW Young Lawyers Criminal Law Committee submitted that the second community work stage of the sentence could also involve programs and educational activities.<sup>122</sup>

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114. NSW Sentencing Council, *Review of Periodic Detention*, Report (2007) 24-25.

115. NSW Sentencing Council, *Review of Periodic Detention*, Report (2007) 56.

116. NSW Sentencing Council, *Review of Periodic Detention*, Report (2007) 203

117. NSW Sentencing Council, *Review of Periodic Detention*, Report (2007) 117.

118. NSW Sentencing Council, *Review of Periodic Detention*, Report (2007) 115-118.

119. Law Society of NSW, *Submission SE16*, 11; NSW Bar Association, *Submission SE27*, 10; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 15.

120. The Shopfront Youth Legal Centre, *Submission SE28*, 5; Legal Aid NSW, *Submission SE31*, 16; The Public Defenders, *Submission SE24*, 13.

121. Legal Aid NSW, *Submission SE31*, 17; The Shopfront Youth Legal Centre, *Submission SE28*, 6.

122. NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 16.



- 9.90 Some submissions opposed the reintroduction of periodic detention.<sup>123</sup> The Probation and Parole Officers' Association of NSW submitted that it was a high cost program that could not be established across NSW and that home detention was the preferable alternative.<sup>124</sup> Corrective Services NSW submitted that periodic detention had "various limitations and impracticalities", including limited geographical reach and high and inflexible administration costs.<sup>125</sup>

### Our view

- 9.91 We agree that it may be possible to create a version of periodic detention that had a greater rehabilitative content. However, we do not support its reintroduction. The reasons advanced by the NSW Sentencing Council for its abolition are persuasive. Periodic detention could never be made available state-wide without a hugely disproportionate investment in constructing and staffing additional periodic detention centres. Even in metropolitan areas, the costs of administering periodic detention, which are directed to maintaining the periodic detention facility rather than the needs of the offender, are high compared to home detention and ICOs.<sup>126</sup> The introduction of reforms to the existing models for home detention and ICOs, or the introduction of the proposed CDO in their place, constitute a more effective use of scarce resources.

#### **Recommendation 9.7: Periodic detention**

Periodic detention should not be reintroduced.

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123. NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 8; NSW Police Force, *Submission SE32*, 10; Corrective Services NSW, *Submission SE52*, 16; Probation and Parole Officers' Association of NSW, *Submission SE49*, 11.

124. Probation and Parole Officers' Association of NSW, *Submission SE49*, 11.

125. Corrective Services NSW, *Submission SE52*, 16.

126. Corrective Services NSW, *Submission SE52*, 16.



## 10. Suspended sentences

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### In brief

Suspended sentences are a conceptually and practically flawed sentencing option that can be both too lenient (if the bond is not breached) and too severe (if the bond is breached). They should be abolished and replaced with our proposed community detention order (CDO). If the CDO is not introduced and suspended sentences are retained, we recommend three changes to improve their operation and minimise the problems they cause.

<b>Background</b> .....	<b>222</b>
History .....	222
The form of the sentence.....	222
Revocation .....	224
Use of suspended sentences .....	224
Effectiveness of suspended sentences .....	226
<b>Should suspended sentences be retained?</b> .....	<b>226</b>
Advantages of suspended sentences.....	226
Problems with suspended sentences .....	227
Our view .....	229
<b>Possible areas for reform if suspended sentences are retained</b> .....	<b>230</b>
Limiting the offences for which suspended sentences should be available .....	231
Our view.....	231
Maximum duration of the sentence.....	231
Our view.....	232
Partial suspension .....	232
Our view.....	233
Conditions attached to the bond.....	233
Our view.....	234
Bond length .....	235
Our view.....	236
Breach and revocation process .....	236
The statutory test .....	238
Order to be made on revocation .....	239
Jurisdiction to deal with the breach of the bond.....	239

- 10.1 In this chapter we consider whether courts should continue to have the power to suspend the execution of sentences of imprisonment, and if so whether that power should be modified in any way.
- 10.2 We recommend some reforms to the operation of suspended sentences which represent the minimum changes that we consider necessary for their improved operation. However, our preferred approach is that suspended sentences be abolished in favour of a single new community detention order (CDO), which would replace home detention, intensive correction orders (ICOs) and suspended sentences.

## Background

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### History

- 10.3 Until 1974, suspended sentences could be imposed under the *Crimes Act 1900* (NSW).<sup>1</sup> In 1974 that power was removed following a report of the NSW Criminal Law Committee, in which it said:

We are convinced that the “common law bond” system of dealing with convicted persons is superior in many ways to the suspended sentence. The present s 558, even though it applied only to first offenders, frequently has a harsher operation than does a “common law bond”, and is much less flexible in its provisions respecting breaches of recognizance.<sup>2</sup>

- 10.4 We recommended the reintroduction of suspended sentences in 1996 in our Report 79 on sentencing, on the basis that they served a useful purpose in the case of serious offences where there were strong mitigating circumstances.<sup>3</sup> Section 12 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA) implemented this recommendation.

- 10.5 In the second reading speech to the introduction of the Bill for CSPA, the Attorney General observed:

The primary purpose of suspended sentences is to denote the seriousness of the offence and the consequences of re-offending, whilst at the same time providing an opportunity, by good behaviour, to avoid the consequences. Their impact on the offender is, however, weightier than that of a bond.<sup>4</sup>

### The form of the sentence

- 10.6 Under s 12 of the CSPA, a court that imposes a term of imprisonment of two years or less may suspend the execution of the sentence on the condition that the offender enters into a good behaviour bond. The sentence of imprisonment then hangs over the offender until the end of the term of the bond. If the court revokes the bond due to a breach, the sentence of imprisonment descends on the offender.<sup>5</sup> The court does not set a commencement date for the sentence of imprisonment or non-parole period unless the bond is revoked.<sup>6</sup>
- 10.7 There are three steps involved in the imposition of a suspended sentence:<sup>7</sup>

- first, a determination that no sentence other than imprisonment is appropriate;

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1. *Crimes Act 1900* (NSW) s 558-562.  
2. NSW, Criminal Law Committee, *Report of the Criminal Law Committee on Proposed Amendments to the Criminal Law and Procedure* (1973) 19.  
3. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [4.22].  
4. NSW, *Parliamentary Debates*, Legislative Assembly, 28 October 1999, 2326.  
5. Unless the court orders the offender to serve the term of imprisonment either in home detention or subject to an intensive correction order: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 99(2)-(3).  
6. *R v Tolley* [2004] NSWCCA 165 [26]; *R v JW* [2010] NSWCCA 49; 77 NSWLR 7 [218].  
7. *Douar v R* [2005] NSWCCA 455 [70]-[72]; *Amado v R* [2011] NSWCCA 197 [5].

- secondly, a determination of the appropriate term of that sentence, without considering the manner in which it is to be served; and
- thirdly, if the term is not more than two years, a determination whether to suspend its execution.

In some decisions the first two steps have been combined.<sup>8</sup>

- 10.8 The order of these steps is important as the court is not permitted to reduce the length of the sentence, that would otherwise be appropriate, to two years or less in order to permit its suspension.<sup>9</sup> The court is also not permitted to increase the length of a sentence of imprisonment that would otherwise be appropriate to compensate for any perceived leniency arising from suspension of its execution.<sup>10</sup>
- 10.9 As from July 2003, it is the “whole of the sentence” that can be suspended. Previously an order for partial suspension was available,<sup>11</sup> as still continues to be the case where an offender is convicted of a federal offence.<sup>12</sup> Suspended sentences are available in NSW for all offences and all types of offenders.
- 10.10 Although s 12 is contained in the CSPA under the heading “non-custodial alternatives”, it remains a sentence of imprisonment, the service of which is suspended until a breach of the bond results in its revocation. It is generally considered less severe than full-time imprisonment, home detention and an ICO in the sentencing hierarchy and as more severe than a non-custodial bond or community service order (CSO).<sup>13</sup>
- 10.11 A sentence of imprisonment cannot be suspended if the offender is serving another sentence of imprisonment, including the parole period for that sentence.<sup>14</sup> It appears that a suspended sentence can be imposed and a sentence of imprisonment then imposed for a second offence,<sup>15</sup> although commonly the second offence will constitute a breach of the bond for the suspended sentence and lead to its revocation.
- 10.12 The bond attached to the suspended sentence of imprisonment automatically includes conditions that require the offender to be of good behaviour and appear before the court if called upon to do so at any time during the term of the bond. The court can specify additional conditions, including those requiring the offender to submit to supervision from Corrective Services NSW or participate in an intervention

8. *Dinsdale v The Queen* (2000) HCA 54; 202 CLR 321 [79]; *R v Zamagias* [2002] NSWCCA 17 [25]-[29].

9. *R v Ryan* [2006] NSWCCA 394; 167 A Crim R 241 [2].

10. *R v Zamagias* [2002] NSWCCA 17 [26]; *R v Stephen* [2003] NSWCCA 377 [23] in the context of periodic detention but equally applicable in the present context. In cases where a term of imprisonment is imposed and suspension would not be appropriate due to the objective seriousness of the offence, the court may still impose a suspended sentence in exceptional circumstances to recognise extreme hardship to third parties that would arise if full-time imprisonment was imposed: *R v Macleod* [2013] NSWCCA 108 [43], [54].

11. *R v Gamgee* [2001] NSWCCA 251; 51 NSWLR 707 [15].

12. *Crimes Act 1914* (Cth) s 20(1)(b).

13. *R v JCE* [2000] NSWCCA 498; 120 A Crim R 18 [16].

14. *R v Edigarov* [2001] NSWCCA 436; 125 A Crim R 551 [27]-[32].

15. *R v Finnie* [2005] NSWCCA 533 [81]-[83].

program and to comply with any intervention plan arising out of the program.<sup>16</sup> The court cannot add a condition requiring the offender to perform community service work or to make any payment, whether in the nature of a fine or compensation or otherwise.<sup>17</sup>

## Revocation

- 10.13 The Court *must* revoke a s 12 bond upon breach unless it is satisfied that the offender's failure to comply with its conditions was "trivial in nature",<sup>18</sup> or that there are "good reasons for excusing the failure".<sup>19</sup> This is a narrower discretion than the court has in relation to a breach of a s 9 bond.<sup>20</sup> These strict provisions are intended to ensure that suspended sentences remain a serious custodial sentence.<sup>21</sup> Justice Howie observed in *DPP v Cooke* in this respect:

There is nothing more likely to bring suspended sentences into disrepute than the failure of courts to act where there has been a clear breach of the conditions of the bond by which the offender avoided being sent to prison. Notwithstanding what has been stated about the reality of the punishment involved in a suspended sentence, if offenders do not treat the obligations imposed upon them by the bond seriously and if courts are not rigorous in revoking the bond upon breach in the usual case, both offenders and the public in general will treat them as being nothing more than a legal fiction designed to allow an offender to escape the punishment that he or she rightly deserved.<sup>22</sup>

- 10.14 When the s 12 bond is revoked, the sentence of imprisonment descends on the offender. The court can order that it be served by way of full-time imprisonment, home detention or an ICO.

## Use of suspended sentences

- 10.15 In 2012, approximately 5% of offenders sentenced in the Local, District and Supreme Courts received a suspended sentence as their principal penalty. This proportion has been fairly stable since 2003, although the use of suspended sentences appears to have been increasing in the higher courts. In 2003, 14.04% of offenders in the higher courts (412 people) received a suspended sentence as their principal penalty but by 2012 this had increased to 17.8% (498 people). On average, over half of the suspended sentences imposed in the Local Court have supervision attached as a condition of the bond (2531 in 2012, as against 1937 unsupervised), compared to about two-thirds of suspended sentences imposed in the higher courts (313 in 2012, and 185 unsupervised).<sup>23</sup> The average length of the

16. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95A(1).

17. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95(c).

18. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 98(3)(a).

19. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 98(3)(b).

20. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 98(2).

21. *DPP v Burrow* [2004] NSWSC 433 [23]; *R v Nicholson* [2010] NSWCCA 80 [16].

22. *DPP v Cooke* [2007] NSWCA 2; 168 A Crim R 379 [23].

23. NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics* (2000-2012). See also NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) [4.33]-[4.43].

suspended sentences imposed in 2011 was 9.7 months in the Local Court and 18.8 months in the higher courts.<sup>24</sup>

- 10.16 Suspended sentences were reintroduced, in 2000, as an alternative to full-time imprisonment. They were intended to reduce the number of offenders receiving full-time custodial sentences.<sup>25</sup> However, recent research has found that the introduction of suspended sentences has had a negligible effect on full-time imprisonment rates. Instead, suspended sentences have had a net widening effect, as they have tended to displace lesser, non-custodial penalties like CSOs.<sup>26</sup> The authors of a 2010 NSW Bureau of Crime Statistics and Research (BOCSAR) study observed that “in a significant proportion of cases, judges and magistrates appear to have imposed a suspended sentence where they would not have imposed a prison sentence in the absence of this sentencing alternative”. This, they observed, had “potentially serious implications for imprisonment rates over the longer term”.<sup>27</sup>
- 10.17 The NSW Sentencing Council’s 2011 background report on suspended sentences analysed the cases that were finalised in the NSW Local Court by way of a suspended sentence in 2008. The analysis found that:
- of the 3020 offenders who had been given suspended sentences with supervision, 73.3% had not reoffended during the period of suspension; and
  - of the 2757 offenders who had been given unsupervised suspended sentences, 77.9% had not reoffended during the period of suspension.<sup>28</sup>

The slightly higher breach rate for supervised suspended sentences is likely to be a result of the higher risk characteristics of offenders subject to a supervision condition and the higher likelihood of breaches being detected when the sentence is supervised.

- 10.18 Of the 824 NSW offenders who were dealt with by a court for breach of a s 12 bond in 2012, 488 (59%) were required to serve the sentence by way of full-time imprisonment. Another 173 offenders (21%) were ordered to serve the sentence by way of an ICO or home detention, while 129 (16%) offenders remained subject to the suspended sentence as a result of the court declining to revoke the bond.<sup>29</sup>

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

25. L Snowball, *The Profile of Offenders Receiving Suspended Sentences*, Bureau Brief No 63 (NSW Bureau of Crime Statistics and Research, 2011) 1.

26. G Brignell and P Poletti, *Suspended Sentences in NSW*, Sentencing Trends and Issues No 29 (Judicial Commission of NSW, 2003); P Poletti and S Vignaendra, *Trends in the Use of Section 12 Suspended Sentences*, Sentencing Trends and Issues No 34 (Judicial Commission of NSW, 2005); L McInnis and C Jones, *Trends in the Use of Suspended Sentences in NSW*, Bureau Brief No 47 (NSW Bureau of Crime Statistics and Research, 2010).

27. L McInnis and C Jones, *Trends in the Use of Suspended Sentences in NSW*, Bureau Brief No 47, (NSW Bureau of Crime Statistics and Research, 2010) 4.

28. NSW Sentencing Council, *Suspended Sentences*, Report (2011) [3.15]-[3.17].

29. NSW Bureau of Crime Statistics and Research (unpublished data, ref: kg13-11321). A small number of cases are not included due to data issues.

## Effectiveness of suspended sentences

- 10.19 There is mixed evidence concerning the impact of suspended sentences on reoffending. What evidence there is does not suggest the effect is strong.
- 10.20 The best evidence of effectiveness is a BOCSAR study which found that, after controlling for other variables, offenders on suspended sentences of one year or more were somewhat less likely to reoffend than offenders serving a suspended sentence of less than one year.<sup>30</sup> Of the offenders who received a suspended sentence in the NSW Local, District or Supreme Courts between 2006 and 2008, 52.3% of those with a suspended sentence of one year or more were reported to have reoffended after three years, compared to 58.1% of the offenders serving a suspended sentence of less than one year.
- 10.21 By contrast, research analysing recidivism rates for offenders sentenced to a suspended sentence compared to offenders who received other sentences, has suggested that suspended sentences (either supervised or unsupervised) are no more effective in preventing reoffending than a supervised good behaviour bond.<sup>31</sup>
- 10.22 This research suggested, additionally, that there is no significant difference in recidivism rates for offenders who received a suspended sentence compared to those who received a full-time custodial sentence, as long as they had not served a prior prison sentence.<sup>32</sup>

## Should suspended sentences be retained?

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- 10.23 Suspended sentences have always been controversial. In this part of the chapter we consider the arguments that have been raised for and against their retention as a sentencing option.

## Advantages of suspended sentences

- 10.24 There was considerable support for the retention of suspended sentences among those who made submissions to the NSW Sentencing Council<sup>33</sup> and to this reference,<sup>34</sup> largely on the basis that they provide a useful option for the court to

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30. S Poynton, D Weatherburn and L Bartels, "Good Behaviour Bonds and Reoffending: The Effect of Bond Length" (2013) *Australian and New Zealand Journal of Criminology* (in press); see also S Poynton, "Bonds, Suspended Sentences and Re-offending: Does the Length of the Order Matter?" (Applied Research in Crime and Criminal Justice conference, 2013).
31. D Weatherburn and L Bartels, "The Recidivism of Offenders Given Suspended Sentences in New South Wales, Australia" (2008) 48 *British Journal of Criminology* 667, 677.
32. R Lulham, D Weatherburn and L Bartels, *The Recidivism of Offenders Given Suspended Sentences: A Comparison With Full-Time Imprisonment*, Crime and Justice Bulletin No 136 (NSW Bureau of Crime Statistics and Research, 2009) 10.
33. NSW Sentencing Council, *Suspended Sentences*, Report (2011) [4.3]-[4.7].
34. Homeless Persons' Legal Service, *Preliminary submission PSE7*, 5-6; Law Society of NSW, *Submission SE16*, 8; Children's Court of NSW, *Submission SE18*, 10; NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 7; Police Association of NSW, *Submission SE21*, 15; The Public Defenders, *Submission SE24*, 11; NSW Bar Association, *Submission SE27*, 7; Shopfront Youth Legal Centre, *Submission SE28*, 4; Public Interest Advocacy Centre, *Submission SE29*, 11; Legal Aid NSW, *Submission SE31*, 13; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 13;



avoid imposing full-time imprisonment. Stakeholders pointed out that suspended sentences can provide a “last chance” for an offender to avoid full-time custody, and that if a s 12 bond is breached and revoked a court may still avoid imposing full-time custody by ordering the offender to serve the term of imprisonment by way of home detention or an ICO. Some submissions also noted that suspended sentences are an important option as there is no requirement for a suitability assessment or evaluation by Corrective Services NSW before the sentence is imposed. All offenders are therefore eligible for a suspended sentence as a last chance to avoid full-time custody, even if they are not eligible for home detention or an ICO.<sup>35</sup>

- 10.25 In its background report on suspended sentences, the NSW Sentencing Council noted that, while there were indications that the public regarded the sentence as unduly lenient, only a very small proportion of the judicial officers surveyed considered the option not to be useful.<sup>36</sup> Justice Howie, in *R v Zamagias*, recognised that it has a proper role to play as an intermediate sentencing option:

Further, a sentencing court must approach the imposition of a sentence that is suspended on the basis that it can be a sufficiently severe form of punishment to act as a deterrent to both the general public and the particular offender. Of course it must also be recognised that the fact that the execution of the sentence is to be immediately suspended will deprive the punishment of much of its effectiveness in this regard because it is a significantly more lenient penalty than any other sentence of imprisonment. The question of whether any particular sentencing alternative, including a suspended sentence, is an appropriate or adequate form of punishment must be considered on a case by case basis, having regard to the nature of the offence committed, the objective seriousness of the criminality involved, the need for general or specific deterrence and the subjective circumstances of the offender.<sup>37</sup>

## Problems with suspended sentences

- 10.26 The key problem with suspended sentences is that they are conceptually flawed. They require a court to decide that no sentence other than imprisonment is appropriate, yet no imprisonment in fact takes place unless the s 12 bond is breached and revoked. Justice Basten has observed in this respect:

[i]f, after earnestly making the determinations required at steps one and two [outlined at para 10.7, above], the Court, as step three, then suspends the execution of the sentence, so the person is under no immediate liability to serve the specified period in custody, the result appears incongruous. Even such an appearance tends to undermine the purposes of sentencing set out in s 3A of the [CSPA]. The incongruity, however, is not merely an appearance, but a reality.<sup>38</sup>

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NSW, Department of Family and Community Services, *Submission SE48*, 7; Corrective Services NSW, *Submission SE52*, 13.

35. See Chapter 9 on problems with eligibility for home detention and ICOs.

36. NSW Sentencing Council, *Suspended Sentences*, Report (2011) [4.3]-[4.16].

37. *R v Zamagias* [2002] NSWCCA 17 [32]; *R v Remilton* [2001] NSWCCA 546 [11]; *R v Foster* [2001] NSWCCA 215 [36]-[38].

38. *Amado v R* [2011] NSWCCA 197 [5]; see also Victoria, Sentencing Advisory Council, *Suspended Sentences*, Final Report - Part 1 (2006) xv.

- 10.27 This conceptual flaw has important practical implications, as the sentence can be at once too lenient and too harsh. Particularly in cases of unsupervised suspended sentences, an offender may not be required to do anything under the sentence other than not reoffend. In these cases, if the s 12 bond is not breached, the sentence appears to be too lenient for an offence for which no penalty other than imprisonment was appropriate. However, if the s 12 bond is breached—even if only one day before the end of the sentence—and the bond is revoked, the offender must serve the full term of imprisonment.<sup>39</sup> This can be an unduly harsh result.
- 10.28 Submissions were also concerned that suspended sentences were being used in circumstances giving rise to net widening where, for example, CSOs or s 9 bonds would have been appropriate.<sup>40</sup> Quantitative research undertaken by BOCSAR supports this anecdotal evidence of net widening.<sup>41</sup> The fact that no suitability assessment is required before imposition of a suspended sentence may mean, in some cases, that they are imposed when the offender has little chance of not reoffending or of complying with any other obligations under the sentence. In other words, despite supervision and other conditions that may be attached to the bond, imposition of a suspended sentence can mean that an offender is set up to fail.
- 10.29 The Chief Magistrate's submission<sup>42</sup> argued strongly against retaining suspended sentences on the basis of:
- the procedural difficulties that arise in setting suspended sentences;
  - the perception that suspended sentences are lenient;
  - the "inherent paradox" of the process, in which a finding is first required that there is no appropriate sentence other than imprisonment but a decision is then made to suspend the sentence;
  - the evidence that suspended sentences result in net widening; and
  - the fact that suspended sentences can be imposed in situations where the person is unlikely to be able to comply, increasing the risk of that person being imprisoned.
- 10.30 In this respect the Chief Magistrate commented:

It is concerning to observe that in sentencing proceedings before the Local Court, the use of suspended sentences is often advocated in circumstances where there is a strong likelihood of a breach that will lead to the sentence being served in custody. For instance, if an offender is vulnerable to breaching an ICO

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39. Shopfront Youth Legal Centre, *Suspended sentences - submission to the NSW Sentencing Council* (August 2011).

40. The Shopfront Youth Legal Centre, *Submission SE28*, 4; Legal Aid NSW, *Submission SE31*, 13; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 13; G Henson, *Preliminary submission PSE5*, 7; *Submission SE22*, 5; Police Association of NSW, *Submission SE21*, 16. See also the NSW Sentencing Council, *Suspended Sentences*, Report (2011) [3.34]-[3.38], [4.17]-[4.22] which identified the risk of net widening through the use of suspended sentences as an issue.

41. See above at para [10.16].

42. G Henson, *Submission SE22*, 5; G Henson, *Preliminary submission PSE5*, 6.

insofar as it precludes use of illegal drugs, they may be equally vulnerable to such a breach of a suspended sentence.<sup>43</sup>

- 10.31 The NSW Police Force agreed with the Chief Magistrate's views.<sup>44</sup>

### Our view

- 10.32 It is evident that there is strong support among some stakeholders for the retention of suspended sentences as an intermediate sentencing option, subject to certain modifications. In the context of the current system, we can see that suspended sentences have a role to play provided that they are used appropriately, for example in encouraging guilty pleas, in denouncing the offending conduct and in giving an offender a "last chance" of avoiding immediate imprisonment. In the context of the current system suspended sentences have a particular relevance for those cases where an offender is not able to access home detention, an ICO or a CSO. A suspended sentence may be the last chance for such an offender to avoid a term in full-time custody. Finally, if used appropriately, they can serve a useful purpose in reducing the prison population and costs of imprisonment.
- 10.33 Victoria legislated in May 2013 for the staged abolition of suspended sentences, on the explicit basis that "jail should mean jail".<sup>45</sup> In a general way, this reflects the conceptual problem with suspended sentences that we have already discussed. However, it does not address the question of whether suspended sentences should be preserved subject to some changes, or whether they could be replaced by another form of community-based custodial sentence.
- 10.34 In Chapter 11, we propose a new flexible form of custodial community-based order—the CDO—that is intended to build on the components of home detention and ICOs and to extend their availability to a wider cohort of offenders. Our view is that this new order can also occupy the same space as suspended sentences.
- 10.35 The CDO would require offenders, at the minimum, to submit to supervision if Corrective Services NSW deems this necessary. The CDO would also provide a mechanism for intensive rehabilitative intervention in an offender's life where this is required. By providing the support offenders need to not reoffend, it would avoid setting them up to fail. The offender's experience of the CDO would be more intrusive and less lenient than an unsupervised suspended sentence. The capacity for community work to be included as part of the CDO would also ensure that, even if it was not breached, such a CDO would be more intensive and punitive than a suspended sentence.
- 10.36 At the same time, the flexible design of the breach and revocation procedures proposed are intended to ensure that breach of a CDO does not automatically have an unduly harsh result for an offender. Where a CDO is revoked, only the remainder

43. G Henson, *Submission SE22*, 5

44. NSW Police Force, *Submission SE32*, 8.

45. *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic); Victoria, *Parliamentary Debates*, Legislative Assembly, 17 April 2013, 1259.

of the term would have to be served by an offender in full-time custody, rather than the full term which must be served by an offender upon revocation of the bond attached to a suspended sentence. The offender would also be able to apply for reinstatement of the CDO, which would result in release from custody and a resumption of community supervision.

- 10.37 It is true that abolishing suspended sentences in favour of the CDO would remove an extra step for some offenders between a non-custodial sentence and full-time custody. Currently, some offenders, particularly those offenders with complex needs who have difficulty complying with sentencing orders, who breach a non-custodial sentence, can become subject to a suspended sentence and then, upon breach and revocation of the s 12 bond, receive an additional “last chance” to avoid full-time imprisonment in the form of home detention or an ICO.
- 10.38 If our recommendations were implemented, the CDO would be the only step between a non-custodial sentence and full-time imprisonment. However, we do not believe that this is a valid objection to our recommendation to abolish suspended sentences. The framework for intensive rehabilitative support as part of a CDO is better able to cater for those offenders who would be likely to breach the bond attaching to a suspended sentence. For this reason, we do not agree that suspended sentences should be retained alongside the new CDO.
- 10.39 The evidence that suspended sentences have caused net widening has also convinced us that the availability of suspended sentences has not served the interests of offenders with complex needs who have difficulty complying with sentencing orders.
- 10.40 Should suspended sentences be abolished, we envisage that the majority of offenders who currently receive a suspended sentence (whether supervised or unsupervised) would instead receive a CDO. However, given the net widening effect of suspended sentences, it might be expected that at least some of these offenders would receive a community correction order; the strengthened non-custodial order we have proposed in place of CSOs and s 9 bonds.<sup>46</sup>

**Recommendation 10.1: Abolition of suspended sentences**

- (1) If a revised Crimes (Sentencing) Act makes a community detention order (CDO) available as a sentencing option, suspended sentences should be abolished.
- (2) If suspended sentences are not abolished, they should be amended as set out in Recommendations 10.2-10.5.

**Possible areas for reform if suspended sentences are retained**

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- 10.41 In this section we consider possible areas for reform if suspended sentences are retained as a sentencing option.

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46. Chapter 13.

### Limiting the offences for which suspended sentences should be available

- 10.42 Victoria legislated in 2011 to prohibit the use of suspended sentences for “serious” and “significant” offences.<sup>47</sup> The NSW Sentencing Council considered introducing a limit of this kind. However, it received limited support for such an initiative.<sup>48</sup>
- 10.43 Although one stakeholder submitted that suspended sentences should not be available for homicide, it is not likely that such an order would ever be made (save in cases of infanticide).<sup>49</sup>

#### *Our view*

- 10.44 If suspended sentences are retained, we do not consider it necessary to introduce any exclusions based on the type of offence for which the offender is being sentenced. Offence-specific exclusions can be too broad. Moreover, the retention of a two year limit on the length of the sentence of imprisonment for which suspension is permissible effectively limits its use to offences at the lower level of seriousness.

### Maximum duration of the sentence

- 10.45 The NSW Sentencing Council noted in its background report that 43% of the respondents to its survey supported an increase in the available term,<sup>50</sup> while 5% of the respondents supported a reduction of the two year period.<sup>51</sup>
- 10.46 The *Crimes (Sentencing) Act 2005* (ACT) does not place any restriction on the period for which a suspended sentence can be imposed.<sup>52</sup> Nor does the Tasmanian or South Australian legislation.<sup>53</sup> Some other jurisdictions have a limit of three years<sup>54</sup> or five years.<sup>55</sup> The *Crimes Act 1914* (Cth) does not employ the suspended sentence terminology, but the same result is achieved through the mechanism of a recognisance release order.<sup>56</sup> It does not specify any limit on the duration of the sentence for which the recognisance release order mechanism is available.
- 10.47 Several stakeholders submitted that the maximum duration of the suspended sentence should be increased.<sup>57</sup> The Law Society of NSW proposed an increase to

47. *Sentencing Act 1991* (Vic) s 27(2B). This amendment followed from Victoria, Sentencing Advisory Council, *Suspended Sentences*, Final Report – Part 1 (2006) rec 5.

48. NSW Sentencing Council, *Suspended Sentences*, Report (2011) [4.52]-[4.54]; a precedent for a limitation of this kind previously existed in England and Wales under the *Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 118.

49. Homicide Victims' Support Group, *Submission SE23*, 11.

50. NSW Sentencing Council, *Suspended Sentences*, Report (2011) [4.43].

51. NSW Sentencing Council, *Suspended Sentences*, Report (2011) [4.43], [4.46].

52. *Crime (Sentencing) Act 2005* (ACT) s 12.

53. *Criminal Law (Sentencing) Act 1988* (SA) s 38; *Sentencing Act 1997* (Tas) s 24.

54. *Sentencing Act 1991* (Vic) s 27(2).

55. *Penalties and Sentences Act 1992* (Qld) s 144(1); *Sentencing Act* (NT) s 40(1).

56. *Crimes Act 1914* (Cth) s 19AC, s 20(1)(b).

57. Law Society of NSW, *Submission SE16*, 9, 11; The Public Defenders, *Submission SE24*, 11; The Shopfront Youth Legal Centre, *Submission SE28*, 4; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 13.

three years in the District Court, remaining at two years in the Local Court,<sup>58</sup> a reform that two other stakeholders said should be considered.<sup>59</sup>

### *Our view*

- 10.48 On balance we have concluded that the permissible duration of a suspended sentence of imprisonment should remain at two years. However this is subject to permitting the bond to exceed the length of sentence by up to 12 months.
- 10.49 In our view increasing the permitted length of a term of imprisonment that could be suspended could have undesirable consequences. For example it could result in its use for cases whose seriousness requires a more positive intervention and more serious level of punishment.

### Partial suspension

- 10.50 In *R v Gamgee*<sup>60</sup> it was held that, as originally enacted, s 12 of the CSPA permitted the court to suspend the execution of either the initial part of the sentence or the concluding period. In 2003, an amendment precluded this option.<sup>61</sup> In the second reading speech the Attorney General explained this on the basis that suspended sentences were difficult to administer, and that requiring an offender to go into custody after an initial period of suspension without breach risked causing unnecessary hardship.<sup>62</sup>
- 10.51 A majority of the submissions received by the NSW Sentencing Council opposed the reintroduction of partially suspended sentences,<sup>63</sup> although 72% of the respondents to its survey favoured their return.<sup>64</sup>
- 10.52 Four stakeholders opposed reintroducing partially suspended sentences,<sup>65</sup> while three others supported reintroducing them.<sup>66</sup> In particular, the Probation and Parole Officers' Association of NSW favoured partial suspension on the basis that "it could be useful when dealing with cases where a period of custody on remand has occurred and the court seeks to include such a custodial component in the sentence".<sup>67</sup>

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58. Law Society of NSW, *Submission SE16*, 9, 11. The Public Defenders also said it should be increased to 3 years: *Submission SE24*, 11.

59. The Shopfront Youth Legal Centre, *Submission SE28*, 4; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 13.

60. *R v Gamgee* [2001] NSWCCA 251; 51 NSWLR 707.

61. *Crimes Legislation Amendment Act 2003* (NSW).

62. NSW, *Parliamentary Debates*, Legislative Council, 25 June 2003, 2039, 2041.

63. NSW Sentencing Council, *Suspended Sentences*, Report (2011) [4.32].

64. NSW Sentencing Council, *Suspended Sentences*, Report (2011) [4.35].

65. Law Society of NSW, *Submission SE16*, 9; NSW, Office of the Director of Public Prosecutions, *Submission SE31*, 14; NSW Police Force, *Submission SE32*, 9; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 14.

66. Legal Aid NSW, *Submission SE31*, 14; Probation and Parole Officers' Association of NSW, *Submission SE49*, 9; Corrective Services NSW, *Submission SE52*, 14.

67. Probation and Parole Officers' Association of NSW, *Submission SE49*, 9.

- 10.53 We note that the partial suspension of a sentence of imprisonment is possible under the legislation in force in most of the other Australian jurisdictions,<sup>68</sup> although in some states there is a limit on the length of a sentence that can be the subject of a partial suspension.

### *Our view*

- 10.54 We do not favour the reintroduction of a power to impose a partial suspension of a sentence of imprisonment, particularly if the suspension related to the initial portion of the sentence. It would be unduly harsh to require a person who had complied with a bond to go into custody for the balance of the sentence. This would make little sense and it would almost certainly be counter-productive to rehabilitation.
- 10.55 Otherwise it is doubtful if a partial suspension could achieve anything that could not be achieved by a sentence containing a non-parole period and a period of potential release on parole. Where the sentencing court is taking into account a period of pre-sentence custody, it may note this in its reasons for imposing a suspended sentence and in fixing its duration.

### **Recommendation 10.2: No partial suspended sentences**

If suspended sentences are retained, a revised Crimes (Sentencing) Act should not allow the partial suspension of sentences of imprisonment.

### Conditions attached to the bond

- 10.56 There was limited support in the submissions received by the NSW Sentencing Council for any revision of the conditions that can be attached to the s 12 bond. Currently the bond must contain conditions to the effect that the offender will appear before the court if called on to do so, and to be of good behaviour, during the term of the bond.<sup>69</sup> It can contain such other conditions as are specified in the order by which the bond is imposed other than conditions requiring the person under the bond to perform community service work, or to make any payment, whether in the nature of a fine, compensation or otherwise.<sup>70</sup>
- 10.57 The *Crimes Act 1914* (Cth) and the *Crimes (Sentencing) Act 2005* (ACT) each permit a wide range of conditions to be imposed. The Commonwealth legislation permits conditions requiring the offender: to make reparation or restitution or pay compensation; to pay a pecuniary penalty; and/or to submit to supervision and to obey all reasonable directions of a supervisor.<sup>71</sup> The ACT legislation permits conditions requiring the offender: to perform community service; undertake a rehabilitation program; or comply with a reparation order,<sup>72</sup> as well as conditions

68. *Crimes (Sentencing) Act 2005* (ACT) s 12(2); *Sentencing Act 1991* (Vic) s 40(1); *Sentencing Act* (NT) s 40(2); *Sentencing Act 1997* (Tas) s 7(b); *Criminal Law (Sentencing) Act 1988* (SA) s 38(2a); *Penalties and Sentences Act 1992* (Qld) s 144(3).

69. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95(a)-(b).

70. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95(c).

71. *Crimes Act 1914* (Cth) s 20(1).

72. *Crime (Sentencing) Act 2005* (ACT) s 13(3).

requiring the offender to comply with any non-association or place restriction order and with any lawful directions of a corrections officer. The legislation in force in most other Australian jurisdictions provides a wide discretion, although there are individual differences.<sup>73</sup>

### *Our view*

- 10.58 Our view is that the requirement of the s 12 bond that the offender “be of good behaviour” should be replaced by an automatic requirement “not to commit a further offence punishable by imprisonment”. This change aims to give greater specificity to the requirement in place of the somewhat vague expression “to be of good behaviour”. Some other Australian jurisdictions express the obligation in similar terms.<sup>74</sup>
- 10.59 We consider it appropriate, in the case of a s 12 bond, to confine the condition to one requiring the offender not to commit a further offence *punishable by imprisonment* because of the consequences of a breach. Otherwise, subject to s 98(3), revocation and imprisonment could arise if the offender commits a fine-only offence for which imprisonment would not otherwise be an available punishment. If an offence is sufficiently serious to lead to the revocation of a s 12 bond, it should be punishable by imprisonment. Where it is clearly desirable for a fine-only offence to amount to a breach of the bond, the prosecution could request the court to attach an appropriate additional condition. For example, if a court imposes a suspended sentence for a high range prescribed concentration of alcohol (PCA) offence, it could attach a condition that the person must not commit any future PCA offence (including a fine-only low range PCA offence).<sup>75</sup>
- 10.60 If suspended sentences are retained, the bond should automatically include a condition that the offender must appear in court if called upon to do so. The court should continue to have the power to attach additional conditions relating to matters such as supervision of the offender by Corrective Services NSW and attendance at intervention and rehabilitation programs.
- 10.61 We are not persuaded that it is desirable to include in the bond (or order) conditions requiring the offender to perform community service work, or to make any payment in the nature of a fine, reparation, compensation or otherwise.
- 10.62 In the case of offenders with means, a condition of the latter kind could present an undesirable impression that the person was able to “buy” his or her way out of a sentence that would have otherwise involved full-time custody. In the case of other offenders it might encourage them to reoffend in order to acquire the money to comply with the condition. Otherwise, if reparation or compensation has already been voluntarily given, it might be taken into account as providing some evidence of

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73. See, eg, *Sentencing Act* (NT) s 40(2); *Sentencing Act 1997* (Tas) s 24(2); *Criminal Law (Sentencing) Act 1988* (SA) s 42.

74. *Penalties and Sentences Act 1992* (Qld) s 144(5); *Sentencing Act* (NT) s 40; *Sentencing Act 1997* (Tas) s 24(1).

75. For example, *Road Transport Act 2013* (NSW) s 110(3).



remorse and reflected in the sentence, consistently with our approach to that circumstance in Chapter 4.

### Recommendation 10.3: Conditions on suspended sentences

If suspended sentences are retained, a revised Crimes (Sentencing) Act should provide that the bond with which an offender must comply when a sentence of imprisonment is suspended:

- (1) must contain conditions that, during the term of the bond (or order) the offender must:
  - (a) appear before the court if called on to do so; and
  - (b) not commit a further offence punishable by imprisonment;
- (2) must not contain conditions requiring the offender to:
  - (a) perform community service work; or
  - (b) make any payment, whether in the nature of a fine, compensation or otherwise;
- (3) may contain other conditions, including a condition that the offender must:
  - (a) submit to Corrective Services NSW supervision and comply with all reasonable directions; or
  - (b) engage in rehabilitation, intervention or other programs as specified in the order or as directed by Corrective Services NSW.

### Bond length

- 10.63 A significant majority of the respondents to the NSW Sentencing Council survey supported severance of the connection between the operational period of the bond (or order) and the term of the sentence.<sup>76</sup> This would allow for an increase in the period during which the offender would be required to be of good behaviour, (or, as we propose, “not to commit a further offence punishable by imprisonment”) and to comply with the other conditions of the bond, without increasing the term of imprisonment that would be activated upon revocation of the bond.
- 10.64 Some stakeholders similarly submitted to this review that the length of the bond should not be tied to the length of the suspended sentence.<sup>77</sup> However, there was not universal support for such a change,<sup>78</sup> and Corrective Services NSW raised concerns about resource implications.<sup>79</sup>

76. NSW Sentencing Council, *Suspended Sentences*, Report (2011) [4.51].

77. NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 7; The Public Defenders, *Submission SE24*, 11; Police Association of NSW, *Submission SE21*, 15; NSW Bar Association, *Submission SE27*, 8; The Shopfront Youth Legal Centre, *Submission SE28*, Attachment, 4; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 13; Probation and Parole Officers' Association of NSW, *Submission SE49*, 9.

78. Law Society of NSW, *Submission SE16*, 9; Legal Aid NSW, *Submission SE31*, 14; NSW Police, *Submission SE32*, 8.

79. Corrective Services NSW, *Submission SE52*, 14.

- 10.65 The ACT and Queensland sentencing legislation permits the court to impose a bond for a period that exceeds the period of the sentence which is suspended.<sup>80</sup>

### *Our view*

- 10.66 We see merit in the proposal for breaking the link between the sentence of imprisonment and the length of the bond. It would allow the court to extend the effective period during which the offender would be subject to the “good behaviour” requirement and hence to the risk of revocation of the bond. However, in order to avoid the sentence being unduly harsh in its operation, it would seem appropriate to limit the permissible length of the bond by requiring that it not exceed the term of imprisonment by more than 12 months.

#### **Recommendation 10.4: Bond length for suspended sentences**

If suspended sentences are retained, a revised Crimes (Sentencing) Act should provide that the length of the bond can exceed the term of imprisonment that is suspended by up to 12 months.

### **Breach and revocation process**

- 10.67 There was support in the submissions received by the NSW Sentencing Council, and in the survey responses, for allowing courts’ greater flexibility when dealing with breaches of the bond attached to a suspended sentence.<sup>81</sup> They included extending the term of the bond or varying its terms rather than revocation,<sup>82</sup> allowing credit for street time,<sup>83</sup> deleting the words “trivial in nature”,<sup>84</sup> and giving additional content to the “good reasons to excuse a breach” exception.<sup>85</sup> Similar concerns were raised in the submissions to our review. For example, the Public Interest Advocacy Centre submitted that the courts should have more options when responding to breaches of the bond, particularly in the case of homeless people who will often be found to be unsuitable for ICOs and home detention, leaving full time imprisonment as the only alternative if the bond is revoked.<sup>86</sup> The Shopfront Youth Legal Centre raised a concern that “the consequences of revocation may greatly outweigh the severity of the breach”.<sup>87</sup> Other stakeholders submitted that breach for non-compliance should not automatically lead to revocation,<sup>88</sup> suggesting that courts should have the power instead to extend the term of the bond or to vary its terms.<sup>89</sup>

80. *Crime (Sentencing) Act 2005* (ACT) s 12(3); *Penalties and Sentences Act 1992* (Qld) s 144.

81. Currently they are confined to activating the sentence by requiring the offender to enter into full-time custody or serve the sentence by way of home detention or an ICO.

82. NSW Sentencing Council, *Suspended Sentences*, Report (2011) [4.66]-[4.68].

83. NSW Sentencing Council, *Suspended Sentences*, Report (2011) [4.74].

84. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 98(3)(a).

85. NSW Sentencing Council, *Suspended Sentences*, Report (2011) [4.67].

86. Public Interest Advocacy Centre, *Submission SE29*, 11.

87. The Shopfront Youth Legal Centre, *Submission SE28*, QP 6 attachment, 3.

88. Law Society of NSW, *Submission SE16*, 10; The Public Defenders, *Submission SE24*, 12.

89. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) 93-94 [4.23], cited in The Shopfront Youth Legal Centre, *Submission SE28*, QP 6 attachment, 4.

- 10.68 The Shopfront Youth Legal Centre, Legal Aid NSW and Corrective Services NSW each suggested that the term of imprisonment imposed on revocation should be reduced according to the amount of time during which the offender had complied with the bond,<sup>90</sup> a possibility that the Chief Magistrate also raised.<sup>91</sup>
- 10.69 Some submissions identified problems in the wording of the breach provision. The Law Society and the Office of the Director of Public Prosecutions submitted that the exception to revocation where the breach was found to be “trivial in nature” should be deleted,<sup>92</sup> as it is unduly restrictive and uncertain in its reach. Encouragement was also given for providing greater content to the expression “good reasons for excusing the breach”. For example, the Law Society said that the court should be allowed to take into account:
- matters that go to the nature of the breach;
  - the consequences of the breach;
  - matters preceding and post-dating the breach;
  - the circumstances of the offender; and
  - any other subjective matters of relevance to a decision whether to revoke the bond bringing the suspension to an end.<sup>93</sup>
- 10.70 In some other Australian jurisdictions, a breach of the bond (or equivalent order) will require the court to reinstate the sentence of imprisonment that was suspended, subject to an exception that will apply if it would be “unjust to do so”.<sup>94</sup>
- 10.71 The legislation in place in other jurisdictions varies considerably in relation to the extent to which, upon proof of a breach, the court can make an order other than one that requires the offender to serve the sentence of imprisonment. For example, in Western Australia the court can impose a fine of up to \$6000 or substitute a new suspension period,<sup>95</sup> while in Queensland and the Northern Territory the court can extend the operational period.<sup>96</sup> In Tasmania where the breach involves the commission of a new offence the court can activate the whole or part of the sentence, impose a substituted sentence or vary the conditions of the suspension including extending its term,<sup>97</sup> while in the ACT the court is able to resentence the

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90. The Shopfront Youth Legal Centre, *Submission SE28*, QP 6 attachment, 3; Legal Aid NSW, *Submission SE31*, 14; Corrective Services NSW, *Submission SE52*, 14.

91. G Henson, *Preliminary submission PSE5*, 8.

92. Law Society of NSW, *Submission SE16*, 10; NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 7.

93. Law Society of NSW, *Submission SE16*, 10.

94. *Sentencing Act 1995* (WA) s 80(1)(a), (3); *Sentencing Act 1997* (Tas) s 4C; and see *Penalties and Sentences Act 1992* (Qld) s 80(1)(b), (2), (3) which provides an extensive statement of the matters to which the court must have regard in determining whether it would be “unjust” to order the offender to serve the sentence of imprisonment.

95. *Sentencing Act 1995* (WA) s 80(1)(c)-(d).

96. *Penalties and Sentences Act 1992* (Qld) s 147(1)(a); *Sentencing Act* (NT) s 43(5)(e).

97. *Sentencing Act 1997* (Tas) s 4C.

offender,<sup>98</sup> in lieu of requiring the offender to serve the sentence that was initially imposed, bringing into play the full range of available sentencing options.

- 10.72 Two issues arise for consideration. The first concerns the adequacy of the current statutory test (contained in s 98(3) of the CSPA) relating to the court's decision whether or not to revoke the s 12 bond, thereby terminating the suspension. The second concerns the order that the court can make on revocation of the bond.<sup>99</sup>

### *The statutory test*

- 10.73 In considering whether there are "good reasons" for excusing the offender's failure to comply with the conditions of the bond, the current focus is on the circumstances in which the failure occurred and on any extenuating circumstances that explain its occurrence. The subjective circumstances of the offender at the time of the breach proceedings, the consequences of the revocation, and the sentence imposed for the further offence are immaterial.<sup>100</sup>

- 10.74 We accept that there is a lack of precision in framing an exception from the requirement to revoke a s 12 bond on the ground that the offender's failure to comply with the conditions of the bond was "trivial in nature".<sup>101</sup> Whether a breach qualifies as "trivial" involves a value judgement.

- 10.75 In our view, any imprecision or uncertainty in expression could be overcome by deleting the "trivial in nature" exception and providing greater content to the "good reasons" test. This would allow the court greater scope in the exercise of its discretion than that permitted by the decision in *DPP v Cooke*.<sup>102</sup> The NSW Police Force questioned the desirability of removing the "trivial in nature" qualification on the basis that this would undermine the decision in *Cooke*. However, the court's observations in *Cooke* were predicated on the assumption that the breach was a "clear breach" of the relevant condition.

- 10.76 Our proposal should not alter the courts' current practice in relation to breaches caused by further offending. However, when the court is determining whether there are good reasons for excusing a non-reoffending breach, the court should have regard to:

- the extent to which the breach was deliberate or accidental;
- any extenuating circumstances that explain the breach;
- any prior breaches; and
- the extent to which the offender has otherwise complied with the bond's conditions,

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98. *Crimes (Sentence Administration) Act 2005* (ACT) s 110(2).

99. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 98(3).

100. *DPP v Cooke* [2007] NSWCA 2; 168 A Crim R 379; *DPP v Cooke* [2007] NSWCCA 184.

101. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 98(3).

102. Noted above at para [10.13].

such that it would be unjust to revoke the bond.

- 10.77 We expect that a court would interpret these factors appropriately. We do not envisage that the presence of one factor would necessarily mean that the offender would avoid revocation of the bond, particularly if an “accidental” breach arose from mere forgetfulness. Instead, the four factors would be matters that the court could take into account when dealing with a breach. They would allow the court more scope to make an appropriate decision about revocation on a case-by-case basis.

#### *Order to be made on revocation*

- 10.78 Currently if a s 12 bond is revoked the suspended sentence of imprisonment descends and must be served in full-time custody, unless the court that revokes the order directs that it be served by way of home detention or an ICO.<sup>103</sup>
- 10.79 It has been observed<sup>104</sup> that the automatic activation of the original sentence of imprisonment on the revocation of a s 12 bond may not be compatible with the United Nations Standard Minimum Rule for Non-Custodial Measures (the Tokyo Rules), which provides that “the failure of a non-custodial measure should not automatically lead to the imposition of a custodial measure” and:

In the event of a modification or revocation of [a] non-custodial measure, the competent authority shall attempt to establish a suitable alternative non-custodial measure. A sentence of imprisonment may be imposed only in the absence of other suitable alternatives.<sup>105</sup>

- 10.80 Justice Howie’s reminder in *DPP v Cooke* is of importance on this point:

The suspended sentence is not an alternative to a bond and should not be treated as such. The suspension of the sentence of imprisonment was an act of mercy designed to assist the offender’s rehabilitation or for some other purpose to benefit the offender on the understanding that, if the offender did not fulfil the conditions of the bond, the sentence would be imposed. Therefore, generally speaking, there can be no unfairness in requiring the offender to serve the sentence when the obligations under the bond have been breached.<sup>106</sup>

- 10.81 In our view this essence of the Tokyo Rules is respected because a suspended sentence is a “custodial measure” and, on revocation, the court can impose a sentence of home detention or an ICO (if these options are preserved).

#### *Jurisdiction to deal with the breach of the bond*

- 10.82 Section 98(1) of the CSPA currently provides that, if an offender has breached a good behaviour bond (including a s 12 bond attached to a suspended sentence), the court that made the bond, any other court of like jurisdiction or, with the offender’s consent, any higher court, may deal with the breach of the bond. This

103. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 99(2).

104. L Bartels and S Rice, “Reviewing Reforms to the Law of Suspended Sentences in the Australian Capital Territory” (2012) 14 *Flinders Law Journal* 253, 259-262.

105. United Nations Standard Minimum Rule for Non-Custodial Measures, rule 14.3. For the purpose of these Rules a suspended or deferred sentence is treated as a non-custodial measure: rule 8.

106. *DPP v Cooke* [2007] NSWCA 2; 168 A Crim R 379 [24].

provision has created practical difficulties where a bond is breached through commission of a fresh offence and the court dealing with the fresh offence is not of like jurisdiction to the court that imposed the bond.<sup>107</sup>

- 10.83 Our view is that where breach of a s 12 bond made in the Local Court arises due to the commission of a new offence which is being dealt with in a higher court, the higher court should have jurisdiction to deal with the breach without the offender's consent. Where a higher court has imposed a suspended sentence after an appeal from the Local Court and the bond is breached through commission of a new offence being dealt with in the Local Court, the Local Court should be empowered to deal with the breach of the bond. Ultimately, this would ensure that wherever possible all of the offender's current matters are dealt with in the one court at the same time. This would minimise delays.

#### **Recommendation 10.5: Breach and revocation of suspended sentences**

If suspended sentences are retained, a revised Crimes (Sentencing) Act should provide:

- (1) If an offender breaches the bond attached to the suspended sentence of imprisonment, the court must revoke the bond unless it is satisfied that there are good reasons for excusing the offender's breach.
- (2) Where the offender breaches the bond by committing an offence punishable by imprisonment, the court should, in determining whether there are good reasons to excuse the breach, have regard to whether there were sufficient extenuating circumstances surrounding its commission that would make it unjust to revoke the bond.
- (3) Where the breach of the bond arises because the offender failed to comply with a condition of the bond other than by committing a further offence punishable by imprisonment, the court should, in determining whether there are good reasons to excuse the breach, have regard to:
  - (a) the extent to which the breach was deliberate or accidental;
  - (b) any extenuating circumstances that explain the breach;
  - (c) any prior breaches; and
  - (d) the extent to which the offender has otherwise complied with the conditions of the bond,such that it would be unjust to revoke the bond.
- (4) A court may, on revoking the bond, order that the sentence of imprisonment be served by way of an intensive correction order or home detention.
- (5) Section 99(1)(c), (2)-(5) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should be replicated.

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107. See further para [12.47]-[12.52].

- (6) Where a higher court deals with an offence that constitutes a breach of a bond attached to a suspended sentence that was imposed in the Local Court the higher court should have jurisdiction to deal with the breach of the bond without the offender's consent.
- (7) Where a bond attached to a suspended sentence that was imposed in a higher court after appeal from the Local Court, is breached by a further offence that is dealt with in the Local Court, the Local Court should also be able to deal with the breach of the bond.





## 11. A new community detention order

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### In brief

We propose a new flexible community-based custodial order to replace home detention, intensive correction orders and suspended sentences. We have provisionally named the new order a “community detention order” (CDO). The CDO combines and strengthens the main features of home detention and intensive correction orders in a way that should increase the number of offenders who are able to serve their terms of imprisonment in the community and help to address the causes of their offending.

<b>A new combined order would be simpler, more transparent, and more flexible.....</b>	<b>243</b>
<b>The new order should be custodial .....</b>	<b>246</b>
Our view .....	247
<b>Recommended features of a new community detention order .....</b>	<b>248</b>
Automatic and optional requirements of the CDO .....	249
Additional discretionary conditions .....	250
Maximum length of the order and duration of the requirements .....	251
The work and intervention requirement .....	252
<i>Activities to occupy the CDO work and intervention hours.....</i>	<i>253</i>
<i>Number of CDO work and intervention hours .....</i>	<i>254</i>
Target group for the CDO.....	255
Consent and criminal record.....	256
<b>The assessment process .....</b>	<b>258</b>
<b>Administering the work and intervention requirement of the CDO .....</b>	<b>260</b>
<b>Combination with other sentences.....</b>	<b>261</b>
<b>Variation, breach and revocation.....</b>	<b>261</b>

- 11.1 In Chapters 9 and 10, we proposed reforms to the existing custodial community-based sentences of home detention, intensive correction orders (ICOs) and suspended sentences. In this chapter, we outline our preferred approach: a new combination order to replace all three sentence types. The new order—which we have named the community detention order (CDO)—draws on features of the existing orders but also aims to provide a strengthened and more flexible sentencing option that will better reflect the objectives of sentencing.

### A new combined order would be simpler, more transparent, and more flexible

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- 11.2 There are substantial similarities between home detention and ICOs. An offender serving a sentence of home detention can be directed to perform community service work by their supervisor for up to 20 hours per week. Home detainees can leave their home at any time, with the permission of their supervisor, to maintain employment or to engage in any other approved activity. Home detainees must

undertake personal development and intervention programs if directed by their supervisor.<sup>1</sup> With community work, rehabilitative programs and a significant proportion of time spent out of the home, a sentence of home detention can start to look very much like an ICO.

- 11.3 Similarly, offenders serving an ICO can be required to wear an electronic monitoring device at the direction of their supervisor, and can also be subject to a curfew or a direction to remain at home at certain times. There is no limit on the proportion of the offenders' time that the supervisor can direct that they spend in the home.<sup>2</sup> Administered in this way, an ICO can become indistinguishable from home detention.
- 11.4 Overlap between the two sentences is one reason for recommending their abolition and combination into a new hybrid order. A single order encompassing a range of conditions set by the court would increase transparency and prevent the current situation where an offender's experience of home detention or an ICO may become disproportionately onerous or lenient without any input by the court.
- 11.5 In recommending a new combination sentence, we have also been influenced by the lack of intensiveness that has arisen in the administration of the ICO in practice. There are currently five designated levels of supervision for offenders subject to an ICO. The majority of offenders start at level 3, which involves fortnightly contact with a supervisor. Low risk offenders may quickly progress to levels 4 and 5, which involve monthly or six-weekly contact. Only if an offender is high risk is he or she placed at level 1 or 2, where supervision is weekly or greater and can involve electronic monitoring and curfews.<sup>3</sup>
- 11.6 Corrective Services NSW administers ICOs in this way because its policy is to direct scarce resources (including intensive supervision) to those offenders who are assessed as medium to high risk of reoffending. Similarly, rehabilitative programs and personal development activities are reserved for medium to high risk offenders where they can have greater effect in reducing reoffending.<sup>4</sup>
- 11.7 The administrative and resource allocation policies of Corrective Services NSW are entirely understandable. Its budget is limited and it must direct its resources to where they are likely to be most useful. The problem is not with those policies but, as the NSW Bureau of Crime Statistics and Research confirms,<sup>5</sup> instead with the fact that the population of offenders who can successfully pass the suitability assessment barrier due to the mandatory and inflexible community work requirement, are not the offenders who were originally anticipated as suitable subjects for ICOs. The result is that most offenders serving ICOs present a low risk of reoffending and have only limited need of rehabilitative or intervention programs.

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1. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 200.

2. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 175.

3. NSW Sentencing Council, *Sentencing Trends and Practices*, Annual Report 2011 (2012) 18; Corrective Services NSW, *Submission SE52*, 11-12.

4. Community Corrections Mt Druitt, *Consultation SEC18*.

5. C Ringland, *Sentencing Outcomes for Those Assessed for Intensive Correction Order Suitability*, Bureau Brief No 86 (NSW Bureau of Crime Statistics and Research, 2013).

Although offenders with no rehabilitation needs are still legally eligible for an ICO, it is a sentence that was intended to promote intensive rehabilitation.<sup>6</sup>

- 11.8 The intensiveness of the ICO is important given the order's status as a custodial sentence. An ICO is supposed to be a form of imprisonment and an offender's experience should match that expectation.<sup>7</sup> Several submissions drew attention to the need to ensure that this is the case,<sup>8</sup> and to the fact that currently the offenders who are most likely to benefit from an alternative to full-time imprisonment with a strong rehabilitation element are those who are least likely to be assessed as suitable for an ICO.<sup>9</sup>
- 11.9 Suspended sentences have proved to be an unsatisfactory sentencing option in several ways. The community often perceives them as inappropriately lenient. Their force depends on the assumed deterrent effect that arises from the consequences of breach. However, suspended sentences, and particularly unsupervised suspended sentences, do not otherwise address the causes of an offender's criminal behaviour during the period of suspension. A CDO can more appropriately address these needs.
- 11.10 The new CDO would aim to provide a sentencing option for a range of offenders, including medium to high risk offenders with complex needs who would benefit from intensive administration of the sentence. The CDO would incorporate a remodelled suitability assessment which would help to bridge the divide between the court's concept of the sentence and the way Corrective Services NSW administers it in practice.
- 11.11 In formulating the CDO, we considered but rejected the Victorian omnibus model, which would amalgamate suspended sentences, home detention, ICOs and community service orders (CSOs) into a single order. Victoria has replaced all intermediate sentencing options with a single non-custodial community correction order. Submissions were mixed on the idea of conflating all NSW community-based custodial and non-custodial options into a single omnibus order.<sup>10</sup> A single order would encompass a very large range of cases of varying seriousness, and this could have the effect of decreasing the transparency and consistency that are necessary in sentencing. As Legal Aid NSW pointed out in its submission, an

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6. NSW Sentencing Council, *Review of Periodic Detention*, Report (2007) 159; NSW, *Parliamentary Debates*, Legislative Council, 22 June 2010, 24426; *R v Pogson* [2012] NSWCCA 225.

7. Commonwealth Director of Public Prosecutions, *Submission SE26*, 1-2.

8. G Henson, *Submission SE35*, 1; G Henson, *Submission SE22*, 4-5; Probation and Parole Officers' Association of NSW, *Submission SE49*, 4; Commonwealth Director of Public Prosecutions, *Submission SE26*, 1-2; Local Court practitioners, *Consultation SEC9*.

9. The Shopfront Youth Legal Centre, *Submission SE28*, 3; Public Interest Advocacy Centre, *Submission SE29*, 8; Law Society of NSW, *Submission SE16*, 8; NSW Sentencing Council, *Sentencing Trends and Practices*, Annual Report 2011 (2012), 31.

10. In favour of an omnibus order: NSW Police Force, *Submission SE45*, 1; The Public Defenders, *Submission SE36*, 1; NSW, Department of Family and Community Services, *Submission SE44*, 3. Against: NSW Bar Association, *Submission SE46*, 1; Legal Aid NSW, *Submission SE50*, 2; The Shopfront Youth Legal Centre, *Submission SE37*, 2; Public Interest Advocacy Centre, *Submission SE42*, 3; Law Society of NSW, *Submission SE43*, 1; Corrective Services NSW, *Submission SE55*, 2.

omnibus order would give “insufficient guidance to courts on how to measure the overall severity of the sentence”.<sup>11</sup>

**Recommendation 11.1: A new community detention order (CDO)**

In place of home detention, intensive correction orders and suspended sentences, a revised Crimes (Sentencing) Act should provide for a new community detention order (CDO).

## The new order should be custodial

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- 11.12 In light of criticisms of the current system where a custodial sentence is effectively served in the community, we have considered whether the proposed CDO should be custodial or non-custodial in nature. The main practical ramification of this question concerns which authority deals with breach: the court or the State Parole Authority (SPA). If it is to be a custodial order, the length of the CDO would be set as a term of imprisonment to be served in the community. SPA would deal with revocation.<sup>12</sup> If the order is revoked, then subject to any provision for its reinstatement, the offender would be required to enter into full-time imprisonment for the remainder of the term. If the CDO is to be a non-custodial order, then breaches would be dealt with by the court which would have the power to vary the CDO or to revoke it and resentence the offender for the original offence, as is currently the procedure for breaches of CSOs and good behaviour bonds. Breach and revocation of the order would not necessarily involve entry into full-time custody.
- 11.13 Western Australia’s intensive supervision order is a non-custodial order and breaches are taken back to the court for resentencing. The intensive supervision order is however a less severe order than the proposed CDO.<sup>13</sup> The Victorian community correction order is also non-custodial but it is potentially more severe in its application.<sup>14</sup> The Queensland intensive correction order constitutes a custodial order. The court deals with breaches of the order but if it revokes the order, the offender will serve the remainder of the term in full-time custody.<sup>15</sup>

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11. Legal Aid NSW, *Submission SE50*, 2.

12. Another practical ramification is the interaction of the CDO with the spent convictions regime contained in the *Criminal Records Act 1991* (NSW) s 7. Currently, all ICOs may become spent. By contrast, convictions that result in a prison sentence served by way of home detention for more than 6 months may not become spent. This issue is outside the scope of this report.

13. *Sentencing Act 1995* (WA) s 74-75. The maximum duration of an intensive supervision order is 2 years and the curfew requirement may only be for a maximum of 6 months. Offenders can only be required to perform up to 240 hours of community service work.

14. *Sentencing Act 1991* (Vic) s 38, 48C, 48I. The length of a community correction order is capped at 2 years in the Magistrates Court but in the higher courts, it can be up to the maximum term of imprisonment available for the offence. Offenders can be required to perform up to 600 hours of community service work and a curfew condition can apply for the full term of the order, though it may only require an offender to remain at home for a maximum of 12 hours each day.

15. *Penalties and Sentences Act 1992* (Qld) s 112, 114, 127. Offenders can be directed to participate in up to 12 hours of community service work and/or programs per week. There is no curfew component.

- 11.14 Home detention is available in the Northern Territory as part of a suspended sentence and is “custodial” in nature.<sup>16</sup> If the home detention conditions are breached, the offender will be required to serve the sentence in full-time custody.<sup>17</sup>
- 11.15 New Zealand classifies home detention as a “custodial sentence”, although it is not tied to a term of imprisonment.<sup>18</sup> A sentence of home detention may be made for up to 12 months but the court can also impose post-detention (parole-like) conditions for up to a further 12 months.<sup>19</sup> Breach of the sentence is an offence that results in the imposition of further penalties.<sup>20</sup>
- 11.16 One advantage of treating the CDO as a custodial sentence is that the consequences for breach are known. If the CDO is revoked, the offender will be imprisoned until the CDO is reinstated or the sentence expires. This is likely to have a deterrent effect that would enhance compliance with the conditions of the order. Additionally it enables SPA to manage the breach, revocation and reinstatement procedures to ensure a consistent and rapid response to breach.<sup>21</sup>
- 11.17 On the other hand, creating a CDO as a non-custodial sentence would better reflect its status as a community-based sentence. This would also allow the courts to deal with breaches and exercise a power to resentence that would be wider than any discretion exercisable by SPA.

### Our view

- 11.18 Our view is that the CDO should be classified as a custodial sentence; that is, the CDO should be a way of serving a term of imprisonment in the community in the same way as home detention, an ICO, or a suspended sentence under the current system. This marks it out as a serious sentence with potentially significant consequences for breach, combined with a positive focus on achieving rehabilitation and addressing recidivism.
- 11.19 As a custodial order it is more workable in practice. Stakeholders have emphasised that courts would have significant difficulty in dealing, in a timely way, with CDO revocation applications. SPA is able to deal with matters of this kind much more quickly than the courts and is able to respond at short notice for urgent matters. It has gained considerable experience, as well as an established procedure for dealing with disputed breaches, not only for those who have breached conditions following release on parole, but also for offenders subject to home detention, periodic detention and ICOs. As a single body dealing with breach and revocation it

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16. *Sentencing Act* (NT) s 44. A court which imposes a term of imprisonment of any length may suspend the sentence and order that the offender serve a period of home detention of up to 12 months.

17. *Sentencing Act* (NT) s 48.

18. *Sentencing Act 2002* (NZ) s 15A. A court may only sentence an offender to home detention if it would otherwise have imposed a short sentence of imprisonment.

19. *Sentencing Act 2002* (NZ) s 80A, 80N.

20. *Sentencing Act 2002* (NZ) s 80S.

21. As proposed by the NSW Sentencing Council in relation to ICOs: NSW Sentencing Council, *Review of Periodic Detention*, Report (2007) 167.

is more likely to bring about consistency and certainty of approach than would otherwise be the case.

- 11.20 Upon revocation of the order by SPA, the offender should be required to serve the remainder of the term in full-time custody (subject to a provision allowing an application to SPA for reinstatement of the CDO).<sup>22</sup> This ensures that the consequences of revocation are consistent and known to the offender. It may also provide an important incentive for offender compliance.

#### **Recommendation 11.2: Custodial status of the CDO**

In a revised Crimes (Sentencing) Act:

- (1) The CDO should be constituted as a custodial order; that is, as a way of serving a term of imprisonment in the community.
- (2) The State Parole Authority (SPA) should deal with breaches, revocations and reinstatement applications for CDOs.
- (3) Revocation of a CDO should lead to the offender serving the remainder of the sentence in full-time custody unless SPA reinstates the CDO.

### **Recommended features of a new community detention order**

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- 11.21 The proposed CDO would include key features of home detention and ICOs (including the improvements recommended in Chapter 9) and some aspects of supervised suspended sentences, but would also:
- be more transparent;
  - be more flexible and available for a broader range of offenders;
  - provide a truly rehabilitative and therapeutic response linked to a needs and risk assessment; and
  - be proportionate, in the sense of being sufficiently intensive in the light of the gravity of the offence and subjective circumstances of the offender.
- 11.22 Although no submissions to this review specifically suggested the new order in the form that it is proposed, nearly all were supportive of the introduction of more flexible redesigned sentencing options.<sup>23</sup> Stakeholders have had the opportunity to provide input on the proposal and their input is reflected in this chapter.

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22. Discussed further below, para [11.66]-[11.72].

23. Corrective Services NSW, *Submission SE52*, 15-16; *Submission SE55*, 1-2; Law Society of NSW, *Submission SE16*, 16; Probation and Parole Officers' Association of NSW, *Submission SE49*, 11; Children's Court of NSW, *Submission SE18*, 13; *Submission SE40*, 2; Public Interest Advocacy Centre, *Submission SE42*, 3; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 20; The Shopfront Youth Legal Centre, *Submission SE28*, 5; Legal Aid NSW, *Submission SE31*, 22; NSW, Department of Family and Community Services, *Submission SE44*, 2; NSW Bar Association, *Submission SE46*, 1; Jumbunna Indigenous House of Learning, *Submission SE54*, 9.

- 11.23 The proposed CDO draws on aspects of Western Australia’s intensive supervision order, and Victoria’s community correction order.<sup>24</sup> It also draws on a proposal put forward by Corrective Services NSW for a multi-agency intensive community order that would provide a rehabilitative option for offenders with complex needs.<sup>25</sup>

### Automatic and optional requirements of the CDO

- 11.24 The proposed order would only be made after a conviction is recorded and the offender is favourably assessed by Corrective Services NSW for a CDO. Consistent with our approach in Recommendation 9.2, no offences other than domestic violence offences against a likely co-resident, murder and serious child sexual assault offences with a maximum penalty of more than five years should exclude an offender from a CDO.
- 11.25 The CDO would carry certain automatic conditions to be specified in the legislation that would apply unless specifically excluded by the court when imposing the sentence. These automatic conditions should require the offender:
- not to commit an offence;<sup>26</sup>
  - to submit to supervision from Corrective Services NSW as required;
  - to report to Corrective Services NSW as directed by a supervisor or assigned officer;
  - to reside at approved premises;
  - to obey a supervisor’s (or assigned officer’s) reasonable directions;
  - to submit to electronic monitoring if directed by a supervisor or assigned officer;
  - to accept home visits by the supervisor or assigned officer; and
  - to submit to searches and alcohol and drug testing.
- 11.26 When imposing the sentence the court would also have the option to specify one or both of the following as requirements:
- a home detention requirement; and/or
  - a work and intervention requirement.
- 11.27 An offender serving a term of imprisonment by way of a CDO could thus be subject to:
- a supervision only CDO (where no conditions are added to the automatic conditions);

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24. See *Sentencing Act 1995* (WA) pt 10; *Sentencing Act 1991* (Vic) pt 3A.

25. Corrective Services NSW, *Submission SE52*, 2, 15-16.

26. See para [12.37]-[12.40] for a discussion of our reasons for preferring this formulation to a requirement to “be of good behaviour”.

- a CDO with supervision and either a home detention requirement or a work and intervention requirement; or
- a CDO with supervision, home detention *and* a work and intervention requirement.

We use the term “intervention” in its general meaning, and not in the specific sense of the “intervention programs” declared under the *Criminal Procedure Regulation 2010* (NSW).<sup>27</sup>

11.28 Corrective Services NSW proposed that, as part of the automatic conditions of a CDO, offenders should also be required to participate in activities and attend intervention programs as directed by a Corrective Services NSW supervisor. Currently, both home detention and ICOs permit the imposition of similar requirements.<sup>28</sup>

11.29 Our view is that the operation of the CDO would be more transparent if offenders were only required to participate in development activities and programs by order of the court either as:

- part of the work and intervention requirement; or
- where the court specifies, as an additional condition that the offender must participate in activities and programs at the direction of the supervisor.

If the offender has specific needs in this area, Corrective Services NSW should identify it as part of the assessment report. The court would take this into account when deciding whether the offender should be subject to a work and intervention requirement or an additional condition as part of the order.<sup>29</sup>

11.30 This recognises the reality that, although rehabilitative in nature, intervention programs curtail an offenders’ freedom to direct their own time and activities, and consequently have a punitive element. As such, the extent to which an offender will be required to participate in intervention programs or activities should be apparent to the court to allow the formulation of a proportionate sentence.

### Additional discretionary conditions

11.31 The court should also be empowered to attach additional conditions to the CDO at its discretion where these are considered necessary in order to reduce the likelihood of reoffending. These additional conditions could relate to alcohol and drug abstinence, place and non-association restrictions, curfews, or any other matter, except payment of a fine or other monetary sum.<sup>30</sup> A court may currently impose conditions of this kind as part of a sentence of home detention, an ICO or a

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27. See ch 16.

28. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 175(p), cl 200(r).

29. See below at para [11.40].

30. The payment of money should not be a condition of the order, as defendants of limited means may be disadvantaged by being in breach of the order if they cannot pay. We do however envisage that a CDO could be combined with a fine in certain circumstances, as failure to pay the fine would not amount to a breach of the order: see para [14.39]-[14.42].



suspended sentence.<sup>31</sup> Place and non-association restrictions could be subject to the same safeguards as apply to the existing non-association and place restriction ancillary orders.<sup>32</sup>

- 11.32 The length of these additional conditions could match the overall length of the order or be set separately to run for a specified period of time. If the assessment report indicated that an offender had intervention or rehabilitation needs but the court did not feel that a work and intervention requirement was appropriate,<sup>33</sup> it would still be able to attach an additional discretionary condition requiring the offender to participate in activities and attend intervention programs as directed by a supervisor.
- 11.33 Some stakeholders were concerned that additional conditions like curfews or non-association conditions may set an offender up for failure. Conditions relating to non-association may be particularly difficult for Aboriginal and Torres Strait Islander offenders. We accept the validity of this concern but the court should be well-placed to avoid imposing inappropriate conditions that would be likely to cause breaches of the order.

### Maximum length of the order and duration of the requirements

- 11.34 In line with the reforms to home detention and ICOs discussed in Chapter 9, we consider that the maximum length of the proposed CDO should be three years, or two years in the Local Court (or three years where the offender is sentenced for multiple offences). This is broadly consistent with our proposal to allow the bond attached to a suspended sentence (if suspended sentences are retained) to extend for 12 months beyond its permitted maximum term.
- 11.35 The automatic conditions that are part of a CDO should be in force for the full term of the order. Correctives Services NSW has raised some concerns about such a requirement, particularly if the offender would not benefit from further supervision. This was identified as a particular issue if the CDO is to effectively replace suspended sentences, having regard to recent experience of the number of unsupervised suspended sentences that are imposed. In 2011, 2214 offenders received an unsupervised suspended sentence as their principal penalty in the NSW adult courts.
- 11.36 Our response is that the automatic conditions should require the offender to *submit* to Corrective Services NSW supervision for the full term of the order but the

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31. There is no limit on the conditions that may be imposed as part of a suspended sentence except that they must not require community service or require the offender to make any payment: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95(c). Non-association and place restriction orders may be added to any sentence that is for an offence which is punishable by a term of imprisonment of 6 months or more: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17A. The court is able to attach any additional condition to an ICO or home detention order where these conditions are necessary to reduce the likelihood of reoffending: *Crimes (Administration of Sentences) Act 1999* (NSW) s 81, 103.

32. See para [20.27]-[20.48].

33. For example, if the activity or program which would benefit the offender (and which Corrective Services NSW identified in the assessment report) could not be measured in terms of hours. For more on formulating the work and intervention requirement in terms of hours, see para [11.40]-[11.50].

provisions should be drafted in such a way that Corrective Services NSW would not be obliged to supervise the offender. All offenders on CDOs would be required to submit to supervision, but Corrective Services NSW would be able to direct their supervision resources according to the risk assessment and needs of each offender.

- 11.37 The court should be able to set the length of the optional requirement(s) of a CDO and their start dates separately from the length of the order. For example, a court might impose a CDO with a total duration of two years and specify a home detention requirement for 12 months. The offender would be on home detention for 12 months and then be subject to the potential supervision of Corrective Services NSW and the other automatic conditions of the CDO for the remaining 12 months. Alternatively, an 18 month CDO might involve a one month work and intervention requirement during which the offender completes a residential drug treatment program, followed by an 11 month home detention requirement, and then 6 months of limited supervision under the automatic conditions of the order.
- 11.38 The duration of the conditions of Victoria's community correction order are governed in a similar way, through the mechanism of an "intensive compliance period". A court in Victoria may specify any period shorter than the total length of the order as the intensive compliance period, during which selected conditions of the order apply or must be completed.<sup>34</sup> Designing the CDO in the way suggested would give the court a large amount of flexibility to tailor the order to the individual offender, in light of the assessment report.
- 11.39 Under the proposed model, the court would not set a non-parole period when imposing a term of imprisonment to be served by way of a CDO. Instead, the court could choose to set the duration of the optional requirements such that a period of parole-like supervision was effectively created towards the end of the order, where the offender was subject only to the automatic conditions of the CDO (or such of them as it considered appropriate). The maximum total length of the core requirements should in our view be two years.

### The work and intervention requirement

- 11.40 The purpose of the work and intervention requirement would be to achieve an intensive intervention in the lives of offenders in order to impose an adequate punishment while addressing the causes of their offending. To achieve maximum flexibility, the single requirement should include the offender's participation in any combination of community service work, intervention programs, and other development and rehabilitative activities depending on the circumstances of the case. The work and intervention requirement would involve a set number of hours.

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34. *Sentencing Act 1991* (Vic) s 39.

*Activities to occupy the CDO work and intervention hours*

- 11.41 Like the existing work and development order (WDO) and similar to the current definition given to “community service work”,<sup>35</sup> it should be possible to satisfy the CDO hours through participation in community service work, medical or mental health treatment, education including literacy and numeracy skills, intervention programs, vocational or life skills courses, counselling, drug or alcohol treatment or any combination of these activities. Where appropriate, the earlier CDO hours could focus on those programs or activities that might assist in making the offender suitable for community service work, which could then form the focus of the later part of the sentence.
- 11.42 Corrective Services NSW has suggested that participation in community work should be kept separate from participation in intervention programs and other activities. Under its preferred model, the CDO hours would be satisfied by work only; while any required participation in other activities would not be measured in hours or subject to any time limit. This approach stems from an understanding of community service work as purely punitive and participation in programs and other development activities as purely rehabilitative. In support of this position, Corrective Services NSW noted that there may be practical difficulties in determining the number of hours occupied by activities such as study and medical treatment and in ensuring that offenders are properly completing these activities.
- 11.43 We do not agree that community service work and participation in programs serve entirely different ends. While compulsory unpaid work is certainly punitive it can also have a rehabilitative element, particularly if the offender is able to gain useful work experience to assist in seeking future employment. As discussed above,<sup>36</sup> our view is that a requirement to participate in programs does have a punitive element that sits alongside the rehabilitative nature of these activities. For this reason, our position is that it is appropriate for a range of activities, including both community service work and program participation, to be counted towards satisfaction of an “hours” requirement under the proposed CDO. Allowing a range of activities to satisfy an “hours” requirement will keep the CDO flexible and open to a range of offenders, including those with complex needs. It will also ensure that the court is aware of the likely level of intensity of the order at the time it is imposed.
- 11.44 We accept that Corrective Services NSW would need to develop a suitable procedure to determine the number of CDO hours which any one development or program activity should satisfy. This could be resolved by Corrective Services NSW being specifically empowered at its discretion to “deem” the number of hours which will be counted for any particular activity, or through regulations. It would also be necessary for Corrective Services NSW to develop a procedure to ensure that offenders are in fact attending and participating in non-work activities to the appropriate level. The existing WDO, which is administered by the State Debt Recovery Office as a fine enforcement option, allows offenders to satisfy required hours through a large range of activities. The arrangements that currently exist for

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

36. At para [11.28]-[11.30].

checking compliance with the WDO may assist Corrective Services NSW in administering the work and intervention requirement of the CDO.

- 11.45 Corrective Services NSW should be able to manage the mix of activities that an offender undertakes to satisfy the CDO hours, according to what is available and most appropriate. The court should be able to stipulate the activities to occupy some or all of the hours of the work and intervention requirement, but should only be able to specify an activity if the assessment report provided by Corrective Services NSW has indicated that the activity is available and suitable for the offender.

#### *Number of CDO work and intervention hours*

- 11.46 The precise details of the CDO may need to be further developed in consultation with Corrective Services NSW and other stakeholders. The detail we have proposed in this section is offered by way of example and is not intended to be a prescriptive statement.
- 11.47 The minimum number of CDO hours could be set at four hours multiplied by the number of weeks during which the requirement is to be in force. The maximum number of CDO hours permissible as part of the work and intervention requirement could be set at eight hours multiplied by the number of weeks during which the requirement is to be in force. For example, a court could choose to impose a work and intervention requirement of six months (26 weeks) duration, requiring an offender to complete 200 CDO hours during that time (an average of 7.7 hours per week). We have suggested four hours as the minimum and eight hours as the maximum on the advice of Corrective Services NSW in view of the difficulties it experiences in sourcing sufficient work for the current community work component of the ICO. As it pointed out, a reduction in the eight hour maximum or an increase in the number of community organisations and agencies able to offer work could increase the pool of offenders assessed as suitable for work and hence for a CDO.
- 11.48 As the maximum duration of the work and intervention requirement would be two years, the maximum number of CDO hours that an offender would be required to satisfy in accordance with the structure outlined above would be 832 (104 weeks multiplied by eight hours). In our view this is an appropriate maximum level, given the wide variety of activities that could be undertaken by an offender in order to satisfy these hours. Under current arrangements, an offender may be required to participate in up to 768 hours of community service work as part of a two year ICO and up to 1560 hours of community service work as part of an 18 month home detention sentence, as well as an unlimited number of program hours.
- 11.49 Due to the difficulties it sometimes experiences in arranging sufficient community service work, Corrective Services NSW submitted that the maximum number of CDO hours that may be satisfied through work should be 500. We accept this limit as a practical necessity. Therefore, the overall maximum number of CDO hours could be 832 with a 500 hours cap on work participation.
- 11.50 Corrective Services NSW should have a discretion to vary the intensity of the offender's participation in CDO hours, provided that all of the hours specified are

completed within the term of the requirement. For example, an offender who is required to complete 200 CDO hours within six months may in fact complete this requirement early in the sentence through a program of intensive drug treatment. This flexible model would allow the administration of the CDO to changes in the availability of work and programs over the term of the order and also adapt to any changes in an offender's personal circumstances, such as sickness or seasonal employment.<sup>37</sup>

### Target group for the CDO

- 11.51 The CDO should be available for a range of offenders, including those with limited rehabilitation needs. For offenders with limited program and intervention needs, the requirements of the order might focus more heavily on restrictions such as a curfew or a home detention requirement, or on work and intervention hours to be satisfied through the performance of community service work. With the work and intervention requirement formulated in the flexible way outlined above, a considerably larger proportion of offenders who may have workplace difficulties because of homelessness, mental health, cognitive impairment or substance dependency issues should be suitable for a CDO. In this respect we consider that the CDO could do what the ICO was intended to do, and fill the gap that currently exists in the spectrum of sentencing options for offenders with complex needs.
- 11.52 In the same way, the new CDO could go some way to meet the ongoing need to divert more Aboriginal and Torres Strait Islander offenders from custody. As we discuss in Chapter 17, Aboriginal and Torres Strait Islander imprisonment rates remain very much higher than rates for the overall population.<sup>38</sup> A new alternative to prison such as the CDO, which is designed to be as inclusive as possible, may go some way to redress this imbalance.<sup>39</sup>
- 11.53 Women offenders may also benefit from a more flexible CDO. In 2012, 31% of female offenders sentenced to a term of full-time imprisonment received a sentence of six months or less, compared to 27% of male offenders. The disparity is greater with sentences of one year or less: 73% of female offenders sentenced to a term of full-time imprisonment in 2012 received a head sentence of one year or less compared to 62% of male offenders.<sup>40</sup> A strengthened community-based custodial sentence with more options for intensive program delivery like the CDO could assist in diverting female offenders from these short sentences of imprisonment that allow no time for Corrective Services NSW to work with the offender.

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37. NSW Local Court, Dubbo, *Consultation SEC17*, raised the difficulties the current ICO requirement of 32 work hours per month can create for offenders with seasonal or fluctuating employment. An important advantage of a community sentence is frustrated if an offender loses paid employment due to the conditions of the order. See also Court support services, Dubbo, *Consultation SEC16*; Aboriginal Community Justice Group, Western Region, *Consultation SEC15*.

38. See also NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) figure 7.3.

39. Such an option was also supported by The Shopfront Youth Legal Centre, *Submission SE37*, 2-3; and NSW Bar Association, *Submission SE46 - Attachment 1*, 7-8.

40. See also NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) figure 7.21.

## Consent and criminal record

- 11.54 A court cannot currently make an ICO or home detention order without the written consent of the offender.<sup>41</sup> Home detention also cannot be imposed without the consent of the offender's co-residents.<sup>42</sup> Our view is that the requirement of consent should be carried over to the new order. The CDO has the potential to be an onerous sentence and it would be pointless to impose it unless the offender is willing to comply with the therapeutic/rehabilitative obligations of the sentence. The nature of any home detention or curfew requirement also makes it essential for the consent of the offender's co-residents to be obtained before imposing a CDO with this component.
- 11.55 The conditions of a CDO should be recorded in detail and made available to any court that sentences the offender in relation to further offences. This is important because of the potential reach of the CDO, both in terms of the range of offences for which it might apply and the conditions and obligations imposed.

### Recommendation 11.3: Features of a CDO

In a revised Crimes (Sentencing) Act:

- (1) The CDO should only be imposed after Corrective Services NSW has assessed the offender favourably and the offender has consented to it.
- (2) The CDO should have automatic statutory conditions that are in force for the full term of the order. The conditions should require the offender:
  - (a) not to commit an offence;
  - (b) to submit to supervision from Corrective Services NSW as required;
  - (c) to report to Corrective Services NSW as directed by a supervisor or assigned officer;
  - (d) to reside at approved premises;
  - (e) to obey a supervisor's (or assigned officer's) reasonable directions;
  - (f) to submit to electronic monitoring if directed by a supervisor or assigned officer;
  - (g) to accept home visits by a supervisor or assigned officer; and
  - (h) to submit to searches and alcohol and drug tests.

The conditions should be drafted in such a way that the offender is required to accept any supervision provided by Corrective Services NSW, but Corrective Services NSW is not obliged to supervise the offender where supervision is unnecessary.

- (3) The court may impose one or both of the following optional requirements as part of a CDO:

41. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(1)(d), s 78(1)(d).

42. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 78(1)(c).

- (a) a home detention requirement; and/or
  - (b) a work and intervention requirement.
- (4) The CDO should be for a maximum of three years when imposed by the District and Supreme Courts and two years where imposed by the Local Court (or three years where the case is one that attracts the extended jurisdiction of the Local Court).
- (5) The court should set the duration of the optional requirements separately from the duration of the whole CDO, to a maximum of two years.
- (6) The court should be able to add discretionary conditions to a CDO aimed at reducing the likelihood of reoffending such as alcohol and drug abstinence, place restrictions, non-association or curfews. The discretionary conditions should not include payment of any money.
- (7) The work and intervention requirement should involve a set number of hours, calculated at between a minimum of 4 hours and a maximum of 8 hours multiplied by the number of weeks during which the requirement is in force.
- (8) An offender should be able to satisfy the hours imposed as part of a work and intervention requirement by participating in any combination of community service work, psychological or psychiatric treatment, intervention programs, educational programs, vocational or life skills programs, counselling, drug or other addiction treatment.
- (9) Corrective Services NSW should have the discretion to determine the activities undertaken by the offender as part of the work and intervention requirement and set the times and speed at which the offender completes the activities. The maximum number of CDO hours that the offender may spend on community service work should be capped at 500.
- (10) The court should be able to stipulate activities to occupy some or all of the hours of the work and intervention requirement, but should only be able to specify an activity if the assessment report has indicated that the activity is available and suitable for the offender.
- (11) No offences should automatically exclude an offender from a CDO except:
- (a) domestic violence offences committed against a likely co-resident;
  - (b) murder; and
  - (c) offences under Part 3 Divisions 10 and 10A of the *Crimes Act 1900* (NSW) when the victim is under the age of 16 years and the offence carries a maximum penalty of more than 5 years imprisonment.
- (12) If the CDO includes a home detention requirement, the offender's co-residents should also consent to the order.
- (13) Offenders without rehabilitation needs should still be eligible for a CDO with a work and intervention requirement.
- (14) The criminal history that follows the imposition of a CDO should contain a record of the conditions imposed on the offender.

## The assessment process

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- 11.56 Before imposing a CDO, the court would first set the term of imprisonment to be served by an offender but not any non-parole period. If the term is of an eligible length (in the Local Court, two years or less or three years or less if the extended jurisdiction is activated and in the District and Supreme Courts, three years or less) the court may then refer an offender to Corrective Services NSW for a CDO assessment. If the court decides not to impose a CDO, it would then set a non-parole period (or impose a fixed term). If the court decides to impose a CDO, it would not set a non-parole period.
- 11.57 The assessment should take into account similar matters to those that are currently considered for an ICO suitability assessment (see Recommendation 11.4(2) below).<sup>43</sup> We consider that the assessment should be called an “availability assessment” as, prima facie, all offenders should be suitable for some form of CDO unless excluded by an offence of domestic violence, murder or a serious child sex offence. Instead of being couched in terms of the offender’s suitability, the report’s principal focus would be on the availability of appropriate work and programs and possible need for supervision, though it would also need to consider the risk of harm an offender may pose to the community or any particular person.
- 11.58 The assessment report would need to be comprehensive and inform the court on the matters set out in Recommendation 11.4(3) below. The report should expressly describe the offender’s risk level and the likely need for supervision as well as the level of supervision and programs that will be provided to the offender given the risk level. Armed with this information and a realistic idea of what the sentence would look like in practice, the court would be able to design a CDO appropriate to the offender. Knowledge gained by the court from the assessment report should also prevent an unexpected lack of intensiveness in the sentence leading to a disproportionately lenient sentence.
- 11.59 It is clear that high quality assessment reports will be required that meet the needs of the court. There must be a mutual understanding between the courts and Corrective Services NSW as to what is involved in the risk assessment approach, and as to what is available in the way of work and intervention programs. A working group, including representatives from Corrective Services NSW and the courts, could be established to assist this process and to develop a strategy for the preparation of assessment reports that will be required; as well as providing current information in relation to the programs that are available, and the way in which a CDO should be applied and administered in practice.

### **Recommendation 11.4: Assessment process for the CDO**

In a revised Crimes (Sentencing) Act:

- (1) Before imposing a CDO, the court should first set the term of imprisonment that an offender must serve (but not any non-parole

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



period). The court may then (if the term is of an eligible length) refer the offender to Corrective Services NSW for a CDO availability assessment.

- (2) The availability assessment report should include the following information:
  - (a) the offender's current offence(s) and criminal record;
  - (b) the offender's likelihood of reoffending and other risks associated with managing the offender in the community, including risks of self-harm or harm to any other person, and the likelihood of the offender committing a domestic violence offence;
  - (c) the effect of the order on the offender's family and other co-residents, specifically including the effects of the order on any child under 18;
  - (d) whether the offender's co-residents are likely to consent to the order;
  - (e) whether the offender has (or needs) suitable residential accommodation;
  - (f) the offender's physical and mental health, including any substance dependencies or other addictions;
  - (g) the offender's employment, education and other personal circumstances; and
  - (h) the causes of the offender's criminal conduct.
- (3) The assessment report should be comprehensive, and include information about:
  - (a) the desirability of imposing either a home detention requirement or a work and intervention requirement or both;
  - (b) the likely level of supervision required given the offender's risk level;
  - (c) if a work and intervention requirement is being considered:
    - (i) the likely mix between work, programs and other activities;
    - (ii) any programs or activities that are recommended for the offender and their availability in the area where the offender lives;
  - (d) if the offender is assessed as not currently suitable for home detention or community service work, whether he or she may become suitable by completing certain programs under a work and intervention requirement and if so, whether these programs are available; and
  - (e) any additional conditions that it would be desirable for the court to add to the order.
- (4) A working group including representatives of Corrective Services NSW and the courts should be convened:
  - (a) to develop a strategy for the preparation of the assessment reports that will be required;
  - (b) to promote awareness of the kind of programs and work opportunities that are available; and

(c) to promote awareness of the way in which a CDO will be administered in practice.

## Administering the work and intervention requirement of the CDO

- 11.60 The proposed work and intervention requirement of the CDO requires a multi-agency input. We expect that the therapeutic experience gained through the proven pre-sentence MERIT and CREDIT programs and through the experience of the NSW Drug Court,<sup>44</sup> each of which requires a multi-agency input, will prove useful. Cooperation with NSW Health and Housing NSW would be particularly important.
- 11.61 We expect that Corrective Services NSW, in administering a CDO, would act as the principal case manager for the offender, and would need to work closely with service providers in arranging appropriate work and intervention programs, and in monitoring compliance.<sup>45</sup> We consider that an inter-agency model similar to that recommended by the NSW Sentencing Council in 2012 for the management in the community of high risk violent offenders may be of benefit.<sup>46</sup> Under the NSW Sentencing Council's proposed model, relevant agencies would have a statutory duty to cooperate in establishing arrangements to manage particular offenders in the community through memoranda of understanding. The duty would also extend to information sharing. The proposed model was based on the Multi-Agency Public Protection Arrangements scheme currently in place in England and Wales.<sup>47</sup>
- 11.62 In order to administer the CDO successfully, Corrective Services NSW would also need to have the resources to make appropriate intervention programs and work placements available, and to make them available across NSW.
- 11.63 Despite the CDO's resource intensiveness, its introduction should generate savings. The cost differential between even the most intensive community sentence and full-time custody is large.<sup>48</sup> Other therapeutic interventions like the Drug Court have been proven to reduce recidivism<sup>49</sup> and, if the CDO can also achieve this, costs may be reduced across the sentencing spectrum.

### Recommendation 11.5: Administering the CDO

(1) Corrective Services NSW should be adequately resourced to make the CDO available across NSW, including the establishment and/or funding of appropriate programs, treatment and community service

44. For more information about the use of these programs and their success rates, see ch 15 and 16 and NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) ch 8.
45. Corrective Services NSW, *Submission SE55*, 17-18.
46. NSW Sentencing Council, *High Risk Violent Offenders: Sentencing and Post-custody Management Options*, Report (2012) 129.
47. National Offender Management Service, *MAPPA Guidance 2012* (UK Ministry of Justice, 2012).
48. Although the marginal costs of full-time imprisonment mean that a significant number of offenders may need to be diverted from full-time custody before the savings are felt: see NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) [2.37].
49. D Weatherburn, C Jones, L Snowball and J Hua, *The NSW Drug Court: A Re-evaluation of its Effectiveness*, Crime and Justice Bulletin No 121 (NSW Bureau of Crime Statistics and Research, 2008) 9-12.

work placements for offenders subject to the work and intervention requirement.

- (2) Other government agencies should support Corrective Services NSW to administer the work and intervention component of the CDO as part of a multi-agency model. The government should consider a model which imposes a statutory duty to cooperate on relevant agencies.

## Combination with other sentences

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- 11.64 We intend the CDO to be a flexible sentence with opportunities for the court to select from a wide range of conditions and components. For this reason, we consider that it should not be possible to combine the CDO with any other sentence except a fine. As noted earlier, payment of a fine or other sum should not be a condition of a CDO as failure to pay would cause a breach. Instead, CDOs should be combinable with fines where the fine is imposed as a separate penalty and failure to pay would not amount to breach of the CDO.
- 11.65 A court should be empowered to impose a single CDO in relation to multiple sentences of imprisonment where these are to be served concurrently, partly-concurrently or consecutively up to the overall limits on the length of a CDO.

## Variation, breach and revocation

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- 11.66 Since the CDO would be a custodial order, revocation of the CDO should result in the offender being required to spend the remainder of the sentence in full-time custody, unless the sentence is reinstated after a period in custody.
- 11.67 In our view SPA should manage revocation of the CDO.<sup>50</sup> Where a CDO breach matter comes before SPA, it should have the power to:
- revoke the CDO, committing the offender to full-time custody;
  - not revoke the CDO, where good reasons exist for excusing the breach; or
  - refer the CDO back to the court for variation.
- 11.68 The power for SPA to refer the matter back to the court is important. This will preserve some flexibility in dealing with breach matters, even when the breach is serious. For example, where there is a “no fault” breach because an offender is required to participate in a particular program as a condition of the order and program has been cancelled, it would be appropriate for SPA to refer the matter to the court for variation of the CDO conditions instead of revoking the CDO.

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50. We will consider SPA’s powers and procedures in this and other contexts as part of our reference to review the parole system in NSW.

- 11.69 In cases where SPA refers the matter to the court, the court should be empowered to either revoke the CDO (committing the offender to full-time custody), confirm the CDO in its existing form, or vary the CDO. The legislation should also allow both the offender and Corrective Services NSW to apply to the court at any time for a variation of the conditions of the CDO. Corrective Services NSW should be empowered to make small administrative variations to the CDO such as a change of the address where the offender is to reside or variation of reporting conditions. This would save court time which and streamline the administration of the order.
- 11.70 An internal Corrective Services NSW committee could manage breaches of the CDO before they are brought to SPA. Such a committee could be similar to the existing ICO Management Committee and serve a useful function in overseeing Corrective Services NSW officers in the exercise of their discretion to manage breaches. It could decide whether an application should be made to SPA for revocation of the order in any particular case.
- 11.71 The proposed CDO makes no provision for a parole period. It is, therefore, important that there be a mechanism through which offenders can apply to have their CDO reinstated after revocation. An offender should be able to apply to SPA for reinstatement of the CDO after one month in full-time custody. If reinstatement is refused, SPA could set a date for any further reinstatement application. Setting a future review date would assist in avoiding repeat fruitless applications.
- 11.72 In order to ensure that SPA has maximum flexibility to deal with breaches, it should also be empowered to revoke a CDO for a set period. For example, SPA may decide to revoke a CDO in response to a mid-level breach but order, at the same time as the revocation decision, that the CDO will be automatically reinstated after a specified period in custody. Using this power in appropriate circumstances, SPA could flexibly use periods in full-time custody as part of a sanction and reward approach to managing breaches, similarly to the mechanism available to the NSW Drug Court (see Chapter 15).

**Recommendation 11.6: Variation, breach and revocation of the CDO**

- (1) SPA should deal with breaches and revocations of a CDO and should be able:
- (a) to revoke a CDO;
  - (b) not to revoke a CDO where good reasons exist for excusing the breach; and
  - (c) to refer the CDO, where appropriate, back to the sentencing court for variation.
- (2) If SPA refers the matter back to the court, the court should be able to:
- (a) confirm the CDO in its current form;
  - (b) vary the CDO; or
  - (c) revoke the CDO.

- (3) Revocation of the CDO should lead to the offender being required to serve the remainder of the sentence in full-time imprisonment, unless SPA reinstates the CDO.
- (4) SPA should have the power to revoke a CDO temporarily by specifying, at the time of revocation, a date at which the CDO will be automatically reinstated.
- (5) If a CDO is revoked and the offender is committed to full-time imprisonment, the offender should also be able to apply for reinstatement of the CDO after one month. If refused, SPA should set a date for any further application.
- (6) A CDO management committee (constituted similarly to the current ICO Management Committee) within Corrective Services NSW should manage CDO breaches and have discretion to limit applications to revoke CDOs.
- (7) The court should be able to vary a CDO on application from the offender, or Corrective Services NSW, whether or not a breach has occurred.
- (8) Corrective Services NSW and SPA should be able to make small administrative changes to a CDO, such as change of required residence or a variation to reporting requirements.



## 12. Existing non-custodial orders (if retained)

### In brief

Community service orders, s 9 good behaviour bonds, and s 10 and s 10A orders are important to ensure that imprisonment is reserved as a sentence of last resort. If retained, we recommend eight improvements to these non-custodial sentences to streamline their operation and to increase the use of community service orders which have been underused.

<b>Current law</b> .....	<b>266</b>
Nature of a CSO .....	<b>266</b>
Nature of a s 9 bond .....	<b>267</b>
Orders under s 10 and s 10A .....	<b>268</b>
Breach and revocation of existing non-custodial sentencing options.....	<b>269</b>
Support for existing non-custodial sentencing options.....	<b>271</b>
Use of existing non-custodial sentencing options .....	<b>272</b>
<b>Proposals for reform</b> .....	<b>273</b>
Meaning of “good behaviour” in s 9 and s 10(1)(b) bonds .....	<b>273</b>
Power to vary a s 9 or s 10(1)(b) good behaviour bond.....	<b>274</b>
Standard form of supervision conditions for s 9 and s 10(1)(b) bonds.....	<b>275</b>
Jurisdictional issues in dealing with breaches of s 9 and s 10(1)(b) bonds .....	<b>276</b>
Other issues raised regarding s 10.....	<b>278</b>
Availability of CSOs and s 9 bonds for fine-only offences .....	<b>279</b>
Time to complete CSO work hours.....	<b>280</b>
Availability of community service work and access to CSOs.....	<b>281</b>
Combinations of orders .....	<b>284</b>
<i>Combining CSOs and s 9 bonds</i> .....	<b>284</b>
<i>Combining non-conviction orders with other penalties</i> .....	<b>285</b>

12.1 In this chapter we consider the non-custodial community-based sentences or dispositions that a court can impose under the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA), that is:

- community service orders (CSOs) under s 8;
- good behaviour bonds under s 9;
- dismissal of a charge, without recording a conviction under s 10(1)(a);
- conditional discharge of an offender with an attached good behaviour bond under s 10(1)(b) or with an intervention program order under s 10(1)(c); and
- the recording of a conviction and release of the offender without further penalty under s 10A.

12.2 If retained, we recommend some improvements to these sentencing options which represent the minimum level of reform necessary to address some problems with their use. However, our preferred option is to replace them with the alternative non-

custodial community-based sentences set out in the next chapter. These new sentences would sit below the community detention order (proposed in Chapter 11) in the spectrum of sentencing options.

## Current law

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### Nature of a CSO

- 12.3 A CSO requires an offender to undertake community service work for a set number of hours.<sup>1</sup> The maximum number of hours of work that can be imposed is linked to the maximum term of imprisonment available for the relevant offence and is:
- 100 hours, where the maximum sentence is six months or less;
  - 200 hours, where the maximum sentence is greater than six months but not greater than one year; and
  - 500 hours, where the maximum sentence is greater than one year.<sup>2</sup>
- 12.4 An offender has 12 months to complete a CSO if there are less than 300 hours to perform and 18 months if there are between 300 and 500 hours.<sup>3</sup> Standard conditions that apply to all CSOs require offenders to:
- meet reporting requirements;
  - undertake work at the direction of an assigned officer or supervisor;
  - not participate in community service work while under the influence of drugs or alcohol, or have possession of or use alcohol or intoxicating substances at a work site;
  - provide reasons for failure to attend;
  - submit to home visits by the assigned officer or supervisor and to medical examinations;
  - comply with requirements relating to dress, maintenance of clothing and equipment, standards of safety and conduct, and
  - comply with reasonable directions of the assigned officer or supervisor.<sup>4</sup>
- 12.5 A court can also impose any additional conditions it considers appropriate, as long as those conditions do not require the offender to make any payment and are not inconsistent with the standard conditions listed above.<sup>5</sup> There is no standard

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

2. *Crimes (Sentencing Procedure) Regulation 2010* (NSW) cl 23. Where an offender is serving an existing CSO, a further CSO may only be imposed in relation to another offence if the combined hours of work that remain to be performed do not exceed 500 hours: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 87(1).

3. *Crimes (Administration of Sentences) Act 1999* (NSW) s 107.

4. *Crimes (Administration of Sentences) Act 1999* (NSW) s 108; *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 211.

5. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 90.



condition in a CSO that the offender be of good behaviour so reoffending does not of itself amount to a breach of a CSO.

- 12.6 Before imposing a CSO, the court must be satisfied that the offender is suitable for such an order, and that it is appropriate for the offender to be required to perform community service work.<sup>6</sup> For this purpose Corrective Services NSW provides a suitability assessment.<sup>7</sup> The court can refuse to make a CSO for any reason it considers sufficient, even if the offender is assessed as suitable.<sup>8</sup>
- 12.7 A court cannot impose a CSO on an offender in combination with any type of good behaviour bond for the same offence.<sup>9</sup> However, when sentencing an offender for multiple offences at the same time, there is no legislative bar to the court imposing a CSO for one offence, and a good behaviour bond for another offence.

### Nature of a s 9 bond

- 12.8 Upon recording a conviction, a court can impose a s 9 bond for up to five years.<sup>10</sup> The standard conditions require that the offender:
- appear before the court if called on to do so at any time during the term of the bond; and
  - be of “good behaviour” during the term of the bond.<sup>11</sup>
- 12.9 A s 9 bond can include any condition that the court considers appropriate, except for conditions requiring the person to perform community service work, or to make any payment.<sup>12</sup> The court, in attaching conditions, must ensure that they:
- reasonably relate either to the character of the crime or the purposes of punishment for the crime, including deterrence and rehabilitation;
  - are certain and define with reasonable precision conduct which is proscribed; and
  - are not unduly harsh or unreasonable or needlessly onerous.<sup>13</sup>
- 12.10 Examples of additional conditions include attending counselling for drug and/or alcohol abuse, or residing at a particular rehabilitation centre.<sup>14</sup> Section 9 bonds can also include a condition that the offender be supervised by Corrective Services

6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 86(1)(a), (b).

7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 86(2), s 88.

8. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 86(3).

9. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 13. This means that a CSO cannot be imposed with a suspended sentence, a s 9 good behaviour bond or a s 10 good behaviour bond without conviction.

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

11. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95(a), (b).

12. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95(c) whether in the nature of a fine, compensation or otherwise.

13. *R v Bugmy* [2004] NSWCCA 258 [61] (Kirby J).

14. Judicial Commission of NSW, *Sentencing Bench Book* [4-740].

NSW. In 2012, 34.9% of all s 9 bonds imposed in the Local, District and Supreme Courts included a supervision condition.<sup>15</sup>

- 12.11 Section 95A also specifically empowers a court to attach a condition to a s 9 bond which requires an offender to participate in an “intervention program” and to comply with any intervention plan arising out of the program.<sup>16</sup> The expression “intervention program” is confined to the programs specified in the *Criminal Procedure Regulation 2010* (NSW).<sup>17</sup> As all the currently specified programs are pre-sentence programs, it is difficult to see how a condition of the kind contemplated by s 95A could be imposed. However, this does not limit the court’s ability to attach an ordinary condition to a s 9 bond requiring that the offender complete some other rehabilitation program.

### Orders under s 10 and s 10A

- 12.12 Section 10 of the CSPA allows a court to deal with an offender without recording a conviction.<sup>18</sup> After a guilty plea or finding of guilt, a court can:
- dismiss the relevant charge, with the result that the offender is released without a conviction being recorded and without any penalty (s 10(1)(a));
  - discharge the offender without recording a conviction on the condition that he or she enters into a good behaviour bond (s 10(1)(b)); or
  - discharge the person without recording a conviction on the condition that he or she agrees to participate in an “intervention program” and comply with any resulting intervention plan (s 10(1)(c)).
- 12.13 The court can impose a s 10(1)(b) good behaviour bond if it is satisfied in the circumstances of the case that it is inexpedient to inflict any punishment (other than nominal punishment) or that it is expedient to release the offender on a good behaviour bond.<sup>19</sup> Section 10(1)(b) bonds operate in the same way as s 9 bonds, except they can only be imposed for up to two years.<sup>20</sup>
- 12.14 A court could theoretically make an order under s 10(1)(c) if it was satisfied that it would reduce the likelihood of the person reoffending through promoting his or her treatment or rehabilitation.<sup>21</sup> As noted above, the only “intervention programs” that are currently specified are pre-sentence programs that are available where a court defers a sentence under s 11 of the CSPA.<sup>22</sup> Accordingly, it does not seem to be possible for a court to impose an intervention program order under s 10(1)(c). As a

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

16. See also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95B, s 99A.

17. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3 (definition of “intervention program”); *Criminal Procedure Act 1986* (NSW) s 346-347 (definition of “intervention program”).

18. For a detailed recent report on s 10 orders, see NSW Sentencing Council, *Good Behaviour Bonds and Non-Conviction Orders*, Report (2011).

19. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(2).

20. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(1)(b).

21. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(2A).

22. See Chapter 16.

court could order an offender to participate in some other rehabilitation program as a condition of a s 10(1)(b) bond, it appears that s 10(1)(c) serves no useful purpose.

12.15 Before the court can deal with a matter under s 10, it must consider each of the following:

- the person's character, antecedents, age, health and mental condition;
- whether the offence was trivial in nature;
- any extenuating circumstances in which the offence was committed; and
- any other matter that the court thinks proper to consider.<sup>23</sup>

12.16 A court must not deal with a person under s 10 where that person is charged with any of the following offences if he or she has been dealt with under s 10 for any of these offences within the previous five years:

- negligent driving occasioning death or grievous bodily harm;
- furious or reckless driving, or driving at a speed or in a manner which is dangerous to the public;
- certain offences relating to driving under the influence of alcohol or drugs,
- menacing driving or failing to stop and assist after impact causing injury;
- failing to stop and assist after vehicle impact causing death or grievous bodily harm;
- a severe risk breach of a mass, dimension or load restraint requirement for a heavy vehicle; and
- aiding, abetting, counselling or procuring any of the above offences.<sup>24</sup>

12.17 Section 10 is complemented by s 10A, which allows a court to record a conviction and then release a person without imposing any other penalty.

12.18 The difference between recording and not recording a conviction can have significant ancillary consequences.<sup>25</sup> For example, if an offender is dealt with under s 10 for a traffic offence there will be no demerit points recorded and it may avoid the disqualification of the offender from holding certain offices.

### Breach and revocation of existing non-custodial sentencing options

12.19 If a breach of a CSO is trivial in nature or where there are good reasons for excusing a breach, the Commissioner of Corrective Services can respond to the breach by increasing the hours of community work that an offender must perform by up to 10 hours.<sup>26</sup> Otherwise, Corrective Services NSW brings breaches before the

23. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(3); *R v Paris* [2001] NSWCCA 83 [42].

24. *Road Transport (General) Act 2005* (NSW) s 187(6).

25. *R v Mauger* [2012] NSWCCA 51 [37]-[38].

26. *Crimes (Administration of Sentences) Act 1999* (NSW) s 113.

- court as an application for revocation of the order. If the court decides to revoke the CSO it resentsences the offender for the original offence.<sup>27</sup>
- 12.20 The offender can also apply for revocation of the CSO on the grounds that intervening circumstances have arisen which mean that it is in the interests of justice to revoke the order.<sup>28</sup>
- 12.21 If a court suspects that an offender may have failed to comply with any of the conditions of a good behaviour bond made under s 9 or s 10(1)(b), the court that sentenced the offender, a court of like jurisdiction, or a superior court (with the offender's consent) can call on the offender to appear before it.<sup>29</sup> If a court suspects that an offender may have failed to comply with an order made under s 10(1)(c) (assuming such an order can be made), the court that made the order, or a court of like jurisdiction, could similarly call on the offender to appear before it.<sup>30</sup>
- 12.22 If it is satisfied that an offender has failed to comply with any of the conditions of a s 9 or s 10(1)(b) bond, a court can:
- take no action;
  - vary the conditions of the bond or impose further conditions; or
  - revoke the bond.<sup>31</sup>
- 12.23 In response to a breach of an order under s 10(1)(c) (if one was made), the court could take no action or revoke the order.<sup>32</sup>
- 12.24 If a court elects to revoke a s 9 or s 10(1)(b) bond, the court can resentence the offender for the original offence or, in the case of a s 10(1)(b) bond, convict and sentence the offender for the original offence.<sup>33</sup> A failure to comply with a s 10(1)(c) order (if one could be made) would be dealt with in the same way as a s 10(1)(b) bond.<sup>34</sup> The court must, when sentencing on revocation, take into account any period when the offender complied with the obligations arising under the bond.<sup>35</sup>
- 12.25 In all cases where a court is resentsencing after a breach of these orders, the offender is being punished not for the breach but for the original offence.<sup>36</sup> As a consequence the sentence imposed must not exceed the sentence that was appropriate for the original offence, although it should reflect the fact that the offender has rejected the trust that the previous sentencing court placed in him or

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27. *Crimes (Administration of Sentences) Act 1999* (NSW) s 115.

28. *Crimes (Administration of Sentences) Act 1999* (NSW) s 115(2)(b).

29. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 98(1); see also s 98(1C) (definition of "superior court").

30. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100R(1).

31. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 98(2).

32. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100R(3).

33. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 99(1).

34. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100G-100S.

35. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 24(b).

36. *R v Morris* (Unreported, NSW CCA, 14 July 1995); *Ho v DPP* (1995) 37 NSWLR 393; *Champion v R* (1992) 64 A Crim R 244, 253-4.

her, demonstrated a lack of remorse and cast doubt on his or her prospects of rehabilitation.<sup>37</sup>

### Support for existing non-custodial sentencing options

- 12.26 Submissions to this review strongly favoured the retention of CSOs and s 9 bonds as sentencing options.<sup>38</sup> Both options allow an offender to remain in the community and are much less expensive than imprisonment. Submissions also agreed that s 10 gives courts an important discretion, and should be retained.<sup>39</sup> Stakeholders also supported the operation of s 10A in its current form.<sup>40</sup>
- 12.27 Stakeholders acknowledged that community service work can simultaneously serve rehabilitative, punitive and reparative purposes. The Public Defenders noted that “offenders are generally motivated when they have a purpose in which to constructively occupy their time [and] be useful in their community”.<sup>41</sup> The Police Association of NSW observed that community service work can assist offenders to learn new skills and gain employment. At the same time, the community benefits from work that offenders perform for organisations such as charities, local councils, schools or nursing homes.<sup>42</sup> Community service work is also a valuable option for offenders who do not have the capacity to pay a fine.<sup>43</sup>
- 12.28 Stakeholders made similar comments about s 9 good behaviour bonds. For example, the Law Society of NSW noted that bonds recognise the seriousness of the offence and meet the deterrent and rehabilitative purposes of sentencing while allowing offenders to remain in the community.<sup>44</sup> Other advantages of s 9 bonds mentioned in the submissions related to:

37. *R v Morris* (Unreported, NSW CCA, 14 July 1995), quoted with approval in *R v Doyle* (1996) 84 A Crim R 287, 289-291.

38. Law Society of NSW, *Submission SE16*, 13; NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 9; The Public Defenders, *Submission SE24*, 13; NSW Bar Association, *Submission SE27*, 10-11; The Shopfront Youth Legal Centre, *Submission SE28*, 2; Public Interest Advocacy Centre, *Submission SE29*, 11-13; Legal Aid NSW, *Submission SE31*, 18; NSW Police Force, *Submission SE32*, 12; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 17; Corrective Services NSW, *Submission SE52*, 17.

39. Law Society of NSW, *Submission SE16*, 15; NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 10; Juvenile Justice, *Submission SE20*, 1; Police Association of NSW, *Submission SE21*, 26; The Public Defenders, *Submission SE24*, 14; NSW Bar Association, *Submission SE27*, 12; The Shopfront Youth Legal Centre, *Submission SE28*, QP 7, 4; Public Interest Advocacy Centre, *Submission SE29*, 17; Legal Aid NSW, *Submission SE31*, 21; NSW Police Force, *Submission SE32*, 14; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 19; NSW, Department of Family and Community Services, *Submission SE48*, 10.

40. Law Society of NSW, *Submission SE16*, 15; NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 10; The Public Defenders, *Submission SE24*, 14; NSW Bar Association, *Submission SE27*, 12; Shopfront Youth Legal Centre, *Submission SE28*, QP 7, 3; Public Interest Advocacy Centre, *Submission SE29*, 16-17; Legal Aid NSW, *Submission SE31*, 20; NSW Police Force, *Submission SE32*, 14; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 19; NSW, Department of Family and Community Services, *Submission SE48*, 10.

41. The Public Defenders, *Submission SE24*, 13.

42. Police Association of NSW, *Submission SE21*, 21.

43. NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 17.

44. Law Society of NSW, *Submission SE16*, 13.

- the flexibility of bonds and the ability of courts to attach a wide range of conditions;<sup>45</sup>
  - the capacity of bonds to increase opportunities for an offender to access services, programs and treatment;<sup>46</sup> and
  - the suitability of bonds for homeless offenders who need support to meet their underlying offending factors.<sup>47</sup>
- 12.29 Submissions noted specific advantages of s 10(1)(b) bonds and s 10(1)(a) orders including their capacity to deal appropriately with:
- offenders whose offences are inherently trivial and for whom the lasting stain of a conviction vastly outweighs the criminality involved in their conduct;<sup>48</sup>
  - young people, disadvantaged offenders, offenders with an intellectual disability and offenders with mental health conditions;<sup>49</sup> and
  - first time offenders, particularly those whose employment or study would be disproportionately affected by a criminal conviction.<sup>50</sup>
- 12.30 In addition to these advantages, s 9 bonds, s 10(1)(b) bonds and CSOs have high rates of successful completion. Offenders successfully complete approximately 80% of CSOs and supervised s 9 bonds. Completion rates for unsupervised s 9 bonds are even better with 90% being successfully completed. Completion rates for s 10(1)(b) bonds are the highest at approximately 95%.<sup>51</sup> Recent research has also found that CSOs produce lower rates of reoffending than s 9 bonds after controlling for other variables. Within a two year follow-up period, fewer offenders on CSOs had reoffended compared to offenders on s 9 bonds.<sup>52</sup>

### Use of existing non-custodial sentencing options

- 12.31 Despite the advantages of a CSO, the courts' use of this form of order seems to have declined gradually. In 1997, 5.4% of offenders sentenced in the Local, District and Supreme Courts received a CSO as their principal penalty but this had fallen to 3.5% by 2012.<sup>53</sup>

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45. Law Society of NSW, *Submission SE16*, 13; NSW Police Force, *Submission SE32*, 12; Legal Aid NSW, *Submission SE31*, 18; The Shopfront Youth Legal Centre, *Submission SE28*, 2.

46. NSW Police Force, *Submission SE32*, 12.

47. Public Interest Advocacy Centre, *Submission SE29*, 12.

48. The Shopfront Youth Legal Centre, *Submission SE28*, Attachment 1, 2.

49. Law Society of NSW, *Submission SE16*, 15; Shopfront Youth Legal Centre, *Submission SE28*, Attachment 1, 2.

50. Law Society of NSW, *Submission SE16*, 15; The Public Defenders, *Submission SE24*, 14; Public Interest Advocacy Centre, *Submission SE29*, 17.

51. NSW Bureau of Crime Statistics and Research (unpublished data, ref: mai11/10151lccc). See NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) [5.55].

52. L Snowball, *CSOs Versus Bonds: A Comparison of Reoffending*, Crime and Justice Bulletin No 171 (NSW Bureau of Crime Statistics and Research, 2013). See also NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) [5.18].

53. NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics (1997-2012)*. See also NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) figure 5.2

- 12.32 In contrast, s 9 bonds form a much higher and a steadily increasing proportion of the sentences imposed. In 1997, approximately 14% of offenders received a s 9 bond as their principal penalty and this grew to 20.7% in 2012.<sup>54</sup>
- 12.33 The use of s 10 dispositions (other than s 10(1)(c) orders) has also increased over the same period. In 1997, 12.5% of offenders sentenced in the Local, District and Supreme Courts received a s 10 order for their principal offence. By 2012, this figure had increased to 18.8%. This increase in s 10 orders has come almost entirely from the increased use of s 10(1)(b) bonds.<sup>55</sup>
- 12.34 The courts deal with only a small number of offenders under s 10A each year. In 2011, 1.76% of offenders received a s 10A order as the principal penalty for their principal offence.<sup>56</sup>

## Proposals for reform

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- 12.35 In this section of the chapter, we consider several discrete issues that stakeholders raised in relation to the use of the existing non-custodial options. No stakeholder raised any issues with the operation of s 10A.
- 12.36 The reforms that we recommend are based on the assumption that the existing orders are retained and are not replaced by the orders that we recommend in the next chapter.

## Meaning of “good behaviour” in s 9 and s 10(1)(b) bonds

- 12.37 The NSW Police Force submitted that the requirement in s 9 and s 10(1)(b) bonds that an offender “be of good behaviour” should be clarified to ensure that offenders understand their obligations under this condition.<sup>57</sup> Although the courts and legal practitioners generally accept that an undertaking to be of “good behaviour” means that a person must not commit any further offence,<sup>58</sup> this is not necessarily evident to those who have had little experience with the criminal justice system. Nor is it necessarily clear what the somewhat vague expression “to be of good behaviour” encompasses.
- 12.38 South Australia is the only other state that continues to express an offender’s obligation under community based orders consistently as a requirement to be of “good behaviour”.<sup>59</sup> All WA community-based sentences require an offender not to commit a further offence.<sup>60</sup> Other states and territories use a mixture of terminology

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54. NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics* (1997-2012). See also NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) figure 5.7.

55. NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics* (1997-2012). See also NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) figure 5.14.

56. NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics* (1997-2012). See also NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) figure 5.15.

57. NSW Police Force, *Submission SE32*, 12.

58. NSW Sentencing Council, *Good Behaviour Bonds and Non-Conviction Orders*, Report (2011) [2.53].

59. *Criminal Law (Sentencing) Act 1988* (SA) s 38-39.

60. *Sentencing Act 1995* (WA) s 48(1)(a), s 62(1)(a); s 69(1)(a), s 77(1)(a).

across different orders, sometimes phrasing it as a requirement to be of “good behaviour”, sometimes as a requirement to not commit an offence, and sometimes as a requirement not to commit an offence punishable by imprisonment.<sup>61</sup> In NSW, the conditions of other community-based sentences with non-offending requirements, such as home detention and intensive correction orders (ICOs), require offenders both to be of good behaviour and to not commit an offence.<sup>62</sup>

12.39 We do not believe that an offender’s obligation to be of good behaviour in this context should be narrowed to an obligation not to commit an offence “punishable by imprisonment”. In some circumstances the commission of a fine-only offence should constitute a breach of the bond. If an offender is subject to a s 9 bond for a mid range prescribed concentration of alcohol (PCA) offence, for example, committing a subsequent low range PCA offence (punishable only by a fine) should normally amount to a breach of the bond.

12.40 However, we consider that the requirement that an offender “be of good behaviour” should be rephrased as a requirement that the offender “not commit a further offence” in order to provide greater certainty as to the obligation that arises. Section 98 of the CSPA allows a court to take no action when dealing with a breach of s 9 or s 10(1)(b) bond. A court will therefore have discretion as to the appropriate action to take when an offender has breached the bond by committing a minor offence punishable only by a fine. However, in the case of suspended sentences of imprisonment, where a revocation will result in the sentence descending, we have proposed that the requirement be one not to commit any offence punishable by imprisonment.

**Recommendation 12.1: Meaning of “good behaviour” requirement in s 9 and s 10(1)(b) bonds**

If s 9 and s 10(1)(b) bonds are retained, a revised Crimes (Sentencing) Act should replace the requirement that an offender be of “good behaviour” with a requirement that the offender not commit a further offence.

**Power to vary a s 9 or s 10(1)(b) good behaviour bond**

12.41 Currently, a court can only vary a s 9 or s 10(1)(b) good behaviour bond in response to a breach of the bond. The Shopfront Youth Legal Centre submitted that offenders and Corrective Services NSW should be able to apply to a court to have the conditions of a bond varied even though a breach has not occurred.<sup>63</sup> We agree that this would be a useful provision, for example, in the case of illness which prevents an offender complying with a condition of a bond. A similar power is contained in s 40 of the *Children (Criminal Proceedings) Act 1987* (NSW) that permits the court to vary the conditions of a good behaviour bond imposed under that Act, on

61. *Sentencing Act* (NT) s 11(1)(b), s 13(1)(b), s 39E(1)(a); *Sentencing Act 1991* (Vic) s 45(1)(a), s 72(2)(b); *Penalties and Sentences Act 1992* (Qld) s 31, s 93(1)(a), s 103(1)(a); *Sentencing Act 1997* (Tas) s 24(1), s 28(a), s 37(1)(a), s 59(b); *Crimes (Sentencing) Act 2005* (ACT) s 13; *Crimes (Sentence Administration) Act 2005* (ACT) s 86(1)(a).

62. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 175(a), cl 200(a).

63. The Shopfront Youth Legal Centre, *Submission SE28*, 3.



application made by or on behalf of the person to whom the order relates, or by an authorised officer.

**Recommendation 12.2: Power to vary a s 9 or s 10(1)(b) bond**

If s 9 and s 10(1)(b) bonds are retained, a revised Crimes (Sentencing) Act should allow the court to vary a s 9 or s 10(1)(b) bond, on application made either by the offender or Corrective Services NSW, even though breach has not occurred.

**Standard form of supervision conditions for s 9 and s 10(1)(b) bonds**

12.42 Corrective Services NSW suggested that there should be a set of standard and consistently worded conditions that list an offender's obligations if supervision is a condition of a s 9 or s 10(1)(b) good behaviour bond. The suggested conditions would require an offender to:

- follow all reasonable directions of the Corrective Services NSW supervising officer;
- attend programs and undertake other intervention activities as directed by the Corrective Services NSW supervising officer;
- reside at an approved address as directed by the Corrective Services NSW supervising officer;
- obey curfews as directed by the Corrective Services NSW supervising officer; and
- submit to alcohol and drug testing as directed by the Corrective Services NSW supervising officer.<sup>64</sup>

12.43 Corrective Services NSW submitted that a standard formula for supervision conditions would clarify an offender's obligations and reduce the confusion that can arise when breaches of a bond are contested.<sup>65</sup>

12.44 We agree that the adoption in legislation of a standard set of obligations when the court imposes supervision as a condition of a s 9 or 10(1)(b) bond would enhance clarity. The offender's obligations should be those listed above except that we would substitute for the requirement that the offender "obey curfews as directed" a requirement that an offender "receive home visits by the Corrective Services NSW supervising or assigned officer for any purpose connected with the administration of the order".<sup>66</sup>

12.45 We do not support an offender being required to submit to a restricted movement condition such as a curfew as a standard condition. Rather it should only be imposed where the circumstances of the case require it and where the court expressly attaches it to the supervision condition. Otherwise it may be excessive to

64. Corrective Services NSW, *Submission SE52*, 18.

65. Corrective Services NSW, *Submission SE52*, 18.

66. Although we have recommended a slightly different range of standard supervision conditions for the proposed community correction order and conditional release order: see Chapter 13.

the risks posed by the offender and potentially set that person up for a breach. It would be sufficient in most cases for the offender to be obliged to receive home visits as part of a supervised bond. We understand that it is standard practice for a Corrective Services NSW officer to visit the home of an offender, who is subject to supervision, at least once during the term of the order.<sup>67</sup> A condition to this effect would clarify for offenders that this is a normal part of supervision.

- 12.46 The court should have a discretion to delete or amend any of the standard requirements when imposing the condition where this is required in the circumstances of the case. The standard form of the supervision conditions should be drafted to make it clear that, while offenders are required to submit to supervision under the condition, Corrective Services NSW can use its discretion to provide supervision according to the needs of the case. This would allow Corrective Services NSW the flexibility to direct supervision resources to those offenders at the highest risk of reoffending, and to cease supervising offenders who have made good progress and are at low risk of reoffending, even when the bond has not yet expired.

### **Recommendation 12.3: Standard obligations for a supervised bond**

If s 9 and s 10(1)(b) bonds are retained:

- (1) A revised Crimes (Sentencing) Act should specify standard obligations to be applied when a court makes supervision a condition of a s 9 or s 10(1)(b) bond, unless the court directs otherwise. The standard obligations should be for the offender to:
  - (a) follow all reasonable directions of the Corrective Services NSW supervising officer;
  - (b) attend programs and undertake other intervention activities as the Corrective Services NSW supervising officer directs;
  - (c) live at an address approved by the Corrective Services NSW supervising officer;
  - (d) receive home visits by the Corrective Services NSW supervising officer for any purpose connected with the administration of the bond; and
  - (e) submit to drug and alcohol testing as the Corrective Services NSW supervising officer directs.
- (2) The standard obligations of supervision should be phrased to make clear that, while the offender is required to submit to supervision, Corrective Services NSW has the discretion to provide supervision according to the needs of the case.

### **Jurisdictional issues in dealing with breaches of s 9 and s 10(1)(b) bonds**

- 12.47 Section 98(1) of the CPSA currently provides that, if an offender may have breached a bond, any one of the following courts may call on the offender to appear before it in order to deal with the breach:

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67. Community Corrections Mt Druitt, *Consultation SEC18*.

- the court which originally imposed the bond;
  - any other court of like jurisdiction; or
  - a superior court (with the offender's consent).
- 12.48 This provision has led to delay in circumstances where an offender, who is subject to a bond imposed by the Local Court, commits a subsequent indictable offence and appears before the District Court in relation to the new offence. The new offence amounts to a breach of the existing bond but the District Court cannot deal with the breach and resentence the offender for the original offence unless the offender consents. If an offender withdraws or withholds consent, the proceeding must be adjourned so that the Local Court can deal with the breach. The reverse problem can also occur if an offender is subject to a bond imposed in the higher courts, and the offender appears in the Local Court for sentence in relation to a new offence. Breach of the bond can only be dealt with in the court that imposed the bond, even if the breach stems from a new offence which could be dealt with summarily in the Local Court.
- 12.49 The NSW Director of Public Prosecutions has proposed that the legislation be amended to:
- remove the consent requirement if a breach proceeding in relation to a bond imposed in a lower court is brought before a higher court, in conjunction with proceedings in that court, and ensure that the court's jurisdiction exercised in resentencing for the breach reflects that of the lower court; and
  - give the lower court exclusive jurisdiction to deal with breach proceedings arising out of the commission of a summary offence, even if a higher court had initially imposed the bond.<sup>68</sup>
- 12.50 Submissions from Legal Aid NSW and NSW Young Lawyers Criminal Law Committee supported these proposed changes and there was no opposition from other stakeholders.<sup>69</sup>
- 12.51 We recommend that the proposals of the NSW Director of Public Prosecutions be implemented. Where a breach of a s 9 or s 10(1)(b) bond imposed in the Local Court arises due to the commission of a new offence that is being dealt with in a higher court, the higher court should have jurisdiction to deal with the breach. A restriction to the effect that a higher court must resentence an offender, after breach of the bond, in accordance with the jurisdictional limits of the court that imposed the bond would prevent this amendment from disadvantaging an offender.
- 12.52 Where a higher court has imposed a bond for a summary offence after an appeal from the Local Court, and the offender later breaches the bond by committing a new offence that is being dealt with in the Local Court, then the Local Court should be able to deal with the breach of the bond within its existing jurisdictional limits. Ultimately this would ensure that wherever possible all of the offender's current

68. L Babb, Letter to P Musgrave, Criminal Law Review Division, Department of Attorney General and Justice (14 February 2012).

69. Legal Aid NSW, *Submission SE31*, 19; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 18.

matters are dealt with in the one court at the same time. This would prevent delays and forum shopping.

- 12.53 Currently, a higher court can deal with a breach of a CSO without the offender's consent even where the Local Court imposed the CSO. However, the Local Court cannot deal with the breach of a CSO imposed by the higher courts, even where the CSO was imposed after an appeal from the Local Court.<sup>70</sup> Although no stakeholder raised this restriction as an issue, it would be beneficial to harmonise the provisions for breaches of good behaviour bonds and CSOs.<sup>71</sup>

#### **Recommendation 12.4: Jurisdiction to deal with breach of bond**

If s 9 and s 10(1)(b) bonds are retained, in a revised Crimes (Sentencing) Act:

- (1) Where a higher court deals with an offence that constitutes a breach of a s 9 or s 10(1)(b) bond that was imposed in the Local Court, the higher court should have jurisdiction to deal with the breach of the bond without the offender's consent.
- (2) If a higher court deals with breach of a bond made in the Local Court, the higher court should deal with the breach within the Local Court's jurisdictional limits.
- (3) Where a bond that was imposed in a higher court after an appeal from the Local Court, is breached by a further offence that is dealt with in the Local Court, the Local Court should also be able to deal with the breach of the bond within its jurisdictional limits.
- (4) Where a higher court imposes a CSO after an appeal from the Local Court, and the offender subsequently appears before the Local Court in relation to a further offence, the Local Court should be able to deal (within its jurisdictional limits) with any application to revoke the CSO and resentence the offender at the same time.

### **Other issues raised regarding s 10**

- 12.54 Most submissions indicated that there were no other discrete issues with the use of s 10, supporting the finding of the NSW Sentencing Council in 2011 that the section is not being used disproportionately and does not require reform.<sup>72</sup> However, two submissions did suggest changes to the way in which s 10 operates.
- 12.55 The NSW Police Force submitted that the current list of factors which allow a court to deal with a matter under s 10 is too broad. The submission suggested deleting s 10(3)(d), which allows a court to deal with a matter under s 10 in light of "any other matter that the court thinks proper to consider".<sup>73</sup> We do not agree that it would be

70. *Crimes (Administration of Sentences) Act 1999* (NSW) s 115(1).

71. These jurisdictional issues also arise for breach of the s 12 bonds attached to suspended sentences and should be addressed in the same way for suspended sentences: see Chapter 10.

72. NSW Sentencing Council, *Good Behaviour Bonds and Non-Conviction Orders*, Report (2011); NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 10; NSW Bar Association, *Submission SE27*, 12; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 19; Law Society of NSW, *Submission SE16*, 16.

73. NSW Police Force, *Submission SE21*, 15.

desirable to curtail the court's discretion in this way. There may be something outside the factors listed in s 10(3)(a)-(c)—allowing a court to have regard to a person's character, antecedents, age, health and mental condition, the trivial nature of the offence and any extenuating circumstances—which justifies the making of a non-conviction order. The Court of Criminal Appeal has, in a series of decisions, cautioned against inappropriate use of s 10 orders. For example, it has made it clear that s 10 should not be used merely to avoid some legislative consequence of conviction<sup>74</sup> and that the sentence must still reflect the objective seriousness of the offence committed.<sup>75</sup> We do not support this change, particularly in light of the NSW Sentencing Council's finding that the orders are not being overused.

- 12.56 The Shopfront Youth Legal Centre submitted that there should be an upper limit on the length of s 10 bonds that can be imposed for offences with low maximum penalties, especially fine-only offences.<sup>76</sup> We acknowledge that, even when imposed without recording a conviction, a good behaviour bond of up to two years would be too severe a penalty for a trivial fine-only offence. However, we do not support any further limit on the court's discretion to impose s 10 bonds. No other stakeholder raised disproportionate s 10 bonds as an issue and we consider that the court should select a penalty appropriate to the circumstances of the case.

### Availability of CSOs and s 9 bonds for fine-only offences

- 12.57 The CSPA currently provides that CSOs and s 9 bonds can be made “instead of imposing a sentence of imprisonment on an offender”.<sup>77</sup> Some stakeholders submitted that, expressed in this way, it is uncertain whether the courts can impose CSOs and s 9 bonds for offences where the maximum penalty is a fine.<sup>78</sup> The NSW Sentencing Council has found that the courts have sometimes imposed s 9 bonds for fine-only offences.<sup>79</sup>
- 12.58 We note that the legislation which introduced the CSO as a sentencing option in 1979 specifically precluded imposing it for fine-only offences.<sup>80</sup> Additionally, under the current law, there are limits on the number of CSO hours that can be imposed which are related to the maximum length of imprisonment that is available for the relevant offence,<sup>81</sup> rather than to the maximum fine. These circumstances point against the use of a CSO for a fine-only offence.

74. *R v Fing* (unreported, NSW CCA, 4 October 1994); *R v Stephenson* [2010] NSWSC 779 [66]-[67].

75. *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 3 of 2002)* [2004] NSWCCA 303, 61 NSWLR 305.

76. The Shopfront Youth Legal Centre, *Submission SE28*, QP7, 3.

77. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8(1), s 9(1).

78. The Shopfront Youth Legal Centre, *Submission SE28*, QP7, 2; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 17-18. See, eg, R Howie, “Amendments to the Law of Sentencing” (2000) 7(3) *Criminal Law News* 21, 24 (ix); G Zdenkowski, “Non-financial Non-custodial Sentencing Options in the Crimes (Sentencing Procedure) Act 1999” (2003) 6 *Judicial Review* 189, 197-198. See also NSW Sentencing Council, *Good Behaviour Bonds and Non-Conviction Orders*, Report (2011) [2.3].

79. NSW Sentencing Council, *Good Behaviour Bonds and Non-Conviction Orders*, Report (2011) [3.18].

80. *Community Service Orders Act 1979* (NSW) s 4(1) (now repealed).

81. *Crimes (Sentencing Procedure) Regulation 2010* (NSW) cl 23. See also above at para [12.3].

- 12.59 In our view a CSO is not appropriate for fine-only offences. Where an offender does not have capacity to pay a fine which is imposed for such an offence, the offender is able to work off the fine through a work and development order (WDO). An offender can, however, in some cases, pay off a fine through a CSO that the State Debt Recovery Office has imposed.<sup>82</sup>
- 12.60 In most cases a s 10 good behaviour bond will be available and will be a sufficient sentence, rendering it unnecessary for the court to have a power to impose a s 9 bond for a fine-only offence. There are, however, some exceptions, for example, as noted above, a court cannot impose a s 10 bond for certain traffic offences if the offender has received a s 10 order for any of a number of listed offences within the preceding 5 years.<sup>83</sup> Our view is that when sentencing an offender in these circumstances, but not otherwise, the court should be able to impose a s 9 good behaviour bond.<sup>84</sup>

**Recommendation 12.5: Availability of CSOs and s 9 bonds for fine-only offences**

If s 9 and s 10(1)(b) bonds and community service orders are retained, in a revised Crimes (Sentencing) Act:

- (1) It should be clear that CSOs are only available for offences punishable by imprisonment.
- (2) Section 9 bonds should not be available for fine-only offences unless, in relation to certain traffic offences, the court is expressly precluded from imposing a s 10(1)(b) bond.

### Time to complete CSO work hours

- 12.61 If an offender's CSO involves less than 300 work hours, the offender has 12 months in which to complete the order. If the CSO requires between 300 and 500 work hours, the order runs for 18 months.<sup>85</sup> Legal Aid NSW submitted that offenders often have insufficient time in which to complete the work hours.<sup>86</sup> It is possible for an offender or Corrective Services NSW to apply to the court for an extension of time but only where, having regard to circumstances that have arisen since the imposition of the CSO, it would be in the interests of justice to extend the term of the order.<sup>87</sup>
- 12.62 Most other states and territories allow offenders a larger period of time to complete community service work hours.<sup>88</sup> We agree with the suggestion of Legal Aid NSW

82. *Fines Act 1996* (NSW) s 78-86, s 99A-99J.

83. *Road Transport (General) Act 2005* (NSW) s 187(6).

84. Supported by NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 17-18.

85. *Crimes (Administration of Sentences) Act 1999* (NSW) s 107.

86. Legal Aid NSW, *Submission SE31*, 18.

87. *Crimes (Administration of Sentences) Act 1999* (NSW) s 114(1).

88. The ACT and Tasmania do not have deadlines by which the work hours must be completed: *Crimes (Sentencing) Act 2005* (ACT) s 91; *Sentencing Act 1997* (Tas) s 34. In Queensland, the hours (between 40 and 240 hours) must be performed within 12 months or another period set by the court: *Penalties and Sentences Act 1992* (Qld) s 103(2). In the NT, there is no time limit on the up to 480 hours to be performed under a community work order. If an offender is required to perform work (up to 500 hours) under a community based order, the offender cannot be required to perform more than 250

that the fairest method is to calculate the duration of a CSO by a formula based on the number of hours imposed.<sup>89</sup> This would address the anomalous situation that currently can exist where an offender who must work 299 hours has 12 months to complete the order, and an offender who must work 301 hours has 18 months in which to complete the order. Our suggestion is that an offender should be allowed one week for every four hours of work imposed. This means that an offender who must complete 208 work hours will have 12 months in which to complete the CSO.

### Recommendation 12.6: Time in which to complete CSO work hours

If the CSO is retained, a revised Crimes (Sentencing) Act should provide that the duration of a CSO is to be calculated by reference to the number of hours of work required, at the rate of one week for every four hours.

## Availability of community service work and access to CSOs

- 12.63 Despite general support for community service work as a sentencing option and the advantages discussed earlier in this chapter, the use of CSOs has been in gradual decline to the point where they made up only 3.5% of the principal penalties imposed in the Local, District and Supreme Courts in 2012.<sup>90</sup> Comparison with selected other jurisdictions shows that courts in Victoria and South Australia appear to impose community work slightly more often than NSW, and courts in New Zealand impose it much more often than any Australian jurisdiction.<sup>91</sup>
- 12.64 Submissions and consultations highlighted problems with the availability of community service work placements as a reason for the decline in use of CSOs.<sup>92</sup> Stakeholders in rural and regional areas were particularly concerned about a lack of work placements. Similar difficulties in finding work placements were also reported in metropolitan areas.<sup>93</sup>
- 12.65 Stakeholders also reported that a number of offenders could not access CSOs because they were assessed as unsuitable.<sup>94</sup> The elderly, offenders with a physical

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hours in a year: *Sentencing Act* (NT) s 34, s 39G(3). In Victoria, a court may select the time period during which the up to 600 hours of unpaid work under a community correction order must be completed. An offender cannot be required to work more than 20 hours per week: *Sentencing Act 1991* (Vic) s 48C(4)-(5).

89. Legal Aid NSW, *Submission SE31*, 18.
90. NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics* (2012). For a more detailed discussion of the decline of CSOs, see NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) figure 5.2.
91. See NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) figures 5.3 and 5.4.
92. Law Society of NSW, *Submission SE16*, 10; NSW Bar Association, *Submission SE27*, 11; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 17; Corrective Services NSW, *Submission SE52*, 17; G Henson, *Submission SE22*, 6; Local Court practitioners, *Consultation SEC9*; Corrective Services NSW, *Consultation SEC11*; Court support services, Dubbo, *Consultation SEC16*; Legal practitioners, Dubbo, *Consultation SEC14*.
93. Local Court practitioners, *Consultation SEC9*; Corrective Services NSW, *Consultation SEC11*; Court support services, Dubbo, *Consultation SEC16*; Legal practitioners, Dubbo, *Consultation SEC14*; Aboriginal Community Justice Group, Western Region, *Consultation SEC15*. See also NSW, Legislative Council Standing Committee on Law and Justice, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006).
94. The Shopfront Youth Legal Centre, *Submission SE28*, 2; Public Interest Advocacy Centre, *Submission SE29*, 12; Public Interest Advocacy Centre, *Submission SE42*, 3; Legal Aid NSW, *Submission SE31*,

disability or illness, offenders with substance dependence problems and offenders with a mental health or cognitive impairment can be excluded from a CSO at the suitability assessment stage, due to workplace safety concerns, difficulties in finding work that the offender can perform, and/or the low probability that such an offender will successfully complete the order.

- 12.66 Stakeholders reported that lack of access to a CSO can lead to some offenders receiving disproportionately severe penalties. In particular, there were concerns about offenders who had breached multiple s 9 good behaviour bonds and who were excluded from receiving a CSO due to a lack of suitability or of a work placement. These offenders risked receiving a suspended sentence (with its potentially severe consequences on breach) despite the relatively minor nature of their offending.<sup>95</sup>
- 12.67 The CSPA allows some capacity for offenders to participate in activities other than community service work as part of a CSO. A court can attach an additional condition to a CSO that requires an offender to participate in a development program as a substitute for some community work.<sup>96</sup> “Development programs” are defined to include personal development, educational and “other” programs.<sup>97</sup> However, the power is restricted such that the court must specify the exact number of hours when imposing the order, and an offender must not be required to participate in the program more than three times in a week, must not be required to participate for more than 15 hours in a week, and must not be required to participate in a program for less than a total of 20 hours.<sup>98</sup> Corrective Services NSW has reported that the inflexibility of this provision means that any change in arrangements for the number of hours the offender will spend on development programs makes it necessary for the matter to be returned to court for a variation.<sup>99</sup>
- 12.68 The CSPA may also allow some offenders to participate in activities other than community service work because of the definition of “community service work” in the *Crimes (Administration of Sentences) Act 1999* (NSW). This definition also applies to the CSPA and specifies that “community service work” comprises “any service or activity approved by the Minister, and includes participation in personal development, educational or other programs”.<sup>100</sup> However, it was clear from the submissions and consultations that either because this definition has been overlooked, or otherwise, CSOs are generally considered to be confined to

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18; NSW, Department of Family and Community Services, *Submission SE48*, 9; Local Court practitioners, *Consultation SEC9*; NSW Local Court, Dubbo, *Consultation SEC17*.

95. Public Interest Advocacy Centre, *Submission SE42*, 3; Local Court practitioners, *Consultation SEC9*; Legal practitioners, Dubbo, *Consultation SEC14*; NSW Local Court, Dubbo, *Consultation SEC17*. But see L Snowball, *Does a Lack of Alternatives to Custody Increase the Risk of a Prison Sentence?* Crime and Justice Bulletin No 111 (NSW Bureau of Crime Statistics and Research, 2008) which found that offenders in regional areas where CSOs and other options were not available were no more likely to be imprisoned than offenders in metropolitan areas.

96. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 90.

97. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 85.

98. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 90(3).

99. Corrective Services NSW, *Submission SE55*, 3; Community Corrections, Mt Druitt, *Consultation SEC18*.

100. *Crimes (Administration of Sentences) Act 1999* (NSW) s 3(1); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3(1).



community service work. If so, the broad definition has not been operating in the way intended to increase eligibility for the order.<sup>101</sup>

- 12.69 We have considered whether CSOs should be amended to include some aspects of the WDO scheme in order to improve access to CSOs.<sup>102</sup> WDOs are used as a fine enforcement option under the *Fines Act 1996* (NSW) and explicitly allow offenders to satisfy work hours through participating in community service work, medical or mental health treatment, education, vocational or life skills courses, financial or other counselling, drug or alcohol treatment, or any combination of these activities.<sup>103</sup> Submissions unanimously supported amending CSOs to allow offenders to satisfy the “work” hours component through participation in a more flexible mix of activities.<sup>104</sup>
- 12.70 Given the advantages of community work and the apparent scope to increase its use in NSW, our view is that, if CSOs are retained as a sentencing option, offenders should be able to satisfy the CSO work hours through the same range of activities as are available under the WDO scheme. The suitability assessment report which the court must order before imposition of a CSO should indicate:
- whether the offender is suitable for community service work;
  - whether appropriate work is available; and
  - whether there are any other programs, treatments, courses or activities that are available and recommended for the offender.
- 12.71 The court should have the power to stipulate the offender’s participation in a particular activity if the assessment report has indicated that it is appropriate and available. However, the normal procedure should be for the court to impose a CSO with a set number of hours and Corrective Services NSW should then be able to arrange a variety of appropriate activities—which may include community service work, personal development, educational or other programs, or other treatments, or activities—to satisfy those hours. This more flexible approach would aim to make the CSO more inclusive for a broader range of offenders and also allow Corrective Services NSW to target higher level programs and interventions at higher risk offenders where these resources are most needed.<sup>105</sup>
- 12.72 In addition, consideration should be given to reformulating the terminology used in the CSO provisions of the CSPA and *Crimes (Administration of Sentences) Act 1999* (NSW), given that the current broad definition of “community service work” does not seem to have increased access to this form of sentence.

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101. G Henson, *Submission SE22*, 6.

102. NSW Law Reform Commission, *Non-custodial Sentencing Options*, Sentencing Question Paper 7 (2012) Question 7.10(2).

103. NSW, State Debt Recovery Office, *Work and Development Order Guidelines 2012* (2012).

104. Law Society of NSW, *Submission SE16*, 16; Women in Prison Advocacy Network, *Submission SE17*, 12; NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 11; The Public Defenders, *Submission SE24*, 15; NSW Bar Association, *Submission SE27*, 13; The Shopfront Youth Legal Centre, *Submission SE28*, 6; Public Interest Advocacy Centre, *Submission SE29*, 17-18; Legal Aid NSW, *Submission SE31*, 22; NSW Police Force, *Submission SE32*, 17; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 21; Corrective Services NSW, *Submission SE52*, 21.

105. Corrective Services NSW, *Submission SE55*, 3.

### **Recommendation 12.7: Increased access to and flexibility of CSOs**

If the CSO is retained:

- (1) Corrective Services NSW should increase the number of community service work placements available.
- (2) A revised Crimes (Sentencing) Act should provide that:
  - (a) The suitability assessment report, which must be ordered before the court imposes a CSO, should indicate:
    - (i) whether the offender is suitable for community service work;
    - (ii) whether appropriate work is available; and
    - (iii) whether there are any other programs, treatments, courses or activities that are available and recommended for the offender.
  - (b) Unless the court requires otherwise, Corrective Services NSW should have the discretion to determine the activities through which an offender can satisfy CSO work hours, including community service work, medical or mental health treatment, education, vocational or life skills courses, financial or other counselling, drug or alcohol treatment, or any combination of these activities.
  - (c) The court may require an offender to participate in a particular activity if the assessment report indicates that it is appropriate and available.

## Combinations of orders

### *Combining CSOs and s 9 bonds*

- 12.73 Section 13 of the CSPA specifically prohibits CSOs being imposed in combination with any form of good behaviour bond for the same offence. However, there is no prohibition on a court imposing a CSO and a s 9 bond together when it is sentencing an offender for multiple offences. Some stakeholders reported that this does occur in practice.<sup>106</sup>
- 12.74 Several stakeholders favoured allowing the combination of a CSO and a s 9 bond when sentencing for a single offence.<sup>107</sup> Two arguments were put forward in favour of this reform. First, combinations can and do already occur where an offender is sentenced for multiple offences. Secondly, although a CSO requires an offender to engage in work and possibly in some programs, little is provided in the way of supervision, monitoring or support from Corrective Services NSW. Section 9 bonds, on the other hand, provide for supervision and support but have little in the way of a reparative or punitive element, such as community service work. Combining the two

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106. Legal practitioners, Dubbo, *Consultation SEC14*; NSW, Office of the Director of Public Prosecutions, *Submission SE41*, 2; The Shopfront Youth Legal Centre, *Submission SE28*, 2.

107. Community Corrections, Mt Druitt, *Consultation SEC18*; The Shopfront Youth Legal Centre, *Submission SE37*, 2; NSW, Office of the Director of Public Prosecutions, *Submission SE41*, 2.

would open up a new form of sentence to courts that wish to include a punitive or reparative element alongside a rehabilitation element and supervision.

- 12.75 Allowing the combination of community service work, a non-offending requirement and supervision for a single offence would bring NSW into line with other Australian jurisdictions. Western Australia, Victoria, South Australia, the NT and the ACT all have orders which allow a court to impose supervision and community service work as part of a single sentence.<sup>108</sup> In Queensland, community service orders and probation orders remain separate sentences but can be imposed together for a single offence.<sup>109</sup>
- 12.76 Corrective Services NSW was the only stakeholder to expressly oppose an amendment that would permit the court to combine a CSO and a s 9 bond. It argued that a “function of this kind of strengthened non-custodial sentence is already provided by the ICO”.<sup>110</sup>
- 12.77 We acknowledge that ICOs as they are currently administered are similar to a combined CSO and s 9 bond, with the important exception that an ICO is a custodial, rather than non-custodial, sentence.<sup>111</sup> In Chapter 9, we provide recommendations for the strengthening of ICOs so that, if this form of sentence is retained, it would operate in practice in a way that is more appropriate for its position in the spectrum of sentencing options. If these recommendations are implemented, there would be a space for a sentence involving a combination of CSOs and a s 9 bond. Even if no changes are made to the ICO, our view is that a combination of CSOs and s 9 bonds (if they are retained) would be a useful sentencing option for offenders whose conduct has not merited the more serious custodial penalty involved in an ICO.

#### **Recommendation 12.8: Combining CSOs and s 9 bonds**

If CSOs and s 9 bonds are retained, the court should be able to impose a CSO and a s 9 bond together for the one offence.

#### *Combining non-conviction orders with other penalties*

- 12.78 Other Australian jurisdictions tend to have a larger range of penalties that can be imposed without recording a conviction. In Victoria, for example, a court can impose a fine, a community correction order, or an adjourned undertaking of up to five years

108. WA community-based order: *Sentencing Act 1995* (WA) pt 9; Victorian community correction order: *Sentencing Act 1991* (Vic) pt 3A; NT community based orders: *Sentencing Act* (NT) pt 3 div 4A; SA through community service as a condition on a bond or supervision as a condition on a community service order: *Criminal Law (Sentencing) Act 1988* (SA) s 39-44, pt 6; ACT community service condition and supervision condition attached to a good behaviour order: *Crimes (Sentencing) Act 2005* (ACT) s 13.

109. *Penalties and Sentences Act 1992* (Qld) s 109.

110. Corrective Services NSW, *Submission SE52*, 17.

111. Custodial sentences (ICOs, home detention, suspended sentences) are direct alternatives to imprisonment. Breach of these sentences will normally result in the offender being committed to full-time custody for the remaining period of the sentence. This is quite different to non-custodial sentences, which (although they are available for offences where the maximum penalty is imprisonment) are not direct alternatives to imprisonment. Breach and revocation of a non-custodial sentence results in the court resentencing the offender.

(similar to a good behaviour bond) without recording a conviction.<sup>112</sup> A Queensland court can, without recording a conviction, impose a community service order, a fine, a probation order or a recognisance.<sup>113</sup> In WA, a community-based order, fine or conditional release order can be imposed without conviction.<sup>114</sup>

- 12.79 We have considered whether it should be possible to combine other sentencing options with non-conviction orders.<sup>115</sup> The submissions produced a range of responses.<sup>116</sup> During consultations there was some support for the court being able to impose some community work as part of a sentence at a lower level than the CSO.<sup>117</sup> Some stakeholders however opposed the inclusion of community service work as a condition of a s 10(1)(b) bond.<sup>118</sup>
- 12.80 We do not support allowing courts to impose a CSO or a s 9 bond without recording a conviction. Although CSOs and s 9 bonds are non-custodial sentences they do have potentially serious consequences on breach. We cannot envisage circumstances which would justify the imposition of either of these sentences that would not justify the recording of a conviction. If these sentences were available without recording a conviction, it could lead to a net widening if imposed where a s 10(1)(b) bond would have been more appropriate.<sup>119</sup>
- 12.81 We do however recognise the value in allowing courts to impose a broader range of penalties without recording a conviction that can currently be imposed as part of a s 10 order. In particular, there may be value in permitting the imposition of a requirement for the performance of a small number of hours of community service work or participation in a development program.
- 12.82 The Chief Magistrate of the Local Court submitted that a possible option for the imposition of a combination sentence, involving a s 10(1)(b) bond, would be to specify, at the time of sentencing, a penalty such as a fine or a CSO to which the offender will become liable if the bond is breached due to the commission of a further offence. The “suspended penalty” would then automatically descend on the offender, upon a conviction being recorded for a new offence, without the need for the court to deal separately with the breach. The Chief Magistrate submitted that

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112. *Sentencing Act 1991* (Vic) s 7(e), (f), (i).

113. *Penalties and Sentences Act 1992* (Qld) s 29, s 30, s 44, s 90, s 100.

114. *Sentencing Act 1995* (WA) s 39.

115. NSW Law Reform Commission, *Non-custodial sentencing options*, Sentencing Question Paper 7 (2012) Question 7.7.

116. Combining a s 10 order with a fine: Law Society of NSW, *Submission SE16*, 16; NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 11; Police Association of NSW, *Submission SE21*, 26; G Henson, *Submission SE22*, 6; NSW Bar Association, *Submission SE27*, 12; The Shopfront Youth Legal Centre, *Submission SE28*, QP 7, 4-5 and *Submission SE37*, 2; Legal Aid NSW, *Submission SE50*, 3. Three in favour of CSOs: Law Society of NSW, *Submission SE16*, 16; NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 11; Legal Aid NSW, *Submission SE50*, 2. Three making general comments in favour of combinations with non-custodial options or ancillary orders: The Public Defenders, *Submission SE24*, 14; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 19; G Henson, *Submission SE22*, 6.

117. Community support organisations, Dubbo, *Consultation SEC13*.

118. The Shopfront Youth Legal Centre, *Submission SE28*, 5; The Public Defenders, *Submission SE24*, 14.

119. The Shopfront Youth Legal Centre, *Submission SE28*, 4.

such an option could also have the benefit of adding some deterrence to the imposition of a s 10(1)(b) bond.<sup>120</sup>

- 12.83 This suggestion would effectively extend the model of the suspended sentence further down the spectrum of sentencing options. We acknowledge the utility of an approach of this kind, so far as it might allow courts to impose a “suspended fine” in Chapter 14. However we do not consider that it would be practical to have a “suspended CSO”, as its availability would need to be assessed at the time of the imposition of the sentence and circumstances could change subsequently that would make implementation difficult.

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120. G Henson, *Submission SE22*, 6.



## 13. New non-custodial community-based orders

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### In brief

Existing community-based orders are structured in an overlapping and unnecessarily rigid way. Strong and flexible community-based options are essential to ensure that imprisonment is only used as a last resort. We propose a single community correction order to replace community service orders and s 9 bonds; a single conditional release order that can be imposed with or without conviction to replace s 10(1)(b) bonds and s 10(1)(c) orders; and a new “no penalty” provision that can be imposed with or without conviction in place of s 10(1)(a) and s 10A orders.

<b>New non-custodial orders to address less serious offending .....</b>	<b>289</b>
<b>A new community correction order in place of CSOs and s 9 bonds .....</b>	<b>290</b>
Similarity to Victoria's community correction order .....	291
Automatic conditions .....	292
Optional requirements of the community correction order .....	293
<i>The supervision requirement.....</i>	<i>293</i>
<i>The work and program requirement.....</i>	<i>293</i>
<i>The personal restriction requirement .....</i>	<i>295</i>
Duration of order.....	296
Duration of the optional requirements.....	297
Additional discretionary conditions of the community correction order .....	298
Consent .....	298
The assessment process.....	299
Variations, breaches and revocations of the community correction order .....	300
Criminal record .....	300
<b>A new conditional release order in place of s 10(1)(b) and s 10(1)(c) orders .....</b>	<b>301</b>
Nature of the conditional release order.....	301
The assessment process.....	302
<b>A “no penalty” provision to replace s 10(1)(a) and s 10A .....</b>	<b>304</b>
<b>Combinations of the new sentences with other penalties .....</b>	<b>305</b>

- 13.1 In this chapter we propose a new structure of non-custodial community-based orders that would replace community service orders (CSOs), s 9 bonds, s 10(1)(b) bonds and other orders under s 10 and 10A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA). The new orders we propose are: a community correction order (CCO), a conditional release order (CRO) and a sentence of “no penalty”.

### New non-custodial orders to address less serious offending

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- 13.2 Our recommendations in Chapter 12 are designed to meet some of the conceptual and other issues with the existing non-custodial sentences that we identified. However, they do not completely eliminate the problems with the existing options, nor do they address the undesirable complexity of the good behaviour bond structure.

- 13.3 Bonds are currently linked to three sentences that are quite different in their impact on an offender: a s 12 bond attached to a suspended sentence of imprisonment; a s 9 bond imposed following conviction; and a s 10(1)(b) bond attached to a non-conviction order. We were informed during the consultations that offenders who had previously served a s 9 bond had particular difficulty appreciating the difference between that bond and a newly imposed s 12 bond, and in understanding that the consequences for breach of the s 12 bond were much more serious.<sup>1</sup>
- 13.4 Most other Australian jurisdictions do not use the terminology of bonds or the earlier and more obscure term “recognisance” that was replaced in NSW in 1999.<sup>2</sup> Instead they employ a separate term for each type of sentence to prevent the kind of confusion that our submissions and consultations identified.<sup>3</sup> We consider that this approach should be adopted to establish a clear demarcation between the different sentence types.
- 13.5 Our proposal to restructure the non-custodial community-based sentences aims to achieve simpler, more transparent and flexible sentences to address less serious offending.

## A new community correction order in place of CSOs and s 9 bonds

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- 13.6 Our preferred approach to s 9 bonds and CSOs is to incorporate them into a new single, flexible non-custodial order. An order that incorporates the elements of both CSOs and s 9 bonds would simplify the options available. It would increase the opportunity for the court to design a sentence that is fitted to the individual offender. The new order would also aim to increase the use of community service work as part of a sentencing option where this is appropriate.
- 13.7 We have named this new order a community correction order (CCO). It would incorporate the reforms that we discussed in Chapter 12 as well as some new features that are outlined below. The new order would fit into a redesigned structure of sentencing options as a less severe version of the proposed community detention order (CDO).<sup>4</sup>
- 13.8 Some stakeholders have expressed disquiet with any reform which reduces, rather than increases, the range of community-based sentencing options available. Their concern is that a reduction in community-based options (through bringing CSOs and s 9 bonds under the same umbrella) will inevitably lead to penalty escalation and to offenders moving more quickly up the hierarchy to a prison sentence.

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1. Local Court practitioners, *Consultation SEC9*; Legal practitioners, Dubbo, *Consultation SEC14*.  
2. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [4.3]-[4.5]; NSW, *Parliamentary Debates*, Legislative Assembly, 28 October 1999, 2326 (Bob Debus, Attorney General).  
3. The exceptions are *Criminal Law (Sentencing) Act 1988* (SA) pt 5 and *Sentencing Act* (NT) s 11, which refer to “bonds”.  
4. See Chapter 11.



- 13.9 We do not agree with this view. We have effectively proposed rationalising the existing sentencing options into a more coherent and flexible form, rather than reducing the responses available to the courts.
- 13.10 Stakeholders also reported to us in consultations that offenders routinely receive several sentences of the same type sequentially (for example, several s 9 bonds over time for different offences). We envisage a similar practice occurring with the CCO and the other sentencing options outlined in this chapter.

**Recommendation 13.1: A new community correction order**

A revised Crimes (Sentencing) Act should replace CSOs and s 9 bonds with a new order, the community correction order (CCO), available in relation to offences punishable by imprisonment.

**Similarity to Victoria’s community correction order**

- 13.11 The proposed CCO would have some similarity to the Victorian community correction order, although with a more limited selection of optional requirements. As part of the Victorian community correction order, a court must attach at least one of the following:
- unpaid community work;
  - a treatment and rehabilitation condition;
  - supervision;
  - a non-association condition;
  - a residence restriction condition;
  - a place restriction condition;
  - a curfew;
  - an alcohol exclusion condition;
  - a judicial monitoring condition;
  - a justice plan condition; and/or
  - a residential treatment condition.<sup>5</sup>
- 13.12 The court in Victoria can impose any other condition except a condition requiring the payment of money.<sup>6</sup>
- 13.13 We propose a limited list of optional requirements in order to simplify the proposed new order while retaining sufficient flexibility for the court to apply it to individual cases.

5. *Sentencing Act 1991* (Vic) s 47, 48B-48L, 80-83.

6. *Sentencing Act 1991* (Vic) s 48.

- 13.14 We envisage that a CCO would cover a more limited range of offences than the Victorian model. It would take its place between the more serious proposed CDO and the less serious proposed conditional release order (CRO), which is discussed later in this chapter. Together they would cover the same range which the Victorian order addresses, but their separate existence would help to ensure that the court sets a sentence that is appropriate to the nature, circumstances and seriousness of the offence and the offender's subjective circumstances.

### Automatic conditions

- 13.15 The CCO should only be available where a conviction is recorded and where the offence is one that is punishable by imprisonment. A revised Crimes (Sentencing) Act should set out two standard conditions which would automatically apply and that would be in force for the duration of the order. These should be that:

- the offender not commit an offence, and
- the offender appear before the court if called upon to do so during the term of the order.

In line with Recommendation 12.1, we prefer a provision that requires an offender to “not commit an offence” rather than to “be of good behaviour”. The proposed breach provisions would allow courts to respond flexibly to conduct which was a breach of this requirement but only involved a minor regulatory or fine-only offence.

- 13.16 We have carefully considered whether the requirement that an offender not “commit an offence” should be an automatic or an optional condition of the CCO. The CSO does not currently require an offender to be of good behaviour and reoffending in most cases will not constitute a breach. Automatically including a requirement not to commit an offence means that the CCO may not achieve the completion rates of the current CSO. However, the CSO is the only order of its type in NSW to omit a non-offending condition; suspended sentences, home detention, intensive correction orders, s 9 bonds and s 10 bonds all require an offender to be of good behaviour.<sup>7</sup> Other Australian jurisdictions also consistently include a non-offending condition in their mid-level orders.<sup>8</sup> We, therefore, consider that a requirement not to commit a further offence should be an automatic condition of the CCO.

#### **Recommendation 13.2: Automatic conditions of the CCO**

The community correction order should have automatic conditions requiring an offender not to commit an offence and to appear in court if called upon to do so during the term of the order.

7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95(b); *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 175, 200.

8. *Criminal Law (Sentencing) Act 1988* (SA) s 38(1)(a), 39(1)(a); *Sentencing Act 1995* (WA) s 48(1)(a), 62(1)(a); 69(1)(a), 77(1)(a); *Sentencing Act* (NT) s 11(1)(b), 13(1)(b), 39E(1)(a); *Sentencing Act 1991* (Vic) s 45(1)(a), 72(2)(b); *Penalties and Sentences Act 1992* (Qld) s 31, 93(1)(a), 103(1)(a); *Sentencing Act 1997* (Tas) s 24(1), 28(a), 37(1)(a), 59(b); *Crimes (Sentencing) Act 2005* (ACT) s 13; *Crimes (Sentence Administration) Act 2005* (ACT) s 86.

## Optional requirements of the community correction order

- 13.17 In addition to the automatic conditions, a court should have the option to impose one or more of the following requirements:
- a supervision requirement;
  - a work and program requirement; and/or
  - a personal restriction requirement.
- 13.18 The court could attach any or all of these optional requirements to a CCO, so long as the resulting order is proportionate in all of the circumstances of the case. It is appropriate however that the court also retain a discretion not to attach any of these requirements resulting in a sentence similar to a “bare” s 9 bond.<sup>9</sup>

### *The supervision requirement*

- 13.19 A CCO with a supervision requirement would create a sentence that is largely identical to a supervised s 9 bond. A revised Crimes (Sentencing) Act should set out the standard obligations of a supervision requirement, as set out in Chapter 12,<sup>10</sup> with one modification. These standard obligations would require the offender to comply with the reasonable directions of Corrective Services NSW supervisors or assigned officers, accept home visits, submit to alcohol and drug testing, and reside at an approved address. A CCO’s standard supervision conditions should be drafted such that the offender is required to *submit* to Corrective Services NSW supervision for the duration of the requirement, but Corrective Services NSW is not obliged to supervise the offender once it is satisfied that this is no longer necessary. It would thus be able to allocate supervision resources according to the risks and needs of different offenders.
- 13.20 Our view is that a CCO’s standard supervision conditions should not include a requirement that the offender participate in intervention programs and activities as directed by a supervisor. In the interests of transparency, an offender should only be required to attend programs on the explicit order of the court. The court could order that an offender participate in intervention programs and activities either by attaching a work and program requirement to the CCO or by including an additional condition that the offender must participate in intervention programs and activities as the supervisor directs.<sup>11</sup> This recognises that requiring offenders to participate in such activities can be punitive because it infringes on their freedom to direct their own time.

### *The work and program requirement*

- 13.21 A work and program requirement of a CCO, if imposed, should be formulated in terms of a set number of CCO hours that offenders would be required to complete

9. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9(2), s 95.

10. Recommendation 12.3.

11. See para [13.37].

satisfactorily. As outlined in Chapter 12 in relation to the CSO,<sup>12</sup> our view is that there should be a range of allowable activities, including community service work, medical or mental health treatment, education, vocational or life skills courses, financial or other counselling, drug or alcohol treatment, or any combination of these activities. This optional requirement for the CCO is a similar but more limited version of the “work and intervention requirement” proposed for the new CDO.

- 13.22 As noted in Chapter 11, Corrective Services NSW has suggested that participation in punitive community work should be kept separate from participation in rehabilitative intervention programs and other activities. Under the preferred Corrective Services NSW model, the CCO hours would be satisfied by work only and participation in other activities would not be measured in terms of hours.
- 13.23 We believe that both community service work and participation in programs can be rehabilitative as well as punitive. For this reason, as well as the benefits to flexibility it provides, a large range of activities should be acceptable to satisfy the hours of a CCO work and program requirement. Difficulties in determining how many hours should be counted for non-work activities could be resolved by giving Corrective Services NSW the discretion to “deem” the relevant number of hours for any particular activity. The Victorian community correction order has recently been amended to allow hours spent in treatment or rehabilitation activities to count as community service work.<sup>13</sup>
- 13.24 The maximum number of CCO hours a court should be able to impose as part of the work and program requirement should be 500 hours, as is currently the case for the CSO. Unlike the CSO, we do not consider it necessary to link the number of hours that may be imposed to the maximum term of imprisonment available for the offence. The court should have the discretion to impose any number of hours it deems appropriate up to a maximum of 500 hours, regardless of the maximum penalty for the offence.
- 13.25 Corrective Services NSW should be able to manage the mix of activities that an offender undertakes to satisfy the CCO hours, according to what is available and most appropriate. However, there should be a cap on the maximum number of CCO hours that can be satisfied through community service work. Corrective Services NSW has suggested that the maximum number of work hours that it is likely to be able to provide for an offender is 300 and we accept this practical limitation. As a result, the court could impose up to 500 CCO hours (to be satisfied through work, programs and other activities) but there should be a cap of 300 hours on the number of hours that can be spent in work.
- 13.26 The legislation should set out the standard obligations of the offender where a work and program requirement is imposed. These could be based on the current

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12. Recommendation 12.7.

13. *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic) inserting *Sentencing Act 1991* (Vic) s 48CA.

standard conditions of a CSO and would require the offender to fulfil the CCO hours in the manner directed by a Corrective Services NSW supervisor.<sup>14</sup>

### *The personal restriction requirement*

- 13.27 If a court imposes a personal restriction requirement, it could include one or more of the following:
- a curfew;
  - a place restriction;
  - a non-association condition; and/or
  - an alcohol and /or drug abstention condition.
- 13.28 A revised Crimes (Sentencing) Act should set out some limits on the severity of the conditions that a court could impose as part of the personal restriction requirement. For example, the terms of a non-association or place restriction condition should be limited by considerations similar to those currently included in s 100A of the CSPA. Any curfew should also be limited in order to ensure that the conditions of a CCO remain appropriate for a non-custodial sentence at this level. Under Victoria's community correction order, curfews that restrict an offender's movements for more than 12 hours in any 24 hour period cannot be imposed.<sup>15</sup> We support a similar limit for the CCO.

#### **Recommendation 13.3: Optional requirements of the CCO**

- (1) The court should be able, but not required, to attach one or more of the following optional requirements to a community correction order (CCO):
  - (a) a supervision requirement;
  - (b) a work and program requirement; or
  - (c) a personal restriction requirement.
- (2) The nature and conditions of the supervision, work and program and personal restriction requirements should be set out in legislation.
- (3) The standard obligations of the supervision requirement should be for the offender to:
  - (a) follow all reasonable directions of the Corrective Services NSW supervising officer;
  - (b) live at an address approved by the Corrective Services NSW supervising officer;
  - (c) receive home visits by the Corrective Services NSW supervising officer for any purpose connected with the administration of the CCO; and

14. See para [12.4].

15. *Sentencing Act 1991* (Vic) s 481(3)(b).

- (d) submit to drug and alcohol testing as the Corrective Services NSW supervising officer directs.
- (4) The standard obligations of supervision should be phrased to make clear that, while the offender is required to submit to supervision, Corrective Services NSW has the discretion to provide supervision according to the needs of the case.
- (5) A court may impose a work and program requirement of up to 500 hours.
- (6) Unless the court requires otherwise, Corrective Services NSW should have the discretion to determine the activities through which an offender can satisfy CCO work and program hours, including community service work, medical or mental health treatment, education, vocational or life skills courses, financial or other counselling, drug or alcohol treatment, or any combination of these activities. Of the hours imposed, the maximum number of hours that can be spent on community service work is 300.
- (7) Personal restriction requirements may include a curfew; a place restriction; a non-association condition; and/or an alcohol or drug abstention condition. Conditions which a court could impose as part of the personal restriction requirement should be subject to statutory restrictions appropriate to a non-custodial sentence at this level.

### Duration of order

- 13.29 Our view is that the maximum duration of a CCO should be 3 years. A number of factors influenced us in arriving at this limit, which is shorter than the current 5 year maximum duration of a s 9 bond.
- 13.30 First, the current 5 year limit on s 9 bonds is unusually long when compared to orders of this type in other jurisdictions. In South Australia, courts can impose bonds for up to 3 years.<sup>16</sup> In Queensland and Tasmania, similar probation orders are also capped at 3 years.<sup>17</sup> In NT and WA, courts can impose community based orders for up to 2 years.<sup>18</sup> In Victoria, Magistrates Courts can impose community correction orders for up to 2 years, although the higher courts can impose them for up to the maximum term of imprisonment for the relevant offence.<sup>19</sup>
- 13.31 Secondly, it seems that a significant majority of the bonds that are currently imposed in the Local, District and Supreme Courts fall well below the current 5 year limit. In 2012, the average length of a s 9 bond imposed in the Local Court was 14.7 months and the average length in the higher courts was 21.4 months.<sup>20</sup> In 2012, 76% of s 9 bonds imposed in the Local, District and Supreme Courts were for less than two years. Nearly all s 9 bonds (97%) were for less than 3 years.<sup>21</sup> This

16. *Criminal Law (Sentencing) Act 1988* (SA) s 40.

17. *Penalties and Sentences Act 1992* (Qld) s 92(2); *Sentencing Act 1997* (Tas) s 39.

18. *Sentencing Act* (NT) s 39D; *Sentencing Act 1995* (WA) s 62(5).

19. *Sentencing Act 1991* (Vic) s 38.

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

21. NSW Bureau of Crime Statistics and Research (unpublished data, ref: kg13-11321). See also NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) figure 5.9.

indicates that the current 5 year maximum may be unnecessarily long and could be reduced without unduly affecting sentencing options.

- 13.32 Thirdly, the optional requirements that can be attached to the proposed CCO mean that the CCO can be more severe than a s 9 bond. An order of 5 years duration with conditions such as supervision, a curfew and up to 300 hours of community service work would not be proportionate for a non-custodial sentence.
- 13.33 We are persuaded that a 3 year limit is preferable to a 2 year limit for the CCO because longer bonds have been shown to reduce the likelihood of a person reoffending. A recent study has found that offenders on s 9 bonds of 2 years or more were slightly less likely to reoffend than offenders subject to a bond of less than two years, once other variables had been controlled for.<sup>22</sup>

#### **Recommendation 13.4: Duration of the CCO**

The maximum duration of a community correction order should be three years.

#### **Duration of the optional requirements**

- 13.34 A court should be able to set the duration of the three optional requirements separately to the overall duration of the order. For example, a court might impose a three year CCO that includes supervision for the first two years of the order and a condition that the offender abstain from alcohol or non-prescription drugs or medications as part of a personal restriction requirement which is in force for the first 12 months.
- 13.35 There should not be any statutory limit on the maximum duration of the supervision requirement (within the order's three year limit). Similarly there should not be a statutory limit on the length of any personal restriction requirement, unless it involves a curfew. It is appropriate for a non-custodial sentence at this level, for a curfew requirement to be for a maximum period of six months. This is in line with the Victorian community correction order.<sup>23</sup> This would mean that the conditions and severity of the CCO are clearly differentiated from the proposed CDO, which can include home detention and unrestricted curfew requirements.<sup>24</sup>
- 13.36 As proposed in Recommendation 12.6, there should be a formula which governs the length of the work and program requirement based on the number of hours imposed. This would ensure that an offender has sufficient time in which to complete the hours.

22. S Poynton, D Weatherburn and L Bartels, "Good behaviour bonds and reoffending: The effect of bond length" (2013) *Australian and New Zealand Journal of Criminology* (in press); see also S Poynton, *Bonds, Suspended Sentences and Re-offending: Does the Length of the Order Matter?* (BOCSAR, Applied Research in Crime and Criminal Justice Conference, 2013).

23. *Sentencing Act 1991* (Vic) s 48I(3).

24. See Chapter 11.

**Recommendation 13.5: Duration of the optional requirements of the CCO**

- (1) The court should be able to set the length of any optional requirements of the community correction order (CCO) independently from but not to exceed the length of the CCO.
- (2) The duration of a work and program requirement of a CCO should be calculated by reference to the number of hours of required, at the rate of one week for every four hours.

**Additional discretionary conditions of the community correction order**

- 13.37 A court should also have the discretion to attach any other condition it considers appropriate. This would allow a court, for example, to order that an offender participate in a particular program, or access a particular service, without tying the offender's participation to a specified number of hours through a work and program requirement. The court could also require, as a condition of the CCO, that the offender comply with an intervention plan arising out of one of the intervention programs specified in the *Criminal Procedure Regulation 2010* (NSW). However, the court should not be able to attach an additional condition to a CCO that requires any payment of money.
- 13.38 As with the optional requirements, the court should be able to set the length of any additional conditions independently from (but not exceeding) the length of the order.

**Recommendation 13.6: Additional conditions of a CCO**

- (1) The court should be able to attach additional conditions to a community correction order (CCO) at its discretion (including compliance with an intervention plan arising from one of the programs stipulated in the *Criminal Procedure Regulation 2010* (NSW)) other than a condition requiring the offender to make any monetary payment.
- (2) The court should be able to set the length of any additional conditions independently from but not to exceed the length of the CCO.

**Consent**

- 13.39 Some but not all Australian jurisdictions require an offender to consent to a community-based order before a court can impose it.<sup>25</sup> In a practical sense, an offender's consent is necessary for both s 9 bonds and CSOs. Section 97 of the CSPA provides that, if a court makes an order for a good behaviour bond and the offender fails to enter into the bond, then the court can sentence the offender as if no order had been made.<sup>26</sup> An offender must sign an undertaking to comply with his

25. Consent required: *Penalties and Sentences Act 1992* (Qld) s 96, 106; *Sentencing Act 1991* (Vic) s 37(c); *Crimes (Sentencing) Act 2005* (ACT) s 105. Consent not required in NT, Tasmania, SA or WA.

26. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 97.



or her obligations under a CSO as soon as practicable after a court has imposed that order. If the offender refuses to sign the undertaking, the court can revoke the CSO and resentence the offender.<sup>27</sup>

- 13.40 Our view is that these requirements should arise directly rather than indirectly so that a court should only impose a CCO after the offender has consented to it.

**Recommendation 13.7: Requirement for offender’s consent**

The community correction order should only be imposed with an offender’s consent.

**The assessment process**

- 13.41 Currently, a court can only impose a CSO after Corrective Services NSW has assessed the offender’s suitability.<sup>28</sup> A s 9 bond does not require an assessment before a court can impose it.<sup>29</sup> However, in practice, the court is likely to request an informal pre-sentence report from Corrective Services NSW in order to inform itself about appropriate and available programs.

- 13.42 We consider that a court should only be able to impose a CCO with a work and program requirement after receiving an assessment report from Corrective Services NSW that identifies some work or program that is both appropriate and available for the offender. The court should be empowered to stipulate that the offender perform, as part of the work and program hours, any appropriate and available activity that the report identifies. However, the court should also be able to frame an order in terms allowing Corrective Services NSW to determine the mix of activities.

**Recommendation 13.8: Assessment for a CCO**

- (1) The court should not be able to make a community correction order that includes a work and program requirement unless it has received an assessment report indicating that some work or other program is appropriate for the offender and is available.
- (2) The court should be able to stipulate that a particular activity be performed as part of an offender’s work and program hours if the assessment report has identified that activity as appropriate and available (otherwise Corrective Services NSW should determine the activities to be performed).

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27. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 86(5).  
 28. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 86(2).  
 29. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95A and s 95B require a court to refer an offender for a suitability assessment if it plans to attach a condition that the offender must participate in an intervention program as part of a good behaviour bond. However, “intervention program” is limited to those programs declared as such under the *Criminal Procedure Regulation 2010* (NSW) which are only available pre-sentence and, therefore, not at sentence.

### Variations, breaches and revocations of the community correction order

- 13.43 A court should deal with suspected breaches of the CCO. Upon finding a breach, the court should have the options currently available for s 9 bonds; that is, it should have the power to:
- take no action on the breach;
  - vary the order; or
  - revoke the order.
- 13.44 If the court revokes a CCO, it should resentence the offender for the original offence. Revocation proceedings should be brought before the court that made the order. However, any court before which the offender is appearing for another offence should also have jurisdiction to deal with the breach.
- 13.45 In accordance with Recommendation 12.2, a court should also have the power to vary a CCO on application made by the offender or by Corrective Services NSW independently from any proceedings for breach. Corrective Services NSW should be able to make minor administrative changes such as a change of address or variations to reporting conditions without the need for a court order.

#### **Recommendation 13.9: Variations, breaches and revocations of the CCO**

- (1) A breach of a community correction order (CCO) should be dealt with by:
  - (a) the court that imposed the order; or
  - (b) where the breach arises from a further offence, the court dealing with that offence.
- (2) If a CCO is revoked, the court should resentence the offender for the original offence.
- (3) A court should be able, on application made by either the offender or by Corrective Services NSW, to vary a CCO whether or not breach has occurred.
- (4) Corrective Services NSW should be able to make minor administrative changes to a CCO, such as a change of address or a variation in reporting requirements.

### Criminal record

- 13.46 In order to prevent penalty escalation and net widening under this new order, an offender's criminal history should clearly record the conditions imposed on any CCO. The CCO can cover a wide range of conditions of varying intensity and seriousness. Recording the detailed conditions will help a subsequent sentencing court to understand the nature and intensity of any previous CCO that has been imposed on the offender.

**Recommendation 13.10: Criminal history following the CCO**

The criminal history that follows the imposition of a community correction order should contain a record of the conditions imposed.

## A new conditional release order in place of s 10(1)(b) and s 10(1)(c) orders

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- 13.47 Our view is that conditional discharges under s 10(1)(b) and 10(1)(c) should be transformed into a new conditional release order (CRO). The CRO would carry over the features of the s 10(1)(b) bond and remove any need for the unused s 10(1)(c), as the court would be able to order an offender attend a rehabilitation or other program as a condition of the CRO.
- 13.48 The new order would sit below the proposed CCO in terms of severity. It should only be imposed with the offender's consent.
- 13.49 We propose that a court should be able to impose a CRO with or without recording a conviction. In this way, it would include the range of circumstances currently covered by s 10(1)(b) bonds but it would go further in creating an option for courts where, although it is appropriate to record a conviction, only a low level penalty would be proportionate to the circumstances of the case.
- 13.50 When a court imposes a CRO without recording a conviction, it would be subject to the same exclusions as currently apply to the use of s 10 orders where the offender has previously been dealt with without conviction for certain prescribed offences.<sup>30</sup>
- 13.51 We consider that the CRO (with or without conviction) should be available for less serious offences that are punishable by imprisonment, as well as for fine-only offences. This will give courts an appropriate sentencing option particularly in cases where offenders have limited capacity to pay a fine.

### Nature of the conditional release order

- 13.52 We propose that the CRO should carry the same automatic conditions as the CCO; that is, conditions that the offender:
- not commit an offence; and
  - appear before the court if called upon to do so during the term of the order.

These automatic conditions should be in force for the full term of the order.

- 13.53 In addition to the automatic conditions, the court should be able to attach one or more of the following optional requirements:

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30. See para [12.16].

- a supervision requirement; and/or
- a personal restriction requirement.

These would include the conditions that a court can currently attach to a s 10 bond.

- 13.54 The court should have the discretion to attach any other additional conditions it considers appropriate, other than a requirement that the offender pay any money or comply with a curfew, which would not be appropriate to a non-custodial order at this level. The court would be able to include a condition requiring the offender to comply with an intervention plan arising out of one of the intervention programs specified in the *Criminal Procedure Regulation 2010* (NSW). The court could also attach a condition that the offender must participate in another specific rehabilitation program, or attend activities and programs as directed by a Corrective Services NSW supervisor.
- 13.55 The maximum duration of the CRO should be two years, as is currently the case for s 10 bonds. The court should be able to set the length of any conditions separately to the length of the order (although subject to the two year limit).
- 13.56 The court should be able to vary a CRO on application made by either the offender or by Corrective Services NSW. In dealing with a breach of a CRO, a court should be able to take no action, vary the CRO or revoke it. If the court revokes a CRO, it should resentence the offender for the original offence.

### The assessment process

- 13.57 The court should not be required to receive an assessment report before imposing a CRO but it should be able to request such a report if it considers that it would be helpful in determining whether to impose any other conditions.

#### **Recommendation 13.11: A new conditional release order**

- (1) A revised Crimes (Sentencing) Act should replace orders under s 10(1)(b) and s 10(1)(c) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) with a new order, to be called a conditional release order (CRO).
- (2) The CRO should be available for offences punishable by imprisonment and for fine-only offences.
- (3) The court should be able to impose a CRO with or without recording a conviction.

#### **Recommendation 13.12: Automatic conditions of the CRO**

The conditional release order should have automatic conditions requiring an offender not to commit any offence and to appear in court if called upon to do so during the term of the order.

**Recommendation 13.13: Optional requirements of the CRO**

- (1) When imposing a conditional release order (CRO), the court should be able, but not required, to attach one or more of:
  - (a) a supervision requirement;
  - (b) a personal restriction requirement.
- (2) The nature and conditions of the supervision and personal restriction requirements should be set out in legislation.
- (3) The standard obligations of the supervision requirement should be for the offender to:
  - (a) follow all reasonable directions of the Corrective Services NSW supervising officer;
  - (b) live at an address approved by the Corrective Services NSW supervising officer;
  - (c) receive home visits by the Corrective Services NSW supervising officer for any purpose connected with the administration of the CRO; and
  - (d) submit to drug and alcohol testing as the Corrective Services NSW supervising officer directs.
- (4) The standard obligations of supervision should be phrased to make clear that, while the offender is required to submit to supervision, Corrective Services NSW has the discretion to provide supervision according to the needs of the case.
- (5) Personal restriction requirements may include a place restriction; a non-association condition; and/or an alcohol or drug abstinence condition, but should not include a curfew. Conditions which a court could impose as part of the personal restriction requirement should be subject to statutory restrictions appropriate to a non-custodial sentence at this level.

**Recommendation 13.14: Duration of the CRO and optional requirements.**

- (1) The maximum duration of the conditional release order should be two years.
- (2) The court should be able to set the length of any optional requirements independently from the length of the order (although not longer than the duration of the order imposed).

**Recommendation 13.15: Additional conditions and consent for the CRO**

- (1) The court should be able to attach additional conditions to a conditional release order (CRO) at its discretion (including compliance with an intervention plan arising from one of the programs stipulated in the *Criminal Procedure Regulation 2010* (NSW)) other than one requiring the offender to make any monetary payment.
- (2) The court should only impose a CRO with an offender's consent.

**Recommendation 13.16: Variation, breach and revocation of the CRO**

- (1) The court should be able, on application by either the offender or by Corrective Services NSW, to vary a conditional release order (CRO) whether or not a breach has occurred.
- (2) A breach of the CRO should be dealt with by:
  - (a) the court that imposed the order; or
  - (b) where the breach arises from a further offence, the court dealing with that offence.
- (3) If a court revokes a CRO it should resentence the offender for the original offence.

## A “no penalty” provision to replace s 10(1)(a) and s 10A

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- 13.58 In the interests of simplicity, s 10(1)(a) and s 10A should be replaced with a single provision which allows the court to deal with an offender without imposing any penalty. The provision could be modelled on s 15 of the *Criminal Law (Sentencing) Act 1988* (SA) and state that, where a court finds a person guilty of an offence but it is inappropriate to impose any penalty, it may:
- without recording a conviction, dismiss the charge; or
  - upon recording a conviction, discharge the person without penalty.
- 13.59 A revised Crimes (Sentencing) Act should also include a provision similar to s 10(3) of the CSPA but with slightly updated language. It should specify that, before deciding not to record a conviction, a court must have regard to:
- the person’s character, antecedents, age, and physical and mental condition (including any cognitive or mental health impairment);
  - the nature and seriousness of the offence;
  - any extenuating circumstances in which the offence was committed; and
  - any other matter the court thinks proper to consider.
- 13.60 The new provision would effectively result in two new sentencing options: “no penalty” with conviction; and “no penalty” without conviction. Our view is that this formulation is a more straightforward description of the effect of the current options. A new “no penalty” sentence would be less open to confusion than the current provisions, particularly given the similarity in numbering of s 10(1)(a) and s 10A that can lead to recording errors.

**Recommendation 13.17: A new “no penalty” provision**

A revised Crimes (Sentencing) Act should replace s 10(1)(a) and s 10A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) with a single new “no penalty” provision. The provision should state:

- (1) Where a court finds a person guilty of an offence but it is inappropriate to impose any penalty, it can:
  - (a) without recording a conviction, dismiss the charge; or
  - (b) upon recording a conviction, discharge the person without penalty.
- (2) Before deciding not to record a conviction, a court must have regard to:
  - (a) the person's character, antecedents, age, and physical and mental condition (including any cognitive or mental health impairment);
  - (b) the nature and seriousness of the offence;
  - (c) any extenuating circumstances in which the offence was committed; and
  - (d) any other matter the court thinks proper to consider.

## Combinations of the new sentences with other penalties

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- 13.61 It is preferable for an offender to be subject to only one non-monetary community-based sentence at any given time. It emerged in consultations that offenders can often be subject to multiple concurrent bonds and other sentences, either as a result of being sentenced to separate sentences for separate offences, or having a further sentence imposed for a fresh offence where an existing order is not revoked. Stakeholders reported that offenders can find this confusing, and it can also make court processes and record keeping unnecessarily difficult.<sup>31</sup>
- 13.62 It should not be possible to combine the new sentences that we propose—the CDO, the CCO and the CRO—with any other sentence except a fine or an ancillary order,<sup>32</sup> regardless of whether the court is sentencing the offender for single or multiple offences. The proposed new sentences preserve sufficient flexibility for the court to avoid the need to impose multiple sentences.
- 13.63 We therefore propose that a revised Crimes (Sentencing) Act include an aggregate sentencing power which would apply to the proposed new sentences and which is analogous to the court's current power under s 53A of the CSPA. This should enable a court to impose a single community-based sentence for multiple offences. A court could also use it when dealing with a breach and possible revocation of a community-based sentence. For example, when an offender subject to a CRO commits a fresh offence and the court revokes the CRO, the court could use the aggregate sentencing power to impose a single new CCO for both the original offence and the new offence. Such a power to impose an aggregate community-

31. Legal practitioners, Dubbo, *Consultation SEC14*.

32. For example, a personal restriction order, an order for compensation or for the restitution of property, or for the forfeiture of a firearm seized by police.

based sentence already exists in Victoria where courts can impose a single community correction order for multiple offences.<sup>33</sup>

- 13.64 Unlike an aggregate sentence of imprisonment, we do not consider it necessary to require the court to specify what sentence would have been imposed for each offence when imposing an aggregate community-based sentence. Any appeal would be against the aggregate sentence and, if successful, would result in a new sentence for each of the relevant offences.

**Recommendation 13.18: Aggregate community-based sentences**

A revised Crimes (Sentencing) Act should provide that the court has power to impose an aggregate community-based sentence in respect of multiple offences, that can be exercised either:

- (a) when the court is sentencing an offender for multiple offences; or
- (b) when it is resentencing an offender for an original offence at the same time as it is sentencing that person for a fresh offence.

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33. *Sentencing Act 1991* (Vic) s 40.



## 14. Fines

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### In brief

Most stakeholders are satisfied with fines as a sentencing option. There were some concerns about fining offenders with limited capacity to pay and the prohibition on imposing fines in combination with non-conviction orders. We recommend a more flexible regime for combining fines with other sentencing options and some measures to assist courts in considering an offender's capacity to pay a fine.

<b>Current law</b> .....	<b>307</b>
<b>Proposals for change</b> .....	<b>308</b>
Better consideration of capacity to pay .....	<b>309</b>
Our view .....	<b>310</b>
No link between a fine amount and the length of imprisonment available .....	<b>311</b>
Our view .....	<b>313</b>
Flexible combination of fines with other sentencing options .....	<b>313</b>
Imposition of fines without conviction .....	<b>314</b>
Our view .....	<b>315</b>
Introduction of a suspended fine option .....	<b>317</b>
No introduction of fines held in trust .....	<b>317</b>

### Current law

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- 14.1 The power to impose fines in NSW is found generally in offence provisions that specify fines as a possible penalty and is subject to the provisions of the *Crimes (Sentencing Procedure) Act 1999* (NSW)<sup>1</sup> (CSPA). In the case of an indictable offence tried on indictment where a fine is not specified as a penalty, the court can impose on an individual a maximum fine of 1,000 penalty units (\$110,000).<sup>2</sup> In the case of an indictable offence dealt with summarily, the Local Court may impose a maximum fine of 100 penalty units (\$11,000).<sup>3</sup>
- 14.2 To complement this legislation, the *Fines Act 1996* (NSW) sets out the procedures for the payment<sup>4</sup> and enforcement<sup>5</sup> of fines, including a requirement that the court consider the ability of the offender to pay the fine when setting the amount.<sup>6</sup>
- 14.3 Our recent report on penalty notices dealt with the enforcement of penalty notices.<sup>7</sup> The same enforcement provisions apply to fines. The State Debt Recovery Office (SDRO) enforces both penalty notices and fines.<sup>8</sup> Fine mitigation measures, such

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1. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 2 div 4.

2. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 15. The CSPA also makes provision for sentencing bodies corporate in such cases: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 16.

3. See also *Criminal Procedure Act 1986* (NSW) s 267(5).

4. *Fines Act 1996* (NSW) s 7-11.

5. *Fines Act 1996* (NSW) s 12-17, s 57-104, s 105-108.

6. *Fines Act 1996* (NSW) s 6; *Rahme v R* (1989) 43 A Crim R 81, 87-89.

7. NSW Law Reform Commission, *Penalty Notices*, Report 132 (2012).

8. The SDRO is part of the Office of State Revenue in NSW Treasury.

as work and development orders<sup>9</sup> (WDOs) and time to pay arrangements<sup>10</sup> are available and apply to both fines and penalty notices.<sup>11</sup> There are some limits on the ability of courts to impose fines together with penalties other than a sentence of imprisonment. We deal with these limits below.<sup>12</sup>

- 14.4 The fine is the most frequently imposed penalty in the Local Court, and was the most serious penalty imposed for the principal offence in 41% of all cases in the Local Court in 2012.<sup>13</sup> The higher criminal courts impose fines infrequently. In 2012, the District Court and the Supreme Court collectively imposed twelve fines as the most serious penalty for a principal offence.<sup>14</sup> The use of court-imposed fines as a principal penalty for offenders has been steadily decreasing over the last 15 years.<sup>15</sup>
- 14.5 Fines are the only effective sentencing option available for corporate offenders.<sup>16</sup> Many of the fines imposed on corporate offenders do not appear in the criminal court statistics as they are often imposed for offences subject to summary criminal enforcement proceedings in the Land and Environment Court, or in relation to offences which, until recently, were finalised in the Industrial Relations Commission of NSW under the *Occupational Health and Safety Act 2000* (NSW).<sup>17</sup>

## Proposals for change

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- 14.6 Stakeholders generally supported the retention of fines as a sentencing option,<sup>18</sup> especially for the majority of minor offences in the Local Court.<sup>19</sup>
- 14.7 However, stakeholders identified some areas for possible reform and raised concerns about fines being imposed on offenders who have no realistic capacity to pay.<sup>20</sup>

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9. *Fines Act 1996* (NSW) s 99A-99J.

10. *Fines Act 1996* (NSW) s 100.

11. *Fines Act 1996* (NSW) s 57 (interpretation of "fine").

12. Para [14.27]-[14.36].

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

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

15. NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics* (1997-2012). See also NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) figure 5.11.

16. NSW Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [5.2]-[5.13].

17. Since largely moved to the jurisdiction of the Local Court and District Court in its summary jurisdiction by *Work Health and Safety Act 2011* (NSW) s 229B.

18. Law Society of NSW, *Submission SE16*, 14-15; Children's Court of NSW, *Submission SE18*, 12; NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 10; Police Association of NSW, *Submission SE21*, 23-24; G Henson, *Submission SE22*, 6; The Public Defenders, *Submission SE24*, 14; NSW Bar Association, *Submission SE27*, 11; The Shopfront Youth Legal Centre, *Submission SE28*, 3; Public Interest Advocacy Centre, *Submission SE29*, 15; Legal Aid NSW, *Submission SE31*, 19; NSW Police Force, *Submission SE32*, 13; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 18.

19. Law Society of NSW, *Submission SE16*, 14; Police Association of NSW, *Submission SE21*, 23-24.

20. Law Society of NSW, *Submission SE16*, 14; NSW Bar Association, *Submission SE27*, 11; Legal Aid NSW, *Submission SE31*, 20; The Shopfront Youth Legal Centre, *Submission SE28*, 3; Children's Court of NSW, *Submission SE18*, 12; The Public Defenders, *Submission SE24*, 14; Police Association of NSW, *Submission SE21*, 24-25; Legal Aid NSW, *Submission SE31*, 20; Vulnerable groups, *Consultation SEC21*.

## Better consideration of capacity to pay

- 14.8 There was support for including a provision in the CSPA to the effect of s 6 of the *Fines Act 1996* (NSW), requiring the court to consider an offender's "means and ability" to pay a fine.<sup>21</sup> It was suggested that an offender's capacity to pay a fine was often overlooked on sentencing.<sup>22</sup> Several stakeholders called for a review of the fines policy under s 6 of the *Fines Act 1996* (NSW),<sup>23</sup> or more generally stressed the importance of courts giving greater attention to the financial circumstances of the offender when fixing the amount of a fine.<sup>24</sup>
- 14.9 The Children's Court reported it was aware of many instances, particularly traffic matters, where young people had received fines that were set in the same amounts as those imposed on adults, without the same means to pay.<sup>25</sup> The Shopfront Youth Legal Centre (Shopfront) concurred, stating "[i]n our experience, the offender's capacity to pay is often overlooked".<sup>26</sup>
- 14.10 The Law Society of NSW similarly remarked that, although s 6 of the *Fines Act 1996* (NSW) requires a court to consider a person's capacity to pay when fixing the amount of a fine, in the experience of the members of its Criminal Law Committee it was "rarely observed".<sup>27</sup> Legal Aid NSW, although supporting fines as an appropriate sentence for most minor offences, was "concerned about excessive fines imposed as a matter of course in the Local Court". It was also Legal Aid's experience that "fines are often imposed that are beyond the means of the persons fined".<sup>28</sup>
- 14.11 The Police Association of NSW and Legal Aid NSW also drew attention to the practical difficulties faced by magistrates when fixing a fine as they often had scant information about a vulnerable offender's income, debts (including unpaid fines), family obligations and community expectations.<sup>29</sup>
- 14.12 When people with limited financial means receive excessive fines injustice can result if the SDRO's enforcement procedure leads to the withdrawal of driver licences or vehicle registration.<sup>30</sup> The Law Society of NSW observed:

The most significant problem with the fine enforcement system is the link between non-payment of fines and suspension/refusal of driver licences. Where the unpaid fines are traffic fines, this makes some sense and is perhaps

21. Children's Court of NSW, *Submission SE18*, 12; The Shopfront Youth Legal Centre, *Submission SE28*, 3; Public Interest Advocacy Centre, *Submission SE29*, 16.

22. The Shopfront Youth Legal Centre, *Submission SE28*, 3; Vulnerable groups, *Consultation SEC21*.

23. Law Society of NSW, *Submission SE16*, 14.

24. The Public Defenders, *Submission SE24*, 14; Police Association of NSW, *Submission SE21*, 24-25; Public Interest Advocacy Centre, *Submission SE29*, 16; Legal Aid NSW, *Submission SE31*, 20; NSW Police Force, *Submission SE32*, 13; Vulnerable groups, *Consultation SEC21*.

25. Children's Court of NSW, *Submission SE18*, 12: "Relying on parents to pay their fine does not serve the purposes of sentencing."

26. The Shopfront Youth Legal Centre, *Submission SE28*, 3.

27. Law Society of NSW, *Submission SE16*, 14. See also Legal Aid NSW, *Submission SE31*, 20; Vulnerable groups, *Consultation SEC21*.

28. Legal Aid NSW, *Submission SE31*, 20.

29. Police Association of NSW, *Submission SE21*, 24-25; Legal Aid NSW, *Submission SE31*, 20.

30. *Fines Act 1996* (NSW) s 65-70.

justifiable; however, to impose licence sanctions for non-traffic fines is illogical and may result in injustice.<sup>31</sup>

- 14.13 The Law Society of NSW submitted that driver licence sanctions for failure to pay non-traffic fines should be abolished,<sup>32</sup> a position that now applies where the offender was aged under 18 years, at the time of the offence.<sup>33</sup> The NSW Police Force highlighted the unjust outcomes that arise where fines are rigidly imposed on offenders who could not pay, suggesting that this can undermine the broader objectives of law enforcement. It suggested, additionally, that judicial attempts to avoid these potentially unjust outcomes, can in turn, lead to unjust outcomes through the “disproportionate leniency” of the resulting sentence. It submitted that offenders who are unable to pay should be able to apply to the court to work off a fine by way of community service.<sup>34</sup>
- 14.14 Several submissions strongly supported current fine mitigation measures, such as WDOs, as an effective way of allowing impecunious offenders to satisfy fines and penalty notices through unpaid work, courses or treatment.<sup>35</sup> Shopfront was strongly against any move to make the payment of a fine or penalty a condition of a bond or other community-based order.<sup>36</sup>

### *Our view*

- 14.15 We support the retention of fines as a non-custodial sentencing option available to courts, but share the concerns of stakeholders about the imposition of fines where the offender has limited capacity to pay.<sup>37</sup> We agree that this can undermine fines as an effective penalty, create administrative costs in enforcement, and result in a much more serious consequence upon default in payment.
- 14.16 We also note that the degree of punishment arising from a fine will vary significantly depending on the economic status of the offender. A fine may be a minor inconvenience to a person of substantial means and a very serious matter for those within a lower socio-economic bracket.
- 14.17 To facilitate an increased awareness, particularly among legal practitioners, that courts must take the means of the offender into account when determining the quantum of a fine, we consider that a provision similar to s 6 of the *Fines Act 1996* (NSW) should be included in a revised Crimes (Sentencing) Act. It is preferable for courts to give attention to this issue when they set the fine rather than have it considered in the course of fine enforcement proceedings, involving consideration of time to pay arrangements, a fine write-off application or acceptance of a WDO.

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31. Law Society of NSW, *Submission SE16*, 14.

32. Law Society of NSW, *Submission SE16*, 14.

33. *Fines Act 1996* (NSW) s 65(3).

34. NSW Police Force, *Submission SE32*, 13-14.

35. Women in Prison Advocacy Network, *Submission SE17*, 11; Juvenile Justice, *Submission SE20*, 1; Public Interest Advocacy Centre, *Submission SE29*, 16.

36. The Shopfront Youth Legal Centre, *Submission SE28*, 3.

37. Law Society of NSW, *Submission SE16*, 14; NSW Bar Association, *Submission SE27*, 11; Legal Aid NSW, *Submission SE31*, 20; The Shopfront Youth Legal Centre, *Submission SE28*, 3; Children’s Court of NSW, *Submission SE18*, 12; The Public Defenders, *Submission SE24*, 14; Police Association of NSW, *Submission SE21*, 24-25; Legal Aid NSW, *Submission SE31*, 20; Vulnerable groups, *Consultation SEC21*.

The Victorian government has recently inserted a provision of this kind in the *Sentencing Act 1991 (Vic)*.<sup>38</sup>

- 14.18 We note that the Law Society proposed a review of fines policies in the context of concerns “about excessive fines [being] imposed as a matter of course in the Local Court”.<sup>39</sup> Although the imposition of fines is already a subject of judicial education for magistrates, it seems that there are some practical impediments to courts receiving adequate information, particularly where the offender is unrepresented. This is a matter that could be considered by a working group comprising representatives from the Local Court, the Law Society of NSW, Legal Aid NSW and other stakeholders. It is not a matter that legislative reform alone can address. The working group could consider ways of streamlining the provision of financial information to the magistrate, including, for example, the creation of a template or standard form that practitioners could use in support of a submission concerning an offender’s limited means.
- 14.19 In any event, time to pay arrangements for court fines are available to assist impecunious offenders. Offenders can apply initially to the registrar of the court which imposed the fine for an extension of time to pay or for payment by instalments.<sup>40</sup> After a fine enforcement order is made, an offender can apply to the SDRO for time to pay,<sup>41</sup> or for an extension of time to pay or payment by instalments.<sup>42</sup> Offenders on Centrelink benefits<sup>43</sup> can apply to the Local Court, before a fine enforcement order is made,<sup>44</sup> for specified amounts to be deducted directly from their government benefits each fortnight or month.

#### **Recommendation 14.1: Consideration of capacity to pay a fine**

- (1) A provision to the effect of s 6 of the *Fines Act 1996 (NSW)*, requiring the court to consider the means of the offender to pay a fine, should be included in a revised Crimes (Sentencing) Act.
- (2) The Local Court of NSW, Law Society of NSW, Legal Aid NSW and any other relevant stakeholders should consider establishing a working group to develop a practice note or protocol concerning the way in which adequate information about an offender’s financial means can be provided to the court before it imposes a fine.

### **No link between a fine amount and the length of imprisonment available**

- 14.20 Where an offence provides for a term of imprisonment but does not specify a fine amount for that offence, there is currently no guidance about how courts should calculate a fine. An issue arises as to whether the quantum of the fine should continue to be determined as a matter of judicial discretion, or whether there should

38. *Sentencing Act 1991 (Vic)* s 52 inserted by *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013 (Vic)*.

39. Law Society of NSW, *Submission SE16*, 14.

40. *Fines Act 1996 (NSW)* s 10-11.

41. *Fines Act 1996 (NSW)* s 11(6), s 100.

42. *Fines Act 1996 (NSW)* s 100(3).

43. Also, holders of a Department of Veterans’ Affairs Pensioner Concession Card.

44. *Fines Act 1996 (NSW)* s 100(1A).

be a legislative statement of the maximum available fine relative to the maximum term of imprisonment that is available for the offence.

- 14.21 In Victoria, and under Commonwealth criminal laws, a correlation has been established between the maximum term of imprisonment for an offence and the maximum amount of the fine for that offence. The *Crimes Act 1914* (Cth) provides that where a Commonwealth offence “is punishable by imprisonment only, the court may ... impose, instead of, or in addition to, a penalty of imprisonment, a pecuniary penalty”. The maximum fine in penalty units is calculated by multiplying the maximum sentence for the offence (in months) by five.<sup>45</sup> In Victoria, maximum penalties for offences are determined by “levels” established under the imprisonment or fines tables in s 109 of the *Sentencing Act 1991* (Vic).
- 14.22 For a large number of offences in NSW that are punishable by imprisonment the legislation has specified both the maximum term that is available as well as the maximum amount of the fine that can be imposed in addition to or instead of imprisonment. It can be seen from the following limited examples that there is no consistent ratio or scale between the maximum term of imprisonment and maximum fine:

***Crimes Act 1900 (NSW)***

**38A Spiking drink or food**

Maximum penalty: Imprisonment for 2 years or 100 penalty units, or both.

**93FA Possession, supply or making of explosives**

Maximum penalty: Imprisonment for 3 years or 50 penalty units, or both.

**124 Fraudulent appropriation**

Maximum penalty: Imprisonment for 2 years or 20 penalty units, or both.

**307C False or misleading documents**

Maximum penalty: Imprisonment for 2 years or 200 penalty units, or both.

**546C Resisting etc police**

Maximum penalty: Before the Local Court, imprisonment for 12 months or 10 penalty units, or both.

**546D Impersonation of police officers**

Maximum penalty: Imprisonment for 2 years or 100 penalty units, or both.

***Drug Misuse and Trafficking Act 1985 (NSW)***

**25A Offence of supplying prohibited drugs on an ongoing basis**

Maximum penalty: Imprisonment for 20 years or 3,500 penalty units, or both.

***Firearms Act 1996 (NSW)***

**39 Failure to take reasonable precautions for the safe keeping of a prohibited firearm**

Maximum penalty: Imprisonment for 2 years or 50 penalty units.

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45. *Crimes Act 1914* (Cth) s 4B(2). One penalty unit is equal to \$110: *Crimes Act 1914* (Cth) s 4AA.

- 14.23 Stakeholders did not strongly advocate for the introduction of a legislative formula similar to those in place in Victoria or under the *Crimes Act 1914* (Cth).<sup>46</sup> There was in fact some opposition on the basis that the means of an offender to pay a fine should remain the primary consideration. In particular the Office of the Director of Public Prosecutions observed that fines should only be calculated and imposed according to an offender's ability to pay, and as such there is limited utility for some such formula.<sup>47</sup> The NSW Police Force agreed, stating, "providing for a calculation cannot sit with the instinctive synthesis approach to sentencing ... The maximum fine should take into account the objective seriousness of the circumstances of the offence balanced against the offender's financial means".<sup>48</sup>

### *Our view*

- 14.24 In the absence of strong support from stakeholders for introducing a statutory scale, we consider that introducing a legislative structure tying fine amounts to terms of imprisonment for an offence is unnecessarily inflexible and complicated. It ignores the practical reality that serving a term of imprisonment and the payment of a sum of money are different concepts, and that it is impractical to attempt to place a monetary value on the former. Moreover, as noted earlier, the level of punishment experienced by the recipients of fines will vary significantly according to their means and socio-economic status.
- 14.25 We consider that the present system of a court setting the amount of a fine in the exercise of its judicial discretion appears to be operating effectively in practice. It does not seem necessary to introduce a statutory link of the kind noted above.
- 14.26 Any detailed consideration of this issue would fall outside of our terms of reference, and would require an extensive evaluation of the appropriateness of the maximum terms of imprisonment and/or fines that are prescribed, and in particular whether one or the other of those penalties was inconsistent with the seriousness of the offence.

### Flexible combination of fines with other sentencing options

- 14.27 In some situations fines can be combined with other penalties but the rules governing this are complex and not necessarily consistent.
- 14.28 If an offence is punishable by imprisonment only, a court may still impose a fine in addition to another penalty if the offence is dealt with on indictment in the higher courts.<sup>49</sup> If the offence is punishable by a fine, imprisonment or both, then the court can impose both forms of penalty.

46. Law Society of NSW, *Submission SE16*, 15; Children's Court of NSW, *Submission SE18*, 12; NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 10; G Henson, *Submission SE22*, 6; The Public Defenders, *Submission SE24*, 14; NSW Bar Association, *Submission SE27*, 11; The Shopfront Youth Legal Centre, *Submission SE28*, 3; Legal Aid NSW, *Submission SE31*, 20; NSW Police Force, *Submission SE32*, 14.

47. NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 10.

48. NSW Police Force, *Submission SE32*, 14.

49. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 15.

- 14.29 A court cannot make payment of a fine or other sum a *condition* of a home detention order.<sup>50</sup> However, this may not prevent a court from imposing home detention in combination with a fine where the offence is punishable by a fine, imprisonment or both. In this situation, the fine would not be a condition of the home detention order and failure to pay would not constitute a breach of a home detention order.
- 14.30 Community Service Orders (CSOs) have historically been considered alternatives to imprisonment.<sup>51</sup> Courts are not permitted to make payment of a fine a condition of a CSO,<sup>52</sup> but arguably a fine could be imposed in addition to a CSO where the offence is punishable by a fine, imprisonment or both.
- 14.31 The CSPA specifies that a court may impose s 9 good behaviour bonds and s 12 bonds (as part of a suspended sentence) in combination with a fine where the offence is punishable by a fine, imprisonment or both.<sup>53</sup> However, a court is specifically precluded from imposing a fine along with a s 10(1)(b) good behaviour bond.<sup>54</sup> The relevant provision is silent as to whether a court can impose a fine in combination with an order made under s 10(1)(a). However, the common law principle that a person who has not been convicted of an offence should not be punished by a court order,<sup>55</sup> arguably points against imposing a fine in such a case. The wording of s 10A would also preclude imposing a fine together with that order, as it involves a “conviction with *no other* penalty”.<sup>56</sup>
- 14.32 There is no bar to a court combining a fine with any other penalty where the court is sentencing an offender on a single occasion for two or more offences.

#### *Imposition of fines without conviction*

- 14.33 Conferring an express power in the courts to impose a fine when a charge against an offender is dismissed under s 10(1)(a), or an offender is discharged conditionally upon entering into a bond to be of good behaviour under s 10(1)(b), might assuage public concern as to the perceived leniency of non-conviction orders, while still allowing an offender to avoid a criminal conviction.<sup>57</sup> Most Australian jurisdictions currently permit courts to impose fines without conviction.<sup>58</sup>
- 14.34 As noted above, this would involve a departure from the common law. However, the use of a non-conviction order is premised upon a finding of guilt, and where the offender is currently discharged upon condition of entering a bond or an intervention plan, this constitutes a form of punishment. Moreover such an order has “the same

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50. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 82(1).

51. The legislation uses the phrase “instead of imposing a sentence of imprisonment” in the provision outlining CSOs: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8.

52. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 90(1).

53. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 14(1).

54. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 14(3).

55. *R v Ingrassia* (1997) 41 NSWLR 447, 450.

56. Judicial Commission of NSW, *Sentencing Bench Book*, [6-130].

57. NSW Law Reform Commission, *Non-custodial Sentencing Options*, Sentencing Question Paper 7 (2012) [7.60]-[7.79].

58. *Penalties and Sentences Act 1992* (Qld) pt 3-5; *Sentencing Act 1995* (WA) s 39(2)(c); *Criminal Law (Sentencing) Act 1988* (SA) s 16; *Sentencing Act 1991* (Vic) s 7(1)(f); *Sentencing Act* (NT) s 7(e).



effect” as a conviction for some purposes.<sup>59</sup> It could be argued that the offender’s guilt or blameworthiness in committing the offence provides the touchstone for punishment rather than whether or not a conviction is recorded.

- 14.35 While some stakeholders opposed amending the CSPA to permit a court to impose a fine together with a non-conviction order,<sup>60</sup> and there were some concerns as to the potential net widening effects,<sup>61</sup> there was also quite strong support for a reform of this kind.<sup>62</sup>
- 14.36 In order to prevent potential net widening, Shopfront<sup>63</sup> submitted that the Local Court should have the discretion to impose a fine without recording a conviction “in the case of fine-only offences and/or offences capable of being dealt with by a penalty notice, issued by a regulatory agency or criminal infringement notice”, issued by police.<sup>64</sup> This simple legislative measure, Shopfront argued, could assist in preventing vulnerable people unwittingly acquiring criminal records. It explained that financially disadvantaged people often elect to have a court deal with a matter of this kind,<sup>65</sup> not because they wished to defend the charge, but because they simply could not afford to pay the fixed penalty amount that is specified in a penalty notice or criminal infringement notice. However, if found guilty of the offence by the court, they risked acquiring a conviction which would not have been recorded if they had been able to pay the penalty notice or fine promptly.<sup>66</sup> As Shopfront observed, a conviction, even for a minor offence, can have a number of detrimental effects on the employment and credit prospects of vulnerable people.

### *Our view*

- 14.37 We agree that court-election in response to a penalty notice or criminal infringement notice can result in a disproportionately negative outcome if a conviction is recorded. This could be resolved by providing courts with the discretion to impose a fine and s 10 non-conviction order where the offence is proved following a court-election. This would require legislation to allow courts to impose fines in conjunction with s 10 non-conviction orders in proceedings where an offender has elected to have a penalty notice or criminal infringement notice heard in court.
- 14.38 The decision whether to impose a fine, and its amount, would remain a matter for discretion in accordance with the same considerations as apply when a s 9 bond is

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

60. The Public Defenders, *Submission SE24*, 14; NSW Police Force, *Submission SE32*, 15.

61. The Shopfront Youth Legal Centre, *Submission SE28*, 4; NSW Police Force, *Submission SE32*, 15. Each had different reasons for net widening.

62. Law Society of NSW, *Submission SE16*, 16; NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 11; Police Association of NSW, *Submission SE21*, 26; NSW Bar Association, *Submission SE27*, 12; The Shopfront Youth Legal Centre, *Submission SE28*, 4; Legal Aid NSW, *Submission SE31*, 21; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 19; Legal practitioners, Dubbo, *Consultation SEC14*. G Henson, *Submission SE22*, 6 supported fines with s 10(1)(b) bonds which would activate on breaches of bonds due to other offences.

63. The Shopfront Youth Legal Centre, *Submission SE28*, 4. This restriction would be to prevent potential net widening.

64. Under *Criminal Procedure Act 1986* (NSW) s 333. Referred to in the *Criminal Procedure Act 1986* (NSW) as a “penalty notice” but commonly referred to as “a CIN”.

65. *Fines Act 1996* (NSW) s 23A.

66. The Shopfront Youth Legal Centre, *Submission SE28*.

imposed, and would not preclude, in suitable cases, a s 10A disposition without a fine.

- 14.39 If the new sentencing orders we propose in Chapter 11 are implemented, the current law regarding the combination of fines with terms of imprisonment should apply both to sentences of full-time imprisonment and to terms of imprisonment served by way of a community detention order (CDO). A fine could thus be combined with a CDO or term of full-time imprisonment where the offence is punishable by a fine, imprisonment, or both, or where an imprisonment-only offence is dealt with on indictment.
- 14.40 It should also be possible to impose a community correction order in combination with a fine in the same circumstances, that is, if that new form of order is introduced as we recommend in Chapter 13. Similarly, it should be possible to combine a conditional release order (CRO) (whether imposed with or without conviction) with a fine in all cases where an offence is punishable by a fine.
- 14.41 The nature of our proposed new “no penalty” provision to replace s 10(1)(a) and s 10A dictates that it should not be possible to combine a fine with a sentence of “no penalty”.
- 14.42 In circumstances where an offender is being sentenced for more than one offence, it should be possible for the court to impose a fine and any of the new range of sentencing orders we propose, so long as they are available for the offences in question.

#### **Recommendation 14.2: Combination of fines with other options**

In a revised Crimes (Sentencing) Act:

- (1) If s 10 orders are retained, a court should be able to impose a fine with a s 10 order.
- (2) If the new sentencing options proposed in recommendations 11.1-11.6 and 13.1-13.18 are implemented:
  - (a) The current law on combining fines with imprisonment should apply both to terms of full-time imprisonment and to a community detention order.
  - (b) In cases where a court can impose a community correction order, it should be possible to impose a fine together with that order.
  - (c) A court should be able to impose a fine together with a conditional release order (CRO), whether imposed with or without conviction.
  - (d) A court should not be able to impose a fine together with a sentence of “no penalty”.
  - (e) When a court is sentencing an offender for more than one offence, it should be able to impose a fine and any other sentence so long as they are available for the offences in question.

## Introduction of a suspended fine option

- 14.43 The Chief Magistrate of the Local Court proposed a variation on the simple combination of a fine and a s 10 bond so that when a s 10 bond is imposed (if the order is retained in its present form) the court would also have the option of attaching a suspended fine. The offender would become automatically liable to pay the fine if the bond was breached and revoked.<sup>67</sup> This, it was suggested, could have the benefit of building some deterrence into the s 10 bond by motivating offenders to comply with the bond in order to avoid paying the suspended fine.
- 14.44 We see merit in this approach and consider it preferable to the fine in trust option. However, there would need to be some discretion available to the court when dealing with the breach of a s 10 bond that is subject to a suspended fine. For example, an offender's capacity to pay may have changed since the suspended fine order was made. In these cases, the court would need to be able to cancel the fine and resentence the offender for the original offence. The court should also have discretion over whether a conviction is recorded for the original offence.
- 14.45 If our proposed new sentencing options are introduced, a court should also be able to attach a suspended fine to a CRO imposed without conviction.

### Recommendation 14.3: Suspended fines

Where a court imposes a bond under s 10(1)(b) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), or (if our new sentencing options are adopted) imposes a CRO without conviction, the court should be able also to impose a fine but suspend payment by ordering that it become payable upon breach and revocation of the bond (or CRO).

## No introduction of fines held in trust

- 14.46 In Question Paper 7 we asked whether a sentencing option should be introduced that would involve a fine being paid up front but held on trust by the state, to be returned to the offender at the end of a period fixed by the court, on condition that the offender did not commit any further offence during that period.
- 14.47 Although there was some support for this option,<sup>68</sup> most of the stakeholders who dealt with this question did not support it,<sup>69</sup> for three reasons:
- It would have an unfair or discriminatory impact.<sup>70</sup> While it might be appropriate for offenders with the financial resources to pay a fine upfront,<sup>71</sup> it is unlikely that

67. G Henson, *Submission SE22*, 6.

68. Law Society of NSW, *Submission SE16*, 16.

69. NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 11; Police Association of NSW, *Submission SE21*, 27; G Henson, *Submission SE22*, 7; The Shopfront Youth Legal Centre, *Submission SE28*, 6; Legal Aid NSW, *Submission SE31*, 22; NSW, Department of Family and Community Services, *Submission SE48*, 10.

70. NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 11; Police Association of NSW, *Submission SE21*, 27; G Henson, *Submission SE22*, 7; The Shopfront Youth Legal Centre, *Submission SE28*, 6; NSW, Department of Family and Community Services, *Submission SE48*, 10.

this would be possible for socially and economically disadvantaged offenders,<sup>72</sup> who are often on government benefits,<sup>73</sup> such as the homeless, poor or mentally impaired.<sup>74</sup>

- It might encourage third parties (often relatives of offenders) to pay the amount. This would place an unfair emotional and financial burden on them,<sup>75</sup> and allow the offender to escape the financial consequences of non-compliance.
- There is a risk that offenders might use the proceeds of the crime to pay the amount.<sup>76</sup>

Additionally, it was suggested during consultations that fines held in trust would pose a further administrative burden on court registry staff.

14.48 We consider that introducing the “fine held in trust” would cause more problems than it solves. In particular, it is likely to have a negative and disproportionate impact on economically and socially disadvantaged offenders and their families. As such we do not recommend its introduction.

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71. G Henson, *Submission SE22*, 7.

72. The Shopfront Youth Legal Centre, *Submission SE28*, 6.

73. NSW, Department of Family and Community Services, *Submission SE48*, 10: “Given the high rate of dependence of people with disability on government benefits and the extra burdens their care places on relatives, FACS would have concerns over the equity of fines held in trust being used as a sentencing option for minor criminal offences. However there may be scope for using it as a response to regulatory offences where fines could be fixed at high rates for businesses and those on higher incomes”.

74. Police Association of NSW, *Submission SE21*, 27.

75. NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 11.

76. NSW Police Force, *Submission SE32*, 16, while supporting a fine held in trust, said it would be inappropriate for use against any offence where there is a *mere possibility* that the proceeds of the crime may be used to pay the fine held in trust. NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 20 while supporting a fine held in trust, also noted the risk of funds from an offence of fraud or larceny being used to pay the fine and so should be excluded as a sentencing option in cases where the property or funds has not been returned in full to the victims.

## 15. Drug dependent offenders

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### In brief

Most stakeholders would like to see the Drug Court program and compulsory drug treatment detention expanded to a wider pool of offenders. These programs have a key role to play in breaking the cycle of reoffending although they are resource intensive. We recommend some limited ways to expand both programs.

<b>Drug Court program</b> .....	<b>320</b>
Outline of the program.....	320
<i>Eligibility</i> .....	320
<i>Treatment program</i> .....	321
<i>Breach and revocation</i> .....	323
<i>Evaluations of the program</i> .....	323
Extending the program to cover non-prohibited drugs.....	324
Extending the program's geographic coverage.....	325
Extending the program to more types of offenders.....	326
<i>Refining the violent conduct exclusion</i> .....	326
<i>Our view</i> .....	328
<b>Compulsory Drug Treatment Detention (CDTD)</b> .....	<b>329</b>
Compulsory drug treatment order.....	329
<i>Eligibility</i> .....	330
<i>Treatment program</i> .....	330
<i>Evaluations of the CDTD program</i> .....	332
Expanding eligibility for the CDTD program.....	333
<i>Our view</i> .....	335
Problems with the requirement for a sentence of an eligible length.....	335
Procedural reforms.....	337
Geographical reach.....	337

- 15.1 The *Drug Court Act 1998* (NSW) instituted the Drug Court program in 1999 with the objectives of reducing the drug dependency of eligible people, of promoting their reintegration into the community and of reducing their need to resort to criminal activity to support their drug dependency.<sup>1</sup> The first Drug Court was established in Parramatta and it has been followed by a second Drug Court in the Hunter Region and by a third in the Downing Centre Sydney.<sup>2</sup> It exercises the criminal jurisdiction of the Local Court and the District Court.<sup>3</sup>
- 15.2 The Drug Court manages offenders in two ways:

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1. *Drug Court Act 1998* (NSW) s 3(1).  
2. Drug Court of NSW, "About Us – History", <[www.drugcourt.lawlink.nsw.gov.au/drgcrt/dc\\_history.html](http://www.drugcourt.lawlink.nsw.gov.au/drgcrt/dc_history.html)>.  
3. *Drug Court Act 1998* (NSW) s 24.

- It can accept offenders into the Drug Court program which, following sentence, allows the court to impose a number of conditions<sup>4</sup> that will permit the offender to remain in the community during the term of the order.<sup>5</sup>
- It can, after a sentence of imprisonment has been imposed, order that an offender serve the sentence by way of compulsory drug treatment detention in a compulsory drug treatment correctional centre.<sup>6</sup>

## Drug Court program

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### Outline of the program

#### *Eligibility*

15.3 The Local and District Courts sitting within a relevant referral area<sup>7</sup> must consider whether a person who is before that Court in a number of specified circumstances<sup>8</sup> appears to be eligible for referral to the Drug Court.<sup>9</sup> To be eligible an offender must:

- be highly likely, if convicted, to be required to serve a sentence of full-time imprisonment;<sup>10</sup>
- have pleaded guilty or indicated that he or she intends to plead guilty to the offence;<sup>11</sup>
- appear to be dependent on the use of prohibited drugs;<sup>12</sup>
- not be charged with a serious drug supply offence that cannot be dealt with summarily or with an offence involving violent conduct or sexual assault;<sup>13</sup>
- be willing to participate in the program;<sup>14</sup>
- be an adult (the matter not being within the jurisdiction of the Children's Court);<sup>15</sup>
- not be suffering from a mental condition that would restrict their ability to participate in the program;<sup>16</sup> and

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4. *Drug Court Act 1998* (NSW) s 7A(2)(e), (5)(a).

5. *Drug Court Act 1998* (NSW) s 7A(5)(b).

6. *Drug Court Act 1998* (NSW) s 18C.

7. *Drug Court Regulation 2010* (NSW) cl 6.

8. Either after being charged, or when appealing against a sentence or when called up for a breach of a suspended sentence issued as a result of previous proceedings before the Drug Court: *Drug Court Act 1998* (NSW) s 6, 7.

9. *Drug Court Act 1998* (NSW) s 6(2), 7(1)-(2).

10. *Drug Court Act 1998* (NSW) s 5(1)(b).

11. *Drug Court Act 1998* (NSW) s 5(1)(c).

12. *Drug Court Act 1998* (NSW) s 5(1)(d).

13. *Drug Court Act 1998* (NSW) s 5(2).

14. *Drug Court Act 1998* (NSW) s 6(2)(b), 7(2)(b).

15. *Drug Court Regulation 2010* (NSW) cl 4(c)-(d).

16. *Drug Court Regulation 2010* (NSW) cl 4(b).

- reside within the catchment area specified in the regulations.<sup>17</sup>
- 15.4 If eligible, the court must, as soon as practicable, refer the person to the Drug Court.<sup>18</sup> This can occur before sentence or following committal to the District Court or at the time of resentencing for a breach of a s 12 bond, or on appeal.<sup>19</sup>
- 15.5 The Drug Court can accept an offender into the program if it is satisfied that:
- the offender is eligible for the program, that it is appropriate for the offender to participate, that the facilities for a program are available, and that the offender accepts the conditions imposed by the Act and the court;<sup>20</sup>
  - the offender has pleaded guilty and been found guilty, or (where relevant) has admitted to breaching the conditions of a bond and has in fact breached them;<sup>21</sup>
  - co-residents of the offender are willing for the offender to reside with them for the duration of the program;<sup>22</sup> and
  - the offender is informed of the consequences of compliance or non-compliance with the program as regards the final sentence.<sup>23</sup>

The Drug Court Policy gives preference to Aboriginal and Torres Strait Islander offenders,<sup>24</sup> although this policy does allow exceptions.

- 15.6 If an offender who was charged with an offence, or appealed a sentence is not accepted into the program, the Drug Court can, with the offender's consent, sentence the offender,<sup>25</sup> or otherwise return him or her to the referring court.<sup>26</sup> In the case of an offender who was referred to the Drug Court following call up for a breach of a good behaviour bond but who was not accepted into the program, the Drug Court can deal with the breach as if it were the sentencing court.<sup>27</sup>

### *Treatment program*

- 15.7 Once the Drug Court determines an offender is eligible and suitable the matter is adjourned for sentence. The Act provides that, pending sentence, the offender can, if he or she consents, be remanded in custody where necessary to facilitate detoxification, assessment and development of a treatment plan.<sup>28</sup> On completion of

17. *Drug Court Regulation 2010* (NSW) cl 4(a).

18. *Drug Court Act 1998* (NSW) s 6(3), 7(3).

19. *Drug Court Act 1998* (NSW) s 6(3), 7(2), but not, in the case of a breach of a suspended sentence where the offender is in full-time custody: *Drug Court Act 1998* (NSW) s 7(4).

20. *Drug Court Act 1998* (NSW) s 7A(2), 7B(2), 7C(2).

21. *Drug Court Act 1998* (NSW) s 7A(2)(b), 7B(2)(b), 7C(2)(b).

22. *Drug Court Act 1998* (NSW) s 7A(2)(g), 7B(2)(g), 7C(2)(e).

23. *Drug Court Act 1998* (NSW) s 7A(2)(f), 7B(2)(f).

24. Drug Court of NSW, *Policy 12: Selection of Participants* (2012) [3].

25. *Drug Court Act 1998* (NSW) s 7D(2)-(3).

26. *Drug Court Act 1998* (NSW) s 7D(4) in practice the matters are referred back to the referring court: Drug Court of NSW, "When we refuse entry into our program" <[www.drugcourt.lawlink.nsw.gov.au/drgcrt/dc\\_program/dc\\_refuse.html](http://www.drugcourt.lawlink.nsw.gov.au/drgcrt/dc_program/dc_refuse.html)>.

27. *Drug Court Act 1998* (NSW) s 7E.

28. *Drug Court Act 1998* (NSW) s 8A(1). Note: s 8A(2) gives preference to programs outside of the custodial setting but at present there are no suitable programs in the community.

detoxification and assessment an offender is returned to the Drug Court for sentencing. On or within 14 days of being sentenced, the sentence is suspended and the Drug Court makes an order imposing the conditions that further the offender's treatment plan.<sup>29</sup>

- 15.8 Thereafter the Drug Court team supervises the offender during the period of the suspended sentence. The Drug Court team comprises the Drug Court Judge, a DPP solicitor, a Police Prosecutor, a clinical nurse consultant, a Legal Aid solicitor, the Community Compliance Monitoring Group Co-ordinator, and the Registrar of the Drug Court.<sup>30</sup>
- 15.9 Treatment plans are individually tailored to offenders' specific needs. Each plan can include conditions that relate to conduct and good behaviour, attendance for counselling and treatment, social support and the development of living skills, supervision and regular drug testing.<sup>31</sup> Treatment plans may also require a participant to reside in a rehabilitation centre, or in supported accommodation,<sup>32</sup> and to engage in activities, training, and employment.
- 15.10 A treatment plan comprises three phases, each of which has a minimum time frame and specific goals that an offender must attain before progressing to the next phase:
- **Phase 1** has a minimum term of three months. Participants are required to reduce drug use, stabilise their physical health, cease criminal activity, submit to drug testing three times a week and report to the Drug Court once a week.
  - **Phase 2** has a minimum term of three months. Participants must remain drug and crime free, and work towards developing life and job skills in order to progress to the next stage. They must submit to drug testing twice weekly and report to the Drug Court fortnightly.
  - **Phase 3** has a minimum term of six months. Participants are expected to seek employment and become fiscally responsible. Drug testing continues twice weekly, and participants are required to report to the Drug Court monthly.<sup>33</sup>
- 15.11 In the course of the program compliance can be rewarded with privileges (including a reduction in the frequency of counselling, supervision and drug testing), while sanctions can be imposed for failure to comply.<sup>34</sup> Sanctions range from increased supervision, to a requirement for the performance of community work, to a return into custody for up to 14 days.<sup>35</sup> If the offender commits a fresh offence while on the

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29. *Drug Court Act 1998* (NSW) s 7A(5), 7B(7), (9), 7C(7). The suspension order does not suspend a driver disqualification: *Drug Court Act 1998* (NSW) s 7A(11), 7B(11).

30. Drug Court of NSW, *Policy 1: Drug Court Team Meetings* [2].

31. *Drug Court Act 1998* (NSW) s 7A(7); Drug Court of NSW, *Policy 2: Treatment Plans and Placement; Policy 9: Drug and Alcohol Use by Participants*.

32. *Drug Court Act 1998* (NSW) s 7A(7); Drug Court of NSW, *Policy 2: Treatment Plans and Placement; Policy 5: Place of Residence*.

33. Drug Court of NSW, *Policy 7: Program Goals and Measures*.

34. *Drug Court Act 1998* (NSW) s 10(1)(a), 16.

35. *Drug Court Act 1998* (NSW) s 16(2).



program the matter can be brought before the Drug Court to determine whether the offender should continue with the program.<sup>36</sup>

- 15.12 At the conclusion of the offender's treatment plan, either because of graduation or early termination (by the Drug Court or at the offender's request), the Drug Court must reconsider the initial sentence, in light of the offender's response and of any history of sanctions.<sup>37</sup> Participation in the program is not equivalent to imprisonment, nor is it a form of pre-sentence custody that would require a sentence to be backdated. Instead it is equated with the situation where an offender has been on bail for a lengthy period with strict conditions.<sup>38</sup> The court will take successful completion of the treatment program into account in determining the final sentence. The court can resentence the offender if the program is not completed successfully, but the sentence cannot be greater than the initial sentence.<sup>39</sup>

### *Breach and revocation*

- 15.13 In the second reading speech it was noted that:

the program targets an extremely difficult treatment group - that is, chronic, drug-dependent offenders. For this group, relapse must realistically be expected as part of the recovery process.

The program will seek to deal with such lapses within the confines of the program, with exclusion from the program a last resort.<sup>40</sup>

- 15.14 The Drug Court can terminate an offender's participation in the program if it is satisfied, on the balance of probabilities, that the offender is unlikely to make any further progress, or that further participation poses an unacceptable risk to the community that the offender may reoffend.<sup>41</sup> Termination will normally occur, for example, when the offender commits new offences, continually fails to attend or returns a pattern of positive drug tests.<sup>42</sup> An offender who is unable or unwilling to continue on the program can withdraw and is then returned to court for the imposition of a final sentence.<sup>43</sup>

### *Evaluations of the program*

- 15.15 Each year, on average, approximately 165 offenders have entered the Drug Court program. In 2010, 57% of offenders received a non-custodial sentence at the end of

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36. *Drug Court Act 1998* (NSW) s 10.

37. *Drug Court Act 1998* (NSW) s 12.

38. *Bushara v R* [2006] NSWCCA 8 [26]-[27].

39. *Drug Court Act 1998* (NSW) s 12.

40. NSW, *Parliamentary Debates*, Legislative Assembly, 27 October 1998, 9032.

41. *Drug Court Act 1998* (NSW) s 10(1)(b).

42. *Drug Court Act 1998* (NSW) s 10, 11; Drug Court of NSW, *Policy 6: Completion or Termination of Program*.

43. *Drug Court Act 1998* (NSW) s 11(1)(b), 12.

the program.<sup>44</sup> As at 2009, about 21% of participants were female and 12% identified as Aboriginal or Torres Strait Islander.<sup>45</sup>

- 15.16 A 2008 BOCSAR evaluation indicated that the NSW Drug Court was more cost effective and more successful at lowering the rate of recidivism than prison.<sup>46</sup> A separate 2008 BOCSAR and Centre for Health Economics Research and Evaluation report estimated the total cost of the Drug Court program at that time to be \$16.3m per year (including \$8.4m that was attributed to the cost of final imprisonment following participation in the program). It was estimated that if the relevant offenders had been imprisoned instead of participating in the program, this cost would have increased to \$18.1m per year.<sup>47</sup>
- 15.17 The 2008 BOCSAR evaluation also found that Drug Court participants, when compared with drug dependent offenders who were imprisoned, were
- 17% less likely to be convicted of a new offence;
  - 30% less likely to be reconvicted of a violent offence; and
  - 38% less likely to be reconvicted of a drug offence at any point during the follow up period (which averaged at 35 months).<sup>48</sup>
- 15.18 Some submissions strongly supported the Drug Court program,<sup>49</sup> including Corrective Services NSW which considers it to be a good example of a successful program.<sup>50</sup> A number of submissions generally supported expanding the program.<sup>51</sup>

### Extending the program to cover non-prohibited drugs

- 15.19 Several submissions supported extending the Drug Court program to offenders with addictions to prescription medications such as benzodiazepines.<sup>52</sup> The NSW Office of the Director of Public Prosecutions (ODPP) submitted, however, that this was

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44. NSW Drug Court, *Annual Review 2010*, 8.

45. R Dive and S Tonkin, "Drug Court of NSW" (Speech, Drug Court of NSW 10th Anniversary Conference, Parramatta, 6 February 2009).

46. D Weatherburn, C Jones, L Snowball, and J Hua, *The NSW Drug Court: A Re-evaluation of its Effectiveness*, Crime and Justice Bulletin No 121 (NSW Bureau of Crime Statistics and Research, 2008) 12.

47. S Goodall, R Norman and M Haas, *The Costs of NSW Drug Court*, Crime and Justice Bulletin No 122 (NSW Bureau of Crime Statistics and Research and Centre for Health Economics Research and Evaluation, 2008) 9.

48. D Weatherburn, C Jones, L Snowball, and J Hua, *The NSW Drug Court: A Re-evaluation of its Effectiveness*, Crime and Justice Bulletin No 121 (NSW Bureau of Crime Statistics and Research, 2008) 8-9.

49. NSW, Office of the Director of Public Prosecutions, *Submission SE41*, 3; Law Society of NSW, *Submission SE43*, 4; The Shopfront Youth Legal Centre, *Submission SE37*, 5; Public Defenders, *Submission SE36*, 2; NSW Bar Association, *Submission SE46*, 2; Public Interest Advocacy Centre, *Submission SE42*, 11-12; Children's Court of NSW, *Submission SE40*, 9-10.

50. Corrective Services NSW, *Submission SE55*, 13, 17.

51. Public Defenders, *Submission SE36*, 2; The Shopfront Youth Legal Centre, *Submission SE37*, 6-7; NSW Bar Association, *Submission SE46*, 2; Corrective Services, *Submission SE55*, 13-14; Law Society of NSW, *Submission SE43*, 4; Children's Court of NSW, *Submission SE40*, 9-10; Legal Aid NSW, *Submission SE50*, 5; Legal Aid NSW, *Submission SE31*, 9; Public Interest Advocacy Centre Ltd, *Submission SE42*, 11-12.

52. Public Interest Advocacy Centre, *Submission SE42*, 12; Public Defenders, *Submission SE36*, 2; The Shopfront Youth Legal Centre, *Submission SE37*, 7.

unnecessary as most entrants to the program are addicted to a range of drugs, including prohibited and prescription drugs.<sup>53</sup>

- 15.20 Some other submissions supported extending the program to alcohol-addicted offenders.<sup>54</sup> The ODPP specifically opposed this change because alcohol addiction is often associated with violent offending, and including these offenders could significantly change the profile of offenders in the program.<sup>55</sup>
- 15.21 We do not recommend expanding the program to offenders who present with alcohol addiction but no other drug dependency. The dynamic of alcohol dependency and its contribution to criminality require a separate response that can be dealt with through the several forms of diversion surveyed in Chapter 16 and in corrections-based programs.
- 15.22 At this stage, we consider that the focus of the Drug Court should remain unchanged. However, as resources permit, the government could consider using its regulation making power under s 5(1)(d)<sup>56</sup> to extend the eligibility criteria to include offenders whose dependency involves the use of drugs other than those that are prohibited by the *Drug Misuse and Trafficking Act 1985* (NSW). This would enable offenders with prescription drug dependency to access the program.

### Extending the program's geographic coverage

- 15.23 A number of submissions supported expanding the program's geographic coverage.<sup>57</sup> In consultations, strong support was reported for establishing a program in Dubbo which was reported to have a high incidence of drug-related property crime.<sup>58</sup>
- 15.24 We acknowledge that it is desirable to expand the program to a wider catchment area of referring courts and places of residence, and to establish Drug Courts in selected rural areas where drug dependent criminality is particularly prevalent. However, we also recognise that this would be resource intensive. We consider that the possibility should be kept under review and implemented selectively as resources permit and demand justifies. In the next chapter, we recommend expanding the Magistrates Early Referral Into Treatment (MERIT) program to more locations across NSW. It may offer a less resource intensive way of providing intervention for drug dependent offenders.

53. NSW, Office of the Director of Public Prosecutions, *Submission SE41*, 4.

54. Public Defenders, *Submission SE36*, 2; Law Society of NSW, *Submission SE43*, 4.

55. NSW, Office of the Director of Public Prosecutions, *Submission SE41*, 4.

56. *Drug Court Act 1998* (NSW) s 5(1)(d).

57. The Shopfront Youth Legal Centre, *Submission SE37*, 6; Aboriginal Community Justice Group, Mt Druitt and Aboriginal Legal Service, *Consultation SEC19*; Public Interest Advocacy Centre, *Submission SE42*, 11; Women in Prison Advocacy Network, *Submission SE17*, 10; Public Defenders, *Submission SE36*, 2; NSW, Office of the Director of Public Prosecutions, *Submission SE41*, 4-5; Law Society of NSW, *Submission SE43*, 4; NSW Bar Association, *Submission SE46*, 2.

58. Legal practitioners, Dubbo, *Consultation SEC14*; Community Support Organisations, Dubbo, *Consultation SEC13*; Court support services, Dubbo, *Consultation SEC16*.

**Recommendation 15.1: Consider expanding the Drug Court’s geographic coverage**

The possibility of extending the Drug Court program in other areas of the State should be kept under review and implemented, as resources permit and demand justifies. The government should give priority to those areas where drug dependent crime is particularly prevalent.

**Extending the program to more types of offenders**

- 15.25 There was support for the expansion of eligibility to the following groups:
- high risk offenders;<sup>59</sup> and
  - people with a mental illness.<sup>60</sup>
- 15.26 There was also support for adapting the selection procedure and the program to the following groups:
- Women,<sup>61</sup> particularly young aboriginal women;<sup>62</sup>
  - young people (although that would require detoxification to be available in a facility outside a prison or detention centre);<sup>63</sup>
  - Aboriginal people and Torres Strait Islanders;<sup>64</sup>
  - the homeless;<sup>65</sup> and
  - people with intellectual disabilities.<sup>66</sup>
- 15.27 We do not see any need to revise the personal eligibility criteria. Subject to resources, the program is available to offenders within the above categories who have the capacity to participate positively in a program, and that must remain a criterion.

***Refining the violent conduct exclusion***

- 15.28 There was some, but not universal, support<sup>67</sup> for making more offenders eligible by refining the “violent conduct” exclusion.<sup>68</sup> The courts have interpreted this provision

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59. Corrective Services, *Submission SE55*, 14.

60. Public Interest Advocacy Centre, *Submission SE42*, 11, 12; Recommendation 7.

61. Public Interest Advocacy Centre, *Submission SE42*, 11.

62. The Shopfront Youth Legal Centre, *Submission SE37*, 6.

63. Children’s Court of NSW, *Submission SE40*, 9; Public Interest Advocacy Centre, *Submission SE42*, 12; Recommendation 7.

64. NSW Bar Association, *Submission SE46*, Appendix 1, 9.

65. Public Interest Advocacy Centre, *Submission SE42*, 11.

66. NSW, Department of Family and Community Services, *Submission SE44*, 5.

67. Legal Aid NSW, *Submission SE50*, 5; NSW, Department of Family and Community Services, *Submission SE44*, 5; Corrective Services NSW, *Submission SE55*, 14; The Shopfront Youth Legal Centre, *Submission SE37*, 6-7; Public Interest Advocacy Centre, *Submission SE42*, 12, Recommendation 7 if no actual violence.

68. *Drug Court Act 1998* (NSW) s 5(2).

to exclude offenders where violence was inherent in the elements of their offence, whether or not violent conduct was actually involved. Dangerous driving occasioning death has therefore been excluded as a relevant offence, as has robbery because the threat of violence put the victim in fear.<sup>69</sup>

- 15.29 The current approach leads to the anomaly that an offender convicted of an offence of armed or unarmed robbery without actual violence is excluded,<sup>70</sup> whereas an offender convicted of a break, enter and steal offence that involved a substantial level of destructive behaviour directed at the victim's property, such as a "ram raid", will be eligible.<sup>71</sup> To some extent, this is contrary to the approach that the government anticipated when the Drug Court was first established. In the second reading speech, the Minister said that the program would deal with "unarmed robberies provided there is no violence".<sup>72</sup>
- 15.30 In its 2007 report on sentencing robbery offenders, the NSW Judicial Commission noted that the vast majority of offenders (83.5%) had a history of drug and/or alcohol abuse. Seven out of 10 offenders were addicted to drugs and 13.3% were addicted to alcohol.<sup>73</sup> The motivation for committing the robbery was drug related in three-quarters of robberies, the foremost reason being the "need to obtain funds or drugs to support a drug habit" (70.4%).<sup>74</sup> This suggests that many offenders charged with offences such as robbery could benefit from referral to the Drug Court. In a random sample of 346 robbery cases between 1999 and 2002 the Judicial Commission found that almost two-thirds of the cases involved a threat of violence rather than its actual use.<sup>75</sup>
- 15.31 Other Australian jurisdictions have taken a different approach in an exclusion based on violence. Some refer to specific offences or types of offences<sup>76</sup> and some exclude any offence where actual bodily harm was inflicted.<sup>77</sup>
- 15.32 There are several possible approaches to this issue, including:
- clarifying the definition of violence for the purpose of the eligibility provision;
  - giving the Drug Court a discretion to determine what cases to accept; or

69. *Chandler v DPP* [2000] NSWCA 125; 49 NSWLR 1; *DPP v Ebsworth* [2001] NSWCA 318, 124 A Crim R 410.

70. This is because it is an element of the offence of robbery that (i) the offender use force; or (ii) the victim is put into in fear, and the courts have held that both amount to "violent conduct".

71. *DPP v Hilzinger* [2011] NSWCA 106, 80 NSWLR 629.

72. NSW, *Parliamentary Debates*, Legislative Council, 25 November 1998, 10576.

73. Judicial Commission of NSW, *Sentencing Robbery Offenders since the Henry Guideline Judgment*, Monograph 30 (2007) [3.6.9]-[3.6.11].

74. Judicial Commission of NSW, *Sentencing Robbery Offenders since the Henry Guideline Judgment*, Monograph 30 (2007) [3.6.13].

75. Judicial Commission of NSW, *Sentencing Robbery Offenders since the Henry Guideline Judgment*, Monograph 30 (2007) [3.5.12].

76. *Drug Court Act* 2000 (Qld) s 7(1)(a), 7(4); *Criminal Code* (Qld) s 335, 340, 413; *Bail Act* 1985 (SA); *Summary Procedure Act* 1921 (SA) s 4(1) (definition of "offence of violence"). *Sentencing Act* (NT) s 65(1). WA runs the program under bail or a pre-sentence adjournment and specific offences are excluded by the policy manual and others are at the discretion of the court: *Bail Act* 1982 (WA) and *Perth Drug Court Manual* (2007).

77. *Sentencing Act* 1991 (Vic) s 18Z(1)(a)(ii), (5); *Sentencing Act* 1997 (Tas) s 27B(1)(a)(ii), (f)(ii).

- making no change.
- 15.33 The NSW Police Force proposed a definition of “violent conduct” as conduct that
- (a) includes violent conduct towards property and persons, and
  - (b) is not restricted to conduct causing or intended to cause injury or damage but includes any other violent conduct (for example, throwing at or towards a person a missile of a kind capable of causing injury which does not hit or falls short).<sup>78</sup>
- 15.34 Corrective Services NSW noted that higher risk offenders have a greater tendency to violence and have more to gain from the Drug Court’s intensive programs. It proposed that the Court be given a greater discretion to include offenders convicted of offences involving violence who could benefit from the program, that would be weighed in the light of the safety of the community.<sup>79</sup> Legal Aid NSW similarly suggested that offenders convicted of violent conduct could be considered for acceptance on a case by case basis.<sup>80</sup> The Public Interest Advocacy Centre suggested that offenders should be included where there was no actual violence, even though violence was an element of the offence.<sup>81</sup> Shopfront favoured including robbery as well as some other violent offences and firearm offences within the eligibility criteria.<sup>82</sup>
- 15.35 Extending the Drug Court to domestic violence offences was suggested in one consultation, although it was acknowledged that the current intensive program model would require a different form of collaborative case management.<sup>83</sup>
- 15.36 The ODPP did not favour expanding the program to include offenders convicted of violent conduct. It submitted that the criteria should be clarified to ensure that those who commit an offence containing an element of violence, and those who commit offences involving actual violence are excluded.<sup>84</sup>

### *Our view*

- 15.37 The violent conduct exclusion should be amended to make the Drug Court program accessible to offenders convicted of offences of which violence is an element, so long as the behaviour during the offence did not involve the actual infliction of bodily harm. This amendment reflects the stated intention of the program to include offenders convicted of unarmed robberies where there is no actual violence. Given the statistics stated above on the relationship between drug dependency and robberies, this would allow a group of offenders who could benefit from the intensive supervision and rehabilitation regime to access the Drug Court.

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78. NSW Police Force, *Submission SE45*, 4-5.

79. Corrective Services NSW, *Submission SE55*, 14.

80. Legal Aid NSW, *Submission SE50*, 5.

81. Public Interest Advocacy Centre, *Submission SE42*, 12, Recommendation 7.

82. The Shopfront Youth Legal Centre, *Submission SE37*, 6.

83. Community Corrections Mount Druitt, *Consultation SEC18*.

84. NSW, Office of the Director or Public Prosecutions, *Submission SE41*, 5-6.

- 15.38 Alternatively, the Drug Court could have discretion to accept offenders for the program who are convicted of an offence, an element of which is violence, so long as it is satisfied that the level of actual harm inflicted or threat of harm was minor.
- 15.39 An eligibility test of either kind would need to be subject to the Court having a discretion to refuse to accept an offender if it had concerns about the safety of the community or of the staff involved in the program. The Drug Court would make this decision in the light of the evidence before it including the history of the offender and the nature and seriousness of the conduct involved in the offence.

**Recommendation 15.2: New test for Drug Court eligibility criteria regarding violent conduct**

- (1) The test of eligibility contained in the Drug Court Act with respect to violent conduct should be amended so that the Drug Court may accept an offender who has committed an offence of which violence is an element, if it is satisfied that the offence did not involve the actual infliction of bodily harm.
- (2) Alternatively, the Drug Court should be able to accept an offender into the program where the offender has committed an offence of violence if it is satisfied that the harm or threat of harm caused by the offender was minor in nature.
- (3) The Drug Court should be able to decline to accept any offender if it has concerns about the safety of the community or of the staff involved in the Drug Court program.

## Compulsory drug treatment detention (CDTD)

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### Compulsory drug treatment order

- 15.40 The Drug Court can make a compulsory drug treatment order (CDTO) that will require an eligible convicted offender<sup>85</sup> to serve a term of imprisonment imposed on that offender by way of compulsory drug treatment detention (CDTD).<sup>86</sup>
- 15.41 The Drug Court must not make the order unless the offender has been referred to the multi-disciplinary assessment team to determine that person's eligibility and suitability for the program.<sup>87</sup>
- 15.42 The effect of the CDTO is to:
- cancel the offender's warrant of commitment;
  - revoke any parole order; and

85. Who is referred by a Local or District Court that is within the prescribed list of courts empowered to make a referral: *Drug Court Act 1998* (NSW) s 18B; *Drug Court Regulation 2010* (NSW) cl 9.

86. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5A; *Drug Court Act 1998* (NSW) s 18C.

87. *Drug Court Act 1998* (NSW) s 18D, 18E.

- require the offender to comply with the offender's drug treatment personal plan.<sup>88</sup>

The Drug Court issues a warrant for the committal of the person to the Compulsory Drug Treatment Correctional Centre (CDTCC) which is located within the Parklea Correctional Centre.<sup>89</sup> The Drug Court constitutes the Parole Authority for offenders on a CDTO.<sup>90</sup>

### *Eligibility*

15.43 Currently, a person is eligible for a CDTO if:

- the person has been convicted of at least two other offences in the previous five years that resulted in a sentence of imprisonment, community service order or bond;
- the person has a long-term dependency on the use of prohibited drugs;
- the offence was related to a long-term drug dependency and associated lifestyle; and
- the person has, when the Drug Court is determining whether to make a CDTO, been sentenced to full time detention with an unexpired non-parole period of at least 18 months and no more than 3 years.<sup>91</sup>

15.44 A person is not eligible for a CDTO if convicted:

- of murder or related offences,
- sexual assault of an adult or child or a sexual offence involving a child,
- an offence involving the use of a firearm, or
- certain drug offences involving commercial or larger commercial quantities.<sup>92</sup>

A person is also ineligible if the person has a mental condition, illness or disorder that is serious, or that leads to the person being violent, or that could prevent or restrict active participation in a drug treatment program.<sup>93</sup> The offender must also live in one of the prescribed local government areas, be aged 18 years or over, be male and the relevant offence for which the offender was convicted must not be within the jurisdiction of a Children's Court.<sup>94</sup>

### *Treatment program*

15.45 After the Drug Court has imposed a CDTO, the Commissioner of Corrective Services, in consultation with Justice Health, prepares a drug treatment personal

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88. *Drug Court Act 1998* (NSW) s 18G.

89. *Drug Court Act 1998* (NSW) s 18J.

90. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106T; Drug Court of NSW, *Policy 14: Parole for Participants of the Compulsory Drug Treatment*.

91. *Drug Court Act 1998* (NSW) s 5A(1).

92. *Drug Court Act 1998* (NSW) s 5A(2).

93. *Drug Court Act 1998* (NSW) s 5A(3).

94. *Drug Court Regulation 2010* (NSW) cl 5.



plan which comes into operation when the Drug Court approves it.<sup>95</sup> All treatment plans include mandatory conditions that the offender not use non-prescription drugs, or resort to or threaten violence, or commit any further offences; and that the offender comply with any community supervision order.<sup>96</sup> Other conditions can be included, such as those requiring that the offender be of good behaviour, attend counselling or other treatment, submit to drug testing, and take part in activities, courses, training or employment aimed at promoting reintegration into the community.<sup>97</sup>

- 15.46 The CDTO program is divided into three treatment stages each lasting at least six months.<sup>98</sup> Movement between the stages depends on order by the Drug Court.<sup>99</sup>
- **Stage 1 (closed detention):** participants are in full-time custody at the CDTCC where they undertake therapeutic and educational programs.
  - **Stage 2 (semi-open detention):** participants may leave the CDTCC with approval for paid employment, training or social activities.
  - **Stage 3 (community custody):** participants are subject to intensive supervision while living in the community.<sup>100</sup>
- 15.47 The Drug Court can progress or regress a participant through the stages of the program in the light of assessment reports prepared by an officer of the Probation and Parole Service or the Director of the CDTCC.<sup>101</sup> In special circumstances the Commissioner of Corrective Services can make regression and removal orders.<sup>102</sup>
- 15.48 The CDTO continues until the sentence expires or the order is revoked.<sup>103</sup> Participants are released after stage 3 if the term of their sentence has expired. Once the non-parole period has ended, the Drug Court can release the offender on parole.<sup>104</sup>
- 15.49 If a participant does not comply with the treatment plan, the Commissioner of Corrective Services can withdraw privileges, apply to the Drug Court to increase supervision or the frequency of drug testing.<sup>105</sup> Conversely the Commissioner can reward compliance by decreasing the level of management; or by varying other conditions with the Drug Court's approval.<sup>106</sup> A serious breach must be referred to the Drug Court.

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95. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106F(1)-(5).

96. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106H.

97. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106F(6).

98. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106D, 106M; J Dekker, K O'Brien and N Smith, *An Evaluation of the Compulsory Drug Treatment Program (CDTP)* (NSW Bureau of Crime Statistics and Research, 2010) 3.

99. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106M.

100. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106D(1)-(4).

101. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106M and 106N.

102. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106P.

103. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106E.

104. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106T.

105. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106I(2).

106. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106J.

- 15.50 The Drug Court can make a revocation order where a participant's failure to comply with a condition of the personal plan is serious, and in its opinion the participant:
- is unlikely to make any further progress in the compulsory drug treatment program; or
  - poses an unacceptable risk to the community of reoffending; or
  - poses a significant risk of harm to self or others.<sup>107</sup>
- 15.51 After revoking a CDTO, the Drug Court must issue a warrant requiring the offender to be transferred to a correctional centre to serve the remainder of the sentence.<sup>108</sup>

### *Evaluations of the CDTD program*

- 15.52 In 2011/12, 57 new offenders were referred for assessment for suitability for a CDTO. This resulted in the Court making 27 orders.<sup>109</sup>
- 15.53 An evaluation of CDTOs published in 2010 reported that 26 participants in a sample size of 54 were released to parole while 26 had their CDTOs revoked.<sup>110</sup> Of those paroled, the majority had been regressed at least once. Many of the participants (46.2%) had their CDTOs revoked during Stage 1. Out of 54 participants, 59.3% were regressed at least once.<sup>111</sup>
- 15.54 The authors of the evaluation noted that, while the program appears to be successful in effectively treating drug dependency, it was not possible, in the absence of a suitable control group, to assess whether it had successfully reduced the likelihood of relapse.<sup>112</sup>
- 15.55 The NSW program is based on models from the United States and the Netherlands.<sup>113</sup> There are currently no comparable programs in Australia. Since the the NSW program commenced, Hong Kong has introduced detention and compulsory treatment of drug-addicted offenders.<sup>114</sup>
- 15.56 The program in the Netherlands began in 2001 and, like the NSW program, it involves a court-ordered treatment of drug-dependant offenders administered in three stages. An Amsterdam Institute of Addiction Research evaluation found some evidence that the program was effective with participants performing significantly

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107. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106Q(1)(a)(iii).

108. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106S.

109. NSW, Department of Attorney General and Justice, *Annual Report 2011/12* (2012) 84.

110. J Dekker, K O'Brien and N Smith, *An Evaluation of the Compulsory Drug Treatment Program (CDTP)* (NSW Bureau of Crime Statistics and Research, 2010) 20-21.

111. J Dekker, K O'Brien and N Smith, *An Evaluation of the Compulsory Drug Treatment Program (CDTP)* (NSW Bureau of Crime Statistics and Research, 2010) 19-21.

112. J Dekker, K O'Brien and N Smith, *An Evaluation of the Compulsory Drug Treatment Program (CDTP)* (NSW Bureau of Crime Statistics and Research, 2010) 42.

113. NSW, *Parliamentary Debates*, Legislative Assembly, 23 June 2004, 9967.

114. J Dekker, K O'Brien and N Smith, *An Evaluation of the Compulsory Drug Treatment Program (CDTP)* (NSW Bureau of Crime Statistics and Research, 2010) 6-7.

better than offenders in regular detention in terms of subsequent offending, addiction and social functioning.<sup>115</sup>

- 15.57 Stakeholders generally considered the CDTO was well targeted at persistent serious drug-using offenders who were not eligible for the Drug Court program and for whom a custodial sentence was inevitable.<sup>116</sup> The exception to this was the NSW Police Force submission that the historical 50% revocation rate for non-compliance indicates that the program is not effective.<sup>117</sup> On this basis, the ODPF submitted that there should be further rigorous research to find whether the CDTD program was effective in reducing reoffending.<sup>118</sup>

### Expanding eligibility for the CDTD program

- 15.58 Several stakeholders supported expanding the eligibility criteria. For example, the Drug Court proposed expanding the eligibility criteria to include a larger pool of participants, in particular, by removing the “recidivism” requirement. The Drug Court submitted that an ongoing demand tension for places helps to entrench the program as valuable and ensures that unmotivated participants are not over-served.<sup>119</sup>
- 15.59 Legal Aid NSW similarly suggested that CDTOs should be available to offenders with no prior criminal record “as this would reduce reoffending and promote the rehabilitation of offenders”;<sup>120</sup> or alternatively that the eligibility criterion be amended by substituting a conviction of at least one prior offence in the preceding 5 years in place of the current requirement for two such offences. Others went further by suggesting that CDTD should be made available to offenders whether or not they had a criminal record.<sup>121</sup>
- 15.60 Corrective Services NSW also suggested that the eligibility criteria for CDTOs was too restrictive and excluded individuals who could benefit.<sup>122</sup> It suggested that consideration be given to broadening the sentencing and referral pathway for a CDTO (including the State Parole Authority becoming a referral authority) and introducing an internal screening and referral process to identify individuals who may fit the intended target group.<sup>123</sup>

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115. J Dekker, K O'Brien and N Smith, *An Evaluation of the Compulsory Drug Treatment Program (CDTP)* (NSW Bureau of Crime Statistics and Research, 2010) 6, citing M W J Koeter, and M Bakker, *Effectevaluatie van de strafrechtelijke opvang verslaafden (SOV) (Effect Evaluation of the Rehabilitation of Drug-addicted Offenders Act (SOV))* (2007).

116. NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 4; Public Defenders, *Submission SE24*, 9-10; The Shopfront Youth Legal Centre, *Submission SE28*, 2; Legal Aid NSW, *Submission SE31*, 9; Drug Court of NSW, *Submission SE33*, 1; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 10; Probation and Parole Officers' Association of NSW, *Submission SE49*, 2; Corrective Services NSW, *Submission SE52*, 5.

117. NSW Police Force, *Submission SE32*, 7.

118. NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 4-5.

119. Drug Court of NSW, *Submission SE33*, 2.

120. Legal Aid NSW, *Preliminary submission PSE18*, 8.

121. NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 10.

122. Corrective Services NSW, *Submission SE52*, 6.

123. Corrective Services NSW, *Submission SE52*, 6-7.

- 15.61 The Children’s Court suggested introducing a new “suitability” provision<sup>124</sup> that would permit the Court to take into account the offender’s drug treatment history and level of motivation to participate in program.<sup>125</sup>
- 15.62 Some stakeholders suggested that CDTD be extended to female offenders.<sup>126</sup> WIPAN in particular proposed the trial of a pilot program for female offenders and suggested amending the CDTD eligibility criteria to allow the Court to make a CDTO for women with multiple diagnoses of substance dependency and a mental health or cognitive impairment.<sup>127</sup> The Children’s Court also supported extending the eligibility criteria to include young people with a dual diagnosis for mental health and drug and alcohol issues.<sup>128</sup>
- 15.63 The Department of Family and Community Services (FACS) submitted that it could be seen as inherently discriminatory to exclude offenders with a “mental illness, condition or disorder that is serious or leads to violence and could restrict their effective participation in a treatment program”.<sup>129</sup> It favoured a neutral criterion based on the potential effectiveness of the order in place of one based on disability.
- 15.64 The Probation and Parole Officers’ Association of NSW agreed that this exclusion constituted a form of discrimination on the grounds of disability. It saw the custodial setting as an environment in which to manage complex cases. It proposed replacing the exclusion criteria with criteria dependent on a practical consideration of the offender’s suitability for a CTDO.<sup>130</sup> It submitted, additionally, that the requirement for the offender to have a “long-term dependency on a prohibited drug” causes problems. It noted that this potentially excludes offenders whose dependency relates to drugs such as benzodiazepines and suggested that the expression “dependency”, is a controversial and ambiguous term that is rejected by some alcohol and other drug agencies. It saw a criterion based on a history of “long-term drug use” or “long-term drug problems” as more useful. A similar definitional problem was said to apply for the criterion that “the offence was related to a long-term drug dependency and associated lifestyle”.<sup>131</sup>
- 15.65 Despite suggesting these revisions to the eligibility criteria, the Probation and Parole Officers’ Association of NSW was principally concerned that custodial CDTOs should not displace earlier voluntary drug treatment in the community (for example, through the MERIT program). Its view was that CDTD should remain a treatment option of last resort and be reserved for hardcore offenders who repeatedly commit drug-related crime and have a history of absconding and failing to complete community-based drug treatment.<sup>132</sup>

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124. Currently *Drug Court Act 1998* (NSW) s 18E.

125. Children’s Court of NSW, *Submission SE18*, 8.

126. Law Society of NSW, *Submission SE16*, 6; WIPAN, *Submission SE17*, 10; Public Defenders, *Submission SE24*, 10; NSW Bar Association, *Submission SE27*, 5; Legal Aid NSW, *Submission SE31*, 9; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 10.

127. WIPAN, *Submission SE17*, 10.

128. Children’s Court of NSW, *Submission SE18*, 8.

129. NSW, Department of Family and Community Services, *Submission SE48*, 6.

130. Probation and Parole Officers’ Association of NSW, *Submission SE49*, 3.

131. Probation and Parole Officers’ Association of NSW, *Submission SE49*, 2.

132. Probation and Parole Officers’ Association of NSW, *Submission SE49*, 2.

*Our view*

- 15.66 CDTD was not intended for first time offenders, as it is an intensive program for offenders with a high risk of recidivism. The second reading speech was very clear about the type of offenders who were targeted:

The Compulsory Drug Treatment Correctional Centre will target a hard-core group of offenders with long-term drug addiction and who have an associated life of crime and constant imprisonment. It is for offenders who have failed to enter or complete other voluntary or court-based treatment programs.<sup>133</sup>

- 15.67 First-time offenders, who may present less risk of reoffending, would seem likely to benefit more from voluntary or court-based treatment programs which are less intensive than the custodial CDTD. However, consideration might be given to redrafting the current criteria around recidivism to allow recidivist offenders with relevant offences slightly outside the five year limit to enter the program.
- 15.68 We understand that a lack of available resources may limit the extent to which the program can be extended to female offenders and offenders with a cognitive or mental health impairment. Different models of service delivery would need to be developed for each of these groups. For example, tailored treatment options may be required for people with a cognitive or mental health impairment. FACS could lend its expertise, in conjunction with Corrective Services NSW and the Drug Court, in delivering the program to offenders with a cognitive impairment.

**Recommendation 15.3: Expanded eligibility for the CDTD program**

- (1) Consideration should be given to redrafting the current legislative requirements about recidivism in order to allow flexibility in admitting recidivist offenders with relevant offences slightly outside the five year limit to the program.
- (2) Corrective Services NSW should develop and cost a model for the provision of CDTD appropriate for the needs of:
  - (a) female offenders; and
  - (b) offenders with a mental health or cognitive impairment.

**Problems with the requirement for a sentence of an eligible length**

- 15.69 In order to be eligible for a CDTO, an offender must be subject to an unexpired non-parole period of between 18 months and 3 years.<sup>134</sup> Although the ODPP submitted that this restriction is appropriate, it also noted that, where offenders are subject to longer non-parole periods, some referring courts may intentionally delay placing the offender's material before the Drug Court until the unexpired period is less than three years.<sup>135</sup> The Drug Court also referred to this issue.<sup>136</sup>

133. NSW, *Parliamentary Debates*, Legislative Assembly, 23 June 2004, 9966.

134. *Drug Court Act 1998* (NSW) s 5A(1)(b).

135. NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 5.

136. Drug Court of NSW, *Submission SE33*, 4.

- 15.70 The NSW Bar Association submitted that the current system may disadvantage offenders who plead and are sentenced early, as they may have a longer unexpired non-parole period from the time of sentencing compared to offenders whose sentencing has been delayed. The Association proposed amending the referral mechanism to allow courts to refer an offender for Drug Court assessment at a time when the offender will have at least 18 months but less than 3 years of a non-parole period still to serve. This would allow courts to identify and “tag” suitable offenders for referral when they are in the last stage of their non-parole period.<sup>137</sup>
- 15.71 The NSW Bar Association also identified a problem that arises when a short sentence is imposed for an old offence on someone who has already entered the compulsory drug treatment program. The current provisions would render the participant ineligible and liable for revocation.<sup>138</sup> It suggested amending the definition of “eligible convicted offender”<sup>139</sup> so that a court is to take into account the length of the overall effective non-parole period, whether it arises from a single sentence, an aggregate sentence or an accumulated series of sentences.
- 15.72 The Drug Court submitted that the sentence eligibility criteria should be expressed in relation to the total term of the sentence, rather than the outstanding non-parole period, and that the upper limit should be a total term of six years. The offender would still need to be subject to an unexpired non-parole period of at least 18 months, in order to ensure that he or she has sufficient time to complete the program.<sup>140</sup>
- 15.73 We agree that the relevant provisions require some amendment. Offenders should not be disadvantaged by early pleas or by the structure of their sentences. We favour the solution of shifting the emphasis to the overall effective sentence being served by the offender. Offenders sentenced to a total term of six years or less whether by way of a simple sentence or aggregation or accumulation should be eligible for the program, as long as they are serving an unexpired non-parole period of at least 18 months, which is the minimum length of time to complete the program successfully.

**Recommendation 15.4: Amending the length of sentences eligible for a CDTO**

The sentences eligible to be served by way of a CDTO should be described in terms of the total effective sentence being served by the person. Consideration should be given to a limit of six years total sentence. Only those offenders with an unexpired non-parole period of at least 18 months should be admitted to the program.

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137. NSW Bar Association, *Submission SE27*, 5-6.

138. NSW Bar Association, *Submission SE27*, 5.

139. *Drug Court Act 1998* (NSW) s 5A(1).

140. Drug Court of NSW, *Submission SE33*, 4.

## Procedural reforms

- 15.74 The Drug Court submitted that making a CDTO should revoke any existing parole order. This would clearly signal to the participant that successfully completing the CDTO should be the priority, rather than awaiting a parole eligibility date.<sup>141</sup>
- 15.75 The Drug Court also submitted that the Director of the CDTCC should be able to regress a participant to an earlier stage of the program without the Drug Court considering the matter. This would reduce the administrative burden of regression decisions. It suggested that the legislation should allow participants to apply to the Drug Court to review the Director's decision.<sup>142</sup>
- 15.76 It also submitted that it should be possible, where a participant is unwilling to continue the program and the participant and the Director of the CDTCC have agreed, to revoke a CDTO without any requirement that the offender has committed a serious breach of the program.<sup>143</sup>
- 15.77 We recommend that the government consider adopting the Drug Court's proposals, subject to consultation with other relevant stakeholders.

### Recommendation 15.5: Procedural issues for CDTD

Subject to further consultation, the government should consider implementation of the Drug Court's proposals for streamlining the procedural operation of CDTOs.

## Geographical reach

- 15.78 Finally, we note that the Public Defenders urged the expansion of CDTD to include offenders who are sentenced in regional courts.<sup>144</sup> Although we support the concept of allowing a wider group access to CDTD regardless of where they are sentenced, we recognise that this depends on the government's capacity to provide the necessary resources.

### Recommendation 15.6: Expanded geographic reach of CDTD program

Subject to resource constraints, the government should consider extending the geographical reach of the CDTO program.

141. Drug Court of NSW, *Submission SE33*, 4.

142. Drug Court of NSW, *Submission SE33*, 6.

143. Drug Court of NSW, *Submission SE33*, 5.

144. Public Defenders, *Submission SE24*, 10.





## 16. Diversion and deferral of sentencing

### In brief

Diversion and deferral options are an important way of diverting offenders from sentencing and imprisonment. We recommend that the government expand pre-charge cautioning for adults and the MERIT program. Stakeholders had mixed views about the value of the Circle and Forum Sentencing programs and, while we support retaining them, we recommend that their aims and scope be reconsidered.

<b>Early Diversion - cautions</b> .....	<b>340</b>
Pre-charge cautions .....	<b>340</b>
<i>Informal cautions</i> .....	<b>340</b>
<i>Formal cautions</i> .....	<b>340</b>
<i>Options for reform</i> .....	<b>342</b>
<i>Our view</i> .....	<b>343</b>
Cautions administered when the matter reaches court.....	<b>344</b>
<i>Conditional cautions in the UK</i> .....	<b>344</b>
<i>Court cautions for young offenders in NSW</i> .....	<b>344</b>
<i>Our view</i> .....	<b>345</b>
<b>Pre-sentence interventions</b> .....	<b>345</b>
Magistrates Early Referral into Treatment (MERIT) program .....	<b>345</b>
<i>Submission and consultations</i> .....	<b>347</b>
<i>Our view</i> .....	<b>349</b>
Court Referral of Eligible Defendants Into Treatment (CREDIT) program.....	<b>349</b>
<i>Submissions and consultations</i> .....	<b>350</b>
<i>A new program: a person-centred approach to reoffending</i> .....	<b>351</b>
<i>Our view</i> .....	<b>352</b>
Section 11 adjournment.....	<b>352</b>
<i>Submissions and consultations</i> .....	<b>353</b>
<i>Our view</i> .....	<b>354</b>
Intervention programs.....	<b>354</b>
<i>Traffic Offenders Intervention Program</i> .....	<b>355</b>
<i>Forum Sentencing</i> .....	<b>356</b>
<i>Circle Sentencing</i> .....	<b>359</b>

16.1 In this chapter we outline the existing mechanisms for pre-sentence interventions and for the diversion of offenders that are aimed at rehabilitation. We have divided this chapter into two parts:

- **cautions** – pre-court and court based options for cautioning an offender instead of proceeding to conviction and sentence; and
- **pre-sentence interventions** – programs and options that allow courts to defer sentencing while an offender participates in a program or other form of intervention designed to deal with the offending behaviour.

- 16.2 There was considerable support in the submissions and consultations for making the current cautioning and intervention programs more widely available.<sup>1</sup> Some stakeholders also supported expanding the range of diversion and intervention options.<sup>2</sup>

## Early Diversion - cautions

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### Pre-charge cautions

- 16.3 There is a well-established common law discretion in NSW that allows police not to arrest and charge a person whom they suspect of committing an offence and, instead, to issue a formal or informal caution.<sup>3</sup> Even after a person has been arrested, a police officer can discontinue the arrest and give the offender a caution.<sup>4</sup>

### Informal cautions

- 16.4 The number of informal cautions issued in NSW is not known. Recent NSW Bureau of Crime Statistics and Research (BOCSAR) interviews with police found that some officers do not issue informal cautions because of the lack of accountability and concerns about allegations of corruption. However, other police officers acknowledged their use.<sup>5</sup>

### Formal cautions

- 16.5 There are two formal cautioning schemes in NSW:<sup>6</sup>
- the Cannabis Cautioning Scheme (CCS);<sup>7</sup> and
  - cautioning under the Young Offenders Act 1997 (NSW) (YOA).<sup>8</sup>

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1. G Henson, *Submission SE35*, 2-3; The Public Defenders, *Submission SE36*, 2-3; The Shopfront Youth Legal Centre, *Submission SE37*, 2-5; Children's Court of NSW, *Submission SE40*, 8-12; Public Interest Advocacy Centre, *Submission SE42*, 8-10; Law Society of NSW, *Submission SE43*, 3-5; NSW Bar Association, *Submission SE46*, 2-3; Legal Aid NSW, *Submission SE50*, 4-7; Jumbunna Indigenous House of Learning, *Submission SE54*, 11-13.

2. Legal Aid NSW, *Submission SE50*, 7; NSW, Department of Family and Community Services, *Submission SE44*, 4-7; The Shopfront Youth Legal Centre, *Submission SE37*, 2; The Public Defenders, *Submission SE36*, 2-3; Public Interest Advocacy Centre, *Submission SE42*, 4-5; NSW, Office of the Director of Public Prosecutions, *Submission SE41*, 2-3; Jumbunna Indigenous House of Learning, *Submission SE54*, 14.

3. See S Morrison and M Burdon, *The Role of Police in the Diversion of Minor Alcohol and Drug-Related Offenders*, Final Report (Commonwealth Department of Health and Aged Care, 1999) 14; *R v Commissioner of Police; Ex Blackburn* [1968] 2 QB 118, 136, 139. See also C Edwards, *Changing Policing Theories for 21st Century Societies* (3rd ed, The Federation Press, 2011) 193-194; *Enever v The King* (1906) 3 CLR 969; NSW Police Force, *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)* (2012) 16.

4. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 105; NSW Police Force, *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)* (2012) 15, 61.

5. J Baker and D Goh, *The Cannabis Cautioning Scheme Three Years on: An Implementation and Outcome Evaluation* (NSW Bureau of Crime Statistics and Research, 2004) 31-32.

6. There are also cautions issued under *Fines Act 1996* (NSW) s 19A. These cautions divert people from penalty notices rather than court proceedings and so will not be dealt with here.

7. NSW Police Force, "Cannabis Cautioning Scheme", <[www.police.nsw.gov.au/community\\_issues/drugs/cannabis\\_cautioning\\_scheme](http://www.police.nsw.gov.au/community_issues/drugs/cannabis_cautioning_scheme)>.

- 16.6 The only formal cautions administered to adults in NSW are under the CCS. Under the CCS guidelines,<sup>9</sup> police can caution people found in possession of 15 grams or less of dried cannabis leaf. The guidelines limit their use to offenders who have no other current offences for which they face court, and who do not have a record for offences involving drugs, violence or sexual assault. The caution is generally administered on the spot.
- 16.7 The caution is accompanied by a sheet providing information on the services provided by the Alcohol and Drug Information Service (the ADIS) and a request that the offender phone an information line. There is no follow-up for the first caution. On a second caution there is a mandatory requirement for the offender to participate in an education session with the ADIS. No more than two cautions are allowed per person. Within that framework the police officer may always forgo the caution and charge the offender. Police have reported that the process is straightforward.<sup>10</sup>
- 16.8 Cautioning under the YOA is part of a hierarchy of sanctions designed to divert young offenders from the court system. Cautions may be given for any offence that the Children's Court can deal with, except graffiti offences.<sup>11</sup> The young person must admit the offence.<sup>12</sup> The caution is not given on the spot but at a police station between 10 and 26 days after the offence.<sup>13</sup> The process is formal and recorded.<sup>14</sup>
- 16.9 The 2011 Auditor-General's performance audit found these schemes were successful in:
- diverting people from the criminal justice system, noting that the number of matters cautioned rose at a faster rate than the number of matters before the courts;<sup>15</sup> and
  - reducing reoffending (being assessed as among the most successful schemes in Australia in reducing reoffending rates).<sup>16</sup>
- 16.10 BOCSAR has similarly found that the system of cautions and conferences under the YOA had reduced the risk of young people, including Aboriginal people and Torres Strait Islanders, receiving a custodial sentence.<sup>17</sup>
- 16.11 Notwithstanding these positive findings, some problems have been identified:

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8. *Young Offenders Act 1997* (NSW) pt 4, div 1, 3.

9. NSW Police Force, *Cannabis Cautioning Scheme Guidelines*.

10. NSW, Auditor-General, *The Effectiveness of Cautioning for Minor Cannabis Offences*, Auditor-General's Report, Performance Audit (2011) 17.

11. *Young Offenders Act 1997* (NSW) s 18.

12. *Young Offenders Act 1997* (NSW) s 19.

13. *Young Offenders Act 1997* (NSW) s 26.

14. *Young Offenders Act 1997* (NSW) s 30.

15. NSW, Auditor-General, *The Effectiveness of Cautioning for Minor Cannabis Offences*, Auditor-General's Report, Performance Audit (2011) 12.

16. NSW, Auditor-General, *The Effectiveness of Cautioning for Minor Cannabis Offences*, Auditor-General's Report, Performance Audit (2011) 15. See also J Ogilvie and K Willis, *Police Drug Diversion in Australia*, Criminal Justice Bulletin Series 3 (National Cannabis Prevention and Information Centre, Australian Institute of Criminology, 2009).

17. W Wan, W Moore and S Moffatt, *The Impact of the NSW Young Offenders Act (1997) on Likelihood of Custodial Order*, Crime and Justice Bulletin No 166 (NSW Bureau of Crime Statistics and Research, 2012) 8.

- While acknowledging the success of the CCS, the audit evaluation found that cautions were not consistently applied throughout the state or even within a Local Area Command.<sup>18</sup>
  - The prior offence exclusions from the CCS tended to exclude vulnerable offenders, including the homeless and indigenous women.<sup>19</sup>
- 16.12 Other Australian jurisdictions have adopted police pre-charge cautioning schemes. For example:
- Every jurisdiction, except NSW and Tasmania, has a diversionary scheme for the minor possession of any illegal drug.<sup>20</sup>
  - Victoria had a police cautioning scheme for adult shoplifting offences.<sup>21</sup>
  - Queensland has a police cautioning system for people aged over 65 years, and for adults with a cognitive or mental health impairment.<sup>22</sup>
- 16.13 In our report *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion* we recommended legislative provisions for a pre-court diversion option for summary offences and indictable matters that can be dealt with summarily.<sup>23</sup> We also recommended extending the use of cautions by NSW Police for people with cognitive or mental health impairments.
- 16.14 In our *Penalty Notices* report, we proposed strengthening the use of cautions instead of penalty notices, and the introduction of guidelines for all agencies, including police.<sup>24</sup>

### *Options for reform*

- 16.15 **Expand the CCS to minor offences involving other prohibited drugs.** The Chief Magistrate and the Public Interest Advocacy Centre supported extending the CCS

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18. NSW, Auditor-General, *The Effectiveness of Cautioning for Minor Cannabis Offences*, Auditor-General's Report, Performance Audit (2011) 14; J Baker and D Goh, *The Cannabis Cautioning Scheme Three Years on: An Implementation and Outcome Evaluation* (NSW Bureau of Crime Statistics and Research, 2004) 19; Law Society of NSW, *Submission SE43*, 3 and Jumbunna Indigenous House of Learning, *Submission SE54*, 83.

19. Corrective Services NSW, Women's Advisory Council, *Submission SE53*, 18; NSW Bar Association, *Submission SE46*. See also J Baker and D Goh, *The Cannabis Cautioning Scheme Three Years on: An Implementation and Outcome Evaluation* (NSW Bureau of Crime Statistics and Research, 2004) 38-39.

20. C Hughes and A Ritter, *A Summary of Diversion Programs for Drug and Drug-Related Offenders in Australia*, Drug Policy Modelling Program Monograph 16 (National Drug and Alcohol Research Centre, 2008)15-17, 46-73; J Ogilvie and K Willis, *Police Drug Diversion in Australia*, Criminal Justice Bulletin Series 3 (National Cannabis Prevention and Information Centre, Australian Institute of Criminology, 2009) 3.

21. Queensland, Criminal Justice Commission, *Police Cautioning of Adults: Drug and Other Offences*, Briefing Paper (1999) 11.

22. Queensland Police Service, *Operational Procedures Manual*, 6.5.1 as quoted in Queensland, Criminal Justice Commission, *Police Cautioning of Adults: Drug and other Offences*, Briefing Paper (1999).

23. NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, Report 135 (2012) rec 8.3, 8.4.

24. NSW Law Reform Commission, *Penalty Notices*, Report 132 (2012) rec 5.1, 5.4.

to other prohibited drugs.<sup>25</sup> This would bring the NSW scheme into line with those in most other Australian jurisdictions.

- 16.16 **Introduce a formal, legislatively based general cautioning scheme for adults.** Such a scheme could be modelled on the current YOA scheme for juveniles. Such a scheme would be in addition to the scheme we previously recommended to divert people with mental health or cognitive impairments from the criminal justice system. A number of submissions supported a general cautioning scheme for adults.<sup>26</sup>

*Our view*

- 16.17 We consider that the CCS should be expanded to cover possession of minor quantities of other prohibited drugs. Expanding the scheme would allow a larger number of first time offenders to be diverted from the criminal justice system. The diversion scheme would also apply consistently across minor possession offences which carry the same maximum penalty.<sup>27</sup>
- 16.18 In light of the success of the CCS and the YOA scheme in reducing recidivism and the number of people who come before the courts, and in the light of the general support in submissions, our view is that the government should consider introducing a legislatively based general cautioning scheme for adults. Particular attention should be paid to delivering any cautioning scheme across the state and to ensuring that any prior offence exclusions do not deny access to vulnerable people, who would otherwise benefit from a caution. Consideration would also need to be given to whether the scheme should also operate post-charge, whether the police or some other body should administer the scheme, and whether the cautions should be conditional or unconditional.

**Recommendation 16.1: Expanded cautioning options**

- (1) The cannabis cautioning scheme should be expanded to cover possession of small quantities of other prohibited drugs.
- (2) Consideration should be given to the introduction of an expanded legislative cautioning scheme for adults in addition to the diversion scheme recommended in our report, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, Report 135 (2012).

25. G Henson, *Submission SE35*, 2; Public Interest Advocacy Centre, *Submission SE42*, 6.

26. The Shopfront Youth Legal Centre, *Submission SE37*, 2; NSW, Office of the Director of Public Prosecutions, *Submission SE41*, 2-3; Public Interest Advocacy Centre, *Submission SE42*, 4-5; Law Society of NSW, *Submission SE43*, 3; NSW, Department of Family and Community Services, *Submission SE44*, 4; Legal Aid NSW, *Submission SE50*, 4.

27. See G Henson, *Submission SE35*, 2.

## Cautions administered when the matter reaches court

### *Conditional cautions in the UK*

- 16.19 The *Criminal Justice Act 2003* (UK) permits a Crown Prosecutor to issue a “conditional caution”<sup>28</sup> to an adult after charging.<sup>29</sup> An offender must admit guilt before a conditional caution is administered<sup>30</sup> and the admission can be used as evidence if the offence is subsequently prosecuted.<sup>31</sup> The conditions imposed may include: payment of a fine; participating in treatment of a drug or alcohol dependency; attending anger management courses or driver rectification classes; and performing unpaid community work.<sup>32</sup>
- 16.20 Conditional cautions are available for a range of offences, such as common assault, assaulting a police officer, unlawful taking of a motor vehicle, theft, handling stolen goods, damaging property, and minor drug possession,<sup>33</sup> but are not available for indictable-only offences or domestic violence offences. When a conditional caution is administered, the prosecution is suspended. If the offender breaches the conditions then the criminal proceedings can be reactivated and the caution ceases to have effect.<sup>34</sup>
- 16.21 Submissions did not support the introduction of conditional cautions.<sup>35</sup> The Shopfront Youth Legal Centre and the Office of the Director of Public Prosecutions (ODPP) suggested that, if such a system was introduced, an agency other than the police prosecutors or the ODPP would need to run it.<sup>36</sup>

### *Court cautions for young offenders in NSW*

- 16.22 In NSW, the Children’s Court can give cautions to young offenders under the age of 18 years for the same offences as can be the subject of a police caution.<sup>37</sup> The Children’s Court issued cautions in about 13% of matters where the offender was found guilty. In 2012 this resulted in 892 cases being dismissed with a caution compared to 2154 bonds, 1381 probation orders, 427 fines, 265 community service orders and 727 control orders.<sup>38</sup>

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28. *Criminal Justice Act 2003* (UK) pt 3.

29. England and Wales, Director of Public Prosecutions, *The Director’s Guidance on Conditional Cautioning – Guidance to Police Officers and Crown Prosecutors* (6th ed, 2010) [4.5], [4.9], [4.10].

30. *Criminal Justice Act 2003* (UK) s 23.

31. *Criminal Justice Act 2003* (UK) s 24(2).

32. *Criminal Justice Act 2003* (UK) s 22; I Brownlee, “Conditional Cautions and Fair Trial Rights in England and Wales; Form Versus Substance in the Diversionary Agenda?” [2007] *Criminal Law Review* 129, 130.

33. England and Wales, Director of Public Prosecutions, *The Director’s Guidance on Conditional Cautioning – Guidance to Police Officers and Crown Prosecutors* (6th ed, 2010) 12, Annex A.

34. *Criminal Justice Act 2003* (UK) s 24.

35. Law Society of NSW, *Submission SE43*, 3; Legal Aid NSW, *Submission SE50*, 4; Corrective Services NSW, Women’s Advisory Council, *Submission SE53*, 18.

36. The Shopfront Youth Legal Centre, *Submission SE37*, 2; NSW, Office of the Director of Public Prosecutions, *Submission SE41*, 3.

37. *Young Offenders Act 1997*(NSW) s 8, s 31.

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

- 16.23 There was little support in the submissions for introducing a court cautioning scheme for adults (and then only as an option in remote areas where other sentencing options are limited).<sup>39</sup>

### *Our view*

- 16.24 Offences that could be suitable for a court caution in an adult court are those that magistrates can currently deal with by dismissal under s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA) or that could be dealt with under our proposed “no penalty” provision.<sup>40</sup> In dismissing a charge, the court can, in its reasons for sentence, explain why the offence is considered to be serious and the possible consequences of the offender’s actions. These remarks are equivalent to those used when cautioning in the Children’s Court. We therefore see no reason to make court cautions available as an additional sentencing option for adults.

### **Recommendation 16.2: No court-based cautioning for adults**

Court-based cautioning for adults should not be introduced in NSW.

## Pre-sentence interventions

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- 16.25 Pre-sentence program-based interventions are founded on a problem-solving approach to justice which seeks to address the offender’s problems. There are currently two programs available at the pre-plea stage: Magistrates Early Referral into Treatment (MERIT) and the Court Referral of Eligible Defendants into Treatment (CREDIT) schemes. They are not based in legislation and are facilitated by adjournment, which may include conditional release on bail.
- 16.26 Following a finding of guilt, the court has a power under s 11 of the CSPA to adjourn a matter for up to 12 months to allow an offender to participate in a program which can include MERIT, CREDIT or one of three legislatively based “intervention programs”, comprising the Traffic Offenders Program, the Circle Sentencing scheme and Forum Sentencing scheme.

### Magistrates Early Referral into Treatment (MERIT) program

- 16.27 MERIT is a voluntary scheme available in some Local Courts for defendants with drug problems.<sup>41</sup> It was introduced as a pilot in 2000 and is now available in over 60 locations in NSW. In 2012, it was extended to include, in some locations, defendants with alcohol problems.<sup>42</sup> Alcohol MERIT developed from the Rural Alcohol Diversion (RAD) pilot at Bathurst and Orange Local Court, using the MERIT

39. Jumbunna Indigenous House of Learning, *Submission SE54*, 13.

40. Recommendation 13.17.

41. Local Court of NSW, *Case Management of Criminal Proceedings in the Local Court* (Practice Note Crim 1, 24 April 2012) [12.1].

42. NSW Alcohol MERIT was available at the following Local Courts in 2012: Newcastle, Albion Park, Kiama, Port Kembla, Wollongong, Hornsby, Manly, North Sydney, Ryde, Fairfield, Liverpool and Campbelltown.

model. Alcohol MERIT has expanded to include seven other Local Courts.<sup>43</sup> The Department of Attorney General and Justice (DAGJ) administers MERIT and court-based staff are NSW Health or non government organisation employees.

- 16.28 The program aims to reduce criminal offending associated with drug or alcohol use by allowing participants to engage in drug or alcohol treatment and rehabilitation. While the aims of the program are similar to those of the Drug Court, MERIT differs in being a voluntary pre-plea scheme that is available only in the Local Court and that targets less serious offending.<sup>44</sup> The program is not available for those charged with offences that are strictly indictable, or specified sexual offences or specified offences involving serious violence. The defendant must not have similar offences pending before a court.<sup>45</sup>
- 16.29 Defendants can be referred for MERIT assessment: by police after arrest; on their own initiative or that of their legal representatives; by a magistrate; or by any other person (for example, a health professional, a probation and parole officer, family member or friend of the defendant).<sup>46</sup> To participate in MERIT the defendant must be a known or suspected adult drug user; while for Alcohol MERIT, the defendant must have an alcohol problem.<sup>47</sup>
- 16.30 If a defendant is eligible to participate, the proceedings are adjourned for the MERIT assessment team to conduct a suitability assessment. If found suitable, the defendant may be placed in the program if the magistrate approves. If the defendant is found to be unsuitable, the matter will proceed in the usual way.<sup>48</sup>
- 16.31 An individualised treatment plan is then devised that matches health and welfare services with treatment needs. The plan is generally for three months and can include medically supervised and home-based detoxification, drug therapy, residential rehabilitation, counselling and psychiatric treatment.<sup>49</sup> The court monitors the defendant as a condition of bail.<sup>50</sup> The defendant appears before the court at intervals with a MERIT progress report provided to the court.
- 16.32 At the end of the program, a final report will be provided to the court and the defendant will be asked to enter a plea. The court takes the defendant's successful engagement in the program into account on sentence, and it may be "a matter of some weight (taken into account) to the defendant's favour".<sup>51</sup> The court does not

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43. Broken Hill, Coffs Harbour, Dubbo, Manly, Wellington, Wilcannia and Wollongong.

44. J Linden, "Magistrates Early Referral into Treatment Program (MERIT)" (2003) 15(5) *Judicial Officers' Bulletin* 33.

45. Local Court of NSW, *Case Management of Criminal Proceedings in the Local Court* (Practice Note Crim 1, 24 April 2012) [12.4].

46. Local Court of NSW, *Case Management of Criminal Proceedings in the Local Court* (Practice Note Crim 1, 24 April 2012) [12.2].

47. Local Court of NSW, *Case Management of Criminal Proceedings in the Local Court* (Practice Note Crim 1, 24 April 2012) [12.1].

48. Local Court of NSW, *Case Management of Criminal Proceedings in the Local Court* (Practice Note Crim 1, 24 April 2012) [12.5].

49. Local Court of NSW, *Case Management of Criminal Proceedings in the Local Court* (Practice Note Crim 1, 24 April 2012) [12.6].

50. J Linden, "Magistrates Early Referral into Treatment Program (MERIT)" (2003) 15(5) *Judicial Officers' Bulletin* 33.

51. *Brown v R* [2006] NSWCCA 144 [4]. The applicants had complied with and successfully completed a MERIT program over a period of 14 months.



equate time spent on a MERIT program as a period of quasi-custody unless it included a full time residential program.<sup>52</sup>

- 16.33 The MERIT team is required to notify the court if a defendant fails to comply with the program. The magistrate will then determine whether the defendant should continue in the program. On removal or withdrawal from the program the matter will proceed in the usual way following entry of a plea.<sup>53</sup> Failure to complete MERIT will not adversely affect a defendant's sentence as participation in the scheme is voluntary.<sup>54</sup>
- 16.34 There have been a number of evaluations of MERIT that have found that:
- it reduced offending;<sup>55</sup>
  - it reduced drug use,<sup>56</sup>
  - it was cost effective;<sup>57</sup> and
  - there was a high level of judicial satisfaction.<sup>58</sup>
- 16.35 The Auditor-General's 2009 report was generally favourable, although it noted that it had not reached enough Aboriginal or Torres Strait Islander defendants.<sup>59</sup> It recorded that referrals were missed; the eligibility criteria excluded Aboriginal and Torres Strait defendants; Aboriginal and Torres Strait Islander defendants were less likely to engage with the program; and that the program, due to limited funding, was not available in all courts including those with high indigenous representation.

### *Submission and consultations*

- 16.36 There was strong support for MERIT both in the submissions<sup>60</sup> and consultations.<sup>61</sup> Stakeholder identified the following advantages:

52. *Brown v R* [2006] NSWCCA 144 [59].

53. Local Court of NSW, *Case Management of Criminal Proceedings in the Local Court* (Practice Note Crim 1, 24 April 2012) [12.7].

54. J Linden, "Magistrates Early Referral into Treatment Program (MERIT)" (2003) 15(5) *Judicial Officers' Bulletin* 33.

55. R Lulham, *The Magistrates Early Referral Into Treatment Program: Impact of Program Participation on Re-offending by Defendants with a Drug Use Problem*, Crime and Justice Bulletin No 131 (NSW Bureau of Crimes Statistics and Research, 2009) 8-9.

56. NSW Health, *The Magistrates Early Referral Into Treatment (MERIT) Program: Health Outcomes* (2007) 25.

57. L Bartels, *Challenges in Mainstreaming Specialty Courts*, Trends and Issues in Crime and Criminal Justice No 383 (Australian Institute of Criminology, 2009) 3, citing Northern Rivers University Department of Health, *Evaluation of the Lismore MERIT Pilot Program - Final Report* (NSW Attorney General's Department, 2003).

58. L Barnes and P Poletti, *MERIT: Magistrates Early Referral Into Treatment Program – A Survey of Magistrates*, Monograph 24 (Judicial Commission of NSW, 2004) 50.

59. NSW, Auditor General, *Helping Aboriginal Defendants through MERIT*, Auditor-General's Report, Performance Audit (2009) 2.

60. NSW Police Force, *Submission SE45*; Police Association of NSW, *Submission SE34*; The Shopfront Youth Legal Centre, *Submission SE37*; Jumbunna Indigenous House of Learning, *Submission SE54*, 41; Corrective Services NSW, Women's Advisory Council, *Submission SE53*.

61. Local Court Practitioners, *Consultation SEC9*; Aboriginal Community Justice Group, Western Region, *Consultation SEC15*; Legal practitioners, Dubbo, *Consultation SEC14*; Community support organisations, Dubbo, *Consultation SEC13*; Vulnerable groups, *Consultation SEC21*.

- Being a pre-plea program means that the defendant's issues are addressed while plea negotiations and facts are settled without delaying the court process.<sup>62</sup>
- Clients appreciate the assistance it provides in gaining access to treatment programs and are willing to comply with the conditions.<sup>63</sup>
- It replaces onerous bail conditions and so reduces the occurrence of bail breaches.<sup>64</sup>
- The support services are closely aligned to magistrates' decisions, and therefore work better.<sup>65</sup>

16.37 There was support for expanding eligibility for MERIT to those with more serious offences,<sup>66</sup> such as indictable offences,<sup>67</sup> and for adapting and extending the program to make it suitable, or more suitable, for:

- defendants with co-morbid cognitive and mental health impairments and drug dependency;<sup>68</sup>
- defendants with limited literacy;<sup>69</sup>
- Aboriginal or Torres Strait Islander defendants,<sup>70</sup> defendants from culturally and linguistically diverse backgrounds and refugees;<sup>71</sup>
- female defendants, particularly Aboriginal and Torres Strait Islander women;<sup>72</sup>
- young people, including adolescents and those in the Children's Court;<sup>73</sup> and
- defendants with addictions to alcohol,<sup>74</sup> prescription drugs<sup>75</sup> and gambling.<sup>76</sup>

16.38 Corrective Services NSW however identified concerns about alcohol MERIT that:

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62. Local Court practitioners, *Consultation SEC9*.

63. Local Court practitioners, *Consultation SEC9*.

64. Local Court practitioners, *Consultation SEC9*.

65. Court support services, Dubbo, *Consultation SEC16*.

66. G Henson, *Submission SE35*.

67. Legal Aid NSW, *Submission SE50*.

68. G Henson, *Submission SE35* and Public Interest Advocacy Centre *Submission SE42*, 11, rec 6.

69. Law Society of NSW, *Submission SE43*, 4; Public Interest Advocacy Centre, *Submission SE42*, 10-11.

70. Corrective Services NSW, *Submission SE55*.

71. Public Interest Advocacy Centre, *Submission SE42*, 11, rec 6.

72. Legal Aid NSW, *Submission SE50* and Corrective Services NSW, Women's Advisory Council, *Submission SE53*.

73. Legal Aid NSW, *Submission SE50*; The Public Defenders, *Submission SE36*; Public Interest Advocacy Centre, *Submission SE42*; Children's Court of NSW, *Submission SE40*; Community support organisations, Dubbo, *Consultation SEC13*.

74. The Shopfront Youth Legal Centre, *Submission SE37*; Vulnerable Groups, *Consultation SEC21*; Public Interest Advocacy Centre, *Submission SE42*; Corrective Services NSW, Women's Advisory Council, *Submission SE53*.

75. The Shopfront Youth Legal Centre, *Submission SE37*.

76. Public Interest Advocacy Centre, *Submission SE42*, Corrective Services NSW, Women's Advisory Council, *Submission SE53*.

- while MERIT may address the underlying addiction to alcohol, it may not address the offending behaviour or the relationship between offending and alcohol; and
- it can delay or prevent people with an alcohol dependency from entering into the successful domestic violence program run by Corrective Services NSW.<sup>77</sup>

16.39 Although there was general support for expanding MERIT to all Local Courts in NSW, there was an equally widespread acknowledgement of the lack of resources to support MERIT in regional locations, particularly in the central west and western area.

### *Our view*

16.40 Given the widespread satisfaction with the MERIT program and its ability to reduce reoffending, we consider that, as far as is possible given resource constraints, MERIT should be offered to an expanded pool of defendants. Consideration should be given to all of the suggested mechanisms for broadening its operation.

#### **Recommendation 16.3: Expansion of the MERIT program**

Consideration should be given to expanding the operation of the MERIT program as far as is possible given resource constraints. Options for expansion that should be considered include:

- (a) relaxing the eligibility criteria so those defendants charged with more serious offences are also eligible;
- (b) providing the MERIT program in more locations;
- (c) providing Alcohol MERIT in more locations;
- (d) redesigning aspects of the program so that defendants with limited literacy, limited English, or a cognitive or mental health impairment may participate;
- (e) redesigning aspects of the MERIT program so that it is of more benefit to Aboriginal and Torres Strait Islander defendants;
- (f) expanding the program to defendants with other addictions such as to gambling or prescription drugs; and
- (g) allowing juvenile defendants access to MERIT.

### **Court Referral of Eligible Defendants Into Treatment (CREDIT) program**

16.41 CREDIT is a pilot scheme that has been operating in two courts (Burwood and Tamworth). It is a case management system that coordinates services, uses the services of the community, and decouples treatment from the offence within a criminal justice program.<sup>78</sup> It aims to reduce reoffending rates by addressing the

77. Corrective Services NSW, *Submission SE55*.

78. Crime Prevention and Community Programs Division, NSW Department of Attorney General and Justice, *Consultation SEC10*.

causes of offending.<sup>79</sup> Accordingly it concentrates on those with the highest risk of reoffending.<sup>80</sup>

- 16.42 The program directs defendants into treatment and other services including: accommodation; financial counselling; counselling for gambling; mental health assessment or support; suicide counselling; domestic violence or sexual assault support; drug assessment, treatment or support; alcohol assessment and treatment; education, training or employment; and disability services.<sup>81</sup> There are similar programs in Victoria in the form of the Court Integrated Services Program (CISP)<sup>82</sup> and the CREDIT/Bail Support Program (CBSP).<sup>83</sup>
- 16.43 Like MERIT, the scheme operates under the court's power to adjourn proceedings and to grant bail to allow the defendant to be assessed for and, where suitable, to participate in the program.<sup>84</sup> The CREDIT target group is broader than the MERIT target group and can include higher risk offenders with multiple needs.
- 16.44 The 2012 BOCSAR evaluation of CREDIT demonstrated that there were high levels of satisfaction among participants and support for its state-wide implementation.<sup>85</sup> The evaluation noted that participants felt they were better able to negotiate services and seek treatment at an earlier stage.<sup>86</sup> Another recent BOCSAR study looked at the effects of the CREDIT program on reoffending and found that recidivism rates were similar for CREDIT participants and a matched control group. However, the results may have been affected by the small number of CREDIT participants, the short follow-up period and the inability to control for variables like drug use or mental illness.<sup>87</sup>

### *Submissions and consultations*

- 16.45 There was widespread support for CREDIT in the submissions and consultations,<sup>88</sup> particularly in providing a motivation to complete a program, and in providing evidence at sentencing of that motivation and ability to participate in programs.<sup>89</sup> Its

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79. L Trimboli, *NSW Court Referral of Eligible Defendants into Treatment (CREDIT) Pilot Program: An Evaluation*, Crime and Justice Bulletin No 159 (NSW Bureau of Crime Statistics and Research, 2012) 1.

80. NSW, Attorney General's Department, Crime Prevention Division, *NSW Credit Program: Court Referral of Eligible Defendants into Treatment* (2009) 8.

81. NSW, Attorney General's Department, Crime Prevention Division, *NSW Credit Program: Court Referral of Eligible Defendants into Treatment* (2009).

82. Magistrates Court of Victoria, *Guide to Court Support and Diversion Services* (2011) 5.

83. Magistrates Court of Victoria, *Guide to Court Support and Diversion Services* (2011) 7.

84. Crime Prevention and Community Programs Division, NSW Department of Attorney General and Justice, *Consultation SEC10*; Court support services, Dubbo, *Consultation SEC16*.

85. L Trimboli, *NSW Court Referral of Eligible Defendants into Treatment (CREDIT) Pilot Program: An Evaluation*, Crime and Justice Bulletin No 159 (NSW Bureau of Crime Statistics and Research, 2012) 21.

86. L Trimboli, *NSW Court Referral of Eligible Defendants into Treatment (CREDIT) Pilot Program: An Evaluation*, Crime and Justice Bulletin No 159 (NSW Bureau of Crime Statistics and Research, 2012) 21.

87. N Donnelly, L Trimboli and S Poyton, *Does CREDIT Reduce the Risk of Reoffending?* Crime and Justice Bulletin No 169 (NSW Bureau of Crime Statistics and Research, 2013).

88. Police Association of NSW, *Submission SE34*; The Public Defenders, *Submission SE36*; Local Court practitioners, *Consultation SEC9*; Vulnerable Groups, *Consultation SEC21*; Legal Aid NSW, *Submission SE50*; The Shopfront Youth Legal Centre, *Submission SE37*.

89. Community Corrections Mount Druitt, *Consultation SEC18*.

use in relation to vulnerable groups was widely supported.<sup>90</sup> There was also strong support for extending CREDIT to other groups of defendants, including:

- those with multiple and complex needs such as mental health or cognitive impairments and drug dependency;<sup>91</sup>
- young offenders over 16 years;<sup>92</sup> and
- those charged with more serious offences including strictly indictable offences.<sup>93</sup>

16.46 Some submissions favoured its extension to operate post-sentence, that is, to allow case management to continue while an offender is serving a sentence,<sup>94</sup> or is subject to release on parole,<sup>95</sup> especially for those with complex and multiple needs.<sup>96</sup>

16.47 There was also support for extending CREDIT to all parts of the state,<sup>97</sup> although it was acknowledged that this would depend on services being available. In our report *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, we recommended extending CREDIT to all Local Courts because of its value in providing case management services for people with cognitive and mental health impairments who are diverted under s 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW).<sup>98</sup>

16.48 On the other hand, Corrective Services NSW expressed concern about the consequences of the delay of two to six months that occurs while the offender is in the CREDIT program. It was suggested that this may cause anxiety to victims, and also prevent offenders from entering Corrective Services NSW violent offender programs that could address their offending behaviour, a matter that was seen as causing particular problems for Aboriginal offenders who are more at risk of reoffending during the delay period.<sup>99</sup>

#### *A new program: a person-centred approach to reoffending*

16.49 We are informed that DAGJ is currently implementing a new program that will take a person-centred approach to those entering the criminal justice system, that will be trialled in two Local Courts as a replacement for CREDIT.

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90. Vulnerable Groups, *Consultation SEC21*.

91. G Henson, *Submission SE35*; The Shopfront Youth Legal Centre, *Submission SE37*; NSW, Department of Family and Community Services, *Submission SE44*.

92. Children's Court of NSW, *Submission SE40*; Public Interest Advocacy Centre, *Submission SE42*.

93. Legal Aid NSW, *Submission SE50*.

94. Legal Aid NSW, *Submission SE50*.

95. The Shopfront Youth Legal Centre, *Submission SE37*.

96. Public Interest Advocacy Centre, *Submission SE42*.

97. G Henson, *Submission SE35*, Public Interest Advocacy Centre, *Submission SE42*; The Shopfront Youth Legal Centre, *Submission SE37*; see also NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, Report 135 (2012) rec 7.6.

98. NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, Report 135 (2012) rec 7.4.

99. Corrective Services NSW, *Submission SE55*.

- 16.50 It aims to provide a single point of entry system that can concentrate resources on those most likely to reoffend. An initial screening assessment will identify those who will most benefit from intervention and assistance. A case management service will be provided by an NGO-run multi-disciplinary team supported by DAGJ. It will provide comprehensive needs assessment and referral to services. It will also provide reports to the court on entry into the program and as the defendant progresses.
- 16.51 A person's matter will continue within the criminal justice system while he or she participates in the program. Some matters may be adjourned to allow the defendant to complete a program or establish a referral. During that period a case manager will supervise the person. At the end of the adjournment period, the person may enter a guilty plea and will be sentenced taking into account his or her participation in the program. If the person's sentence requires supervision by Corrective Services NSW this will be supported with reports from the case management service.
- 16.52 This model is very similar to CREDIT in its aim to provide case management services, but seeks to go an extra step in rationalising the assessment and reporting process, in enabling a smoother transition between agencies and in maintaining a single comprehensive record that will follow the offender through the system.

### *Our view*

- 16.53 As we support the general structure and approach of the proposed pilot program, we have not made any recommendations concerning CREDIT as it currently exists.

## **Section 11 adjournment**

- 16.54 Section 11 of the CSPA allows a court to adjourn sentencing proceedings, after a finding of guilt, for up to 12 months, to allow the offender to undertake or to demonstrate rehabilitation. This provision formalises the process at common law known as a "*Griffiths* remand".<sup>100</sup>
- 16.55 There is no statutory qualification or limitation on the offences for which s 11 is available.<sup>101</sup> It can be applied if the court considers that an adjournment will be of assistance in determining the appropriate sentence.<sup>102</sup> Deferral is permissible even where a custodial sentence is inevitable after the adjournment period,<sup>103</sup> although not in a more serious case where the imposition of a *substantial* period of full-time custody is unavoidable.<sup>104</sup>
- 16.56 The court can impose bail conditions during the period of the s 11 adjournment as it considers appropriate.<sup>105</sup> These can include, for example, a good behaviour

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100. See generally *Griffiths v The Queen* (1977) 137 CLR 292.

101. *R v Rayment* [2010] NSWCCA 85 [154].

102. *R v Rayment* [2010] NSWCCA 85 [25].

103. *R v Trindall* (2002) 133 A Crim R 119 [59]; *R v Leahy* [2004] NSWCCA 148 [13]; *R v Rayment* [2010] NSWCCA 85 [22].

104. *R v ABS* [2005] NSWCCA 255 [23]-[32].

105. Judicial Commission of NSW, *Sentencing Bench Book* [5-410]; see also *Bail Act 1978* (NSW) s 36A(2).

condition, a reporting condition, or a requirement to participate in one of the programs discussed in this chapter. If the offender breaches bail the court may revoke the order and call up the offender for sentencing.<sup>106</sup> There is no geographical limit to the use of a s 11 order, although there may be practical limitations if rehabilitation programs are unavailable.

### *Submissions and consultations*

- 16.57 There was strong support for the retention of s 11.<sup>107</sup> One advantage noted by stakeholders was that, as s 11 adjournments are a pre-sentencing step, offenders may be particularly motivated to demonstrate that they have addressed their offending behaviour.<sup>108</sup> The Public Interest Advocacy Centre and Corrective Services NSW submitted that courts should make greater use of s 11 adjournments.<sup>109</sup>
- 16.58 The NSW Department of Family and Community Services noted that s 11 adjournments could provide its clients with intellectual disabilities with stronger supervision and support than a s 32 order.<sup>110</sup> On the other hand, the Public Interest Advocacy Centre was concerned that people with cognitive or mental health impairments may have difficulties with bail compliance, particularly where that conflicts with their treatment obligations.<sup>111</sup> Corrective Services NSW also noted that, without adequate supervision, there was a risk of bail breaches.<sup>112</sup>
- 16.59 In our consultations with representatives of vulnerable and Aboriginal and Torres Strait Islander groups, it became apparent that courts make limited use of s 11 orders for these offenders because of the lack of residential programs and difficulties in accessing rehabilitation services even though the intervention could stop escalation of their offending.<sup>113</sup>
- 16.60 The NSW Police Force submitted that s 11 should be limited to providing assistance for the formulation of an appropriate sentence.<sup>114</sup> It was pointed out that, while a s 11 deferral may help offenders in accessing a program, it remains necessary that they be dealt with for the offence.<sup>115</sup> Some submissions noted that s 11 can also

106. I Potas, S Eyland and J Munro, *Successful Completion Rates for Supervised Sentencing Options*, Sentencing Trends and Issues 33 (NSW Bureau of Crime Statistics and Research, 2005) 1.

107. NSW Bar Association, *Submission SE46*, 3; NSW, Office of the Director of Public Prosecutions, *Submission SE41*, 6; Legal Aid NSW, *Submission SE50*, 6; The Public Defenders, *Submission SE36*, 3; Public Interest Advocacy Centre, *Submission SE42*, 13; Law Society of NSW, *Submission SE43*, 4-5; NSW, Department of Family and Community Services, *Submission SE44*, 6; Corrective Services NSW, *Submission SE55*, 9.

108. Community Corrections, Mount Druitt, *Consultation SEC18*.

109. Corrective Services NSW, *Submission SE55*, 9; Public Interest Advocacy Centre, *Submission SE42*, 13.

110. NSW, Department of Family and Community Services, *Submission SE44*.

111. Public Interest Advocacy Centre, *Submission SE42*, rec 8.

112. Corrective Services NSW, *Submission SE55*.

113. Vulnerable Groups, *Consultation SEC21*; Aboriginal Community Justice Group, Mount Druitt and Aboriginal Legal Service, *Consultation SEC19*; Community Corrections, Mt Druitt, *Consultation SEC18*.

114. NSW Police Force, *Submission SE45*.

115. NSW Local Court, Dubbo, *Consultation SEC17*.

create administrative difficulties in the Local Court.<sup>116</sup> The ODPP proposed limiting the adjournment length to 6 months, because of the practical difficulty in ensuring continuity in the involvement of the magistrate and of prosecution and defence lawyers in the case.<sup>117</sup>

- 16.61 The Chief Magistrate questioned the need for s 11 in view of the general adjournment power contained in s 40 of the *Criminal Procedure Act 1986* (NSW). He also suggested that it protracts Local Court proceedings. The Homicide Victims' Support Group suggested that s 11 only be used where a full-time term of imprisonment was not the most likely outcome,<sup>118</sup> because it caused distress to victims during the adjournment period.

### *Our view*

- 16.62 On balance, we conclude that s 11 should be retained in its current form. It provides the court with an important degree of flexibility and may also allow for a constructive intervention in an offender's life. The issues noted above do not require legislative intervention. They can be properly managed through the exercise of appropriate judicial discretion and by legal practitioners identifying programs that could be suitable for their clients.

#### **Recommendation 16.4: Retention of s 11 adjournments**

A revised Crimes (Sentencing) Act should preserve the power of courts to defer sentencing (currently provided for in s 11 of the *Crimes (Sentencing Procedure) Act 1999* (NSW)) and to order that an offender enter into a rehabilitation or intervention program.

### Intervention programs

- 16.63 There are three legislatively based intervention programs operating in NSW: the Traffic Offenders Intervention Program (TOP); the Circle Sentencing program (Circle); and the Forum Sentencing program (Forum).
- 16.64 The intervention programs are governed by provisions in the *Criminal Procedure Act 1986* (NSW) (CPA),<sup>119</sup> the CSPA,<sup>120</sup> and the *Criminal Procedure Regulations 2010* (NSW).<sup>121</sup> One of objects of these provisions is to reduce reoffending.<sup>122</sup>
- 16.65 The three intervention programs are restricted to:
- adults and children dealt with according to law,<sup>123</sup> and

116. Corrective Services NSW, *Submission SE55*, 9-10; NSW, Office of the Director of Public Prosecutions, *Submission SE41*, 6; Law Society of NSW, *Submission SE43*, 5.

117. NSW, Office of the Director of Public Prosecutions, *Submission SE41*.

118. Homicide Victims' Support Group, *Submission SE47*.

119. *Criminal Procedure Act 1986* (NSW) pt 4.

120. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 8C.

121. *Criminal Procedure Regulation 2010* (NSW) pt 6-8.

122. *Criminal Procedure Act 1986* (NSW) s 345(1)(c).

123. *Criminal Procedure Act 1986* (NSW) s 349.



- summary offences or indictable offences able to be tried summarily, subject to a number of exceptions.<sup>124</sup>
- 16.66 The inclusion of these intervention programs in separate Acts and Regulations has complicated their operation. Locating the relevant provisions in a revised Crimes (Sentencing) Act and in Regulations made under that Act would simplify their application.
- 16.67 The legislation currently allows the court to require a person to participate in an intervention program as a condition of: a s 11 adjournment; a s 9 good behaviour bond; a s 10 good behaviour bond; or a s 12 good behaviour bond attached to a suspended sentence. However, each of the three existing intervention programs that are declared in the *Criminal Procedure Regulation 2010* (NSW) are pre-sentence programs.<sup>125</sup> In practice, therefore, participation in any one of these programs can only ever be a condition of a s 11 adjournment. Courts often order that offenders who have participated in one of the programs comply with the intervention plan that is imposed as part of the program as a condition of a s 9, s 10 or s 12 bond.

#### *Traffic Offenders Intervention Program*

- 16.68 The TOP, has been available in the Local Court since 2008.<sup>126</sup> Before TOP was formalised as a declared intervention program, traffic offender programs existed in various Local Court areas and received referrals from courts exercising their power of deferral.<sup>127</sup> The Director-General of DAGJ approves courses for the program and the Attorney General issues guidelines.<sup>128</sup> NSW Police Citizens Youth Clubs run most TOPs.<sup>129</sup>
- 16.69 The aim of TOP is to provide traffic offenders with the necessary skills and information needed to develop positive attitudes and safer behaviours when driving.<sup>130</sup> A person is eligible to participate in TOP if he or she has pleaded guilty to, or has been found guilty of, a traffic offence,<sup>131</sup> has not yet been sentenced;<sup>132</sup> and has agreed to participate in the program. The court must be satisfied that the person is suitable for the program.<sup>133</sup>

124. *Criminal Procedure Act 1986* (NSW) s 348.

125. *Criminal Procedure Regulation 2010* (NSW) pt 6-8.

126. *Criminal Procedure Regulation 2005* (NSW) as amended by the *Criminal Procedure Amendment (Traffic Offender Intervention Program) Regulation 2007* (NSW).

127. G Symes, "Overview: TOP Since 1992" <[www.trafficoffenders.com.au/Overview.htm](http://www.trafficoffenders.com.au/Overview.htm)>. Most traffic offender programs are outside the TOP scheme because the Director-General has not approved them. They are undertaken on adjournments under bail conditions: Local Court of NSW, *Consultation SEC22*.

128. *Criminal Procedure Regulation 2010* (NSW) cl 96 and 98.

129. Local Court of NSW, "Traffic Offenders Intervention Program" <[www.localcourt.lawlink.nsw.gov.au/localcourts/sentencing\\_and\\_penalties/finalising\\_criminal/traffic.html](http://www.localcourt.lawlink.nsw.gov.au/localcourts/sentencing_and_penalties/finalising_criminal/traffic.html)>

130. *Criminal Procedure Regulation 2010* (NSW) cl 92; Local Court of NSW, "Traffic Offenders Intervention Program" <[www.localcourt.lawlink.nsw.gov.au](http://www.localcourt.lawlink.nsw.gov.au)>.

131. A traffic offence is defined as an offence under the *Road Transport (General) Act 2005* (NSW): *Criminal Procedure Regulation 2010* (NSW) cl 89.

132. *Criminal Procedure Act 1986* (NSW) s 348; *Criminal Procedure Regulation 2010* (NSW) cl 89, cl 91.

133. *Criminal Procedure Regulation 2010* (NSW) cl 91.

- 16.70 The participant is required to adhere to the standard requirements of the order as well as any additional conditions imposed by the course provider.<sup>134</sup> In the case of s 11 bonds, the course provider reports to the court on the offender's compliance with the program, before the date set for the deferred sentencing hearing.<sup>135</sup>
- 16.71 In 2012 BOCSAR evaluated the risk of reconviction of offenders who commenced the Blacktown Traffic Offender Program (BTOP) between 1994 and 2011. It found that:
- Overall, 15.2 per cent of BTOP program entrants committed an offence, and 10.5 per cent committed a traffic offence in the 2 years following program commencement.<sup>136</sup>
- However it noted:
- In the absence of this information and the inability to form a comparison or 'no program' group (where these offenders are not systemically different from those who do commence the program), it is not possible to make any assessment of whether BTOP is effective in reducing re-offending.<sup>137</sup>
- 16.72 One particular issue raised was that the TOP was unsuitable for many driving offenders because they were chronically unlicensed<sup>138</sup> as a result of cumulative disqualifications. We recommend in Chapter 20 that the system of driver licence disqualification be reviewed.<sup>139</sup>
- 16.73 The general feedback from consultations was that the program gave offenders greater insight into their offence and was supported.<sup>140</sup> We similarly support the continuation of TOP, and recommend that the provisions governing its availability and use be relocated in a revised Crimes (Sentencing) Act and its regulations.

**Recommendation 16.5: Traffic Offenders Intervention Program**

The legislation which governs the Traffic Offenders Intervention Program should be simplified and the relevant provisions relocated in a revised Crimes (Sentencing) Act and its regulations.

*Forum Sentencing*

- 16.74 Forum sentencing commenced as the Community Conferencing for Young Adults Pilot Program in 2005 at Liverpool Local Court and on a north coast Local Court

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134. *Criminal Procedure Regulation 2010* (NSW) cl 93(b). See also Local Court of NSW, *Traffic Offender Intervention Program Operational Guidelines* (2011).

135. *Criminal Procedure Regulation 2010* (NSW) cl 93(c) and 94.

136. P Rourke and C Jones, *Risk of Reconviction among Traffic Offenders who Commence the Blacktown Traffic Offender Program*, Bureau Brief No 81 (NSW Bureau of Crime Statistics and Research, 2012) 7.

137. P Rourke and C Jones, *Risk of Reconviction among Traffic Offenders who Commence the Blacktown Traffic Offender Program*, Bureau Brief No 81 (NSW Bureau of Crime Statistics and Research, 2012) 7.

138. The Shopfront Youth Legal Centre, *Submission SE37*.

139. Recommendation 20.1.

140. Local Court practitioners, *Consultation SEC9*; Legal practitioners, Dubbo, *Consultation SEC14*.

circuit. It is now available at 13 sites which service 52 courts across Sydney and Northern NSW<sup>141</sup> and is no longer subject to an age restriction.<sup>142</sup>

16.75 The aim of Forum is to help repair harm to the victim and the community and to reduce the offender's likelihood of reoffending. The Minister has issued guidelines for the operation of Forum. Forum brings together the offender, victim(s), and any other people affected by the crime at a "forum" with the aim of the offender making reparations to the victim and the community, and learning about the consequences of his or her offending behaviour.<sup>143</sup> As such, Forum is based on restorative justice principles.

16.76 An adult is eligible for Forum if he or she:

- has pleaded guilty or has been found guilty;
- is likely to receive a sentence of imprisonment;
- has at no time been convicted of: murder or manslaughter; certain personal violence and drug offences; or of a serious firearms or weapons offence;
- has been assessed as suitable for the program by the Forum facilitator who has established that he or she agrees to participate in the program, identified his or her needs or issues, and contacted the victim.<sup>144</sup>

The Magistrate considers the victim's wishes to participate when deciding whether to order a Forum.<sup>145</sup>

16.77 The following people may attend a Forum:

- the offender and his or her legal representative and/or a support person;
- any victim or a representative and/or a support person;
- the forum facilitator; and
- a police officer responsible for investigating the offence or a representative.<sup>146</sup>

16.78 The Forum facilitator may invite other people to attend the forum after consulting with the offender and any participating victim.<sup>147</sup> The members of the forum "may agree to make such recommendations as they think fit about the referred offender".<sup>148</sup> Those recommendations form a draft intervention plan and may

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141. Crime Prevention and Community Programs Division, NSW Department of Attorney General and Justice, *Consultation SEC10*; NSW, Department of Attorney General and Justice, *2010/11 Annual Report*, 49.

142. See *Criminal Procedure Regulation 2010* (NSW) cl 63.

143. NSW, Attorney General and Justice, Lawlink, "Forum Sentencing" (2011) <[http://www.lawlink.nsw.gov.au/lawlink/cpd/ll\\_cpd.nsf/pages/forum\\_index](http://www.lawlink.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/pages/forum_index)>.

144. *Criminal Procedure Regulation 2010* (NSW) cl 63; Crime Prevention and Community Programs Division, NSW, Department of Attorney General and Justice, *Consultation SEC10*.

145. *Criminal Procedure Regulation 2010* (NSW) cl 63A.

146. *Criminal Procedure Regulation 2010* (NSW) cl 69(1).

147. *Criminal Procedure Regulation 2010* (NSW) cl 69(2).

148. *Criminal Procedure Regulation 2010* (NSW) cl 76(1).

require, for example, that the offender apologise to the victim, make reparations, or participate in an appropriate program.

- 16.79 The court considers the draft intervention plan and, if the plan is approved, makes an intervention plan order.<sup>149</sup> An intervention plan can be carried out as a condition of bail or of a good behaviour bond.<sup>150</sup> The Forum administrator implements the plan by supervising the intervention plan outcomes,<sup>151</sup> and may, where appropriate, provide a non-compliance report to the court.
- 16.80 A BOCSAR study on Forum participation between 1 October 2005 and 19 May 2008 concluded that participants were no more or less likely to reoffend than members of a suitably matched control group. It suggested that, to be able to reduce recidivism, Forum may need to be combined with other programs which target the underlying causes of offending.<sup>152</sup> BOCSAR is currently undertaking a further evaluation of Forum.
- 16.81 DAGJ is currently exploring ways to improve Forum's operation. However, stakeholders did not universally support it. The issues raised included:
- uncertainty as to where the intervention sat in the sentencing hierarchy,<sup>153</sup>
  - that the plans imposed were too lenient<sup>154</sup> or too onerous,<sup>155</sup>
  - a lack of clarity as to the basis on which a magistrate might refuse to accept a Forum recommendation,<sup>156</sup> and
  - the adequacy of the training of Forum staff and the way in which forums were administered.<sup>157</sup>
- 16.82 **Our view.** We consider that the goals of Forum should be carefully reconsidered, in light of the BOCSAR finding that it may not reduce reoffending. Forum may still be valuable in providing a mechanism for victims to participate in the sentencing process. Repurposing the program in this way may require adjustment to its scope, eligibility criteria and procedures. We understand that DAGJ is already engaged in this process.
- 16.83 The legislation which governs Forum could also be clarified by relocating the relevant provisions in a revised Crimes (Sentencing) Act and its Regulations.

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149. *Criminal Procedure Regulation 2010* (NSW) cl 58(1)(f).

150. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95A(1); *Criminal Procedure Regulation 2010* (NSW) cl 56.

151. *Criminal Procedure Regulation 2010* (NSW) cl 78-80.

152. C Jones, *Does Forum Sentencing Reduce Re-offending?* Crime and Justice Bulletin No 129 (NSW Bureau of Crime Statistics and Research, 2009) 3, 10, 12.

153. Law Society of NSW, *Submission SE43*.

154. G Henson, *Preliminary submission PSE5*, 13.

155. Local Court practitioners, *Consultation SEC14*.

156. Local Court practitioners, *Consultation SEC14*.

157. Local Court practitioners, *Consultation SEC14*; Vulnerable Groups, *Consultation SEC21*.

**Recommendation 16.6: Reconsideration of Forum Sentencing**

- (1) The legislation which governs Forum Sentencing should be simplified by relocating the relevant provisions in a revised Crimes (Sentencing) Act and its regulations.
- (2) The goals and scope of the Forum Sentencing program should be carefully reconsidered in light of the findings of the NSW Bureau of Crime Statistics and Research that the program is not effective in reducing reoffending.

*Circle Sentencing*

- 16.84 Circle sentencing is only available for adult Aboriginal and Torres Strait Islander offenders. It was first introduced as a trial in the Nowra Local Court area in 2002. There are currently 20 Aboriginal Community Justice Groups (ACJG) with 17 coordinators. We were informed that full capacity at present is two circles per month in each of the 17 locations, amounting to no more than 408 circles per year.<sup>158</sup>
- 16.85 A magistrate and community members sit in a Circle to discuss the offence and surrounding circumstances before recommending a sentence that is tailored to the offender. Local Aboriginal people, commonly Elders, are included in the sentencing process with the objectives of improving the Aboriginal community's confidence in the criminal justice system, and of addressing reoffending.<sup>159</sup>
- 16.86 A court may refer a person to be assessed for Circle eligibility at any stage before sentencing. The Circle convenor determines whether the offender is an Aboriginal person, has been assessed as suitable by the local ACJG, and has agreed to participate in the Circle.<sup>160</sup>
- 16.87 In assessing an offender's suitability, the local ACJG must consider:
- the nature of the offence;
  - the association of the offender with any Aboriginal community;
  - the impact of the offence on its victims and the relevant Aboriginal community;
  - the potential benefits of participation in the program to the offender, victims and community; and
  - any other matter that it considers relevant.<sup>161</sup>

The importance of attitude and relationship to the community was emphasised in consultation.<sup>162</sup> Once eligibility is established the matter is adjourned to allow the Circle to take place.

158. Crime Prevention and Community Programs Division, NSW Department of Attorney General and Justice, *Consultation SEC10*.

159. *Criminal Procedure Regulation 2010* (NSW) cl 35.

160. *Criminal Procedure Regulation 2010* (NSW) cl 36.

161. *Criminal Procedure Regulation 2010* (NSW) cl 34.

162. Aboriginal Community Justice Group, Mt Druitt and Aboriginal Legal Service, *Consultation SEC19*.

- 16.88 The Circle must include the offender and legal representatives, the prosecutor, the presiding magistrate, the Circle project officer and at least three Aboriginal people (chosen by the project officer) that belong to the relevant Aboriginal community.<sup>163</sup> Community members are not paid for participating.<sup>164</sup> The Circle can also include any victim, and a support person, as well as any other person the project officer chooses, but only with the consent of the offender and any participating victims.<sup>165</sup> A victim participating in a Circle “must be given an opportunity to express his or her views about the offender and the nature of the offence”.<sup>166</sup>
- 16.89 The Circle sits in a closed session at a location outside the courtroom environment,<sup>167</sup> and its function is to:
- determine an appropriate plan for the offender’s treatment or rehabilitation;
  - recommend an appropriate sentence; and
  - provide support or other assistance to the offender in completing the program or any intervention plan arising out of it together with any other functions that may be conferred on the group under the *Criminal Procedure Regulation 2010* (NSW) or guidelines.<sup>168</sup>
- 16.90 An intervention plan may include requirements concerning the offender’s:
- conduct;
  - counselling or other treatment;
  - supervision;
  - residence;
  - non-association with other people;
  - involvement in activities, courses, training or employment, or other matters that the group considers appropriate to rehabilitate and reintegrate the offender into the community.<sup>169</sup>
- 16.91 The presiding magistrate presides at Circle meetings and its decisions are made by majority vote.<sup>170</sup> The court may sentence the offender in accordance with the Circle’s recommendations or impose another sentence.<sup>171</sup>
- 16.92 A BOCSAR study compared 153 offenders who participated in the Circle program between February 2002 and June 2007 with a control group of Aboriginal people

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163. *Criminal Procedure Regulation 2010* (NSW) cl 39(1).

164. Crime Prevention and Community Programs Division, NSW Department of Attorney General and Justice, *Consultation SEC10*.

165. *Criminal Procedure Regulation 2010* (NSW) cl 39(2).

166. *Criminal Procedure Regulation 2010* (NSW) cl 43.

167. Crime Prevention and Community Programs Division, NSW Department of Attorney General and Justice, *Consultation SEC10*.

168. *Criminal Procedure Regulation 2010* (NSW) cl 40(1).

169. *Criminal Procedure Regulation 2010* (NSW) cl 40(2).

170. *Criminal Procedure Regulation 2010* (NSW) cl 44.

171. *Criminal Procedure Regulation 2010* (NSW) cl 31(1)(h).

who did not participate in the program.<sup>172</sup> The study concluded that there was no significant difference in the frequency, timing or seriousness of reoffending of people in the Circle group and people in the control group. However, it noted that reducing recidivism was not the only aim of Circle and “[i]f it strengthens the informal social controls that exist in Aboriginal communities, circle sentencing may have a crime prevention value that cannot be quantified through immediate changes in the risk of re-offending for individuals”.<sup>173</sup>

- 16.93 A relatively small number of matters can be referred to Circle because of limited resources and a lack of available rehabilitation programs.<sup>174</sup> Additionally it has been found that involving magistrates in the Circle process is logistically difficult, particularly because of the limited time available in more remote areas with busy lists.<sup>175</sup> We understand that consideration has been given to developing an option for less serious offences where the magistrate would not be required to preside.<sup>176</sup>
- 16.94 The BOCSAR study suggested that the effectiveness of Circle in reducing reoffending may be improved by “combining circle sentencing with other programs ... [such as] cognitive behavioural therapy, drug and alcohol treatment [or] remedial education”.<sup>177</sup>
- 16.95 Some submissions made the same point. Jumbunna House of Indigenous Learning suggested that improvements should be made to support victims and offenders through drug, alcohol, mental impairment and domestic abuse programs similar to those that are available in the Nunga Court in Port Adelaide.<sup>178</sup> The Police Association of NSW noted the lack of services to support treatment and rehabilitation plans and suggested that, if they could not be provided, then offenders would benefit more from participating in CREDIT or MERIT.<sup>179</sup>
- 16.96 Some submissions suggested expanding the Circle model to young offenders, serious offenders, repeat offenders and to areas where the elders can exercise influence.<sup>180</sup> The NSW Bar Association also suggested that Circle be extended to District Court matters.<sup>181</sup>
- 16.97 **Our view.** Although we appreciate that Circle operates under resource constraints, a key limitation of the program appears to be that it reaches only a small number of Aboriginal and Torres Strait Islander offenders. A maximum of 408 defendants can

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172. J Fitzgerald, *Does Circle Sentencing Reduce Aboriginal Offending?* Crime and Justice Bulletin No 115 (NSW Bureau of Crime Statistics and Research, 2008) 3, 8.

173. J Fitzgerald, *Does Circle Sentencing Reduce Aboriginal Offending?* Crime and Justice Bulletin No 115 (NSW Bureau of Crime Statistics and Research, 2008) 7.

174. NSW, Attorney General's Department, *Evaluation of Circle Sentencing Program*, Report (2008) 6.

175. Crime Prevention and Community Programs Division, NSW Department of Attorney General and Justice, *Consultation SEC10*.

176. Crime Prevention and Community Programs Division, NSW Department of Attorney General and Justice, *Consultation SEC10*.

177. J Fitzgerald, *Does Circle Sentencing Reduce Aboriginal Offending?* Crime and Justice Bulletin No 115 (NSW Bureau of Crime Statistics and Research, 2008) 7.

178. Jumbunna Indigenous House of Learning, *Submission SE54*, 12.

179. Police Association of NSW, *Submission SE34*, 10.

180. Jumbunna Indigenous House of Learning, *Submission SE54*, 11, 12.

181. NSW Bar Association, *Submission SE46*, Attachment 1, 8.

participate in the program each year, out of the approximately 15,000 Aboriginal and Torres Strait Islander adults who are sentenced annually.<sup>182</sup>

- 16.98 The limited reach of the program is particularly relevant in light of BOCSAR's finding that Circle may not reduce reoffending. Instead, the key purposes of Circle must be to reduce perceptions of cultural alienation, ensure that sentencing orders are appropriate to the cultural needs of Aboriginal and Torres Strait Islander offenders and to better educate magistrates about the needs of Aboriginal and Torres Strait Islander offenders. Although we support retention of the program, it would be desirable to reconsider its scope and operation so that it can reach more defendants at a reduced cost.
- 16.99 The legislation which governs Circle should also be simplified by relocating the relevant provisions in a revised Crimes (Sentencing) Act and its Regulations.

**Recommendation 16.7: Reconsideration of Circle Sentencing**

- (1) The scope and operation of the Circle Sentencing program should be reconsidered with the objective of reaching a larger proportion of Aboriginal and Torres Strait Islander defendants.
- (2) The legislation which governs Circle Sentencing should be simplified by relocating the relevant provisions in a revised Crimes (Sentencing) Act and its regulations.

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182. NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics* (2012). See also NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) ch 7.



## 17. Aboriginal and Torres Strait Islander offenders

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### In brief

Aboriginal and Torres Strait Islander people are severely overrepresented in the NSW criminal justice system and sentenced prisoner population. Several stakeholders supported including an offender's Aboriginality as a relevant matter in the principles or purposes of sentencing, or as a factor that a court must take into account when sentencing. Depending on the forthcoming decision of the High Court in *Bugmy*, we support expressly including an offender's Aboriginality as a factor that a court must take into account where it is relevant to the sentencing exercise.

<b>Background</b> .....	<b>364</b>
NSW statistics .....	<b>364</b>
Legislation .....	<b>364</b>
Case law.....	<b>365</b>
<i>The Fernando principles</i> .....	<b>365</b>
<i>Canadian case law</i> .....	<b>366</b>
<b>Submissions</b> .....	<b>367</b>
<b>Our view</b> .....	<b>369</b>

17.1 In this chapter we consider the extent to which, and the manner in which, legislation could expressly recognise the factors that impact on Aboriginal and Torres Strait Islander people in sentencing.

17.2 In this regard the Aboriginal Legal Service (ALS) has submitted that:

the claim for express recognition of Aboriginal people in sentencing legislation rests primarily on the indisputable fact that an insidious combination of social deprivation, economic disadvantage, cultural dispossession and racial discrimination have created a radically different set of criminogenic factors in the Aboriginal community than those at play in the general community.<sup>1</sup>

17.3 It has also submitted that:

the courts frequently fail to properly and adequately consider the complex set of background factors that produce the over representation of Aboriginal people in the criminal justice system.<sup>2</sup>

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1. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SE56*, 2.  
2. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SE56*, 2.

## Background

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### NSW statistics

- 17.4 The overrepresentation of Aboriginal and Torres Strait Islander people in the NSW criminal justice system is severe and worsening. In 2012, Aboriginal and Torres Strait Islander people made up 15.2% of the defendants in the NSW adult courts, despite being only 1.8% of the NSW adult population.<sup>3</sup> At the same time, 1649 of 7169 sentenced prisoners being managed by Corrective Services NSW (23%) identified as Aboriginal or Torres Strait Islander.<sup>4</sup> This is a sentenced imprisonment rate of 1640.0 per 100 000 NSW Aboriginal or Torres Strait Islander adults, up from 1356.3 per 100 000 in 2001. The equivalent rate for sentenced NSW prisoners overall in 2012 was 127.3 per 100 000 adults.<sup>5</sup>
- 17.5 In a 2009 report, the NSW Bureau of Crime Statistics and Research (BOCSAR) examined the 48% rise in the number of sentenced adult Aboriginal and Torres Strait Islander offenders in custody in NSW between 2001 and 2008. It attributed this rise to an increase in the proportion of Aboriginal and Torres Strait Islander offenders given a prison sentence and in the length of the terms of imprisonment imposed, rather than to an increase in the number of Aboriginal and Torres Strait Islander adults convicted. It noted that “the substantial increase in the number of Indigenous people in prison is due mainly to changes in the criminal justice system’s response to offending rather than changes in offending itself”.<sup>6</sup>

### Legislation

- 17.6 The *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA) does not have any provision that specifically applies in sentencing Aboriginal or Torres Strait Islander offenders.
- 17.7 Queensland does, however, make specific provision in the *Penalties and Sentences Act 1992* (Qld). In the matters to which a court is to have regard, the Act includes:
- if the offender is an Aboriginal or Torres Strait Islander person—any submissions made by a representative of the community justice group in the offender’s community that are relevant to sentencing the offender, including, for example—
- (i) the offender’s relationship to the offender’s community; or
  - (ii) any cultural considerations; or

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3. NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics* (2012). See also NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) ch 7.

4. Australian Bureau of Statistics, *Prisoners in Australia* (4517.0, 2012).

5. Australian Bureau of Statistics, *Prisoners in Australia* (4517.0, 2012).

6. J Fitzgerald, *Why are Indigenous imprisonment rates rising?* Bureau Brief 41 (NSW Bureau of Crime Statistics and Research, 2009) 6.

- (iii) any considerations relating to programs and services established for offenders in which the community justice group participates.<sup>7</sup>

17.8 The Canadian Criminal Code requires a court to consider, for all offenders, “all available sanctions other than imprisonment that are reasonable in the circumstances ... with particular attention to the circumstances of aboriginal offenders”.<sup>8</sup>

## Case law

### *The Fernando principles*

17.9 In *R v Fernando*, consideration was given to the matters that can be relevant in sentencing Aboriginal and Torres Strait Islander offenders, so far as they identify circumstances that may throw light on the offence and the circumstances of a particular offender that are related to his or her Aboriginality.<sup>9</sup> The judgment observed that:

- (A) The same sentencing principles are to be applied in every case irrespective of the identity of a particular offender or his membership of an ethnic or other group but that does not mean that the sentencing court should ignore those facts which exist only by reason of the offenders' membership of such a group.
- (B) The relevance of the Aboriginality of an offender is not necessarily to mitigate punishment but rather to explain or throw light on the particular offence and the circumstances of the offender.
- (C) It is proper for the court to recognise that the problems of alcohol abuse and violence which to a very significant degree go hand in hand within Aboriginal communities are very real ones and their cure requires more subtle remedies than the criminal law can provide by way of imprisonment.
- (D) Notwithstanding the absence of any real body of evidence demonstrating that the imposition of significant terms of imprisonment provides any effective deterrent in either discouraging the abuse of alcohol by members of the Aboriginal society or their resort to violence when heavily affected by it, the courts must be very careful in the pursuit of their sentencing policies to not thereby deprive Aboriginals of the protection which it is assumed punishment provides. In short, a belief cannot be allowed to go about that serious violence by drunken persons within their society are treated by the law as occurrences of little moment.
- (E) While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities, and the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have

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7. *Penalties and Sentences Act 1992* (Qld) s 9(2)(p).

8. *Criminal Code*, RSC, 1985, c C-46 (Can) s 718.2(e).

9. See *R v Ceissman* [2001] NSWCCA 73; 119 A Crim R 535 [29].

placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.

- (F) That in sentencing persons of Aboriginal descent the court must avoid any hint of racism, paternalism or collective guilt yet must nevertheless assess realistically the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender.
- (G) That in sentencing an Aborigine who has come from a deprived background or is otherwise disadvantaged by reason of social or economic factors or who has little experience of European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him and which is dominated by inmates and prison officers of European background with little understanding of his culture and society or his own personality.
- (H) That in every sentencing exercise, while it is important to ensure that the punishment fits the crime and not to lose sight of the objective seriousness of the offence in the midst of what might otherwise be attractive subjective circumstances, full weight must be given to the competing public interest to rehabilitation of the offender and the avoidance of recidivism on his part.<sup>10</sup>

17.10 These observations were delivered at first instance as a convenient collection of circumstances that courts can take into account in an appropriate case. While they do not purport to be a rigid statement of the law, they have come to be referred to as the “Fernando principles” (an expression that we use for convenience in this chapter). The Fernando principles need to be read in context and courts should not apply them in a way that would justify special leniency on account of an offender’s Aboriginality alone.<sup>11</sup>

### *Canadian case law*

17.11 The Canadian Supreme Court has recently considered the Canadian Criminal Code provision and observed that:

Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society (see, eg, *R v Laliberte*, 2000 SKCA 27, 189 Sask R 190). To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary context for understanding and evaluating the case-specific information presented by counsel.<sup>12</sup>

17.12 The Court observed that the requirement to pay particular attention to the circumstances of Canadian Aboriginal offenders:

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10. *R v Fernando* (1992) 76 A Crim R 58, 62-63.

11. *R v Newman* [2004] NSWCCA 102 [61].

12. *R v Ipeelee* (2012) SCC 13 [60]-[61].

is therefore properly seen as a “direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, *to the extent that a remedy is possible through the sentencing process*” (Gladue, at para 64 (emphasis added)). Applying the provision does not amount to “hijacking the sentencing process in the pursuit of other goals” (Stenning and Roberts, at p 160). The purpose of sentencing is to promote a just, peaceful and safe society through the imposition of just sanctions that, among other things, deter criminality and rehabilitate offenders, all in accordance with the fundamental principle of proportionality. Just sanctions are those that do not operate in a discriminatory manner. Parliament, in enacting s 718.2(e), evidently concluded that nothing short of a specific direction to pay particular attention to the circumstances of Aboriginal offenders would suffice to ensure that judges undertook their duties properly.

Certainly sentencing will not be the sole — or even the primary — means of addressing Aboriginal overrepresentation in penal institutions. But that does not detract from a judge’s fundamental duty to fashion a sentence that is fit and proper in the circumstances of the offence, the offender, and the victim. ...

Section 718.2(e) does not create a race-based discount on sentencing. The provision does not ask courts to remedy the overrepresentation of Aboriginal people in prisons by artificially reducing incarceration rates. Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case.<sup>13</sup>

## Submissions

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- 17.13 We received a number of submissions that supported including an offender’s Aboriginality as a relevant matter, either as an objective of a revised Crimes (Sentencing) Act, as a purpose or principle of sentencing, or otherwise as a factor to be taken into account on sentencing. For example, the ALS submitted that:

Both the diversion, in appropriate cases, of Aboriginal people from sentences of full-time imprisonment and the improvement of community confidence in the justice system must be acknowledged as objectives.<sup>14</sup>

- 17.14 The Jumbunna Indigenous House of Learning proposed including a number of additional purposes of sentencing that should apply to Indigenous people, namely:

- maintaining/encouraging respect for and the authority of culture;
- ensuring the offender is answerable to the community;
- reintegrating the offender into the community;
- ensuring the social cohesion of the community;
- recognising the historical and contemporary disadvantage suffered by Aboriginal and Torres Strait people;
- healing;

13. *R v Ipeelee* (2012) SCC 13 [68]-[69].

14. Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary submission PSE21*, 2.

- rehabilitation;
- accountability; and
- self-determination.<sup>15</sup>

17.15 The Bar Association proposed including in the purposes of sentencing some general statements such as “ensuring (social) justice”, “reducing Aboriginal disadvantage”, “recognising Aboriginal social and economic disadvantage”, and “healing”. The Bar Association also proposed recognising other purposes of sentencing that could have a particular significance for an Aboriginal person or Torres Strait Islander such as “restoration of offenders to their community”, “restoration of stability and harmony to the offender’s community”, and “restoration of the offender to his or her family”.<sup>16</sup>

17.16 The NSW Young Lawyers Criminal Law Committee also identified a number of purposes as having particular relevance for Aboriginal people and Torres Strait Islanders, such as:

- rehabilitation;
- re-integrating the offender into the community; and
- recognising the historical and contemporary intergenerational disadvantage suffered by Aboriginal and Torres Strait people.

However, it also noted the need to conduct further research in order to “identify the extent to which they overlap or supplement the existing law”.<sup>17</sup>

17.17 The Bar Association and the ALS each submitted that the statutory expression of the principle that imprisonment is a sentence of last resort<sup>18</sup> should include express reference to Aboriginal people and their circumstances.<sup>19</sup> To give effect to that submission, the ALS proposed the following rewording of the principle currently contained in s 5 of the CSPA:

A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives (with particular attention to the circumstances of Aboriginal offenders), that no penalty other than imprisonment is appropriate.<sup>20</sup>

17.18 The ALS also proposed including the following, as a factor that a court should take into account:

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15. Jumbunna Indigenous House of Learning, *Preliminary submission PSE15*, 3.  
16. NSW Bar Association, *Submission SE46*, attachment 1, 6. The NSW Bar Association adopted the recommendations of the 2010 Criminal Justice Reform Submission that came from a paper delivered by Judge Stephen Norrish QC, at the NSW Bar Association Criminal Justice Reform Conference, 10 September 2010.  
17. NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 12.  
18. See Recommendation 3.1(2).  
19. NSW Bar Association, *Submission SE46*, Appendix 1, 7; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SE56*, 3-4.  
20. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SE56*, 4.

the character, general background (with particular attention to the circumstances of Aboriginal offenders), offending history, age, physical and mental condition of the offender (including any cognitive or mental health impairment).<sup>21</sup>

17.19 The Bar Association proposed that statute should expressly recognise:

‘cultural or social circumstances to offending’ as ‘mitigating’ or ‘relevant’ factors to be taken into account in the appropriate case. For example, where it could be established that a person’s cultural or social environment or circumstances had contributed to the offending behaviour that may be expressly taken into account as a ‘mitigating factor’.<sup>22</sup>

17.20 The Law Society similarly suggested the possibility of “incorporating a cultural recognition provision somewhere in the Act”, adding that “the provision should specify that courts should take into account an Indigenous offender’s cultural background and community ties”.<sup>23</sup>

17.21 Some submissions supported courts applying the Fernando principles in appropriate cases, yet opposed reproducing them in legislation because this ran the risk of limiting their application, preventing their development and producing unintended results.<sup>24</sup> Other submissions, however, supported reproducing them in legislation.<sup>25</sup> Jumbunna suggested that such legislation could clarify that courts should not limit their consideration of the Fernando principles based on “racist stereotypes based on remote, full-blooded Indigenous people”.<sup>26</sup>

## Our view

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17.22 The principle that imprisonment is a sentence of last resort is well recognised as a fundamental principle of sentencing at common law and in statute. It applies to all offenders, including Aboriginal and Torres Strait islander offenders. We recommend its preservation as a principle in Chapter 3 of this report.<sup>27</sup>

17.23 Similarly, the sentencing factors that we propose, namely, “the offender’s character, general background, offending history, age, and physical and mental condition (including any cognitive or mental health impairment)”<sup>28</sup> are of general application. They are sufficiently broad to allow a court to take into account such matters as any history of disadvantage, limited education or employment, when considering an Aboriginal or Torres Strait Islander offender’s prospects of rehabilitation, and when framing a sentence aimed at reducing the risks of reoffending while serving the

21. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SE56*, 3.

22. NSW Bar Association, *Submission SE46*, Appendix 1, 7.

23. Law Society of NSW, *Submission SE7*, 8.

24. Legal Aid NSW, *Submission SE50*, 14; NSW, Office of the Director of Public Prosecutions, *Submission SE41*, 10; Law Society of NSW, *Submission SE43*, 10; NSW Police Force, *Submission SE45*, QP11, 1.

25. Children’s Court of NSW, *Submission SE40*, 19; The Shopfront Youth Law Centre, *Submission SE37*, QP11, 3.

26. Jumbunna Indigenous House of Learning, *Submission SE54*, 19.

27. Recommendation 3.1.

28. Recommendation 4.2(1)(d).

other purposes of sentencing. An offender may submit that cultural issues tend to explain the background to an offence as part of his or her subjective case on sentence. However, such issues cannot excuse criminal behaviour for a particular class of offenders or of themselves justify a special leniency in sentencing.<sup>29</sup>

- 17.24 We share stakeholders' concerns about the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system and the number of Aboriginal and Torres Strait Islander offenders in prison. But this cannot be effectively addressed through sentencing law alone. As Justice Fitzgerald has observed:

[t]he criminal law is a hopelessly blunt instrument of social policy, and its implementation by the courts is a totally inadequate substitute for improved education, health, housing and employment for Aboriginal communities. Irrespective of race, the criminal justice system increasingly merely punishes those who are the product of deficient or failed social policies. ... While courts cannot entirely yield to the pessimistic belief that adequate punishment frequently does not act as a deterrent to violent offences, it is unrealistic to think that imprisonment is a wholly satisfactory response to behaviour based on anger, resentment, powerlessness and frustration related to deprivation and oppression, whatever the race of the offender.<sup>30</sup>

- 17.25 Although race itself is not a permissible ground of discrimination in the sentencing process,<sup>31</sup> this does not mean that courts should ignore social, economic or other disadvantages that are associated with or related to a particular offender's Aboriginality that is relevant to the offending.<sup>32</sup> Justice Brennan made this clear when observing:

The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group.

But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice. That done, however, the weight to be attributed to the factors material in a particular case, whether of aggravation or mitigation is ordinarily a matter for the court exercising the sentencing discretion of first instance or for the Court of Criminal Appeal.<sup>33</sup>

- 17.26 In our 2000 report on the sentencing of Aboriginal offenders, we concluded that prescribing sentencing principles in legislation would add nothing to the existing common law and that it was therefore unnecessary to incorporate the Fernando principles into legislation.<sup>34</sup> The Jumbunna Indigenous House of Learning has,

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29. *R v Fernando* [2002] NSWCCA 28 [67]; *R v Pitt* [2001] NSWCCA 156 [19]; *Andrews v R* [2007] NSWCCA 68 [20]-[22]; *R v Ah-See* [2004] NSWCCA 202.

30. *R v Daniel* [1998] 1 QdR 499, 530 cited with approval in *R v Fernando* [2002] NSWCCA 28 [68] (Spigelman CJ).

31. *R v Rogers* (1989) 44 A Crim R 301, 307, followed in *R v Juli* (1990) 50 A Crim R 31.

32. *R v Rogers* (1989) 44 A Crim R 301, 307.

33. *Neal v The Queen* (1982) 149 CLR 305, 326. See also *R v Iginiwuni* (unreported, NT SC, Muirhead J, 12 March 1975) 23-25; and *R v Fernando* [2002] NSWCCA 28 [66]-[67].

34. NSW Law Reform Commission, *Sentencing Aboriginal Offenders*, Report 96 (2000) [2.47].



however, suggested that the uneven application of these principles has undermined the position we took at that time.<sup>35</sup>

- 17.27 While in many instances, including those cited by Jumbunna, the courts have found that the case is not one for which the Fernando principles apply,<sup>36</sup> this has inevitably turned upon an assessment of the individual offender's circumstances, and in particular whether they had any relevance to the commission of the offence and to the need to tailor a sentence to advance the purposes of sentencing.
- 17.28 We acknowledge that sentencing law is a blunt instrument of social policy and that it can never hope to address the social, economic and other disadvantages that have been identified. Our focus in this report has, accordingly, been on framing sentencing options that are more flexible and can address the causes of recidivism for all offenders. In that process, we have recommended the removal of many of the requirements that have excluded Aboriginal and Torres Strait Islander offenders from community-based sentences.
- 17.29 We have also supported retaining and, where appropriate, extending diversionary options to make them more available in rural and remote communities, including the Circle Sentencing program which is specific to Aboriginal and Torres Strait Islander offenders.
- 17.30 Our recommended sentencing options provide a framework for delivering effective and relevant rehabilitation programs for offenders. Such programs are key. In a 2010 report, BOCSAR reported that the best way to reduce Indigenous overrepresentation in the court system is to reduce the rate of Indigenous recidivism through effective rehabilitation programs. It noted evidence of the effectiveness of rehabilitation in reducing recidivism which indicates that a reduction in recidivism of 10% is feasible, and that:

The largest average reductions in re-offending were those associated with intensive supervision coupled with treatment (11 studies with an average 16% reduction), vocational education in prison (4 studies with an average 9% reduction) and adult drug courts (57 studies with an average 8% reduction). Investment in drug and alcohol treatment and vocational training would seem particularly worthwhile for Indigenous defendants because drug and alcohol abuse, early school leaving and unemployment have all been shown to be strongly related to the risk of Indigenous arrest (Weatherburn, Snowball and Hunter 2008).<sup>37</sup>

- 17.31 Although any consideration of the rehabilitation programs currently available falls outside our terms of reference, we stress the need to develop further evidence-based programs that can be delivered as part of sentences served in the community, and to target prison programs at preparing Indigenous offenders for

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35. Jumbunna Indigenous House of Learning, *Submission SE54*, 19. citing *R v Pitt* [2001] NSWCCA 156; *R v Walter* [2004] NSWCCA 304; *R v Anderson* [2008] NSWCCA 211; *R v Croaker* [2008] NSWCCA 232; *R v Knight* [2004] NSWSC 498; and *R v Andrews* [2007] NSWCCA 68.

36. See J Manuell, *The Fernando Principles: The Sentencing of Indigenous Offenders in NSW* (NSW Sentencing Council, 2009).

37. B Beranger and others, *Reducing Indigenous Contact with the Court System*, Bureau Brief 54 (NSW Bureau of Crime Statistics and Research, 2010) 3.

release (either on parole or unconditionally) and supporting their post-release reintegration into the community.

- 17.32 In consultations, Corrective Services NSW has acknowledged the need for Aboriginal-specific programs and we encourage them to investigate further incorporating Aboriginal concerns and issues into the design of programs and facilities within the existing custodial system.
- 17.33 We have not considered the possibility of establishing specialist Indigenous courts, such as the Koori Court (or the newly-created Koori County Court) in Victoria or the Nunga Court in South Australia, as this is outside our terms of reference and raises substantial policy issues.
- 17.34 In light of these considerations, we do not consider it appropriate, now, to attempt a statutory statement of the Fernando principles or to include a reference to the circumstances of Aboriginal people and Torres Strait Islanders in the purposes of sentencing or in the objectives of a revised Crimes (Sentencing) Act. We do note, however, that although the Court of Criminal Appeal accepted in *R v Bugmy* that the court had appropriately allowed a modest reduction in the weight given to general deterrence by reference to “Fernando considerations”, the High Court has recently given special leave to appeal from that decision.<sup>38</sup>
- 17.35 Pending the High Court’s consideration of the Fernando principles in *Bugmy* and the possible delivery of a decision that might provide the basis for legislative intervention, we consider it premature to propose specific legislative reform. We do, however, accept that, depending on the decision in *Bugmy*, there may be merit in adding to our Recommendation 4.2(1)(d) about the factors that a court must take into account a reference to the circumstances of Aboriginal and Torres Strait Islander offenders. So worded, the provision would be to the following effect:
- the offender’s character, general background (**with particular attention to the circumstances of Aboriginal and Torres Strait Islander offenders**), offending history, age, and physical and mental condition (including any cognitive or mental health impairment)
- 17.36 Although this would not require a different approach to sentencing, it might help to ensure that courts give attention to any of the factors that are relevant to sentencing that arise because of the offender is an Aboriginal person or Torres Strait Islander.

**Recommendation 17.1: Consider including Aboriginality as a factor to be taken into account**

After the High Court has delivered the decision in *Bugmy*, the government should consider, in light of that decision, whether to amend the factors that a court must take into account to include that an offender is an Aboriginal person or a Torres Strait Islander where that is relevant to the sentencing exercise.

38. *R v Bugmy* [2012] NSWCCA 223; *R v Bugmy* [2013] HCA Trans 111.

## 18. NSW Sentencing Council and guideline judgments

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### In brief

The NSW Sentencing Council plays an important advisory and public education role. It should be continued under a revised Crimes (Sentencing) Act with a slightly expanded membership and an enhanced role in the guideline judgment process. The government should also consider funding the Council at an increased level to ensure that it can properly perform its statutory functions.

<b>NSW Sentencing Council</b> .....	<b>374</b>
Current nature of the NSW Sentencing Council .....	<b>374</b>
<i>Membership</i> .....	<b>374</b>
<i>Responsibilities and functions</i> .....	<b>375</b>
<i>Public education</i> .....	<b>376</b>
<i>Interaction with other agencies</i> .....	<b>377</b>
<i>Report implementation</i> .....	<b>377</b>
<i>Resourcing</i> .....	<b>378</b>
Other sentencing councils .....	<b>378</b>
<i>Victorian Sentencing Advisory Council</i> .....	<b>378</b>
<i>Sentencing Council of England and Wales</i> .....	<b>379</b>
<i>United States Sentencing Commission</i> .....	<b>380</b>
Possible reforms .....	<b>380</b>
<i>Increased membership of the Council</i> .....	<b>380</b>
<i>Functions</i> .....	<b>382</b>
<i>Tabling requirements</i> .....	<b>382</b>
<b>Guideline Judgments</b> .....	<b>383</b>
Guideline judgments in NSW .....	<b>383</b>
Guideline judgments in other jurisdictions .....	<b>385</b>
<i>Other Australian jurisdictions</i> .....	<b>385</b>
<i>England and Wales: the role of the Sentencing Council</i> .....	<b>386</b>
Should NSW take a different approach to developing guidelines? .....	<b>388</b>
<i>Option A – adopt the sentencing guidelines model of England and Wales</i> .....	<b>388</b>
<i>Option B – Enhance the current guideline judgment system</i> .....	<b>389</b>
<i>Option C – extending the capacity to apply for guideline judgments</i> .....	<b>390</b>
Our view .....	<b>390</b>
<i>Our preferred option – option B</i> .....	<b>390</b>
<i>Option B in practice</i> .....	<b>391</b>

## NSW Sentencing Council

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- 18.1 The NSW Sentencing Council (the Council) is a statutory body which was established in 2002. It was the first of its kind in Australia, based on similar models in England and the United States.<sup>1</sup>

### Current nature of the NSW Sentencing Council

- 18.2 The Council is constituted under Part 8B of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA),<sup>2</sup> with the aim of “promoting consistency and transparency in sentencing and promoting public understanding of the sentencing process”.<sup>3</sup>

### Membership

- 18.3 The Council is an independent entity with a membership of 16 people appointed by the Attorney General. Of the members:
- (a) one is to be a retired judicial officer (not being a retired Magistrate), and
  - (a1) one is to be a retired Magistrate, and
  - (b) one is to have expertise or experience in law enforcement, and
  - (c) four are to have 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), and
  - (d) one is to be a person who has expertise or experience in Aboriginal justice matters, and
  - (e) four are to be persons representing the general community, of whom two are to have expertise or experience in matters associated with victims of crime, and
  - (f) one is to have expertise or experience in corrective services, and
  - (g) one is to have expertise or experience in juvenile justice, and
  - (h) one is to be a representative of the Attorney General’s Department, and
  - (i) one is to have academic or research expertise or experience of relevance to the functions of the Sentencing Council.<sup>4</sup>

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1. B Debus, “The NSW Sentencing Council: Its Role and Functions” (2003) 15(6) *Judicial Officers’ Bulletin* 45, 45.

2. Inserted by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW).

3. NSW, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5814.

4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100I(2), (5).

- 18.4 The retired judicial officer appointed under paragraph (a) is appointed as the chairperson. The Attorney General can appoint a deputy chairperson and deputies of members.<sup>5</sup>

### *Responsibilities and functions*

- 18.5 Section 100J(1) of the CSPA sets out the functions of the Council:
- (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.
- 18.6 Section 100J(2) provides that “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.” This provides the Council with an important power of self initiation. Although the Council’s reports are not subject to a statutory tabling requirement, they are routinely made public with the permission of the Attorney General.
- 18.7 The Council’s functions to date have been concerned with the following aspects of sentencing law and practice:
- **Standard minimum non-parole period (SNPP) scheme:** The Council has delivered one general report on the operation of the SNPP scheme;<sup>6</sup> three reports about the possible inclusion of offences concerned respectively with dangerous driving,<sup>7</sup> firearms,<sup>8</sup> and attempt and accessorial offences related to offences already subject to the scheme,<sup>9</sup> and has discussed the operation of the scheme in the context of sexual offending.<sup>10</sup> Additionally it has reviewed current case law and sentencing trends in relation to the scheme’s operation in its annual reports since 2004.

5. *Crimes (Sentencing Procedure) Act 1999* (NSW) sch 1A(2), (5).

6. NSW Sentencing Council, *Standard Non-parole Periods: Background Report* (2011).

7. NSW Sentencing Council, *Standard Non-parole Periods for Dangerous Driving Offences* (2011).

8. NSW Sentencing Council, *Firearm Offences and the Standard Non-parole Period Scheme* (2004).

9. NSW Sentencing Council, *Including Attempt and Accessorial Offences in the Standard Non-parole Period Scheme* (2005).

10. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Report (2008).

- **Guideline judgments:** Since the inception of the Council there has only been one guideline judgment issued, which was argued before the Council was established. The Council has considered whether a guideline judgment for suspended sentences should be sought.<sup>11</sup> It has regularly reported on the operation of the guideline judgment scheme in its annual reports.
- **Annual reports:** The Council has produced seven annual reports reviewing sentencing trends and reporting on significant developments in sentencing law and practice.
- **Research and reports:** The Council has at the request of the Attorney General released a number of research papers and reports on a broad range of subjects.<sup>12</sup> These reports have led to important reforms.<sup>13</sup>

### *Public education*

- 18.8 The Attorney General observed in the second reading speech for the Bill that established the Council that “it will provide an invaluable opportunity for the wider community to make a major contribution to the development of sentencing law and practice in New South Wales”.<sup>14</sup> However, the Bill did not include this role as one of the Council’s statutory functions. In its first annual report the Council raised this as an issue, and said that “[h]aving the ability to educate the public on sentencing matters generally will be conducive to addressing [public confidence in the criminal justice system]”.<sup>15</sup> The Council was given this function in 2007.<sup>16</sup>
- 18.9 In the exercise of this function, the Council contributed to the drafting of the plain English *Sentencing Information Package* that was produced, in 2004, by the Victims of Crime Bureau of the Attorney General’s Department.<sup>17</sup> The package assists victims of crime to understand the sentencing process by explaining the purpose of sentencing, the basic elements of sentencing procedure and the terminology used by the sentencing court.<sup>18</sup> The Council also joined with the NSW Bureau of Crime Statistics and Research (BOCSAR) to commission a study of the public attitude on levels of sentencing. In 2009, the Council published a monograph discussing the results of the survey and proposing a public education strategy.<sup>19</sup>

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11. NSW Sentencing Council, *Seeking a Guideline Judgment on Suspended Sentences* (2006).

12. See, eg, NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options*, Report (2012); *Good Behaviour Bonds and Non-Conviction Orders*, Report (2011); *Suspended Sentences* (2011); *The Fernando Principles: the Sentencing of Indigenous Offenders in NSW* (2009); *Provisional Sentencing for Children* (2009); *Sentencing for Alcohol Related Violence* (2009); *Reduction in Penalties at Sentence*, Report (2009); *Review of Periodic Detention*, Report (2007); *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006); *Abolishing Prison Sentences of Six Months or Less* (2004).

13. See para [18.14].

14. NSW, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5818.

15. NSW Sentencing Council, *Sentencing Trends and Practices*, Annual Report 2003-2004 (2004) 6.

16. *Crimes and Courts Legislation Amendment Act 2006* (NSW) s 100J(1)(e).

17. Now revised: NSW, Department of Attorney General and Justice, Victims Services, *Sentencing Information Package* (2011).

18. NSW Sentencing Council, *Sentencing Trends and Practices*, Annual Report 2006-2007 (2007) 8.

19. NSW Sentencing Council, *Public Confidence in the NSW Criminal Justice System*, Monograph 2 (2009).

- 18.10 The Council has made a number of public presentations on sentencing law and practice in Law Week, and in 2009 and 2010 it was involved in a series of public justice forums<sup>20</sup> which were developed as a result of the findings of the Council-BOCSAR survey.<sup>21</sup>

### *Interaction with other agencies*

- 18.11 Section 100J(4) of the CSPA provides that:

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).

- 18.12 This recognises the importance of the Judicial Commission of NSW and BOCSAR in undertaking sentencing research. The Council has drawn extensively on the expertise of these two bodies both in terms of statistical research and advice.
- 18.13 The Council consults key stakeholders within the criminal justice system and the community in preparing its reports both through a process of consultation and invitation for submissions.<sup>22</sup>

### *Report implementation*

- 18.14 Implemented reports of the Council have resulted in:

- a number of new offences in relation to sexual offending and child pornography, and increases in available penalties;<sup>23</sup>
- changes to the operation of the fines and penalty enforcement system;<sup>24</sup>
- amendments to sentencing discounting factors;<sup>25</sup>
- an increase in the jurisdictional limit of the Local Court in relation to property offences;<sup>26</sup>
- the abolition of periodic detention and its replacement by intensive correction orders;<sup>27</sup>

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20. Forums were conducted in Parramatta, Campbelltown, Gosford, Wollongong, Tamworth, Newcastle and Dubbo.

21. NSW Sentencing Council, *Sentencing Trends and Practices*, Annual Report 2008-2009 (2009) 15.

22. A R Abadee, "Sentencing and the Community: Politics, Public Opinion and the Development of Sentencing Policy" (Paper, Victorian Sentencing Advisory Council's Conference, 21-22 July 2006) 3.

23. *Crimes Amendment (Sexual Offences) Act 2008* (NSW) implementing NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Report (2008).

24. *Fines Amendment Act 2008* (NSW) and *Fines Further Amendment Act 2008* (NSW) implementing NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006).

25. *Crimes (Sentencing Procedure) Amendment Act 2010* (NSW) implementing NSW Sentencing Council, *Reduction in Penalties at Sentence*, Report (2009).

26. *Courts and Crimes Legislation Further Amendment Act 2010* (NSW).

27. *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010* (NSW) implementing NSW Sentencing Council, *Review of Periodic Detention*, Report (2007).

- legislation for the provisional sentencing of children,<sup>28</sup> and
- legislation for the extended supervision and continuing detention of high risk violent offenders.<sup>29</sup>

### *Resourcing*

- 18.15 The Council has limited resources. For most of its existence, it has had approximately two staff: an executive officer and a policy and research officer (sometimes part-time). On occasions, staff numbers have increased temporarily but not beyond four staff members.
- 18.16 This year, the administration of the Council and of the NSW Law Reform Commission have been combined through a memorandum of understanding that retains the resourcing level of the Council and provides more flexibility and support to staff. This promotes efficient operation and has been particularly useful for the conduct of our sentencing reference.

### **Other sentencing councils**

- 18.17 There are sentencing councils or similar bodies in a number of Australian and overseas jurisdictions. The primary function of the Sentencing Advisory Councils of Victoria and Tasmania (like the NSW Sentencing Council) has been to provide advice and conduct research, combined with a public education role. The Victorian Council (like NSW) also has a function of providing advice on guideline judgments but not in promulgating them.

### *Victorian Sentencing Advisory Council*

- 18.18 The Victorian Sentencing Advisory Council is better resourced and has a wider role than the NSW Sentencing Council:
- In 2011-12 it had a budget of \$2.1 million, and an establishment of 17 staff in addition to a board of directors that must consist of not less and not more than 14 directors.<sup>30</sup>
  - It has the function of gathering and reporting on sentencing statistics (in NSW this function is performed by BOCSAR and the Judicial Commission of NSW). The Victorian Council also states its views to the Court of Appeal when the Court is considering issuing or reviewing a guideline judgment, and conducts research on sentencing, gauges public opinion on sentencing, and advises the Attorney General on sentencing matters.<sup>31</sup>

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28. *Crimes (Sentencing Procedure) Amendment (Provisional Sentencing for Children) Act 2013* (NSW).

29. *Crimes (Serious Sex Offenders) Amendment Act 2013* (NSW).

30. Victoria, Sentencing Advisory Council, *Annual Report 2011-12*, 15, 58; *Sentencing Act 1991* (Vic) s 108C.

31. *Sentencing Act 1991* (Vic) s 108F(1).



- It is chaired by a senior academic, and its Council membership is more community focused.<sup>32</sup>
- It has developed an extensive program of public engagement focused around its “You be the Judge” package that is delivered by Council staff, online, and through schools. The package is intended to enhance community understanding of sentencing matters and processes.

### *Sentencing Council of England and Wales*

18.19 The Sentencing Council of England and Wales was established under the *Coroners and Justice Act 2009* (UK) as an independent non-departmental body of the Ministry of Justice, and from 6 April 2010, replaced the Sentencing Guidelines Council and the Sentencing Advisory Panel.<sup>33</sup> It is supported by the Office of the Sentencing Council that has a budget in 2010-11 of £1.439 million and a staff of about 16 people.<sup>34</sup>

18.20 Its functions include:<sup>35</sup>

- preparing sentencing guidelines (its primary role);
- publishing resource implications in relation to those guidelines;
- monitoring the operation and effect of its guidelines;
- promoting awareness of sentencing and sentencing practice; and
- consulting with parliament on sentencing matters.<sup>36</sup>

18.21 It is required to have a membership of eight members appointed by the Lord Chief Justice, and six members appointed by the Lord Chancellor. It is chaired by a judicial officer. The judicial members must include at least one circuit judge, one district judge and one lay justice. Non-judicial membership is available for people with experience in: criminal defence; criminal prosecution; policing; sentencing policy and the administration of justice; the promotion of the welfare of victims of crime; academic study or research relating to criminal law or criminology; the use of statistics; and the rehabilitation of offenders.<sup>37</sup>

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32. *Sentencing Act 1991* (Vic) s 108F. The Directors must include 2 people who have a broad experience in community issues affecting courts; one who has senior academic experience; one who is a member of a victim support or advocacy group; one who is involved in the management of a victim support or advocacy group and who is a victim of crime or a representative of victims of crime; one who is a member of the police force who is actively engaged in criminal law enforcement and is of the rank of senior sergeant or below; one who is a highly experienced prosecution lawyer; one who is a highly experienced defence lawyer and 3-6 other people who have experience in the operation of the criminal justice system.

33. *Coroners and Justice Act 2009* (UK) sch 15.

34. Sentencing Council for England and Wales, *Annual Report and Financial Report 2010/11* (2011) 31-32.

35. *Coroners and Justice Act 2009* (UK) s 127, s 129.

36. *Coroners and Justice Act 2009* (UK) s 120(6)(c).

37. *Coroners and Justice Act 2009* (UK) sch 15.

### *United States Sentencing Commission*

- 18.22 The United States Sentencing Commission was established as an independent agency in the judicial branch of government, under the Sentencing Act Reform provisions of the *Comprehensive Crime Control Act 1984*. Its principal purposes are to:
- establish sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes;
  - advise and assist Congress and the executive branch in the development of effective and efficient crime policy; and
  - collect, analyse, research, and distribute a broad array of information on federal crime and sentencing issues, serving as an information resource for Congress, the executive branch, the courts, criminal justice practitioners, the academic community, and the public.<sup>38</sup>
- 18.23 It has seven voting members appointed by the President of the United States and confirmed by the Senate for six-year terms. At least three of the Commissioners must be federal judges and no more than four can belong to the same political party. The Attorney General and the Chair of the US Parole Commission are ex-officio members. The Commission has a staff of approximately 100 employees and an annual budget in the order of US \$16.5 million.<sup>39</sup>

## Possible reforms

### *Increased membership of the Council*

- 18.24 The membership of the NSW Sentencing Council broadly recognises the key stakeholders in the criminal justice system and makes provision for community representation including victims' groups. Membership is based on appointment in a personal capacity based on experience and expertise. This is consistent with the Council's constitution as a statutory body capable of delivering independent advice to the government.
- 18.25 In practice the members the Attorney General has appointed to the Council with expertise or experience in the areas of prosecution, law enforcement, defence, corrective services and juvenile justice and the "representative of the Attorney General's Department" have been respectively a senior police officer of Assistant Commissioner rank or above, the Senior Public Defender, the Commissioner of Corrective Services NSW, the Chief Executive Officer of Juvenile Justice, and the Director, Criminal Law Review Division.
- 18.26 A question arises as to whether the Act should be amended to require that the Council's membership include the holders of the offices mentioned or their

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38. United States Sentencing Commission, "About the Commission" <[www.ussc.gov/About\\_the\\_Commission/index.cfm](http://www.ussc.gov/About_the_Commission/index.cfm)>.

39. United States Sentencing Commission, *2012 Annual Report* (2013) 4-5.

nominees. This would reflect the practical reality of the way the Council has been constituted to date.

- 18.27 It is inevitable to some degree that members of the Council drawn from these agencies will reflect the views and policies of those agencies. While in theory this might be seen as weakening the independence of the Council, it is difficult to see how the Council might otherwise be constituted. The individual agencies are not committed to adopt any report or recommendations of the Council. More importantly, because it is constituted by officers at a high level of seniority, the Council is able to draw on a cross-section of expertise and view points and to access a breadth of knowledge that would not otherwise be available. Additionally the membership of these officers is balanced by the presence of members drawn from the general community and from a background of academic or research experience.
- 18.28 The establishment of Advisory Councils drawing on representatives from various sectors within the criminal justice system and from the community is not novel. A similar structure can be seen in the Domestic Violence Death Review Team established under the *Coroners Act 2009* (NSW).<sup>40</sup> Although the membership criteria are differently described, a similar objective is achieved in bringing together a council that is representative of a cross-section of interests.
- 18.29 We are not persuaded that the manner in which the Council operates is in any way affected by the practical reality mentioned above, or that its independence is diluted by the fact that individual members hold public office in strategic areas of the criminal justice system.
- 18.30 To the contrary, we are satisfied that the Council has worked effectively and that the current structure is sufficiently flexible to ensure that the separate interests have a voice in its deliberations without impacting on the independence of its advice. We note that the membership categories of the Victorian Sentencing Advisory Council are defined in a similar way; that is, by reference to expertise or experience rather than by reference to some specific office. Accordingly we do not recommend any change in the way that eligibility for Council membership is expressed.
- 18.31 However, we do see some merit in enlarging the membership from 16 members to a maximum of 18 members. While we recognise that entities can become harder to manage and to achieve consensus as they grow, this expansion would not materially add to administrative costs or reduce manageability, but would increase the Council's capacity to inform itself of relevant sentencing issues and solutions.
- 18.32 We see an advantage in adding to the current membership a person who has experience or expertise in legal aid. This could include a senior office holder in Legal Aid NSW or in the Aboriginal Legal Service or other recognised legal aid agency. This member would bring to the Council experience of a group of clients who are significantly represented within the criminal justice system.

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40. *Coroners Act 2009* (NSW) s 101E.

- 18.33 We also consider that it would be beneficial to include a member with expertise or experience in law reform, possibly a Commissioner of the NSW Law Reform Commission. This would reflect the close working relationship that now exists between the Sentencing Council and the NSW Law Reform Commission.
- 18.34 To assist in the revised arrangements between the two agencies it would also be desirable to amend s 100J(4) of the CSPA by adding the NSW Law Reform Commission as an agency with whom the Council can consult and from which it may receive and consider information and advice.

### *Functions*

- 18.35 In general, we do not recommend any change in the current functions of the Council. It is essentially a research and policy body with a subsidiary but aligned public education function. However, we do see a benefit in expanding the statutory function of the Council in relation to guideline judgments, in the way discussed in the following section of this chapter.<sup>41</sup>
- 18.36 The Council has, to date, been resourced to a very limited level that is much lower than its counterparts in other jurisdictions. While it has been able to produce high quality sentencing policy work, there is more it could do. Its public education function has been hampered significantly in the absence of dedicated public education staff. More resources will be needed if it is to fulfil this function at the level expected under its legislation.

### *Tabling requirements*

- 18.37 In our view reports and research papers, including the annual report of the Council, should be treated analogously to reports of the NSW Law Reform Commission and subject to a requirement that they be tabled in parliament within 14 sitting days.<sup>42</sup> This represents a good model of transparency and protects the integrity and independence of the Council.
- 18.38 Such a requirement should be confined to annual reports, and reports or research papers supplied in the exercise of the Council's functions (c) and (d). A tabling requirement should not extend to advice requested or provided under function (a) (although it would, of course, remain subject to the *Government Information (Public Access) Act 2010* (NSW)). The government should retain the ability to request the advice of the Council on confidential matters (including cabinet matters) without a tabling requirement.

#### **Recommendation 18.1: Membership, functions and procedure of the NSW Sentencing Council**

(1) A revised Crimes (Sentencing) Act should contain provisions to the general effect of s 100I-100L and sch 1A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) but also:

41. See para [18.70]-[18.87].

42. See *Law Reform Commission Act 1967* (NSW) s 13(5)-(6).

- (a) increase the membership of the Sentencing Council to 18 by adding one person with expertise or experience in legal aid and one person with expertise or experience in law reform;
- (b) include the NSW Law Reform Commission as an agency with which the Council may consult and from which it may receive and consider information and advice;
- (c) require the annual reports and any reports or research papers provided by the Sentencing Council in response to a request from the Minister to be tabled within 14 sitting days of receipt by the Minister.

- (2) The government should consider providing increased resources for the Council to allow it to fulfil its statutory functions to the expected level and, in particular, to allow it to expand its public education activities.

## Guideline Judgments

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### Guideline judgments in NSW

- 18.39 The Court of Criminal Appeal (CCA) delivered the first guideline judgment in NSW of its own motion (although following precedent established in England and Wales) in its decision in *R v Jurisic*.<sup>43</sup> The judgment considered dangerous driving.
- 18.40 In *Wong v The Queen*,<sup>44</sup> a case concerned with federal drug importation offences, the High Court questioned whether the Court had jurisdiction under the *Criminal Appeal Act 1912* (NSW) to issue guideline judgments on its own motion. In response to that decision, s 37A of the CSPA was enacted, and retrospective validity was given to the previously issued guidelines.
- 18.41 The Guideline Sentencing Scheme is now contained in Part 3 Division 4 of the CSPA. The Division allows the CCA to issue guideline judgments on the application of the Attorney General or on its own motion, and to review or vary those judgments.<sup>45</sup> Guidelines can apply generally, or to particular courts or classes of courts, or particular offences or classes of offences, or particular penalties or classes of penalties, or to particular classes of offenders.<sup>46</sup>
- 18.42 Guideline judgments have tended to take one of two forms:
- those that are numerical in nature and state a range of appropriate sentences,<sup>47</sup> and

43. *R v Jurisic* (1998) 45 NSWLR 209.

44. *Wong v The Queen* [2001] HCA 64; 207 CLR 584.

45. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 37, s 37A, s 37B.

46. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 36.

47. See, eg, *R v Whyte* [2002] NSWCCA 343; 55 NSWLR 252.

- those that are qualitative in nature and define the relevant factors to be taken into account<sup>48</sup> (an approach adopted where there is a significant diversity in the circumstances in which the offence can be committed).

18.43 The courts have made it clear that while, in accordance with the CSPA, courts are to “take into account” guidelines when sentencing an offender,<sup>49</sup> they operate as a “check”, or “sounding board”, and not as a “rule” or “presumption”.<sup>50</sup> However, where a guideline is not applied, it is expected that reasons would be stated:

so that the public interest in the perception of consistency in sentencing decisions can be served and this Court can be properly informed in the exercise of its appellate jurisdiction.<sup>51</sup>

18.44 The last NSW guideline judgment was given in 2002 in *R v Whyte*, again in relation to dangerous driving. Other guideline judgments have related to armed robbery,<sup>52</sup> break, enter and steal,<sup>53</sup> guilty pleas,<sup>54</sup> taking former offences into account,<sup>55</sup> and high range prescribed concentration of alcohol (PCA).<sup>56</sup>

18.45 The Judicial Commission of NSW has evaluated the impact of three of the guideline judgments. In each case it found significant effects on penalty levels (mostly involving increases in penalties) as well as indications of improved consistency. For example:

- Its study on the *Jurisic* guideline found that full-time custodial sentences had increased for all dangerous driving offences under s 52A of the *Crimes Act 1900* (NSW). The overall rate of full time imprisonment as a penalty increased from 49.47% before *Jurisic* to 67.94% after *Jurisic*.<sup>57</sup> For the aggravated dangerous driving offences, there was a significant increase in the proportion of offenders sentenced to a term of full time imprisonment for three years or longer (for s 52A(2)), or two years or longer (for s 52A(4)).
- It found that the *Henry* guideline had been successful in reducing ‘systemic excessive leniency and inconsistency in sentencing practice’ in respect of armed robbery and robbery in company.<sup>58</sup>
- It found that the high range PCA guideline resulted in:

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48. See, eg, *R v Ponfield* [1999] NSWCCA 435; 48 NSWLR 327.

49. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 36.

50. *R v Whyte* [2002] NSWCCA 343; 55 NSWLR 252 [113].

51. *R v Whyte* [2002] NSWCCA 343; 55 NSWLR 252 [73], [114].

52. *R v Barber* [1999] NSWCCA 111; 46 NSWLR 346.

53. *R v Ponfield* [1999] NSWCCA 435; 48 NSWLR 327.

54. *R v Thomson* [2000] NSWCCA 294; 49 NSWLR 353.

55. *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 1 of 2002)* [2002] NSWCCA 518; 56 NSWLR 146.

56. *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 3 of 2002)* [2004] NSWCCA 303, 61 NSWLR 305.

57. L Barnes, P Poletti and I Potas, *Sentencing Dangerous Drivers in New South Wales: Impact of the Jurisic Guidelines on Sentencing Practice*, Monograph Series No 21 (Judicial Commission of NSW, 2002) 18.

58. L Barnes and P Poletti, *Sentencing Trends for Armed Robbery and Robbery in Company: The Impact of the Guideline in R v Henry*, Sentencing Trends and Issues No 26 (Judicial Commission of NSW, 2003) 13.

- a significant reduction in the use of s 10 non-conviction orders for high range PCA offences; and
- a corresponding increase in the proportion of offenders who were disqualified from driving receiving longer disqualification periods,

as proportionately more offenders received the automatic rather than the minimum disqualification period.<sup>59</sup> In addition to the decreased use of s 10 orders for high range PCA offences, there was also a substantial decrease in the use of penalties less severe than a community service order, particularly fines.<sup>60</sup> The guideline judgment also accentuated a clear distinction in sentencing patterns between first offenders and subsequent offenders particularly where the prior offence was a high range PCA offence.<sup>61</sup>

- 18.46 In *R v Whyte* Justice McClellan noted that, in an era of high levels of specialisation in the legal profession, many well qualified but newly appointed Judges have limited experience of sentencing. Even with experience, “the task of sentencing by the process known as ‘instinctive synthesis’ has in recent years become more difficult and prone to miscarry”.<sup>62</sup> In such a situations Justice McClellan noted:

Guideline judgments utilised as a “check, guide or indicator” have the benefit of distilling the experience of this and other courts, so that guidance provided by those decisions in relation to other offenders may be readily available to the sentencing Judge. They also assist member of the public with an interest in the individual case, to understand the reasoning process which resulted in the particular sentence and the relationship of that sentence to other sentences which have been imposed.<sup>63</sup>

### Guideline judgments in other jurisdictions

- 18.47 The development and use of court-issued guideline judgments was well established in England and Wales before the Sentencing Guideline Council was established. The Sentencing Council has now assumed that role. There is similar precedent for the development of guidelines, either by the courts or by an external statutory agency, in the United States, New Zealand, Canada, Hong Kong and other Australian jurisdictions

#### *Other Australian jurisdictions*

- 18.48 Queensland allows the Court of Appeal to issue guideline judgments on its own motion or on application of the Attorney-General, the DPP, or the Chief Executive

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59. P Poletti, *Impact of the High Range PCA Guideline Judgment on Sentencing Drink Drivers in NSW*, Sentencing Trends and Issues No 35 (Judicial Commission of NSW, 2005) 18.

60. P Poletti, *Impact of the High Range PCA Guideline Judgment on Sentencing Drink Drivers in NSW*, Sentencing Trends and Issues No 35 (Judicial Commission of NSW, 2005) 6.

61. P Poletti, *Impact of the High Range PCA Guideline Judgment on Sentencing Drink Drivers in NSW*, Sentencing Trends and Issues No 35 (Judicial Commission of NSW, 2005) 18.

62. *R v Whyte* [2002] NSWCCA 343; 55 NSWLR 252 [246].

63. *R v Whyte* [2002] NSWCCA 343; 55 NSWLR 252 [269].

Officer of Legal Aid Queensland.<sup>64</sup> This power was introduced when the (now abolished) Queensland Sentencing Advisory Council was established.<sup>65</sup>

- 18.49 Victoria instituted a guideline judgment procedure in 2003 that the Court of Appeal can exercise on its own motion or on the application of the parties. The court is required to give the Sentencing Advisory Council an opportunity to express its views and to allow the DPP and Legal Aid the opportunity to be represented at the hearing.<sup>66</sup>
- 18.50 In Western Australia, the Court of Appeal can issue guideline judgments although no procedure for the exercise of this power has been laid down.<sup>67</sup> In addition, the Chief Magistrate can publish guidelines for courts of summary jurisdiction “for the purpose of reducing any disparity in sentences”. The guidelines are not binding and may include guidance on assessing the seriousness of offences, the sentencing process, and when it may be appropriate to impose particular sentencing options as well as suggestions as to appropriate sentencing for particular offences or classes of offences.<sup>68</sup>
- 18.51 In South Australia the Full Court of the Supreme Court can issue sentence guidelines on its own initiative or on application of the Attorney-General, the DPP, or the Legal Services Commission.<sup>69</sup> Prior to enactment of the relevant legislation South Australia had a history of establishing tariffs or standards for a limited number of offences.<sup>70</sup>
- 18.52 We are not aware of any instances where courts outside NSW have used these powers to issue a guideline judgment. In some cases the courts have considered issuing a guideline judgment but have declined to exercise the relevant power.<sup>71</sup>

### *England and Wales: the role of the Sentencing Council*

- 18.53 The Sentencing Council of England and Wales and its predecessor, the Sentencing Guidelines Council, have now issued 27 definitive sentencing guidelines that vary between providing a range of sentences for a specific offence (along with advice as to the way in which sentencing should proceed in such a case), and providing overarching principles in relation to a variety of sentencing related topics.<sup>72</sup>

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64. *Penalties and Sentences Act 1992* (Qld) pt 2A, commenced November 2010.

65. *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld); Criminal Law Amendment Bill 2012 (Qld).

66. *Sentencing Act 1991* (Vic) pt 2AA.

67. *Sentencing Act 1995* (WA) s 143.

68. *Sentencing Act 1995* (WA) s 143A.

69. *Criminal Law (Sentencing) Act 1988* (SA) s 29A, s 29B, s 29C.

70. Discussed in *R v Place* [2002] SASC 101 [21]-[33].

71. See, eg, *R v GP* (1997) 18 WAR 196, 235; *R v Payne* (2004) 89 SASR 49; *Miller v R* [2012] VSCA 265 [39]; see also K Warner, “The Role of Guideline Judgments in the Law and Order Debate in Australia” (2003) 27 *Criminal Law Journal* 8, 9.

72. Sentencing Council for England and Wales, “About the Sentencing Council” (2012) <[www.sentencingcouncil.judiciary.gov.uk/about-us.htm](http://www.sentencingcouncil.judiciary.gov.uk/about-us.htm)>.



- 18.54 The *Coroners and Justice Act 2009* (UK) sets out the process for issuing a sentencing guideline. A guideline can be general in nature or limited to a particular offence, particular category of offence or particular category of offender.<sup>73</sup>
- 18.55 The process involves publishing a guideline in draft form and consulting with the Lord Chancellor, the Justice Select Committee of the House of Commons and such other people as the Lord Chancellor directs or as the Council considers appropriate.<sup>74</sup> The draft is put on public exposure and then issued as a definitive guideline. In exercising its function the Council must have regard to:
- (a) the sentences imposed by courts in England and Wales for offences;
  - (b) the need to promote consistency in sentencing;
  - (c) the impact of sentencing decisions on victims of offences;
  - (d) the need to promote public confidence in the criminal justice system;
  - (e) the cost of different sentences and their relative effectiveness in preventing reoffending;
  - (f) the results of the monitoring carried out under section 128.<sup>75</sup>
- 18.56 Section 125 of the Act (subject to the matters noted in subsection 6) provides for the way in which the courts are to apply the guidelines:
- (1) Every court—
    - (a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender’s case, and
    - (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,

unless the court is satisfied that it would be contrary to the interests of justice to do so.<sup>76</sup>
- 18.57 It has been emphasised that the guidelines “are guidelines: no more, no less”, and that although their purpose is to ensure consistency of approach between courts, it remains necessary for any sentencing decision to be “appropriate for the unique circumstances of each case”.<sup>77</sup>
- 18.58 An example of a comprehensive guideline is the definitive guideline on burglary offences issued in January 2012. This guideline covers three offence types: aggravated burglary, domestic burglary and non-domestic burglary. In each case it specifies a 9 step process:

73. *Coroners and Justice Act 2009* (UK) s 120(2).

74. *Coroners and Justice Act 2009* (UK) s 120(5)-(6).

75. *Coroners and Justice Act 2009* (UK) s 120(11)(a)-(f).

76. *Coroners and Justice Act 2009* (UK) s 125(1).

77. *R v Peters* [2005] EWCA 605; 2 Cr App R(S) 101 [30].

- (1) The court must categorise the offence as category 1, 2 or 3 by considering whether it is high or low harm, and high or low culpability according to the considerations set out in the guideline. A category 1 offence, for example, is one involving high harm and high culpability.
- (2) The court is given a starting point and a range. For a category 1 aggravated burglary the starting point is 10 years custody and the range is 9-13 years. For a category 3 non-domestic burglary the starting point is a medium level community order, and the range is a band of a fine to 18 weeks custody. Factors are set out that govern the level of seriousness.
- (3) The court must consider any factors that indicate reduction, for example, assistance to authorities.
- (4) The court must consider a reduction for a guilty plea.
- (5) The court must consider whether an increase for dangerousness is warranted.
- (6) The court must consider the totality principle for multiple charges.
- (7) The court must consider whether to make compensation or ancillary orders.
- (8) The court must provide reasons.
- (9) The court must consider remand time.

### Should NSW take a different approach to developing guidelines?

- 18.59 Three broad options were proposed in Question Paper 12 to which there was a limited response.

#### *Option A – adopt the sentencing guidelines model of England and Wales*

- 18.60 This model would require the NSW Sentencing Council—or some independent expert body, for example, a sub-committee of the Council comprised by Judges and others with particular expertise and experience—to develop a comprehensive set of sentencing guidelines in consultation with the public, taking into account sentencing law and practice, statistics and the views of key stakeholders and the community.
- 18.61 The Chief Magistrate<sup>78</sup> was opposed to this option, finding it difficult to reconcile with the instinctive synthesis approach to sentencing described by the High Court in *Markarian v The Queen*.<sup>79</sup> The Public Defenders also opposed this option.<sup>80</sup>
- 18.62 The Police Association of NSW viewed this option favourably, primarily on the basis of the educative role it could play for parties and the community in explaining the

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78. G Henson, *Submission SE35*, 8.

79. *Markarian v The Queen* [2005] HCA 25; 228 CLR 357.

80. The Public Defenders, *Submission SE36*, 12.

sentencing process. It did however acknowledge that there may be significant resistance from the courts.<sup>81</sup>

*Option B – enhance the current guideline judgment system*

- 18.63 An alternative approach would seek to maintain the current guideline judgment system by broadening the type of information that the CCA should consider by including victim impact data, offender demographics, and key stakeholder views. For example, the Act could be amended so that as part of the process the CCA would seek a preliminary report from a specialist body with research expertise, such as the NSW Sentencing Council. The Council could then undertake public consultations and provide the Court with an expert report that presented factual information including statistical data on the frequency of the offence, current sentencing trends, victim impact data, and reoffending statistics. The CCA would then determine the guideline taking into account the report, the parties' submissions in relation to it and any other relevant information.
- 18.64 This option could have the benefit of increasing the information available to the Court. It would be broadly consistent with the former Queensland system in which the Court of Appeal was required to notify the Queensland Sentencing Advisory Council (now disbanded) of its intention to promulgate a guideline and to consider the Council's written views provided they were submitted within a reasonable time.<sup>82</sup>
- 18.65 It would also be consistent with the function of the Victorian Sentencing Advisory Council that permits it to supply its views, in relation to a proposed guideline matter, directly to the Court of Appeal.
- 18.66 There was some support in the submissions for this option. The Public Defenders proposed that s 42 of the CSPA be amended to enable the CCA, when entertaining a guideline judgment, to receive into evidence a wide range of material including reports and other publications of the NSW Law Reform Commission, the Council and academic peer-reviewed journals and other publications.<sup>83</sup> The Police Association of NSW also advocated the Court being able to take into account an expert report from the Council, summarising public views, statistical data and approaches to the particular offence in other jurisdictions.<sup>84</sup>
- 18.67 The Shopfront Youth Legal Centre similarly supported the option, noting that the availability of sound criminological research and evidence as to "what works" may produce "better quality" guideline judgments that are not focused so closely on general deterrence.<sup>85</sup>

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81. Police Association of NSW, *Submission SE34*, 27.

82. *Penalties and Sentences Act 1992* (Qld) s 15AE(1).

83. The Public Defenders, *Submission SE36*, 12.

84. Police Association of NSW, *Submission SE34*, 27.

85. The Shopfront Youth Legal Centre, *Submission SE37*, 5.

*Option C – extending the capacity to apply for guideline judgments*

- 18.68 A third option that was raised during the submissions and consultation process would involve extending the capacity to request a guideline judgment to the DPP and to the Senior Public Defender (as is the case in South Australia and Queensland) either individually or jointly.
- 18.69 This option received limited support.<sup>86</sup> It was not supported by the DPP or by the Public Defenders, each of whom preferred that the power to seek a guideline judgment be reserved for the Attorney General.<sup>87</sup>

**Our view**

*Our preferred option – option B*

- 18.70 On balance we prefer option B. We acknowledge that guideline judgments have proved valuable in encouraging greater consistency in sentencing, in correcting inappropriate levels of sentencing and in giving guidance to courts, both in providing numerical ranges and in stating overarching principles.
- 18.71 Option B would enlarge the scope of the Council to engage in the guideline judgment process. Currently its function is confined to advising the Attorney General on matters that might be suitable for a guideline judgment and on any submissions that the Attorney General might advance in support of a guideline. The Council could potentially perform an additional and useful role in delivering a report to the CCA, after undertaking relevant research and consultations, either on the request of the Attorney General or the Court.
- 18.72 Such a report would serve a valuable purpose in providing a thorough research base for the Court. It would relieve the parties of the considerable burden of basic research while at the same time preserving their freedom to make submissions on the report.
- 18.73 We do not consider that it would be possible, in this jurisdiction, to adopt the model in place in England and Wales (option A). First, we doubt the constitutional validity of legislation delegating to a statutory agency a power or responsibility to develop guidelines that the courts would be required to take into account. This problem could potentially be overcome by parliament giving legislative force to any guidelines that the Council developed and published. This could be achieved, for example, by including the guidelines published by the Council in a schedule to a Sentencing Act supported by a provision requiring that a court take them into account when sentencing, unless the court was satisfied that, in the circumstances of the case, there was a good cause to depart from the guideline. However this might then take on the flavour of a minimum or mandatory sentencing scheme that has generally not been favoured in Australia, particularly because of its impact on

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86. The Shopfront Youth Legal Centre, *Submission SE37*, 5.

87. The Public Defenders, *Submission SE36*, 12; NSW, Office of the Director of Public Prosecutions, *Submission SE41*, 17.

the discretionary approach to sentencing that is a critical part of the system of individualised justice.

- 18.74 We note that there was little support in the submissions for giving the Council the responsibility for promulgating guideline judgments. In our view that responsibility should remain with the CCA. Accordingly we do not recommend the adoption of Option A.
- 18.75 We are also not persuaded that the legislation should be amended to confer an express power on the DPP or the Senior Public Defender to apply for a guideline. In practice, the holders of those offices can make a submission to that effect to the Attorney General, or to the Court in a pending appeal inviting it to deliver a guideline judgment on its own motion. Alternatively, either office holder can bring the need for a guideline judgment to the attention of the Council. If satisfied that a case for a guideline exists, the Council can deliver a report to the Attorney General in accordance with the current legislation.<sup>88</sup>

*Option B in practice*

- 18.76 Where the Attorney General is considering applying for a guideline judgment, the Attorney could request a report from the Council before lodging an application. The Council would prepare its report covering statistical data on current sentencing standards and options for a particular offence, the frequency of the offence, data on the impact of the offence and demographics of offenders, and approaches in other jurisdictions.
- 18.77 If the Attorney General decides to proceed with the application, the report could be filed with the request and served on the interested parties. Where research data does not justify an application, the report could take the form of reasoned advice to the Attorney not to proceed with the application. Such a report would provide a good basis for later review if future circumstances demonstrate, for example, significant inconsistency in sentencing or the development of patterns of inadequacy in sentences for the relevant offence.
- 18.78 When preparing the report, the Council could seek submissions on the offence and sentencing trends from the public and stakeholders and include this information. It could also commission or undertake research to gauge matters such as the impact on the community of relevant offences and sentencing outcomes so as to report on informed public opinion.
- 18.79 In this context, we do not support the use of telephone survey questionnaires about sentence levels to gauge public opinion. Such surveys purport to reflect opinion without giving respondents time to reflect or consider the issues and as a consequence have limited meaning. More sophisticated research techniques are

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88. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100I(1)(b).

required to gauge informed public opinion as to the impact of offending and sentencing outcomes.<sup>89</sup>

- 18.80 In the rare cases where the Court decides to deliver a judgment of its own motion, it would be appropriate to give notice to the Council to allow it an opportunity to produce a more limited report in the available time. The report could focus principally on the issues identified by the Court accompanied by statistical and comparative analysis. Whether the report is prepared before an application for a guideline by the Attorney General or after notice from the Court, the parties could make submissions on the Council's report in the usual way before the Court issues a judgment.
- 18.81 The main value of the report will be in providing a research and evidence base for the Court to consider. In appropriate cases the Council will be in a position to express a view on the options available, or the kinds of matters that should be in a guideline judgment. Much of this will be uncontentious and agreed, although individual Council members may express divergent views on some matters.
- 18.82 We note that some members of the Council could have an interest in the outcome of a guideline judgment through their involvement in the case, obvious examples being the DPP, the Senior Public Defender and the member of the Police Force on the Council. Their involvement in Council deliberations is important to ensure that the factual content of the report is as full and accurate as possible. However, it may compromise later positions in the Court if they participate in views expressed by the Council. In practice this may turn out not to be an insurmountable problem, but members should always have the options of recusing themselves from discussions or views expressed in the report, in order not to compromise later positions.
- 18.83 One of the factors that has seemingly resulted in no applications for a guideline judgment in NSW since 2002 has been the demands that assembling the background material that is required places on the DPP, the Public Defenders, and the Crown Advocate (who commonly appears in such proceedings to represent the Attorney General). The proposed role for the Council should help to overcome this obstacle.
- 18.84 If the government takes the approach suggested, the existing resources available to the Council would need a significant increase. In order for the process to be useful and guideline judgments to be of high quality, the reports must be thorough. Timeliness is also important. Guideline cases are often in areas of significant public concern. While time is needed for quality reports, undue delay in lodging applications is undesirable
- 18.85 In "own motion" cases, it would be important for reports of the kind contemplated to be provided quickly within the timeframe of the Court in listing appeals, and with adequate time for the parties to consider the implications of the research. A reporting deadline in the order of 2 months might be expected, although there would also need to be a degree of flexibility in listing a potential guideline case. The

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89. See K Gelb, *Measuring Public Opinion and Sentencing* (Victorian Sentencing Council, 2008).

timeframe needs to avoid undue or unfair delay for the parties involved in the appeals that were selected as vehicles for the judgment.

- 18.86 It would also be necessary for the Council to access assistance from the Judicial Commission, BOCSAR and potentially the NSW Law Reform Commission in order to prepare a report of the kind contemplated.
- 18.87 In our view, this process will only work if the Council is specifically resourced to prepare the kind of background expert report that would be required. We consider that a protocol for developing an appropriate report should be established after consultation between the Council and relevant stakeholders including the DPP, Public Defenders, Legal Aid, the Judicial Commission and BOCSAR.

### **Recommendation 18.2: Guideline judgments and the NSW Sentencing Council**

- (1) A revised Crimes (Sentencing) Act should continue to provide for the Court of Criminal Appeal to issue guideline judgments on the Attorney General's application, and on its own motion, by preserving the procedures set out in the *Crimes (Sentencing Procedure) Act 1999* (NSW), Part 3 Division 4.
- (2) The NSW Sentencing Council should continue to have the function of advising and consulting with the Attorney General on matters suitable for guideline judgment applications, and on submissions that may be made to the Court of Criminal Appeal.
- (3) The NSW Sentencing Council should also have the specific function of preparing a research and advisory report:
  - (a) on the request of the Attorney General, for lodgement with an application for a guideline judgment; and
  - (b) for lodgement with the Court of Criminal Appeal, where the Court decides on its own motion to issue or review a guideline judgment.
- (4) A revised Crimes (Sentencing) Act should require the Court of Criminal Appeal to give notice to the NSW Sentencing Council if it is considering issuing or reviewing a guideline judgment on its own motion, and to receive any research and advisory report the Council provides in response.
- (5) The Sentencing Council should be specifically resourced to undertake this work.





## 19. Victims of crime

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### In brief

Victim impact statements are an important way for victims of serious violent crimes to have a role in the sentencing process. Although we recognise the serious consequences that property crimes can have for victims, victim impact statements should not be used for this category of offence. We recommend that the use of victim impact statements be continued without any changes.

<b>Victim impact statements</b> .....	<b>395</b>
Current position of victim impact statements .....	<b>395</b>
The Previterra issue.....	<b>397</b>
No change to the types of offences for which a VIS can be received.....	<b>399</b>
<b>Victim compensation and reparation</b> .....	<b>401</b>
Reform is not required.....	<b>402</b>

- 19.1 In this chapter we consider the extent to which sufficient recognition is given to victims of crime, and whether the current laws should be reformed better to take into account victims' interests. Although the common law has recognised the entitlement of the courts to have regard to the harm caused to a victim,<sup>1</sup> more formal recognition has been given to their interests as a result of the introduction in 1996 of a Charter of Victims Rights, and the enactment in 2013 of the *Victims Rights and Support Act 2013* (NSW) that incorporates a similar charter.<sup>2</sup>

### Victim impact statements

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#### Current position of victim impact statements

- 19.2 A court can receive and consider a victim impact statement (VIS), “if it considers it appropriate to do so”, at any time after it convicts but before it sentences an offender.<sup>3</sup> A VIS is a statement containing particulars of the personal harm the victim has suffered as a direct result of the offence (in the case of a “primary victim”), or particulars of the impact of a primary victim’s death on the members of his or her immediate family (in the case of a “family victim”).<sup>4</sup> Its provision in a relevant case is not mandatory,<sup>5</sup> and it can take the form of an unsworn statement, or a victim can read it in court in the presence of the offender before sentencing.<sup>6</sup>

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1. *Siganto v The Queen* [1998] HCA 74; 194 CLR 656 [29].  
2. *Victims Rights Act 1996* (NSW) s 6; *Victims Rights and Support Act 2013* (NSW).  
3. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(1).  
4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26.  
5. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 29(1).  
6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30A.

19.3 There are various restrictions relating to when a court may consider a VIS. In the Supreme and District Courts, the offence must be one that:

- results in the death of, or actual physical bodily harm to, a person;
- involves an act of actual or threatened violence;
- is one for which a higher maximum penalty may be imposed if the offence results in the death of, or actual physical bodily harm to, any person than may be imposed if the offence does not have that result; or
- is a prescribed sexual offence.<sup>7</sup>

A court cannot receive or take into account a VIS when sentencing an offender for offences of fraud, or of theft or damage to property.

19.4 In a case involving the death of the primary victim, the court “must” receive a VIS if one is given by a family victim, acknowledge its receipt and make any comment on it that the court considers appropriate.<sup>8</sup> The NSW courts have adhered to the view expressed at first instance by Justice Hunt in *R v Previtera*, that a court cannot take into account the contents of a family victim’s VIS when fixing the penalty for the offence involving the victim’s death because it is “offensive to fundamental concepts of equality and justice for criminal courts to value one life as greater than another”; and, as a result it is “wholly inappropriate to impose a harsher sentence upon an offender because the value of the life lost is perceived to be greater in the one case than in the other”.<sup>9</sup>

19.5 In a case not involving the death of the primary victim, it is for the court to determine what weight to give a VIS, bearing in mind that it was not given on oath, was not tested in cross-examination and is not necessarily an objective or impartial account.<sup>10</sup>

19.6 The VIS process can have a therapeutic benefit for victims,<sup>11</sup> increase their sense of involvement in, and satisfaction with, the criminal justice process, enhance their recovery,<sup>12</sup> and make the sentencing process more transparent and reflective of the

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7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(2).

8. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(1).

9. *R v Previtera* (1997) 94 A Crim R 76, 86-87 (Hunt CJ at CL), applied in later cases and not reversed on appeal: *R v Bollen* (1998) 99 A Crim R 510, 529; *R v Dang* [1999] NSWCCA 42 [25]-[26]; *R v Newman* [2004] NSWCCA 102; *R v King* [2004] NSWCCA 444; 150 A Crim R 409; *R v Josefski* [2010] NSWCCA 41. The possibility of its reconsideration was raised in *R v Berg* [2004] NSWCCA 300 but not taken up in *R v Tzanis* [2005] NSWCCA 274.

10. *Slack v R* [2004] NSWCCA 128 [58]-[63]; *R v Deng* [2007] NSWCCA 216; 176 A Crim R 1 [59]-[61].

11. S Garkawe, “The Effect of Victim Impact Statements on Sentencing Decisions” (Paper, Sentencing Principles, Perspectives and Possibilities Conference, Australian National University, 10-12 February 2006) 1. See also E Erez, “Integrating a Victim Perspective through Victim Impact Statements” in A Crawford and J Goodey (ed), *Integrating a Victim Perspective within Criminal Justice* (2000) 176-177, cited in B Rosebury, “The Political Logic of Victim Impact Statements” (2011) 30(1) *Criminal Justice Ethics* 39, 44.

12. Homicide Victims’ Support Group, *Submission SE8*, 21; see also J Baptie, “The Effect of the Provision of Victim Impact Statements in the Local Courts of New South Wales” (2004) 7 *The Judicial Review* 73, 79–80.

community's response to crime. It may also promote the rehabilitation of offenders by confronting them with the impact of their offending behaviour.<sup>13</sup>

19.7 On the other hand, the VIS process has been criticised for the following reasons:

- It may raise expectations about the sentence that may not be fulfilled.
- It may expose offenders to unfounded allegations.
- It may lead sentencing judges to give disproportionate weight to the impact of a crime on a victim to the detriment of other relevant considerations.
- It may skew an otherwise objective and dispassionate process by the introduction of emotional and possibly vengeful content.
- It may place pressure on family members to provide a VIS in order to be seen to be involved in the sentencing proceedings.
- It is, in a practical sense, difficult for an offender to challenge the statement, but if that does occur then that may undermine the therapeutic effect of allowing family members to give voice to their emotions and to represent the victim in court.<sup>14</sup>

19.8 Two issues arise for consideration:

- Should a VIS be taken into account when determining the sentence in a case involving the death of a primary victim (reversing the decision in *Previtera*)?
- Should the VIS process be extended beyond offences involving personal violence and prescribed sexual offences?

### The *Previtera* issue

19.9 In our report on sentencing in 1996 we expressed our support, in general terms, for the VIS process but did not support a departure from the decision in *R v Previtera*.<sup>15</sup> We maintain that position in this report, both because of the reasons given in that decision, but also because of opposition to any such change in submissions and consultations.

19.10 The Police Association of NSW, apart from noting the in-principle objection to setting a sentence by reference to whether or not the victim was popular or had a loving family, suggested that allowing a family VIS to influence the sentence risked

13. J Baptie, "The Effect of the Provision of Victim Impact Statements in the Local Courts of New South Wales" (2004) 7 *The Judicial Review* 73, 79–80, cited in Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [14.9].

14. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [14.10]; NSW, Department of Attorney General and Justice, *Family Victim Impact Statements and Sentencing in Homicide Cases*, Background Policy Paper (2011) 8-9 and see Victoria, *A Victim's Voice: Victim Impact Statements in Victoria: Findings of an Evaluation into the Effectiveness of Victim Impact Statements in Victoria* (2009) 18.

15. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [2.20]-[2.25].

making that process more complex and more vulnerable to appeal.<sup>16</sup> Legal Aid NSW made the same point.<sup>17</sup>

- 19.11 The Public Defenders submitted that if a family VIS is to be taken into account in setting a sentence, then family members may feel obliged to make a statement from a sense of responsibility to the deceased where they would otherwise not have done so.<sup>18</sup>
- 19.12 The Law Society of NSW opposed any amendment, arguing in addition to the reasons given by other stakeholders, that the role of the family VIS moves too far away from the core feature of criminal justice that a criminal charge is brought on behalf of the public on the basis that a wrong has been committed against the public.<sup>19</sup>
- 19.13 It also suggested that:
- Allowing cross-examination to resolve any factual dispute over the contents of a family VIS could be traumatic for a family victim and may undermine the therapeutic value of making a VIS.
  - If the sentence imposed does not reflect the harm that family victims perceive they have suffered as disclosed in the VIS, the therapeutic benefits of making the statement will be limited and may in fact aggravate the harm caused to the family and damage the public's confidence in the justice system.
  - There is a risk that family victims who currently prefer not to make a VIS because of the trauma attached to the trial will feel increased pressure to provide one.
- 19.14 It submitted that a VIS should be available as part of a therapeutic, and cathartic process for victims and should not be taken into account when determining an offender's sentence in homicide cases.<sup>20</sup>
- 19.15 The Children's Court of NSW<sup>21</sup> and the NSW Office of the Director of Public Prosecutions<sup>22</sup> opposed any change each submitting that the present use of a VIS is appropriate.
- 19.16 The Homicide Victims' Support Group submitted that family VIS should not become a mandatory part of the sentencing process on the basis that not all homicide victims are survived by family members or loved ones who are willing or able to provide a VIS.<sup>23</sup>
- 19.17 Another victims representative in consultation expressed a concern that the notion of a court giving weight to a VIS in determining the sentence in a murder case could

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16. Police Association of NSW, *Submission SE34*, 29.

17. Legal Aid NSW, *Submission SE50*, 29.

18. The Public Defenders, *Submission SE36*, 13.

19. Law Society of NSW, *Submission SE43*, 17.

20. Law Society of NSW, *Submission SE43*, 18.

21. Children's Court of NSW, *Submission SE40*, 21.

22. NSW. Office of the Director of Public Prosecutions, *Submission SE41*, 18.

23. Homicide Victims' Support Group, *Submission SE47*, 8.

place pressure on families to provide a statement that would lead to the maximum sentence, and potentially risk colouring the statement. The Public Defenders made a similar point.<sup>24</sup> Another stakeholder commented that the making of a VIS in these cases may lead to conflict within families and that it could force victims to put private matters before court.<sup>25</sup>

- 19.18 In addition to the views of stakeholders, we consider it would be undesirable to reverse the *Previtera* approach. It risks placing undue weight on denunciation at the expense of proportionality. In fairness it would be necessary to allow the VIS to be tested, and in appropriate cases for its maker to be cross-examined and for the offender to have the opportunity of giving evidence in reply that might be critical of the victim. In either case there is a risk of increasing the trauma of family victims.
- 19.19 Maintained in its present form, in death cases the VIS can serve a valuable cathartic role for family victims, and it can reinforce for the offender an understanding of the harm caused. Each can be seen to reflect restorative justice theory.

### No change to the types of offences for which a VIS can be received

- 19.20 With one exception, there was no support in the submissions or in the consultations for extending the VIS scheme to any additional offences.<sup>26</sup> The NSW Police Force, however, noted that the impact of fraud and property damage on the victims cannot be underestimated,<sup>27</sup> and suggested that the current restriction be reviewed.
- 19.21 This was not a matter that we considered in our 1996 report on sentencing. The legislation in the other Australian jurisdictions that expressly provides for the court to receive a VIS does not limit its use to cases of death or physical bodily harm or to one that involves an act of actual or threatened violence.<sup>28</sup>
- 19.22 We recognise that the consequences to a victim of the theft or damage of their property or the loss of their savings or investments through misappropriation and fraud can be considerable. We also recognise that the bare statement of that loss may not convey the full impact on the victim of the offending. The item stolen or damaged may have a particular sentimental value to its owner that is not otherwise obvious, and the loss of money or income producing investments or assets may cause secondary harm, for example, in compelling a person to sell their home to replace an investment or to return to work out of retirement. Similarly, the knowledge that an offender has broken and entered a home to steal property can leave the victim with a feeling of violation and emotional stress that can be both considerable and enduring.
- 19.23 While not in any way seeking to diminish the impact of that kind of harm, or downplaying the cathartic and denunciatory impact of a VIS in these cases, we do

24. The Public Defenders, *Submission SE36*, 16.

25. NSW Sentencing Council, *Consultation SEC20*.

26. NSW Sentencing Council, *Consultation SEC20*.

27. NSW Police Force, *Submission SE45*, 30.

28. See, eg, *Crimes (Sentencing) Act 2005* (ACT) pt 4.3; *Sentencing Act* (NT) s 106A, s 106B; *Criminal Law (Sentencing) Act 1988* (SA) s 7A; *Sentencing Act 1997* (Tas) s 81A, s 81; *Sentencing Act 1991* (Vic) pt 3 div 1C; *Sentencing Act 1995* (WA) pt 3 div 4.

not consider it advisable to extend the VIS process beyond its current field of operation. For the most part, evidence will be led in cases involving property crime and fraud of the nature and extent of the loss, that can be taken into account within the factors that a court must consider in sentencing an offender.<sup>29</sup>

- 19.24 Use of VISs in a wider group of offences could cause delay and unnecessary complexity, having particular regard to the fact that the range of seriousness of the offences, within the fraud and property damage category, extends from relatively minor offending to very serious offending, and in the case of large scale fraud could involve multiple victims.
- 19.25 In South Australia, the Commissioner for Victims' Rights may furnish the court with a neighbourhood impact statement that describes the effect of the offence, or of offences of the same kind, "on people living or working in the location in which the offence was committed", or a social impact statement that describes the effect of the offence or offences of the same kind "on the community generally or on any particular sections of the community".<sup>30</sup>
- 19.26 Our view is that it is not necessary to introduce community impact statements as they could potentially complicate the sentencing process. The extent to which they could be tested is unclear, as is the use to which they could properly be put.<sup>31</sup>
- 19.27 We also note that the *Criminal Law (Sentencing) Act 1988* (SA) enables a victim to include in an impact statement "recommendations relating to the sentence to be determined by the court".<sup>32</sup> We do not favour adopting a similar provision, even if it is accompanied by a qualification that the court is not required to consider or give effect to the recommendation. It has been held in NSW that the attitude of the victim, whether of vengeance or forgiveness, has no part to play in determining the appropriate sentence.<sup>33</sup>
- 19.28 Victims will not have the knowledge of sentencing law that would be necessary for any such recommendation to be of value and there is a risk that further harm and dissatisfaction will be caused if the court does not adopt the recommendation. It is more appropriate that any assistance be provided through the objective submissions of counsel.
- 19.29 Accordingly we propose that a revised Crimes (Sentencing) Act should contain provisions that would replicate s 26-30A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), subject to the amendments that we recommend in our Report 138 on people with mental health and cognitive impairments in the criminal justice system. In Report 138 we recommended that the VIS provisions should be extended to apply to circumstances where the defendant is found unfit and not acquitted or not

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29. See Recommendation 4.2.

30. *Criminal Law (Sentencing) Act 1988* (SA) s 7B.

31. A Webster, "Expanding the Role of Victims and the Community in Sentencing" (2011) 35 *Criminal Law Journal* 21.

32. *Criminal Law (Sentencing) Act 1988* (SA) s 7C(2). A similar provision is contained in *Sentencing Act* (NT) s 106B(5A).

33. *R v Palu* [2002] NSWCCA 381; 134 A Crim R 174 [37]; *R v Burton* [2008] NSWCCA 128 [102]-[105].

guilty by reason of mental illness under the *Mental Health (Forensic Provisions) Act 1990* (NSW).<sup>34</sup>

### Recommendation 19.1: No change to VIS provisions

A revised Crimes (Sentencing) Act should contain provisions that replicate s 26 to s 30A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), subject to the amendment recommended in our report, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report 138 (2013), recommendation 8.4(1).

## Victim compensation and reparation

- 19.30 In this section we outline the situations where statute makes provision for restitution or compensation for injury or loss suffered by a victim of crime.
- 19.31 In a criminal proceeding, where it is alleged that an accused person has unlawfully acquired or disposed of property, the court can order its return to the person who appears to be lawfully entitled to its possession.<sup>35</sup> The court can make the order whether or not the accused is convicted of an offence involving its acquisition or disposal.<sup>36</sup> The court can exercise a similar power by making an ancillary order for restitution in respect of offences that are taken into account on a Form 1.<sup>37</sup>
- 19.32 The *Victims Rights and Support Act 2013* (NSW), which from June 2013 replaced the *Victims Support and Rehabilitation Act 1996* (NSW), provides for:
- the establishment of a Victims Support Fund;<sup>38</sup>
  - the implementation of a scheme to allow victims (including primary, secondary and family victims) of acts of violence to receive support through counselling services, financial assistance for immediate treatment needs and economic loss<sup>39</sup> as well as a recognition payment;<sup>40</sup>
  - any financial support paid to be recovered from the offender;<sup>41</sup>
  - the imposition of a victims' support levy on people found guilty of crimes in order to fund the statutory scheme;<sup>42</sup> and

34. NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report 138 (2013) rec 8.4(1).

35. *Criminal Procedure Act 1986* (NSW) s 43(1).

36. *Criminal Procedure Act 1986* (NSW) s 43(2).

37. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 34.

38. *Victims Rights and Support Act 2013* (NSW) s 14.

39. *Victims Rights and Support Act 2013* (NSW) pt 4 div 2-3. The entitlement to support varies according to whether the victim is a primary, secondary or family victim.

40. *Victims Rights and Support Act 2013* (NSW) pt 4 div 5.

41. *Victims Rights and Support Act 2013* (NSW) pt 5.

42. *Victims Rights and Support Act 2013* (NSW) pt 7.

- an alternative scheme under which the court can, after a person is convicted of an offence, direct that compensation be paid out of that person's property for any injury, or loss sustained because of the offence.<sup>43</sup>

19.33 These provisions do not exclude any rights that may be available to the victim, at common law, or under an insurance policy, to recover compensation for the injury or loss. The court will not normally decline making the compensation direction because it is claimed that the offender is impecunious.<sup>44</sup>

### Reform is not required

19.34 A restitution order, or a compensation direction, operates as an “ancillary order” rather than as a sentencing option in its own right. It is not possible to impose such a requirement as a condition of a good behaviour bond.<sup>45</sup> Accordingly, a question arises whether a compensation or reparation order should be a sentencing option in its own right.

19.35 Since a limited power to order compensation in criminal cases was introduced in England in 1870,<sup>46</sup> the courts have been wary of this power<sup>47</sup> and there has been strong support for the proposition that such an order should have limited relevance to sentencing.<sup>48</sup> 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.<sup>49</sup>

19.36 In New Zealand, under the *Sentencing Act 2002* (NZ), there is now a presumption in favour of reparation. A court, if entitled to impose a sentence of reparation, must do so unless, among 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”.<sup>50</sup>

19.37 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.<sup>51</sup> The court has a discretion in the making of compensation orders for injury, loss, destruction or damage as a result of other offences.<sup>52</sup> The Tasmania Law Reform Institute has

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43. *Victims Rights and Support Act 2013* (NSW) pt 6. See, eg, *Connor v R* [2005] NSWCCA 431; 158 A Crim R 389.

44. *Connor v R* [2005] NSWCCA 431; 158 A Crim R 389.

45. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95(c)(ii).

46. *Forfeiture of Felony Act 1870* (UK) s 4.

47. *RK v Mirik* [2009] VSC 14; 21 VR 623 [43]-[49].

48. 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.

49. *R v Barney* (1991) 11 Cr App R (S) 448, 450.

50. *Sentencing Act 2002* (NZ) s 12(1).

51. *Sentencing Act 1997* (Tas) s 68(1)(a).

52. *Sentencing Act 1997* (Tas) s 68(1)(b).



suggested that a compensation order should be viewed as a sentencing option in its own right, although as a restorative rather than punitive response.<sup>53</sup> That proposal has not been adopted.

- 19.38 The sentencing legislation in Queensland,<sup>54</sup> and in South Australia,<sup>55</sup> specifically permits the sentencing court to make a compensation or restitution order in addition to any other sentence.
- 19.39 Where a person is convicted of an offence under the laws of the Commonwealth, the court can, in addition to any other penalty, order that person make reparation (by paying money or otherwise) for any loss suffered as a result of the offence.<sup>56</sup> In its 2006 report on sentencing, the Australian Law Reform Commission concluded that a reparation order should not be seen as punitive and thus should not be available as a substitute for other punitive penalties.<sup>57</sup> Previous reports by the Parliament of Victoria Law Reform Committee and the NSW Law Reform Commission came to similar conclusions.<sup>58</sup>
- 19.40 We are not persuaded of the need to amend the current law. There is sufficient provision for restitution and compensation and we do not see any reason to introduce orders of that kind as sentencing options in their own right. There was limited support for the introduction of measures to facilitate the recovery of compensation. For example, the NSW Police Force submitted that it may be useful for there to be a mechanism allowing the prosecution, following the conclusion of criminal proceedings, to bring applications for compensation on behalf of victims without the victims needing to resort to civil proceedings to claim compensation.<sup>59</sup>
- 19.41 As the adequacy of the new scheme for the provision of support and recognition payments to victims is outside our terms of reference, we have not made any additional recommendations about its reach or application. We do, however, record our view that the court should not take into account, in reduction of the sentence being imposed, any order made by the court, or any consequence of a conviction, that requires an offender to restore unlawfully acquired property, to pay compensation (whether by way of reimbursement of the statutory fund, or court ordered payment of compensation or civil damages). We note, however, that for the purposes of the *Fines Act 1996* (NSW), a court costs levy<sup>60</sup> and a victims support levy are taken to be a fine.<sup>61</sup>

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53. Tasmania Law Reform Institute, *Sentencing*, Final Report 11 (2008) [4.4.17].

54. *Penalties and Sentences Act 1992* (Qld) s 35-37.

55. *Criminal Law (Sentencing) Act 1988* (SA) s 52-53.

56. *Crimes Act 1914* (Cth) s 21B.

57. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [8.2.1].

58. 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].

59. NSW Police Force, *Submission SE45*, 14.

60. Payable under the *Criminal Procedure Act 1986* (NSW) s 211A.

61. *Fines Act 1996* (NSW) s 4(2A).



## 20. Other matters

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### In brief

This chapter covers other issues related to sentencing that were raised in the course of our review. We recommend that the government review the current system of driver licence disqualification, clarify some aspects of the Local Court's sentencing powers and also consider making one urgent change to an offender's ability to reapply for parole. We also note the limited use of non-association and place restriction orders, and consider that their aims can be achieved as conditions of the new orders that we propose. We recommend abolishing the common law sentence of "the rising of the court". It is outdated and little used.

<b>Driver licence disqualification and suspension</b> .....	<b>405</b>
The current law .....	406
Frequency of driver licence disqualification .....	409
Stakeholder concerns .....	409
Proposals for change .....	411
Our view .....	412
<b>Non- association and place restriction orders</b> .....	<b>413</b>
The current law .....	413
Use of non-association and place restriction orders .....	414
Submissions .....	414
Our view .....	416
<b>Parole</b> .....	<b>417</b>
Our view .....	418
<b>The Local Court's sentencing powers</b> .....	<b>419</b>
No increase to jurisdictional limit .....	419
Stakeholders' views about the NSW Sentencing Council's conclusions .....	421
Our view .....	422
Jurisdictional limit not restricted to "worst cases" .....	423
Our view .....	424
Aggregate sentencing in the Local Court .....	425
<b>Rising of the court</b> .....	<b>425</b>
History and operation of rising of the court .....	425
Submissions .....	426
Our view .....	427

- 20.1 In this chapter we discuss some other matters related to sentencing that were raised in the course of our review.

### Driver licence disqualification and suspension

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- 20.2 In many of our consultations, the issue of driver licence disqualification was raised as a significant issue. Stakeholders reported that a significant number of people have become subject to accumulating terms of disqualification, from which they could never escape. Some were disqualified from driving due to non-payment of

penalties and fines, rather than for any road traffic offence. The consequences were seen to cause further problems in rural and regional areas where, because of limited public transport, the loss of a driver licence limited the ability of people to obtain and stay in employment. Sometimes it precluded or limited access to medical treatment that was not available locally, or prevented people taking their children to school or sporting events. It was suggested that in some small Aboriginal communities, there were so many adults who had lost their licences that there was no one to teach young people to drive or to provide the supervised hours required for a licence – which unfortunately meant that this next generation were now driving while unlicensed, with potentially detrimental consequences. In rare circumstances, the absence of a licensed driver in a community could have seriously adverse consequences, for example, if it prevented a timely response in cases requiring an emergency evacuation or an emergency hospital admission.

- 20.3 Driver licence disqualification has an important role to play in advancing road safety, and drivers with a history of unsafe driving, including drink driving, and repeat offending should clearly lose their licences. However, the extent of the automatic disqualification that applies may exceed the intended purpose of that form of punishment, including the value of any deterrent effect that it may have.

### The current law

- 20.4 The road transport legislation currently provides a complex structure under which a person who is convicted of one or more driving offences can become subject to a driver licence cancellation, suspension or disqualification. Additionally, a person can become ineligible to apply for a driver licence, or become the subject of an habitual traffic offender declaration,<sup>1</sup> attracting an additional period of disqualification.

- 20.5 Part of the complexity of the law in this area stems from the fact that the offences concerned with the use of a motor vehicle that can result in a driver being fined or imprisoned, and potentially subject to the loss of the right to drive lawfully, are currently contained in the:

- *Crimes Act 1900* (NSW);<sup>2</sup>
- *Road Transport Act 2013* (NSW);<sup>3</sup>
- Transport Rules and Regulations.<sup>4</sup>

- 20.6 The variety of means by which a driver can be precluded from driving lawfully has introduced further complexity. These include:

- suspension of an unrestricted driver licence by Roads and Maritime Services as a result of an accumulation of sufficient demerit points;<sup>5</sup>

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1. *Road Transport Act 2013* (NSW) s 217, s 219.

2. *Crimes Act 1900* (NSW) s 51A, s 51B, s 52A, s 52AB and s 53.

3. *Road Transport Act 2013* (NSW) s 53, s 54, pt 5.1 div 2, pt 5.2 div 1, s 146.

4. See, eg, *Road Rules 2008* (NSW) pt 3-13; *Road Transport (General) Regulation 2013* (NSW) pt 3 div 1, 3; *Road Transport (Driver Licensing) Regulation 2008* (NSW) pt 3 div 1 subdiv 2, pt 10 div 4.

- suspension or cancellation by Roads and Maritime Services of a learner licence or provisional licence through the accumulation of demerit points;<sup>6</sup>
- suspension or cancellation of a driver licence by Roads and Maritime Services for certain speeding offences;<sup>7</sup>
- suspension for up to 14 days of a driver licence by the Commissioner of Police of a person who in the Commissioner's opinion is an incompetent, reckless or careless driver or is found under the influence of liquor;<sup>8</sup>
- suspension of a driver licence by notice served by a police officer where an offender is charged with certain serious offences arising out of the use of a motor vehicle;<sup>9</sup>
- suspension or cancellation of a driver licence by Roads and Maritime Services in connection with enforcement action taken on the direction of the State Debt Recovery Office against a fine defaulter, that is, a person who has failed to pay a fine or penalty (which, save in the case of an offence committed by a person aged under 18 years, need not have involved a traffic offence);<sup>10</sup>
- suspension or cancellation of a driver licence by Roads and Maritime Services in various circumstances, including cases where it appears that it would be dangerous for the holder of the licence to drive because of illness or incapacity, or that such person does not have sufficient driver ability or knowledge of road law, or is not a fit and proper person to hold a licence or has failed a required test or a medical examination;<sup>11</sup>
- licence ineligibility after Roads and Maritime Services gives a notice because of the accumulation of demerit points;<sup>12</sup>
- mandatory or automatic driver licence disqualification (although subject to a power reserved to the courts, in certain cases, to reduce or in some cases to increase the disqualification period) under the *Road Rules 2008* (NSW) for driving at a speed that exceeds the relevant limit by more than 30 km per hour,<sup>13</sup> and under the *Road Transport Act 2013* (NSW):
  - where a person is convicted of certain major offences arising out of the use of a motor vehicle contrary to the provisions of the *Crimes Act 1900* (NSW) (for example including manslaughter, predatory driving, and dangerous driving occasioning grievous bodily harm); or contrary to the provisions of the *Road Transport Act 2013* (NSW) (including, for example, prescribed concentration of alcohol (PCA) offences and offences of driving under the influence of alcohol or drugs; negligent driving occasioning death or grievous

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5. *Road Transport Act 2013* (NSW) s 33, s 38 which extends also to graffiti offenders who become subject to a "driver licence order" under the *Graffiti Control Act 2008* (NSW).

6. *Road Transport Act 2013* (NSW) s 39-40.

7. *Road Transport Act 2013* (NSW) s 59.

8. *Road Transport Act 2013* (NSW) s 223.

9. *Road Transport Act 2013* (NSW) s 224.

10. *Fines Act 1996* (NSW) s 65-66.

11. *Road Transport (Driver Licensing) Regulation 2008* (NSW) cl 55.

12. *Road Transport Act 2013* (NSW) s 35, s 39, s 41.

13. *Road Rules 2008* (NSW) cl 10-2.

bodily harm; driving furiously, recklessly or at a speed or in a manner dangerous to the public);<sup>14</sup>

- where a person is declared an habitual traffic offender following repeat convictions for certain major offences, or for prescribed speeding offences, or for offences involving driving while unlicensed, disqualified, suspended or cancelled, as defined in the Act;<sup>15</sup>
- where a person is convicted of certain offences relating to unapproved races, speed trials, and drag racing;<sup>16</sup>
- for driving while disqualified, suspended or cancelled (in which case the disqualification period will be cumulative upon any existing disqualification or suspension).<sup>17</sup>

20.7 The *Road Transport Act 2013* (NSW) specifies the relevant periods of disqualification that apply, as well as the increased periods of disqualification for second and subsequent offences. In many, if not most, instances the maximum term of imprisonment that is available for the offence will also increase for second or subsequent offences.

20.8 Court imposed discretionary licence disqualification is also available<sup>18</sup> where the court convicts a person of certain other offences under the road transport legislation.<sup>19</sup> The *Road Transport Act 2013* (NSW) precludes the court from disposing of certain offences without conviction under s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW)<sup>20</sup> (CSPA) if, during the period of five years immediately before the court's determination in respect of the current charge, that section, or its predecessor, has been applied for another offence of the same class, that the offender had committed.<sup>21</sup>

20.9 In most instances, any executive action or court order that results in a person not being able to drive lawfully, will be in addition to any penalty, fine or sentence of imprisonment that is imposed for any offence that underlies such action or order. Whether operating as a cancellation, suspension, disqualification or ineligibility to obtain a licence, the effect is to deprive the driver of a capacity to acquire or retain a driver licence or to drive lawfully on a public road. The consequences for a person who resumes driving while unlicensed become increasingly serious, resulting, for example, in the accumulation or extension of the period of disqualification and very often in imprisonment.

20.10 In some circumstances a person who may be disqualified or have his or her licence suspended can take steps to retain the licence. For example, a person whose licence is liable to suspension because of the accumulation of demerit points can

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14. *Road Transport Act 2013* (NSW) s 205.

15. *Road Transport Act 2013* (NSW) s 216-221.

16. *Road Transport Act 2013* (NSW) s 115-116.

17. *Road Transport Act 2013* (NSW) s 54(8)-(11).

18. *Road Transport Act 2013* (NSW) s 204(1)-(3).

19. Although subject to the automatic disqualifications arising under *Road Transport Act 2013* (NSW) s 54(8)-(11), s 115(4).

20. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10.

21. *Road Transport Act 2013* (NSW) s 203.

elect to be issued with a “good behaviour licence”. If during the period of its currency the driver incurs 2 or more demerit points, a notice will issue suspending the driver for twice the period that would otherwise have applied. A similar provision applies to a person who has received a notice of licence ineligibility.<sup>22</sup>

- 20.11 A person (other than an habitual traffic offender) who faces disqualification for committing an “alcohol-related major offence” can be given a conditional licence that will allow the offender to drive a vehicle, subject to a disqualification compliance period, so long as the vehicle is fitted with an approved interlock device that will prevent it from being started if detects a prescribed alcohol level.<sup>23</sup>
- 20.12 Where a person faces possible suspension because he or she is unable to satisfy penalty notices or fines (having exhausted any review rights) then there is a procedure, as part of a fine enforcement action, for the amount due to be cut out through compliance with a work and development order.<sup>24</sup>
- 20.13 Otherwise there are limited rights of appeal against orders made that effectively curtail the right of a person to drive lawfully,<sup>25</sup> as well as limitations on the extent to which the courts can reduce the length of disqualification periods.

### Frequency of driver licence disqualification

- 20.14 The impact of the road transport legislation on the workload of the Local Court and District Court is significant. In 2011, 15,278 people were sentenced for driving while disqualified. Of these, 695 were sentenced to imprisonment (198 of this group were Aboriginal people or Torres Strait Islanders). This represents over 10% of the 6,809 people who were sent to prison that year by the Local Court.
- 20.15 By contrast, although the Local Court sentenced a greater number of people (24,788) for regulatory driving offences (that is, those offences concerned with safety including drink driving and speeding), it imprisoned only 197 people within this group.

### Stakeholder concerns

- 20.16 Stakeholders brought a number of concerns to our attention about the operation of these provisions, and the consequences of driver licence cancellation, disqualification or suspension, and licence ineligibility, particularly where they lead to further engagement with the criminal justice system.
- 20.17 It was suggested, first, that licence disqualification, cancellation or suspension can have a disproportionate effect on:

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22. *Road Transport Act 2013* (NSW) s 36.

23. *Road Transport Act 2013* (NSW) s 208-215; *Road Transport (Driver Licensing) Regulation 2008* (NSW) pt 10.

24. *Fines Act 1996* (NSW) pt 4 div 8 subdiv 1.

25. See, eg, *Road Transport Act 2013* (NSW) s 269-270; *Road Transport (General) Regulation 2013* (NSW) pt 8.

- people in remote and rural areas where public transport is not available, potentially impacting on their prospects of employment; their interaction with the community; and their capacity to attend medical appointments, to drive children to and from school and to other functions, and to engage with family generally;<sup>26</sup>
  - members of the Aboriginal community, who are significantly represented in Local Court proceedings for road and traffic offences, and who may face particular difficulties in paying fines or in participating in the work and development order scheme;<sup>27</sup>
  - young adults whose inability to retain or obtain a licence because of earlier offences can reduce their employment prospects, or act as a disincentive to becoming the responsible holder of a licence.<sup>28</sup>
- 20.18 Secondly, it was suggested that the system creates an increased risk of imprisonment for some offenders arising from the inevitable temptation or pressures that they face to keep driving while unlicensed; a factor of some importance for Aboriginal offenders who are disproportionately represented in the corrections system for driving licence offences.<sup>29</sup>
- 20.19 Thirdly, attention was drawn to the consequences of the accumulation of periods of disqualification which, in some cases, preclude an offender from driving lawfully for periods in excess of 10-20 years.<sup>30</sup>
- 20.20 Fourthly, attention was drawn to the limited discretion that is available to the courts to reduce the periods of disqualification. This sometimes results in an offence that might otherwise result in loss of a licence being dealt with by way of an order under s 10 of the CSPA (although not in circumstances in which its use is excluded).<sup>31</sup>
- 20.21 Finally, a question was raised about the extent to which driver disqualification or suspension has a deterrent effect, and in particular whether imposing lengthy periods of disqualification can have the opposite effect in setting drivers up to reoffend.
- 20.22 None of these concerns is new, each having been identified in our 2012 report on penalty notices<sup>32</sup> and in the 2011 report of the NSW Sentencing Council on good behaviour bonds and non-conviction orders.<sup>33</sup>
- 20.23 The *Road Transport Act 2013* (NSW) was recently enacted to consolidate the provisions of the *Road Transport (General) Act 2005* (NSW), the *Road Transport*

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26. See, eg, Law Society of NSW, *Submission SE43*, 8; The Shopfront Youth Legal Centre, *Submission SE37*, 7; Legal Aid NSW, *Submission SE50*, 10.

27. Law Society of NSW, *Submission SE43*, 9; Legal Aid NSW, *Submission SE50*, 10; Legal practitioners, Dubbo, *Consultation SEC14*.

28. NSW Bar Association, *Submission SE46*, 4.

29. The Shopfront Youth Legal Centre, *Preliminary submission PSE13*, 8; Corrective Services NSW, *Submission SE55*, 18; C Farnan, *Preliminary submission PSE6*, 1.

30. See, eg, C Farnan, *Preliminary submission PSE6*, 1-3, The Shopfront Youth Legal Centre, *Preliminary submission PSE13*, 8.

31. The Shopfront Youth Legal Centre, *Preliminary submission PSE13*, 8.

32. NSW Law Reform Commission, *Penalty Notices*, Report 132 (2012) [1.53]-[1.55], [8.19]-[8.46].

33. NSW Sentencing Council, *Good Behaviour Bonds and Non-Conviction Orders*, Report (2011) [3.24]-[3.31], [5.22]-[5.45].



(*Safety and Traffic Management*) Act 1999 (NSW), the *Road Transport (Driver Licensing)* Act 1998 (NSW) and the *Road Transport (Vehicle Registration)* Act 1997 (NSW). However, this consolidation exercise has largely maintained the current law, and has not addressed the practical consequences of driver licence disqualification and suspension that were identified in submissions and consultations. Nor does it address the fact that there is a significant body of people in prison, particularly from the Aboriginal community, solely because of driving offences.

## Proposals for change

20.24 Several possibilities for reform were proposed in submissions and consultations:

- Abolishing the habitual traffic offender declaration.
- Increasing the discretionary power of the courts so they can reduce disqualification periods, confirming that the courts can backdate disqualification periods, and allowing the courts to direct that disqualification periods be served concurrently.
- Reducing the length of some of the disqualification periods, for example, for driving while unlicensed or suspended.<sup>34</sup>
- Reducing the current maximum sentences of imprisonment.
- Placing a cap of 5 years on the maximum period for which disqualifications can be accumulated and thereafter only for such period as the court orders.<sup>35</sup>
- Introducing a licence restoration provision so that a disqualified driver could apply to a court for an order allowing him or her to reapply for a licence after serving a specified period of disqualification, subject to not having been convicted of a driving offence during that period (this could also be linked to a requirement for additional testing or driver education).<sup>36</sup>
- Extending the good behaviour licensing scheme to selected circumstances where upon conviction the driver would otherwise be subject to driver licence disqualification.<sup>37</sup>
- Conferring jurisdiction in the Administrative Decisions Tribunal (or the NSW Consumer and Administrative Tribunal on commencement) to review suspensions or disqualifications that were imposed administratively (that is, other than by court orders).

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34. See, eg, NSW, Office of the Director or Public Prosecutions, *Submission SE41*, 8; Law Society of NSW, *Submission SE43*, 7-8; The Shopfront Youth Legal Centre, *Submission SE37*, 2; Legal Aid NSW, *Submission SE50*, 11.

35. NSW Bar Association, *Submission SE46*, 4.

36. NSW, Office of the Director or Public Prosecutions, *Submission SE41*, 8; Law Society of NSW, *Submission SE43*, 8; Legal Aid NSW, *Submission SE50*, 11; NSW Police Force, *Submission SE45*, 1; NSW Bar Association, *Submission SE46*, 4.

37. Legal Aid NSW, *Submission SE50*, 11 and see NSW Sentencing Council, *Good Behaviour Bonds and Non-Conviction Orders*, Report (2011) [5.29]-[5.33].

## Our view

- 20.25 The current legislative scheme can have a disproportionate impact on some groups of offenders. For a number of people repeat offending, and in particular offending that involves driving while disqualified or unlicensed, will result in a term of imprisonment that may be disproportionate to the objective criminality involved. On the other hand, serious driving offences particularly those that are alcohol and drug related, or that involve dangerous driving, driving at excessive speeds, or engaging in high risk activities such as police pursuits or drag races (particularly where death or bodily injury is occasioned to others), deserve significant sanctions that may properly include imprisonment and driver licence disqualification.
- 20.26 Although there was a good deal of encouragement given in submissions and consultations for us to make recommendations on these matters, we consider that they fall outside our terms of reference. The topic is a large one that is of particular importance for police, road and traffic authorities and other stakeholders in NSW and that also has a national component. Nonetheless we highlight this issue as one of considerable concern to stakeholders that, in our view, requires further close consideration and consultation, in the context of the implementation of the proposed omnibus Road Transport Act.

### **Recommendation 20.1: Review of driver licence disqualification**

- (1) The government should review the system of driver licence disqualification, suspension and cancellation. The review should include, but not be limited to, a consideration of:
- (a) the length of the automatic and mandatory disqualification periods, and the maximum available sentences of imprisonment, that currently arise under the legislation;
  - (b) the courts' powers to impose or vary disqualification periods;
  - (c) the abolition of the habitual traffic offender declaration;
  - (d) placing a cap on the accumulation of disqualification periods, or permitting such periods to apply concurrently;
  - (e) introducing an administrative review procedure in relation to non court imposed suspensions or cancellations; and
  - (f) introducing a procedure for the courts to cancel licence disqualifications after the offender has served a prescribed period of disqualification without further offending.
- (2) For ease of understanding and consistency in expression, any revision of the proposed Road Transport Act should consolidate in one Part of the Act all of the provisions relating to driver licence disqualification, suspension, cancellation and ineligibility along with any rights for review, or licence restoration, as well as any alternatives to disqualification or suspension (good behaviour licences, interlock devices etc).

## Non- association and place restriction orders

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- 20.27 Non-association and place restriction orders are a relatively recent phenomenon introduced as part of a package of reforms to address gang-related crime. They appear to have been little used. They have limited stakeholder support. We consider that our proposed new sentences, especially the community detention order (CDO) and the community correction order (CCO), would allow courts to impose such conditions as part of a sentence, and would provide a better alternative, removing the need for these orders in a revised Crimes (Sentencing) Act.

### The current law

- 20.28 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. In the second reading speech it was observed that the courts should not use the orders “to water down the sentences they would have otherwise imposed”;<sup>38</sup> and that while non-association or place restriction orders were described as “a new form of sentence”,<sup>39</sup> they were intended as a means of preventing crime and promoting rehabilitation rather than as an additional form of punishment.<sup>40</sup>
- 20.29 The court may make non-association and place restriction orders of up to 12 months’ duration when sentencing an offender for an offence punishable by imprisonment for at least six months.<sup>41</sup> The court imposes an order in addition to and not as an alternative to any sentence it has imposed for the offence.<sup>42</sup> The court must not make an order if the only sentence it has imposed is a s 10 dismissal or good behaviour bond, or a s 11 deferral.<sup>43</sup> The court can impose an order if it is satisfied that it is reasonably necessary in order to prevent the offender from committing further offences.<sup>44</sup> The Act provides a number of limitations and safeguards relating to the categories of people and places that may be specified in the order.<sup>45</sup> Contravention of an order, without reasonable excuse, is an offence attracting a maximum penalty of imprisonment for six months and/or a fine of 10 penalty units.<sup>46</sup>
- 20.30 Similar orders can be imposed under legislation in some other Australian jurisdictions, although not in the same terms as those in NSW, or for the same purpose. In Queensland, a court may impose a non-contact order and also a banning order (prohibiting a person from entering or remaining in, or in the vicinity

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38. NSW, *Parliamentary Debates*, Legislative Assembly, 26 October 2001, 18104 (T Stewart).

39. NSW, *Parliamentary Debates*, Legislative Assembly, 26 October 2001, 18104 (T Stewart).

40. NSW, *Parliamentary Debates*, Legislative Assembly, 26 October 2001, 18104 (T Stewart).

41. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17A(1).

42. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17A(5).

43. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17A(4).

44. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17A(2).

45. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100A.

46. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100E.

of, certain licensed premises, or attending public events where liquor will be sold).<sup>47</sup> In Victoria, as part of a community correction order, a court may order non-association, a residence restriction or exclusion, a place or area exclusion, and an alcohol exclusion (prohibiting presence and consumption of alcohol in licensed premises).<sup>48</sup> Non-association and place restriction orders are also available in the ACT as ancillary sentencing orders.<sup>49</sup>

### Use of non-association and place restriction orders

- 20.31 The NSW Ombudsman reviewed the operation of non-association and place restriction orders in 2006 and found that between 22 July 2002 and 22 July 2004, courts had imposed only 20 orders. Four were non-association orders and 16 were place restriction orders.<sup>50</sup>
- 20.32 The Ombudsman classed five of the 20 matters as “‘gang-type’ offences” involving young people. None involved criminal conduct by members of serious organised gangs. Of these five offences, two involved shoplifting by a small group of young people; one involved an assault of a group by two young males; one involved a robbery on a train involving six young people; and one involved an offence of affray involving five young males influenced by intoxication and road rage.<sup>51</sup>
- 20.33 Use of non-association and place restriction orders has increased since the Ombudsman’s report but remains low. In 2012, 92 such orders were imposed (16 non-association orders and 76 place restriction orders). On average between 2005 and 2012, 13 non-association orders and 74 place restriction orders were imposed each year.<sup>52</sup> JIRS statistics record 57 cases of contravention of a non-association or place restriction order in the four years from January 2009 to December 2012, with varying outcomes including the imposition of imprisonment in 16 cases (28%).<sup>53</sup>

### Submissions

- 20.34 Four stakeholders opposed the retention of non-association and place restriction orders,<sup>54</sup> two stakeholders offered possible support for their retention<sup>55</sup> and only the NSW Police Force offered clear support for retention.<sup>56</sup>

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47. *Penalties and Sentences Act 1992* (Qld) s 43A-43F s 43G-43O.

48. *Sentencing Act 1991* (Vic) s 48F, s 48G, s 48H, s 48J.

49. *Crimes (Sentencing) Act 2005* (ACT) pt 3.4.

50. NSW Ombudsman, *Review of the Justice Legislation Amendment (Non-association and Place Restriction) Act 2001*, Final Report (2006) 33.

51. NSW Ombudsman, *Review of the Justice Legislation Amendment (Non-association and Place Restriction) Act 2001*, Final Report (2006) 42.

52. NSW Bureau of Crime Statistics and Research (unpublished data, ref: HcLc1311394dg). See also NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) figure 9.4.

53. Judicial Information Research System (JIRS), *Penalty type for the principle offence; Crimes (Sentencing Procedure) Act 1999* (NSW) s 100E(1).

54. Public Defenders, *Submission SE36*, 4; The Shopfront Youth Legal Centre, *Submission SE37*, QP 10, 6; Law Society of NSW, *Submission SE43*, 9; Legal Aid NSW, *Submission SE50*, 11.

55. NSW, Office of Director of Public Prosecutions, *Submission SE41*, 9; NSW, Department of Family and Community Services, *Submission SE44*, 8.

56. NSW Police Force, *Submission SE45*, 2.

- 20.35 Of those opposed to the orders, three stakeholders noted that non-association and place restriction orders have not been effective in achieving the original objective of dealing with gang-related crime.<sup>57</sup> Public Defenders, Shopfront and Legal Aid drew attention to adverse effects on vulnerable people. Shopfront Youth Legal Centre,<sup>58</sup> for example, asserted that the current provisions were potentially too broad in their application. It suggested that they are likely to be used in the case of disadvantaged groups such as Aboriginal people and young people who may have a real difficulty in complying and in seeking a variation or revocation of such orders.<sup>59</sup> Legal Aid NSW and the Public Defenders drew attention to difficulties people with cognitive impairment, mental illness, homeless people, and young people might have with complying. Breach may lead to harsher sentences and deeper entrenchment in the criminal justice system.<sup>60</sup>
- 20.36 The Office of the Director of Public Prosecutions (ODPP) drew attention to what appears to be the limited use of these orders and submitted that the need for them was arguably reduced in light of the new consorting offences.<sup>61</sup>
- 20.37 The Public Defenders' concern as to the possible inappropriate imposition of these orders on vulnerable people, including those with cognitive impairments, was shared by Family and Community Services, which submitted that non-association orders have the potential to impact severely on those with cognitive impairments who rely on informal carers to negotiate everyday life situations.<sup>62</sup> Although Family and Community Services acknowledged that these orders can help to protect an offender from exposure to unsafe influences, and that the current restrictions on their reach can provide a reasonable safeguard against their arbitrary application, it also suggested that the role of informal carers had not been sufficiently recognised.<sup>63</sup>
- 20.38 Family and Community Services suggested that it could be beneficial to consider adding non-association and place restriction orders to s 11 adjournment orders. Additionally it proposed a model in which the orders would commence when an offender was released from custody, and in which service providers and stakeholders could be given an opportunity, at that time, to engage and structure appropriate support. It observed that a similar system in NZ was having positive outcomes.<sup>64</sup>
- 20.39 Some practical impediments to the use of these orders were noted in the submissions, along with some suggestions for reform. For example, the NSW Police Force submitted that non-association and place restriction orders are difficult to obtain because of the significant amount of information required. It also suggested

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57. The Shopfront Youth Legal Centre, *Submission SE37*, QP10, 6 and QP 10 Attachment, 2; Law Society of NSW, *Submission SE43*, 9; Legal Aid NSW, *Submission SE50*, 11.

58. The Shopfront Youth Legal Centre, *Submission SE37*, QP10 Attachment, 2.

59. The Shopfront Youth Legal Centre, *Submission SE37*, QP10, 6.

60. Legal Aid NSW, *Submission SE50*, 11.

61. NSW, Office of Director of Public Prosecutions, *Submission SE41*, 9.

62. NSW, Department of Family and Community Services, *Submission SE44*, 8.

63. NSW, Department of Family and Community Services, *Submission SE44*, 8-9.

64. NSW, Department of Family and Community Services, *Submission SE44*, 8-9.

that it would be of more benefit if they could be made for longer periods and if the penalty for not complying was more significant.<sup>65</sup>

- 20.40 The Police Association of NSW submitted that it is important that the conditions imposed for non-association and place restriction orders are not unreasonably broad, or too onerous or unworkable in practice. It observed that non-association and place restriction orders have not been extended to restrict offenders from visiting associates in custody, which gives rise to a risk of criminals continuing their criminal enterprises through prison visits and within prisons.<sup>66</sup>
- 20.41 Legal Aid proposed that if non-association and place restriction orders are retained, then sufficient warning should be given to the defence and that it should have an opportunity to make submissions in response to any such application.<sup>67</sup>
- 20.42 The Public Defenders submitted that if non-association and place restriction orders are to be retained, a decision to seek such an order should be subject to review by an officer of the rank of Deputy Commissioner or similar, and that the relevant legislation should also continue to be subject to regular review by the NSW Ombudsman.<sup>68</sup>

### Our view

- 20.43 In earlier chapters of this report, we have included non-association or place restriction conditions as possible elements of the new sentencing options that we propose.<sup>69</sup> Serious consequences follow breach of a condition of these sentences. A breach of such a condition included in a CDO would give rise to intervention by the State Parole Authority (SPA), including imprisonment where warranted. A breach of a CCO or a conditional release order (CRO) would be dealt with by a court and often involve resentencing.
- 20.44 We prefer permitting non-association and place restriction requirements as additional conditions of sentences to imposing these conditions through ancillary orders. It overcomes the concerns noted in the submissions. Moreover dealing with a contravention as a new offence can have the effect of further criminalising the offender. In our view the proposed new sentences would offer greater flexibility and ensure that the relevant restriction is only imposed where practicable and necessary in all of the circumstances of the case. So framed the proposals should ensure that any restrictions are not disproportionate to the offending and circumstances of the offender. Our proposed sentences also have an element of supervision and support from Corrective Services NSW, improving the prospects of compliance.
- 20.45 Independently of those reforms, we note that similar restrictions can already be imposed with existing sentences under the current law, for example, as conditions of bail or of s 9 and 10(1)(b) bonds, or of suspended sentences. At the time of

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65. NSW Police Force, *Submission SE45*, 2.

66. Police Association of NSW, *Submission SE34*, 16.

67. Legal Aid NSW, *Submission SE50*, 12.

68. The Public Defenders, *Submission SE36*, 4.

69. See para [11.31], [13.27]-[13.28] and Recommendation 13.13.

release on parole an offender can also become the subject of such a condition under a release order, a breach of which can be dealt with by SPA.

20.46 Additionally, there are now several provisions that more directly discourage or punish gang-related association and criminal activities which was the intended focus of the non-association and place restriction provisions. They include:

- the consorting provisions;<sup>70</sup>
- the provisions that deal with participation in a criminal group;<sup>71</sup>
- the provisions that apply to any association between members of a declared organisation who are themselves subject to control orders;<sup>72</sup>

20.47 Having regard to the availability of these alternatives and to the concerns noted above as to whether the non-association and place restriction provisions are being used to any significant extent or are serving the objectives of the legislation, we question the utility of retaining them.

20.48 Because we have proposed a different approach in Chapters 11 and 13 and because we have not been able to access information as to the extent to which, or the circumstances in which, the orders have been used since the Ombudsman's review, we do not make a formal recommendation for the repeal of s 17A or of the consequential provisions contained in s 100A-100H of the CSPA. However, it would be appropriate for this possibility to be considered as part of the government's response to this report.

## Parole

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20.49 The CSPA provides that a court that imposes a head sentence of three years or less must direct the prisoner's release to parole at the end of the non-parole period.<sup>73</sup> An issue that arose in the course of the consultations and submissions is whether this provision should be amended.

20.50 Legal Aid NSW suggested in its preliminary submission that this requirement should be extended to apply to terms of imprisonment of five years or less.<sup>74</sup> That proposal received a mixed reaction from stakeholders.<sup>75</sup> It would potentially apply to a significantly larger group of offenders.

70. *Crimes Act 1900* (NSW) s 93X.

71. *Crimes Act 1900* (NSW) s 93T.

72. *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 26 and s 27.

73. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 50.

74. Legal Aid NSW, *Preliminary submission PSE18*, 8.

75. In favour of the proposal: Law Society of NSW, *Submission SE16*, 4; The Public Defenders, *Submission SE24*, 7; NSW Bar Association, *Submission SE27*, 4 and The Shopfront Youth Legal Centre, *Submission SE28*, 5. Against the proposal: Corrective Services NSW, *Submission SE52*, 4; Homicide Victims' Support Group, *Submission SE23*, 10; NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 3; NSW Police Force, *Submission SE32*, 4; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 8; and Probation and Parole Officers' Association of NSW, *Submission SE39*, 10. Concerns were expressed by NSW, Department of Family and Community Services, *Submission SE48*, 5.

- 20.51 The release to parole of prisoners who have head sentences of three years or less is not as straight-forward as may first appear, as SPA, from time to time, has revoked the court-ordered parole orders.<sup>76</sup> The general power of SPA<sup>77</sup>, to revoke a parole order before an offender is released, extends to revoking a court-ordered parole order.<sup>78</sup> Reasons for revoking parole include the fact that “the offender is unable to adapt to normal lawful community life”, or that “satisfactory accommodation arrangements or post-release plans have not been made or are not able to be made”.<sup>79</sup> Revocation can be made as a result of a request by the offender or the sentencing court; or by the Attorney General or Director of Public Prosecutions if it is suggested that false, misleading or irrelevant information was relied upon to make the order.<sup>80</sup>
- 20.52 The Shopfront Youth Legal Centre said that it appeared that SPA often revoked court orders for release for reasons that included, in addition to those mentioned above, failure to undertake programs in custody (referring specifically to sex offender programs) and failure to demonstrate good behaviour in custody.<sup>81</sup> The Bar Association submitted that the capacity of SPA to revoke a court order for release on parole “is not an entirely satisfactory situation” and suggested that it be reviewed.<sup>82</sup> The Children’s Court suggested as a safeguard against inappropriate exercise of this power that “a presumption for release, with timely and regular review where release is revoked, should be provided for in the legislation”.<sup>83</sup>

### Our view

- 20.53 In the absence of any detailed examination of the parole system, which is outside our terms of reference, we do not consider it appropriate to make any specific recommendations about most of the issues that were raised in submissions in relation to parole. We will further consider these issues as part of our new reference to review the parole system in NSW.
- 20.54 We are, however, concerned about the restriction that currently exists for applications for reinstatement of parole by offenders whose parole has been revoked. Because of the definition of “parole eligibility date” contained in the *Crimes (Administration of Sentences) Act 1999* (NSW) a parolee who is “returned to custody while on release on parole or following revocation of parole” cannot reapply for parole for 12 months.<sup>84</sup>
- 20.55 This can result in parolees who are sentenced in the Local Court to a very short sentence of imprisonment for a minor offence being detained for a period well in

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76. Criminal Justice System Stakeholders, Consultation SEC5; Legal Aid NSW, *Submission SE31*, 5-6.

77. *Crimes (Administration of Sentences) Act 1999* (NSW) s 30.

78. The definition of “parole order” under *Crimes (Administration of Sentences) Act 1999* (NSW) s 3 includes a parole order made by a court under *Crimes (Sentencing Procedure) Act 1999* (NSW) s 50.

79. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 232(1)(b), (c).

80. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 232(1)(a), (d); *Crimes (Administration of Sentences) Act 1999* (NSW) s 172.

81. The Shopfront Youth Legal Centre, *Submission SE28*, 5.

82. NSW Bar Association, *Submission SE27*, 4.

83. Children’s Court of NSW, *Submission SE18*, 6.

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



excess of the newly imposed sentence, without being able to apply for re-release on parole. This consequence may not have been apparent to the Local Court or, even if it was apparent, it may be that the Court considered that it had no option other than to impose a very short sentence of imprisonment for the new offence.

- 20.56 In our view this does require urgent reconsideration, either by reducing the waiting period for a reinstatement application, for example, until the newly-imposed sentence expires; or by giving the SPA discretion, for example, to specify a shorter time frame to apply for a reinstatement.

### **Recommendation 20.2: Relaxing the 12 month restriction on parole**

The government should consider amending the *Crimes (Administration of Sentences) Act 1999* (NSW) to relax the current restriction that prevents an offender who is returned to custody while on release on parole or following revocation of parole from applying for re-release on parole for 12 months from the time when he or she is returned to custody.

## The Local Court's sentencing powers

- 20.57 The Local Court can impose a sentence of imprisonment for any one offence (subject to the maximum sentence available for that offence) of up to two years,<sup>85</sup> and can accumulate sentences for multiple offences up to five years.<sup>86</sup> Stakeholders raised three issues about these powers:
- whether the jurisdictional limit for a single offence should be increased to five years;
  - whether there should be a legislative statement that the Court's jurisdictional limit is not restricted to "worst cases" of an offence; and
  - how the Local Court's power under s 53A of the CSPA to impose an aggregate sentence of up to five years interacts with the jurisdictional limit of two years for individual offences.

### No increase to jurisdictional limit

- 20.58 The Chief Magistrate of the Local Court has been concerned for some time that the current jurisdictional limit of the Local Court can lead to inappropriately lenient sentences in some cases.<sup>87</sup> Through the "Table" system, magistrates can deal summarily with a range of indictable offences in the Local Court.<sup>88</sup> "Table" offences that the Local Court can deal with include some offences of violence (such as

85. These limits are subject to exceptions, such as the further accumulation of a sentence for an escape offence, or where the maximum penalties for certain offences dealt with in the Local Court are lower than 2 years.

86. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 58.

87. G Henson, *Preliminary submission PSE5*, 5.

88. Indictable offences that may be determined summarily in the Local Court are listed in *Criminal Procedure Act 1986* (NSW) sch 1 Tables 1 and 2.

assault occasioning actual bodily harm), as well as child sex, fraud and firearms offences that carry maximum penalties of between 10 and 15 years imprisonment.<sup>89</sup> For all “Table” offences, the prosecution may elect to have the District Court determine the matter.<sup>90</sup> This should happen if the conduct is serious and a sentence within the Local Court’s jurisdictional limit of two years imprisonment is unlikely to be appropriate.

20.59 Over time, the Local Court has finalised a growing number of such indictable offences. In particular, the Local Court dealt with at least the same number of SNPP offences as the District Court between 2003 and 2011.<sup>91</sup> The Chief Magistrate submitted that increasingly serious criminal conduct is being dealt with summarily and that such serious offences receiving sentences within the two year limit challenges the legitimacy of the sentencing exercise that the Local Court undertakes.<sup>92</sup>

20.60 In 2010, the NSW Sentencing Council considered the possibility of increasing the jurisdictional limit of the Local Court to five years for a single offence. The Council concluded that the jurisdictional limit should not be increased because:

- There would be a significant impact on the distribution of cases in the courts, increasing the Local Court’s workload and the time taken to complete matters, while decreasing the trial workload of the District Court and undermining the protections of trial by jury;
- Appeals from the Local Court to the District Court would increase;
- The workload of Police Prosecutors would increase, requiring additional resources and training or the deployment of additional staff from the ODPD to prosecute cases in the Local Court, and increasing the demand for Legal Aid representation in the Local Court.
- Sentence creep might occur, increasing the resources required to house prisoners and to administer those sentences.<sup>93</sup>

20.61 The Council suggested that the solution should lie in improved prosecution practice, including closer consultation between police and the ODDP to ensure that that the District Court dealt with serious matters.

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89. See, eg, the following offences under the *Crimes Act 1900* (NSW): attempted sexual intercourse upon a child aged between 14 and 16 years, or assault with intent to commit such an offence: s 66D, s 66EB, s 61O(2A); using poison etc to endanger life or inflict grievous bodily harm: s 39; aggravated dangerous driving or navigation occasioning grievous bodily harm: s 52A(4) and s 52B(4); possessing or making explosives or other things with intent to injure: s 55; aggravated indecent assault: s 61M(2); producing, disseminating or possessing child abuse material: s 91H; offences involving fraud: s 192E; and stealing firearms: s 154D.

90. For Table 1 offences, the prosecution or the defendant may elect to have the District Court hear the matter.

91. Including maliciously or recklessly inflict grievous bodily harm (or in company), malicious or reckless wounding (or in company), assault police officer occasioning actual bodily harm, ‘car jacking’, cause bushfire and unauthorised possession or use of a prohibited firearm or a prohibited weapon: Email from the Local Court of NSW’s Policy Officer (26 September 2012), citing data from the NSW Bureau of Crime Statistics and Research.

92. G Henson, *Submission SES2*, 1-2; G Henson, *Preliminary submission PSE5*, noting a 33% increase in the number of indictable matters finalised in the Local Court from 53,063 in 1996 to 70,708 in 2008.

93. NSW Sentencing Council, *An Examination of the Sentencing Powers of the Local Court in NSW* (2010) [4.9].

- 20.62 However, the Council recognised that this may not provide a complete answer. A majority of the Council also recommended that a narrowly circumscribed discretion should be conferred on magistrates to refer matters to the District Court for sentencing, if the magistrate was satisfied that any sentence that he or she could impose would not be commensurate with the seriousness of the offence.<sup>94</sup> That recommendation has not been accepted and we will not revisit it here.

### *Stakeholders' views about the NSW Sentencing Council's conclusions*

- 20.63 Most submissions did not support an increase in the Local Court's jurisdictional limit. Stakeholders' resistance to such a change was largely based on the reasons that the NSW Sentencing Council identified in 2010.<sup>95</sup> The NSW Police Force was in favour of such an increase, although it also recognised that this would result in police prosecutors dealing with more matters.<sup>96</sup>
- 20.64 The Chief Magistrate continued to be strongly in favour of an increase to the Local Court's jurisdictional limit.<sup>97</sup> His submission dealt in detail with the objections raised by the NSW Sentencing Council and we accept many of his arguments.<sup>98</sup>
- 20.65 As the Chief Magistrate rightly points out, the Local Court already deals with 98% of criminal matters to finalisation. An increase in its sentencing jurisdiction to five years is unlikely to have a significant or serious impact on its overall caseload. Most matters finalised in the District Court still go through a committal process in the Local Court. If these cases were retained in the Local Court, then the committal hearing would be replaced by a finalisation in that court. The Chief Magistrate notes this would have only a small impact on overall workload.<sup>99</sup> Similarly, it was suggested a small transfer of cases from the District Court to the Local Court is unlikely to have a noticeable impact on the number of District Court jury trials.<sup>100</sup>
- 20.66 The Chief Magistrate questions whether an increase in the Court's jurisdictional limit is likely to have resource implications for Legal Aid NSW and the ODP. <sup>101</sup> Even if the distribution of cases between the Local Court and the District Court changed,

94. NSW Sentencing Council, *An Examination of the Sentencing Powers of the Local Court in NSW* (2010) [4.25]. The NSW Police Force supported this proposal: NSW Police Force, *Submission SES11*, 11-12. However, the Chief Magistrate was opposed: G Henson, *Submission SES2*, 1-2 and annexure letter; and the Chief Judge of the District Court did not see anything in favour of the proposal: R Blanch, *Submission SES1*, 3.

95. Law Society of NSW, *Submission SE16*, 4-5; NSW Bar Association, *Submission SE27*, 5; The Shopfront Youth Legal Centre, *Submission SE28*, 6; Legal Aid NSW, *Submission SE31*, 6-7. NSW Young Lawyers also opposed unless it could be demonstrated that the Local Court was "frequently" identifying its jurisdictional limit as a reason why it could not impose appropriate sentences: NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 9. The ODP indicated that there were "very divergent views" within the Office on whether there should be any increase: NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 3-4.

96. NSW Police Force, *Submission SE32*, 5-6. NSW, Department of Family and Community Services identified one potential benefit limit in that the power for Magistrates to divert or discharge matters under *Mental Health (Forensic Provisions) Act 1990* (NSW) s 32 and s 33 would be available for more offenders who had cognitive impairments and/or mental health issues, but a change to the higher courts' powers to deal with offenders could also achieve this: *Submission SE48*, 6.

97. G Henson, *Submission SE22*, 3.

98. G Henson, *Submission SE22*, Attachment 1.

99. G Henson, *Submission SE22*, Attachment 1, 3.

100. G Henson, *Submission SE22*, Attachment 1, 4.

101. G Henson, *Submission SE22*, Attachment 1, 6.

the overall number of criminal matters would remain the same. Legal Aid NSW and the ODPP might need to rebalance the allocation of their resources between the two court levels, but this would not necessarily lead to a need for additional resources.

- 20.67 The Chief Magistrate also submitted that the NSW Sentencing Council's conclusion about an increase appeals to the District Court was "speculative".<sup>102</sup> We accept that it is not known whether there is likely to be a significant increase in appeals if the Local Court was able to impose sentences of up to five years. Similarly, it is not known whether "sentence creep" would occur.
- 20.68 In addition to these counter-arguments, the Chief Magistrate submitted that an increase to the Local Court's sentencing jurisdiction would not necessarily lead to a transfer of cases to the Local Court that would have otherwise been heard in the District Court.<sup>103</sup> His view is that an increase to the jurisdictional limit of the Local Court would involve an increase in its sentencing powers but not necessarily an increase in the number or category of cases dealt with in the Local Court. The objective would be to improve the magistrates' ability to impose an appropriate sentence in all the cases that they determine, rather than to increase the range and number of cases dealt with by magistrates.

#### *Our view*

- 20.69 The Chief Magistrate's principal concern is that offenders convicted in the Local Court may receive an inadequate sentence because of the current jurisdictional limits in dealing with Table offences, which confine the maximum sentences of imprisonment that can be imposed (with some exceptions) to terms of two years.<sup>104</sup>
- 20.70 The primary consideration for prosecutors when deciding whether to elect for trial in the District Court turns on their assessment of whether the case can be adequately addressed within the Local Court's sentencing limits.<sup>105</sup> In some cases, the assessment made at the beginning of a case will not accord with the assessment made at the end of the day by the magistrate in possession of all the facts.
- 20.71 The problem is caused by the "hard line" of a sentencing limit, no matter the level at which this limit is set. We acknowledge that the jurisdictional line is arbitrary. It is set based on a legislative judgement about the appropriate sentencing jurisdiction for the summary disposal of a criminal prosecution. In the absence of broad stakeholder support for an increase to the Local's Courts jurisdiction, we do not recommend a change at this time, although we recognise that this is an important issue that should remain under review. The preferable approach continues to be improved prosecutorial practice, to ensure that the prosecution appropriately elects for serious cases to be heard in the District Court.

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102. G Henson, *Submission SE22*, Attachment 1, 6.

103. G Henson, *Submission SE22*, Attachment 1, 1-2.

104. *Criminal Procedure Act 1986* (NSW) s 267 and s 268.

105. NSW Sentencing Council, *An Examination of the Sentencing Powers of the Local Court in NSW* (2010) [1.24].

- 20.72 In future, other concerns may strengthen the case for an increase to the Local Court's jurisdictional limit. For example, any significant increase to the caseload of the District Court causing unacceptable delay, or additions to the offences that are part of the Table system (for example, SNPP offences), or the introduction of strategies encouraging earlier resolution through pleas entered in the Local Court, may mean that the question of the Local Court's sentencing jurisdiction needs to be revisited.
- 20.73 The NSW Sentencing Council should continue to monitor any problems with the sentencing limit and report on the issue within two years. If it becomes apparent that more serious cases continue to be prosecuted in the Local Court and that the jurisdictional limit is preventing the imposition of appropriate sentences, or that the current limit is causing a significant increase in the workload of the District Court and delays, then this question should be reconsidered.

**Recommendation 20.3: No change to the jurisdictional limit of the Local Court at this time**

- (1) At this time, the general jurisdictional limit of the Local Court should remain at two years when sentencing for a single offence.
- (2) The NSW Sentencing Council should monitor the consequences of the limit on the Local Court's sentencing jurisdiction. The Council should consider any difficulties that the limit presents for imposing appropriate sentences and any other relevant matter, including the possibility that it is adversely affecting the timely disposition of the state's criminal caseload. The Council should report on its review within two years.

### Jurisdictional limit not restricted to "worst cases"

- 20.74 The Court of Criminal Appeal stated in *R v Doan*:

where the maximum applicable penalty is lower because the charge has been prosecuted within the limited summary jurisdiction of the Local Court, that court should impose a penalty reflecting the objective seriousness of the offence, tempered if appropriate by subjective circumstances, taking care only not to exceed the maximum jurisdictional limit.<sup>106</sup>

It follows that a magistrate need not reserve a sentence of two years imprisonment for the "worst case" examples of an offence.

- 20.75 A number of submissions did not favour a statutory confirmation of the *Doan* principle, on the basis that the law is sufficiently clear,<sup>107</sup> and understood<sup>108</sup> as not to require a legislative statement.<sup>109</sup> The Public Defenders submitted that a statutory statement might in fact encourage magistrates to impose the maximum sentence

106. *R v Doan* [2000] NSWCCA 317; 50 NSWLR 115 [35].

107. Law Society of NSW, *Submission SE7*, 8.

108. NSW Young Lawyers Criminal Law Committee, *Submission SE12*, 13; Legal Aid NSW, *Submission SE11*, 12.

109. The Public Defenders, *Submission SE2*, 6; Law Society of NSW, *Submission SE7*, 8; Legal Aid NSW, *Submission SE11*, 12; NSW Bar Association, *Submission SE9*, 12.

more frequently.<sup>110</sup> The ODPF submitted that it is difficult to justify a statutory statement as the law is clear, but noted that there have been difficulties in interpretation, particularly in the context of the now repealed *Criminal Case Conferencing Trial Act 2008* (NSW).<sup>111</sup>

- 20.76 Other stakeholders favoured a statutory statement of the *Doan* principle,<sup>112</sup> including the NSW Police Force because of the risk that it might not be observed.<sup>113</sup> It also submitted that the Act should require magistrates to refuse to fix a non-parole period where the appropriate penalty is determined to be beyond the Local Court's jurisdictional limit.<sup>114</sup>

### *Our view*

- 20.77 The principle that the Local Court's jurisdictional limit is not reserved for a "worst case" offence is well settled. We do not consider that it is necessary for it to be enshrined as a statutory statement. If it appears to be overlooked on a regular basis then the solution lies in judicial education including, for example, by inserting an appropriate caution in a Bench Book.
- 20.78 However, the Chief Magistrate has raised a concern about the way in which the *Doan* principle interacts with the setting of a non-parole period.<sup>115</sup> Under the current bottom up approach to sentencing, the magistrate must first pronounce the non-parole period for an offence. If the objective seriousness in a particular case is high although not to the point of being a worst case, the magistrate may, consistently with the decision in *Doan*, decide to set a two year non-parole period. This sentence would then need to be expressed as a two year fixed term as any extension of the sentence to include a potential period of release on parole would take it beyond the Court's jurisdictional limit.
- 20.79 Under the top down approach to sentencing, which we recommend,<sup>116</sup> the court first pronounces the head sentence before fixing a non-parole period. Under this approach, a magistrate in a serious, but not worst, case may decide, consistently with *Doan*, that a two year head sentence is appropriate. The magistrate would then need to consider whether there are good reasons (if our proposed test is adopted, or "special circumstances" if the old test is retained) for departing from the proposed presumptive ratio for a non-parole period of two-thirds of the head sentence (in this case, 16 months) or whether he or she should set the sentence as a fixed term without a non-parole period.

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110. The Public Defenders, *Submission SE2*, 6.

111. NSW, Office of the Director of Public Prosecutions, *Submission SE3*, 7.

112. Children's Court of NSW, *Submission SE4*, 6; G Henson, *Submission SE10*, 3-4; NSW Police Force, *Submission SE14*, 7-8. The Children's Court submitted that the principle should also be stated to apply in that court: Children's Court of NSW, *Submission SE4*, 6.

113. NSW Sentencing Council, *An Examination of the Sentencing Powers of the Local Court in NSW* (2010) 7, cited in NSW Police Force, *Submission SE14*, 7-8.

114. NSW Police Force, *Submission SE14*, 8.

115. G Henson, *Preliminary submission PSE5*, 3.

116. Recommendation 6.1.

- 20.80 Our view is that the court should consider the *Doan* principle when setting the head sentence,<sup>117</sup> an approach that would be assisted by a return to top down sentencing. This would allow the court to set a head sentence at the upper end of the jurisdictional limit in an appropriate case, even though it might not qualify as a worst case. We do not consider that legislative intervention is required to resolve the issue if our recommendation for a return to top down sentencing is accepted.

### Aggregate sentencing in the Local Court

- 20.81 The Chief Magistrate also identified some additional issues concerning the use of aggregate sentencing in the Local Court. For convenience, and because one of the issues has broader implications, we have dealt with them in Chapter 6.<sup>118</sup>

## Rising of the court

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### History and operation of rising of the court

- 20.82 A sentence to the “rising of the court” is a sentence of imprisonment that lasts only until the court adjourns.<sup>119</sup> It is classified as a custodial sentence because the offender is restrained from the moment the sentence is passed until the court’s next adjournment.<sup>120</sup> It would, therefore, be expected, consistently with current sentencing law and practice, that a sentence to the rising of the court should not be imposed unless the court determines that no sentence other than a sentence of imprisonment was appropriate. A sentence to the rising of the court differs from an order under s 10A of the CSPA for this reason.
- 20.83 Section 10A was introduced to deal with circumstances where a s 10 dismissal or discharge without conviction was considered inappropriate, because the offence was not trivial, yet it was inconvenient to impose any further penalty.<sup>121</sup> For example, where the offender has been sentenced to imprisonment but also faces additional fine-only offences and lacks the means to satisfy other than a nominal fine.<sup>122</sup> In the second reading speech for the amending Act, it was explained that s 10A was intended to remedy:

an anomaly in the sentencing regime to overcome situations where inappropriate sentences [were being] imposed, such as fines of 50c. Imposing very small nominal fines costs the courts, and State Debt Recovery Office, more to administer and recover, than the value of the fine; and where the offender is

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117. See G Henson, *Preliminary submission PSE5*, 4.

118. Para [6.90]-[6.95].

119. I MacKinnell, *Sentenced to the Rising of the Court*, Sentencing Trends No 11 (Judicial Commission of NSW, 1996).

120. R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 1985) 354.

121. Explanatory Note, Crimes and Courts Legislation Amendment Bill 2006 (NSW). See also Judicial Commission of NSW, *Sentencing Benchbook* “Section 10A Conviction with no other penalty” (2011) [5-300]. See, eg, *R v Chant* [2009] NSWSC 290; *Nikolovski v Sewell* [2010] NSWIRComm 26, 28.

122. L Wells, “Crimes and Courts Legislation Amendment Act 2006” (2006) 18 *Judicial Officer’s Bulletin* 91; see also Judicial Commission of NSW, *Local Court Bench Book* “Section 10A conviction with no other penalty” (2011) [10-000]; *Nikolovski v Sewell* [2010] NSWIRComm 26, 28.

already serving a sentence of imprisonment, the fine is rarely recovered in any event.<sup>123</sup>

- 20.84 The enactment of s 10A did not abolish the “rising of the court” sentence which remains available.<sup>124</sup>
- 20.85 A sentence to the rising of the court was formerly considered to be useful where a person had been held in custody for a sufficient or excessive period, either on remand or for a previous sentence that was quashed.<sup>125</sup> However, it is now thought that in this situation the court should, if it considers that a custodial sentence is warranted, back-date the sentence to take into account previous custody.<sup>126</sup> If such a sentence has already expired when it is imposed, the defendant will be discharged but the sentence will appear as a custodial sentence on the person’s criminal history and will be recorded as such in the court statistics.
- 20.86 Use of rising of the court has decline in recent times. In 2000, 588 people in the Local Court and two people in the higher courts received rising of the court as their principal penalty (0.58% of offenders sentenced). By 2012 this figure had dropped to just 23 people in the Local Court and six people in the higher courts (0.03% of offenders sentenced).<sup>127</sup>

## Submissions

- 20.87 A majority of stakeholders supported abolishing rising of the court as a sentencing option,<sup>128</sup> although there was some support for retaining it.<sup>129</sup>
- 20.88 A key reason given by stakeholders who support the abolition is that s 10A and s 10 of the CSPA have, in practice, superseded the rising of the court.<sup>130</sup> Other reasons for its abolition are that it is an anachronism,<sup>131</sup> it is rarely used in practice<sup>132</sup> and, more importantly, it is difficult to reconcile an effective immediate release with the conclusion that a sentence of imprisonment is called for under the CSPA.<sup>133</sup>

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123. New South Wales, *Parliamentary Debates*, Legislative Assembly, 27 October 2006.

124. Judicial Commission of NSW, *Sentencing Benchbook* “Section 10A Conviction with no other penalty” (2011) [5-300].

125. I MacKinnell, *Sentenced to the Rising of the Court*, Sentencing Trends No 11 (Judicial Commission of NSW, 1996).

126. *Wiggins v R* [2010] NSWCCA 30 [2]-[8].

127. NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics* (2000-2012). See also NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013) figure 4.10.

128. Law Society of NSW, *Submission SE16*, 10; Children’s Court of NSW, *Submission SE18*, 11; NSW, Office of the Director of Public Prosecutions, *Submission SE19*, 8; G Henson, *Submission SE22*, 5; NSW Bar Association, *Submission SE27*, 8; The Shopfront Youth Legal Centre, *Submission SE28*, QP6, 4; NSW Police Force, *Submission SE32*, 9; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 14; Probation and Parole Officers’ Association of NSW, *Submission SE49*, 10.

129. Juvenile Justice, *Submission SE20*, 2; Public Defenders, *Submission SE24*, 12; Legal Aid NSW, *Submission SE31*, 14.

130. G Henson, *Submission SE22*, 5; The Shopfront Youth Legal Centre, *Submission SE28* (QP 6) 4; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 14; Probation and Parole Officers’ Association of NSW, *Submission SE49*, 10.

131. Law Society of NSW, *Submission SE16*, 10; NSW Bar Association, *Submission SE27*, 8.

132. G Henson, *Submission SE22*, 5; NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 14; Probation and Parole Officers’ Association of NSW, *Submission SE49*, 10.

133. G Henson, *Submission SE22*, 5.



- 20.89 NSW Young Lawyers, in supporting abolition of the sentence, submitted that backdating and taking into account previous periods in custody is to be preferred in circumstances where rising of the court might otherwise be used, as this will more accurately reflect the full time spent in custody in both court statistics and an offender's criminal history.<sup>134</sup>
- 20.90 Legal Aid NSW, however, supported retaining it as a sentencing option, despite its rare use, on the basis that "it could have utility in dealing with secondary offences, particularly where the court has to deal with multiple counts in relation to a single pattern of offending". It suggested that giving the sentence a statutory base could increase awareness of its status as a sentencing option and that its link to imprisonment should be retained.<sup>135</sup>
- 20.91 Juvenile Justice NSW submitted that it should continue as a sentencing option, particularly for young offenders who have spent a considerable time in custody while awaiting sentence.<sup>136</sup>
- 20.92 The Public Defenders also supported retaining it as "a useful sentencing option in cases where an offender has spent a sufficient period in custody on remand or where an offender is being dealt with in relation to several counts". However, they did not see a need to give it a legislative base or to reaffirm its link to imprisonment.<sup>137</sup>
- 20.93 Family and Community Services submitted that sentencing a person, who had previously been on remand, to the rising of the court instead of backdating the sentence to cover the remand period is useful in preserving the opportunity for the sentence to be spent under the *Criminal Records Act 1991* (NSW) where the remand period has exceeded six months. Under the Act a sentence cannot be spent if the prison sentence imposed is more than six months.<sup>138</sup> A sentence to the rising of the court would be a sentence of less than six months for those purposes.<sup>139</sup> However, this risks concealing the true basis on which the offender was sentenced.

## Our view

- 20.94 We consider that the sentence to the rising of the court should be abolished. It is an anachronism and its effect of immediate release can, in nearly all cases, be replicated by a s 10A disposition (or by the "no penalty" sentence that we propose) or by backdating a sentence of imprisonment to cover a period spent on remand and, where necessary in the case of multiple sentences, making use of aggregate sentencing.

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134. NSW Young Lawyers Criminal Law Committee, *Submission SE38*, 14.

135. Legal Aid NSW, *Submission SE31*, 14.

136. Juvenile Justice, *Submission SE20*, 2.

137. Public Defenders, *Submission SE24*, 12.

138. See *Criminal Records Act 1991* (NSW) s 7(1)(a).

139. NSW, Department of Family and Community Services, *Submission SE48*, 7.

20.95 We also note the decreasing use of the sentence and the lack of transparency involved in maintaining a sentencing option that does not have legislative recognition.

**Recommendation 20.4: Abolition of rising of the court**

The sentence “to the rising of the court” should be abolished.

## Appendix A: Submissions

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### Preliminary submissions to the sentencing review

PSE1	Mr Richard Parker
PSE2	Ian Temby AO QC
PSE3	The Hon Justice R O Blanch, Chief Judge of the District Court of NSW
PSE4	NSW Bar Association
PSE5	His Honour Judge Graeme Henson, Chief Magistrate of the Local Court of NSW
PSE6	Magistrate Clare Farnan
PSE7	Homeless Persons Legal Service
PSE8	Law Society of NSW
PSE9	Mental Health Coordinating Council
PSE10	Office of the Director of Public Prosecutions (NSW)
PSE11	Young Lawyers NSW
PSE12	Crime and Justice Reform Committee
PSE13	The Shopfront Youth Legal Centre
PSE14	Intellectual Disability Rights Service
PSE15	Jumbunna Indigenous House of Learning
PSE16	Mr David Shoebridge MLC
PSE17	Women in Prison Advocacy Network
PSE18	Legal Aid NSW
PSE19	Corrective Services NSW Women's Advisory Council
PSE20	Probation and Parole Officers' Association of NSW
CPSE21	<i>Confidential preliminary submission</i>
PSE22	Aboriginal Legal Service (NSW/ACT) Limited

### Submissions on standard minimum non-parole periods

SES1	The Hon Justice R O Blanch, Chief Judge of the District Court of NSW, 23 March 2012
SES2	His Honour Judge Graeme Henson, Chief Magistrate of the Local Court of NSW, 2 April 2012
SES3	NSW Bar Association, 4 April 2012
SES4	Law Society of NSW, 10 April 2012
SES5	The Hon Justice Peter McClellan, Chief Judge at Common Law, 13 April 2012
SES6	Professor Mirko Bagaric, Deakin Law School, 13 April 2012
SES7	NSW, Office of the Director of Public Prosecutions, 13 April 2012
SES8	Probation and Parole Officers' Association of NSW, 16 April 2012
SES9	Police Association of NSW, 16 April 2012
SES10	The Shopfront Youth Legal Centre, 16 April 2012
SES11	NSW Police Force, 26 April 2012

## Submissions on Sentencing Question Papers 1-12

- SE1 Women in Prison Advocacy Network (QP 1-4), 25 May 2012
- SE2 Public Defenders (QP 1-4), 29 May 2012
- SE3 New South Wales, Office of the Director of Public Prosecutions (QP 1-4), 31 May 2012
- SE4 Children's Court of New South Wales (QP 1-4), 4 June 2012
- SE5 Public Interest Advocacy Centre Ltd (QP 1-4), 4 June 2012
- SE6 Police Association of NSW (QP 1-4), 4 June 2012
- SE7 Law Society of New South Wales (QP 1-4), 1 June 2012
- SE8 Homicide Victims' Support Group (Aust) Inc (QP 1-4), 6 June 2012
- SE9 New South Wales Bar Association (QP 1-4), 8 June 2012
- SE10 His Honour Judge Graeme Henson, Chief Magistrate of the Local Court (QP 1-4), 14 June 2012
- SE11 Legal Aid NSW (QP 1-4), 15 June 2012
- SE12 NSW Young Lawyers Criminal Law Committee (QP 1-4), 15 June 2012
- SE13 Professor Mirko Bagaric (QP 1-4), 26 June 2012
- SE14 NSW Police Force (QP 1-4), 20 July 2012
- SE15 Probation and Parole Officers' Association of NSW (QP 1-4), 1 August 2012
- SE16 Law Society of NSW (QP 5-7), 6 August 2012
- SE17 Women in Prison Advocacy Network (QP 5-7), 16 August 2012
- SE18 Children's Court of NSW (QP 5-7), 16 August 2012
- SE19 Office of the Director of Public Prosecutions (QP 5-7), 16 August 2012
- SE20 Juvenile Justice (QP 5-7), 16 August 2012
- SE21 Police Association of NSW (QP 5-7), 16 August 2012
- SE22 Judge Graeme Henson, Chief Magistrate of the Local Court (QP 5-7), 21 August 2012
- SE23 Homicide Victims' Support Group (Aust) Inc (QP 5-7), 21 August 2012
- SE24 The Public Defenders (QP 5-7), 20 August 2012
- SE25 The Public Defenders (QP 1-4), 20 August 2012
- SE26 Commonwealth Director of Public Prosecutions (QP 6), 20 August 2012
- SE27 New South Wales Bar Association (QP 5-7), 24 August 2012
- SE28 The Shopfront Youth Legal Centre (QP 5-7), 24 August 2012
- SE29 Public Interest Advocacy Centre Ltd (QP 5-7), 28 August 2012
- SE30 Juvenile Justice (QP 5-7), 27 August 2012
- SE31 Legal Aid NSW (QP 5-7), 30 August 2012
- SE32 NSW Police Force (QP 5-7), 31 August 2012
- SE33 Drug Court of NSW (QP 6), 31 August 2012
- SE34 Police Association of NSW (QP 8-12), 3 September 2012
- SE35 Judge Graeme Henson, Chief Magistrate of the Local Court of NSW (QP 8-12), 3 September 2012
- SE36 Public Defenders (QP 8-12), 5 September 2012
- SE37 The Shopfront Youth Legal Centre (QP 8-12), 10 September 2012
- SE38 NSW Young Lawyers, Criminal Law Committee (QP 5-7), 10 September 2012
- SE39 Probation and Parole Officers' Association of NSW (QP 5), 13 September 2012

- SE40 Children's Court of NSW (QP 8-12), 14 September 2012
- SE41 NSW, Office of the Director of Public Prosecutions (QP 8-12), 13 September 2012
- SE42 Public Interest Advocacy Centre Ltd (QP 8-12), 18 September 2012
- SE43 Law Society of NSW, Criminal Law Committee (QP 8-12), 18 September 2012
- SE44 Family and Community Services (QP 8-12), 20 September 2012
- SE45 NSW Police Force (QP 8-12), 25 September 2012
- SE46 NSW Bar Association (QP 8-12), 25 September 2012
- SE47 Homicide Victims' Support Group (Aust) Inc (QP 8-12), 25 September 2012
- SE48 NSW, Family and Community Services (QP 5-7), 25 September 2012
- SE49 Probation and Parole Officers' Association of NSW (QP 6), 28 September 2012
- SE50 Legal Aid NSW (QP 8-12), 4 October 2012
- SE51 Corrective Services NSW (QP 1-4), 18 October 2012
- SE52 Corrective Services NSW (QP 5-7), 18 October 2012
- SE53 Corrective Services NSW, Women's Advisory Council (QP 8-12), 24 October 2012
- SE54 Jumbunna Indigenous House of Learning, 21 November 2012
- SE55 Corrective Services NSW (QP 8-12), 21 December 2012
- SE56 Aboriginal Legal Service (NSW/ACT) Ltd, 30 January 2013



## Appendix B: Consultations

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### Preliminary consultations

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#### NSW Sentencing Council – PSEC1

*19 October 2011 at 10.00am*

**Level 14, 10 Spring Street, Sydney**

The Hon Jerrold Cripps QC, Chairperson  
Mr Howard Brown OAM  
His Honour Acting Judge Paul Cloran  
Mr Nicholas Cowdery AM QC  
Ms Megan Davis  
Mr Luke Grant  
Mr Mark Ierace SC  
Ms Martha Jabour  
Acting Assistant Commissioner Malcolm Lanyon  
Ms Penny Musgrave  
Prof David Tait

#### Criminal justice system stakeholders – PSEC1

*24 October 2011 at 4.30pm*

**Level 14, 10 Spring Street, Sydney**

Mr Lloyd Babb SC, Director of Public Prosecutions  
Mr Richard Button SC, Public Defenders  
Mr Leigh Costa, Corrective Services NSW  
Ms Amanda Coultas, Legal Aid NSW  
Mr Hugh Donnelly, Judicial Commission of NSW  
Ms Sally Dowling, NSW Bar Association  
Mr Phillip Gibson, Law Society of NSW  
Mr Mark Ierace SC, Senior Public Defender  
Ms Jo McAlpin, Corrective Services NSW  
Ms Penny Musgrave, Criminal Law Review, NSW Department of Attorney General  
and Justice  
Ms Alicia O'Keefe, Police Prosecutions  
Mr Stephen Odgers SC, NSW Bar Association  
Mr Ian Rodgers, Aboriginal Legal Service  
Ms Jane Sanders, Law Society of NSW  
Inspector Brendan Searson, Police Prosecutions  
Mr Brett Thomas, Law Society of NSW

## Consultations

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### NSW Sentencing Council – SEC1

*28 March 2012 at 10.00am*

**Level 14, 10 Spring Street, Sydney**

The Hon Jerrold Cripps QC, Chairperson  
Ms Karin Abrams  
Mr Lloyd Babb SC  
Mr Howard Brown OAM  
Mr Nicholas Cowdery AM QC  
Ms Megan Davis  
Mr John Hubby  
Mr Mark Ierace SC  
Mr Ken Marslew AM  
Ms Penny Musgrave  
Professor David Tait

### Criminal justice system stakeholders – SEC2

*30 March 2012*

**Level 14, 10 Spring Street, Sydney**

Mr Lloyd Babb SC, Director of Public Prosecutions  
Mr Richard Button SC, Public Defenders  
Ms Michelle Crowther, Legal Aid NSW  
Mr Hugh Donnelly, Judicial Commission of NSW  
Ms Sally Dowling, NSW Bar Association  
Mr Greg Elks, Law Society of NSW  
Mr Tim Game SC, Barrister  
Mr David Giddy, Law Society of NSW  
Mr Luke Grant, Corrective Services NSW  
Mr Mark Ierace SC, Senior Public Defender  
Mr Simon Kritsotakis, Corrective Services NSW  
Ms Pierrette Mizzi, Judicial Commission  
Ms Penny Musgrave, Criminal Law Review Division  
Mr Stephen Odgers SC, NSW Bar Association  
Mr Brian Sandiland, Legal Aid NSW  
Inspector Brendan Searson, Police Prosecutions  
Mr Jeremy Styles, Aboriginal Legal Service  
Ms Claire Wasley, Aboriginal Legal Service



## Criminal justice system stakeholders – SEC3

*21 August 2012 at 10.00am*

**Offices of the NSW Public Trustee, Level 7, 19 O'Connell Street, Sydney**

Mr Hugh Donnelly, NSW Judicial Commission  
Ms Sally Dowling, NSW Bar Association  
Ms Deirdre Hyslop, Corrective Services NSW  
Mr Mark Ierace SC, Senior Public Defender  
Mr Richard Leary, NSW Legal Aid  
Ms Jo McAlpin, Corrective Services NSW  
Ms Penny Musgrave, NSW Attorney General's Department  
Mr Stephen Odgers SC, NSW Bar Association  
Ms Johanna Pheils, NSW Office of the Director of Public Prosecutions  
Ms Jane Sanders, Law Society of NSW  
Inspector Brendan Searson, NSW Police Force  
Ms Claire Wasley, Aboriginal Legal Service (NSW/ACT) Limited  
Ms Pauline Wright, Law Society of NSW

## Criminal justice system stakeholders – SEC4

*28 August 2012 at 10.00am*

**Offices of the NSW Public Trustee, Level 7, 19 O'Connell Street, Sydney**

Mr Leigh Costa, Corrective Services NSW  
Mr Hugh Donnelly, NSW Judicial Commission  
Ms Sally Dowling, NSW Bar Association  
Mr David Giddy, Law Society of NSW  
Mr Luke Grant, Corrective Services NSW  
Mr Mark Ierace SC, Senior Public Defender  
Mr Richard Leary, NSW Legal Aid  
Senior Sergeant Daniel McMahon, NSW Police Force  
Ms Penny Musgrave, NSW Department of Attorney General and Justice, Criminal Law Review  
Mr Stephen Odgers SC, NSW Bar Association  
Mr John Pearson, NSW Legal Aid  
Ms Johanna Pheils, NSW Office of the Director of Public Prosecutions  
Inspector Brendan Searson, NSW Police Force  
Mr Jeremy Styles, Aboriginal Legal Service (NSW/ACT) Ltd

## Criminal justice system stakeholders – SEC5

*4 September 2012 at 10.00am*

**Offices of the NSW Public Trustee, Level 7, 19 O'Connell Street, Sydney**

Mr Lloyd Babb SC, NSW Director of Public Prosecutions  
Mr Paul Byrnes, Corrective Services NSW  
Mr Leigh Costa, Corrective Services NSW  
Mr Hugh Donnelly, NSW Judicial Commission  
Ms Sally Dowling, NSW Bar Association  
Mr David Giddy, Law Society of NSW  
Mr Mark Ierace SC, Senior Public Defender  
Senior Sergeant Daniel McMahon, NSW Police Force  
Ms Penny Musgrave, NSW Department of Attorney General and Justice, Criminal Law Review  
Mr Stephen Odgers SC, NSW Bar Association  
Mr John Pearson, Legal Aid NSW  
Ms Johanna Pheils, NSW Office of the Director of Public Prosecutions  
Ms Jane Sanders, Law Society of NSW  
Inspector Brendan Searson, NSW Police Force  
Mr Jeremy Styles, Aboriginal Legal Service (NSW/ACT) Ltd

## Local Court of NSW – SEC6

*11 September 2012 at 2.30pm*

**Downing Centre, Liverpool Street, Sydney**

His Honour Judge Graeme Henson, Chief Magistrate, Local Court of NSW  
Her Honour Deputy Chief Magistrate Jane Mottley, Local Court of NSW  
Her Honour Deputy Chief Magistrate Jane Culver, Local Court of NSW  
Ms Alison Passe de Silva, Local Court Policy Officer

## Supreme Court of NSW – SEC7

*18 September 2012 at 4.30pm*

**Supreme Court, Queens Square, Sydney**

The Hon Chief Justice T F Bathurst  
The Hon Justice Peter McClellan, Chief Judge at Common Law  
The Hon Justice Peter Johnson  
The Hon Justice R A Hulme

## District Court of NSW – SEC8

*19 September 2012 at 2.30pm*

**John Madison Tower, Sydney**

The Hon Justice R O Blanch AM, Chief Judge, District Court of NSW

## Local Court practitioners – SEC9

*11 December 2012 at 4.00pm*

**Conference Room, Crown Solicitor's Office, Level 7, 60-70 Elizabeth Street, Sydney**

Superintendent David Johnson, NSW Police Force

Mr Phillip Gibson, Law Society of NSW

Detective Inspector Matthew Heysmand, NSW Police Force

Ms Rebekah Rodger, Legal Aid NSW

Mr Ian Rodgers, Aboriginal Legal Service

Ms Jane Sanders, Shopfront Youth Legal Centre

Inspector Brendan Searson, NSW Police Force

Mr Richard Wilson, NSW Bar Association

## Crime Prevention and Community Programs Division, NSW Department of Attorney General and Justice – SEC10

*12 December 2012 at 2.00pm*

**Parramatta Justice Precinct**

Mr George Blacklaws

Ms Sandra Crawford

Ms Kylie Gersbach

Mr Dean Hart

Ms Geetha Varughese

## Corrective Services NSW – SEC11

*8 January 2013 at 11.00am*

**Corrective Services NSW, Henry Deane Plaza, Sydney**

Mr Peter Severin, Commissioner, Corrective Services NSW

## NSW Sentencing Council – SEC12

*23 January 2013 at 10.00am*

**Crown Solicitor's Office, 60-70 Elizabeth Street, Sydney**

Acting Assistant Commissioner Peter Cotter  
Mr Nicholas Cowdery AM QC  
Mr Mark Ierace SC  
Ms Martha Jabour  
Mr Ken Marslew AM  
Ms Penny Musgrave  
Commissioner Peter Severin  
Professor David Tait

## Community support organisations, Dubbo – SEC13

*24 January 2013 at 2.00pm*

**Dubbo Neighbourhood Centre**

Ms Rebecca Camilleri, Regional Manager DV Coordinator, NSW Police  
Ms Jill Cross-Anthony, Outreach Dubbo Neighbourhood Centre  
Ms Christine Fernando, Child/Youth and family worker  
Mr Peter Gallagher, Stewart House for the homeless  
Ms Julie Grey, NSW Police  
Mr Peter Hanson, Interrelate  
Ms Wendy Manchester, NSW Police Force, DV Liaison Officer  
Mr Garry Tosh, Dubbo Community Men's Shed  
Sergeant Adam Wood, NSW Police Force  
Mr Maurice Wright, UnitingCare, Burnside

## Legal practitioners, Dubbo – SEC14

*24 January 2013 at 4.00pm*

**Coolabah Room, Community Arts Centre, Dubbo**

Ms Dale Bonham, Aboriginal Legal Service  
Mr Wal Browne, Orana Law Society, Walgett  
Mr Derek Buchanan, Legal Aid NSW  
Senior Sergeant Ray Cameron, NSW Police Force, Western Area Prosecutions  
Mr Tim Cullenward, Orana Law Society  
Ms Felicity Graham, Aboriginal Legal Service  
Mr Dale Gumley, Solicitor, Western Area Prosecutions  
Mr Lawrence Kriithi, Western NSW Community Legal Centre  
Mr Stephen Lawrence, Aboriginal Legal Service

Mr Michael Maher, DPP Office Regional Western NSW  
Mr Paul O'Keefe, Western NSW Community Legal Centre

## Aboriginal Community Justice Group, Western Region – SEC15

*25 January 2013 at 11.00am*

### **Dubbo Court House**

Mr Henry Alberts, Western NSW Local Health District  
Ms Evelyn Barker, Red Cross  
Mr Rod Bird, Community Justice  
Mr Ken Clark, Aboriginal Service Delivery, Dubbo Local Court  
Mr Barry Coe, Coordinator Aboriginal Community Justice Group, Western Region  
Ms Christine Fernando, Dubbo Neighbourhood Centre  
Mr Trevor Forrest, Dubbo Neighbourhood Centre  
Ms Mary Ann Hansia, Interrelate Family Centre  
Ms Margaret Laurent, Rural New Street  
Mr Ian Pritchell, Community Justice  
Ms Kerry Welch, Adolescent Mental Health Services  
Mr Bruce Wilson, Catholic Community Services  
Mr Maurice Wright, UnitingCare, Burnside

## Court support services, Dubbo – SEC16

*25 January 2013 at 2.00pm*

### **Dubbo Court House**

Ms Linda Brett, Community Corrections, Corrective Services, NSW  
Ms Reagan Brown, Women's Domestic Violence Court Assistance Service  
Ms Kath Campbell, Women's Domestic Violence Court Assistance Service  
Ms Karen Davies, Statewide Community and Court Liaison Service, Adult Mental Health  
Mr Mark Harris, Senior registrar, West, Court Services  
Ms Narelle Jeffries, Community Corrections, Corrective Services, NSW  
Ms Mandii Lesslie, Women's Domestic Violence Court Assistance Service  
Ms Heidi Steppa, MERIT  
Ms Kerry Welch, Adolescent Mental Health Services

## NSW Local Court, Dubbo – SEC17

*25 January 2013 at 4.00pm*

### **Dubbo Court House**

His Honour Magistrate Andrew Eckhold

## Community Corrections, Mount Druitt – SEC18

*8 February 2013 at 9.30am*

### **Corrective Services NSW, Mt Druitt**

Mr Mark Canon, Probation and Parole Officer

Mr Barry Grice, Unit Leader

Ms Leanne Haberfield, Probation and Parole officer (Court Duty Officer)

Mr George Marie, Unit Leader

Ms Michelle Micallef, Area Manager

Ms Allison Roberts, Unit Leader

## Aboriginal Community Justice Group, Mount Druitt and Aboriginal Legal Service – SEC19

*8 February 2013 at 11.00am*

### **Mt Druitt Court House**

Mr Raymond Brazil, Law Reform and Policy Legal Officer ALS

Mr Jason Capper, Aboriginal Community Justice Group member

Ms Vicki Chan, Probation and Parole Service

Mr Christopher Horgan, Department of Corrective Services

Ms Rose Khalilizadeh, Solicitor ALS

Ms Alison Law, Aboriginal Services Division, NSW Department of Attorney General and Justice

Ms Dianna Newman, Aboriginal Services Division, NSW Department of Attorney General and Justice

Ms Christine Norman, Aboriginal Community Justice Group member

Ms Vicki Pannaye, Aboriginal Community Justice Group member

Ms Nicole Smith, Aboriginal Services Division, Department of Attorney General and Justice

Mr Robert Tumeth, Acting Chief Legal Officer for the ALS (NSW/ACT)

Mr Rick Welsh, The Men's Shed, Male Suicide Prevention Service

Mr Wayne Young, Field Officer ALS

## NSW Sentencing Council – SEC20

*20 February 2013 at 10.00am*

### **Level 14/10 Spring Street, Sydney**

Ms Karin Abrams

Mr Howard Brown OAM

His Honour Acting Judge Paul Cloran

Mr Nicholas Cowdery AM QC

Ms Megan Davis

Mr Mark Ierace SC  
Ms Martha Jabour  
Ms Penny Musgrave  
Professor David Tait

## Vulnerable groups – SEC21

*22 February 2013 at 10.00am*

**Level 14/10 Spring Street, Sydney**

Ms Kat Armstrong, Women in Prison Advocacy Network  
Mr Tim Chate, Intellectual Disability Rights Service  
Ms Catriona Cotton, Legal Aid NSW  
Ms Anne Cregan, Ashhursts pro bono  
Ms Alex Faraguna, Intellectual Disability Rights Service  
Ms Nicole Lucas, Brain Injury NSW  
Ms Kath McFarlane, Women’s Advisory Council, Corrective Services NSW  
Ms Catriona Martin, The Shopfront Youth Legal Centre  
Mr David Porter, Redfern Legal Centre  
Mr Lou Schetzer, Homeless Persons’ Legal Service  
Mr Sam Sowerwine, Homeless Persons’ Legal Service  
Ms Linda Steel, Women in Prison Advocacy Network  
The Hon Ann Symonds, Women’s Advisory Council, Corrective Services NSW

## Local Court of NSW – SEC22

*11 March 2013 at 12 noon*

**Downing Centre, Sydney**

His Honour Judge Graeme Henson, Chief Magistrate, Local Court of NSW  
Her Honour Deputy Chief Magistrate Jane Mottley, Local Court of NSW  
Her Honour Deputy Chief Magistrate Jane Culver, Local Court of NSW

## District Court of NSW – SEC23

*11 March 2013 at 2.00pm*

**John Madison Tower, Sydney**

The Hon Justice R O Blanch AM, Chief Judge, District Court of NSW

## Legal practitioners – SEC24

*12 March 2013 at 4.00pm*

**Level 14/10 Spring Street, Sydney**

Mr Lloyd Babb SC, Director of Public Prosecutions  
Mr Phillip Gibson, Law Society of NSW  
Mr Mark Ierace SC, Senior Public Defender  
Ms Jane Irwin, The Shopfront Youth Legal Centre  
Superintendent David Johnson, NSW Police Force  
Senior Sergeant Daniel McMahon, NSW Police Force  
Ms Rosslyn Mayne, Legal Aid NSW  
Mr Stephen Odgers SC, NSW Bar Association  
Ms Joanna Pheils, Office of the Director of Public Prosecutions  
Mr Jeremy Styles, Aboriginal Legal Service  
Mr Brett Thomas, Law Society of NSW

## Corrective Services NSW – SEC25

*18 March 2013 at 1.30pm*

**Corrective Services NSW, Henry Deane Plaza, Sydney**

Mr Luke Grant, Assistant Commissioner, Strategic Policy and Planning  
Dr Anne Marie Martin, Assistant Commissioner, Offender Management and Policy  
Ms Rosemary Caruana, Assistant Commissioner, Community Corrections  
Mr James Koulouris, Assistant Commissioner, Governance and Continuous Improvement  
Mr Jason Hainsworth, Director, Community Corrections Strategy  
Mr Craig Flanagan, Director, Community Corrections Operations  
Ms Jo McAlpin, Senior Project Officer, Offender Management and Policy  
Mr Simon Tutton, Senior Legislation and Policy Officer



## NSW Sentencing Council – SEC26

*20 March 2013 at 10.00am*

**Level 14/10 Spring Street, Sydney**

Ms Karin Abrams

Mr Howard Brown OAM

His Honour Acting Judge Paul Cloran

Mr Nicholas Cowdery AM QC

Mr Mark Ierace SC

Ms Martha Jabour

Commissioner Peter Severin

Ms Joanna Pheils

## Drug Court of NSW – SEC27

*21 March 2013 at 1.00pm*

His Honour Judge Roger Dive



## Appendix C: Provisions of the Crimes (Sentencing Procedure) Act 1999 (NSW) subject to recommendations

Section	Recommendation
3A Purposes of sentencing	Recommendation 2.1
5 Imprisonment last resort Six month sentences	Recommendation 3.1
6 Home detention 74-83	Recommendations 9.1-9.3, 9.5-9.6, 11.1-11.6
7 Intensive correction orders 64-73A	Recommendations 9.1-9.2, 9.4-9.6, 11.1-11.6
8 Community service orders 84-90	Recommendations 12.4-12.8, 13.1-13.10, 13.18
9 Good behaviour bonds	Recommendations 12.1-12.4, 12.8, 13.1-13.10, 13.18
10 Dismissal of charge and conditional discharge without conviction	Recommendations 12.1-12.4, 13.11-13.16, 13.18
10A Conviction with no other penalty	Recommendations 13.17-13.18
11 Deferral for rehabilitation or participation in an intervention program 100M-100T	Recommendation 16.4
12 Suspended sentences	Recommendations 10.1, 10.2, 10.4
13 Community service orders and good behaviour bonds to be alternative penalties only	Recommendations 12.8, 13.1-13.10
14 Fine as additional penalty to s 9 bond	Recommendations 14.1-14.3
15 Fine as additional or alternative penalty to imprisonment	Recommendations 14.1-14.3
21A Sentencing factors	Recommendations 4.1-4.2, 17.1
22 Discount – guilty plea	Recommendation 5.1
22A Discount – facilitating the administration of justice	Recommendation 5.2
23 Discount – assistance to authorities	Recommendation 5.3
24 Taking into account pre-sentence custody and past compliance with orders dealt with on breach	Recommendation 4.3
24A Sex and high risk violent offender supervision and other prohibitions – disregarded	Recommendation 4.4
24B Confiscation of assets and forfeiture of proceeds of crime – disregarded	Recommendation 4.5

26-30A Victim impact statements	Recommendation 19.1
44 Setting non-parole period	Recommendations 6.1, 6.2
45 Declining to set non-parole period	Recommendation 6.3
46 No non-parole period for sentences of 6 months or less	Recommendations 6.8, 6.9
53, 55 Multiple sentences of imprisonment – concurrency/accumulation	Recommendations 6.4, 6.7
53A Aggregate sentence of imprisonment	Recommendations 6.5-6.7
54A-54D Standard non-parole period scheme	Recommendation 7.1
58 Extended jurisdictional limit for accumulation in Local Court	Recommendation 6.6
94-95B Good behaviour bonds 97-99A	Recommendations 10.3, 10.5, 12.1, 12.3-12.7, 13.1-13.16
Part 8B NSW Sentencing Council	Recommendations 18.1, 18.2

## Appendix D: Provisions of the Crimes (Sentencing Procedure) Act 1999 (NSW) not subject to recommendations

Section	Comment
1 Name of Act	Similar provision required (updated)
2 Commencement	Similar provision required (updated)
3 Interpretation	Similar provision required (updated)
4 Penalties generally	Preserve
16 Fines for bodies corporate	Preserve
17 Penalty units	Preserve
17A Non-association and place restriction orders 100A-100H	See para [20.43]-[20.48]
18 Interpretation of penalty provisions	Preserve
19 Alterations in penalties	Preserve
20 No double jeopardy	Preserve
21 General power to reduce penalties	Preserve
25 Local Court not to impose certain penalties in the absence of the defendant	Preserve
31-35 Form 1 offences taken into account	Preserve
35A Consultation with victim in relation to charge negotiations	Preserve
36-42A Guideline judgments	Preserve subject to recommendations as to the role of the NSW Sentencing Council (Recommendation 18.2)
43 Power of court to reopen sentencing proceedings	
45 Court may decline to set non-parole period	Preserve
47 Commencement of sentence	Preserve (Assumed in recommendations)
48 Information about release data	Preserve
49 Restriction on term of sentence	Preserve
50 Parole release order for sentence of imprisonment for 3 years or less	Preserve
51 Conditions of parole orders	Preserve
51A Conditions of parole as to non-association and place restrictions	Preserve

51B	Non publications of names of people specified in a parole condition (non-association restrictions)	Preserve
52A	Court's powers on appeal	Preserve
56	Sentence for offences involving assault by convicted inmate	Preserve
57	Sentence for offences involving escape by inmate	Preserve
59	Court may vary commencement of sentence on quashing or varying another sentence	Preserve
60	Application of Part 4 Division 2 (Sentencing procedures for imprisonment – concurrent and consecutive sentences)	Preserve
60A-60I	Provisional sentencing for child offenders	Preserve
61	Mandatory life sentences	Preserve
62	Warrant of commitment	Preserve (subject to amendment to accommodate proposed CDOs if they replace ICOs and home detention)
63	Offenders to be photographed and fingerprinted after being sentenced to imprisonment	Preserve
73A	Review by Sentencing Council of ICO provisions	Preserve if ICOs are retained
83	Explanation of home detention order to offender	Preserve if home detention is retained (otherwise substitute CDO)
91	Removal of graffiti	Preserve if CSOs are retained
92	Explanation of community service order	Preserve if CSOs are retained (otherwise substitute CCO)
93	Written notice of community service order	Preserve if CSOs are retained (otherwise substitute CCO)
96	Explanation of good behaviour (or no further offence) bond	Preserve if bonds (or equivalent) are retained (otherwise substitute CDO, CCO, or CRO as appropriate)
100	Action may be taken after good behaviour bond expires	Preserve if good behaviour bond is retained (otherwise amend to accommodate proposed new orders)
101	Abolition of power of court concerning recognisances and sureties	Preserve
101A	Effect of failure to comply with Act	Preserve
102	Prerogative of mercy preserved	Preserve
103	Regulations	Preserve

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