NSW GOVERNMENT Sentencing Council
Attorney General & Justice

Sentencing Trends and Practices

Annual Report 2012

NSW Sentencing Council

September 2013

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TABLE OF ABBREVIATIONS

Abbreviation	Definition
BOCSAR	NSW Bureau of Crime Statistics and Research
CCA	NSW Court of Criminal Appeal
CCMG	The Community Compliance and Monitoring Group (Corrective Services NSW)
CSNSW	Corrective Services NSW
CSPA	*Crimes (Sentencing Procedure) Act 1999* (NSW)
DAGJ	Department of Attorney General and Justice
DPP	Director of Public Prosecutions
HRVO	High-Risk Violent Offender
ICO	Intensive Correction Order
Muldrock	*Muldrock v The Queen* [2011] HCA 39; 244 CLR 120
PD	Periodic Detention
SNPP	Standard Non-Parole Period
LRC	NSW Law Reform Commission
R v Boughen	*R v Boughen*; *R v Cameron* [2012] NSWCCA 17
R v Henry	*R v Henry* [1999] NSWCCA 111; 46 NSWLR 346; 106 A Crim R 149
R v Way	*R v Way* [2004] NSWCCA 131; 60 NSWLR 168
SPA	State Parole Authority

1. Introduction

Overview

1.1 The NSW Sentencing Council is in its tenth year of operation. This is its ninth statutory report on sentencing trends and practices,[1] which covers the review period from January to December 2012.

1.2 **PART 1** of this report sets out the functions and membership of the Council and reports on the activities in which the Council has been engaged during the review period.

1.3 **PART 2** provides an overview of the projects the Council completed in 2012, and an update on continuing work in the review period.

1.4 **PART 3** identifies sentencing trends and issues that have emerged during the review period by examining relevant case law.

1.5 **PART 4** identifies some legislative amendments.

1.6 **PART 5** provides an update on Intensive Correction Orders.

Functions of the Council

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

> (1) (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.

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

(2) Any advice given to the Minister by the Sentencing Council may be given either at the request of the Minister or without any such request.

(3) The Sentencing Council has such other functions as are conferred or imposed on it by or under this or any other Act.

(4) In the exercise of its functions, the Sentencing Council may consult with, and may receive and consider information and advice from, the Judicial Commission of New South Wales and the Bureau of Crime Statistics and Research of the Attorney General's Department (or any like agency that may replace either of those agencies).

1.8 In addition, the Council has been given an additional function in relation to the conduct of a comprehensive review of the ICO provisions of the CSPA five years after their commencement,[2] and has also been asked by Government to report annually to the Attorney General on the use of ICOs.[3]

Council Members

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

- a retired judicial officer (not being a retired Magistrate),
- a retired Magistrate,
- a member with expertise or experience in law enforcement,
- four members with expertise or experience in criminal law or sentencing (of whom one is to have expertise or experience in the area of prosecution and one is to have expertise or experience in the area of defence),
- one member with expertise or experience in Aboriginal justice matters,
- four members representing the general community, of whom two are to have expertise or experience in matters associated with victims of crime,
- one member with expertise or experience in corrective services,
- one member with expertise or experience in juvenile justice,
- one representative of the Attorney General's Department, and
- one member with academic or research expertise or experience of relevance to the functions of the Council.[4]

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

2. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 73A.
3. NSW, *Parliamentary Debates*, Legislative Council, 22 June 2010, 24426. The then Attorney General, J Hatzistergos, in his second reading speech to the Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Bill 2010 stated the Sentencing Council "will report annually on the use of the new orders and will review their operation after five years".
4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100I(2).

Chairperson

The Honourable Jerrold Cripps QC (to 13 November 2012)	Retired judicial officer
The Hon James Wood AO QC (from 26 November 2012, previously a member)	Retired judicial officer Previously, a member with expertise or experience in criminal law or sentencing

Members

Ms Karin Abrams	Community member
Mr Lloyd Babb SC	Member with expertise or experience in criminal law or sentencing – area of prosecution
Mr Howard Brown OAM	Community member
His Honour Acting Judge Paul Cloran	Retired magistrate
Mr Nicholas Cowdery AM QC	Member with expertise or experience in criminal law or sentencing
Professor Megan Davis	Member with expertise or experience in Aboriginal justice matters
Mr John Hubby (to 30 March 2012)	Member with expertise or experience in juvenile justice
Mr David Hudson APM	Member with expertise or experience in law enforcement
Mr Mark Ierace SC	Member with expertise or experience in criminal law or sentencing – area of defence
Ms Martha Jabour	Community member
Mr Ken Marslew AM	Community member
Ms Penny Musgrave	Representative of the Department of Attorney General and Justice
Professor David Tait	Member with relevant academic or research expertise or experience

Council Business

1.11 The Council meets on a monthly basis with Council business being completed at these meetings and out of session.

1.12 The Council has maintained its close working relationship with the NSW Bureau of Crime Statistics and Research (BOCSAR), the Judicial Commission of New South Wales, the NSW Law Reform Commission (LRC), and the Department of Attorney General and Justice throughout 2012. The Judicial Commission and BOCSAR have provided the Council with extensive data, statistics and general advice; in particular, statistical information useful to the Council's project on violent high-risk offenders. During 2012, the Council provided extensive advice and assistance to the LRC on its wide-ranging review of the *Crimes (Sentencing Procedure) Act 1999* (NSW), including the operation of the standard minimum non-parole scheme and ICOs.

Relationship with the NSW Law Reform Commission

1.13 In 2012-13, the secretariats of the LRC and the Sentencing Council joined into a single administrative unit under a memorandum of understanding. Both statutory bodies require similar secretariat support to undertake projects and propose law reforms (with the Council specialising in sentencing law and providing a specialist advisory function through its expert members). Joining in this way has strengthened the work of both by enabling access to joint operational policies and by enabling more flexible use of resources. Over 2013-14 we will consolidate this process to the benefit of the LRC and the Council, and their staff. There continues to be active and exciting opportunities for law reform, including in the sentencing area.

Officers of the Council

1.14 The Council operates with a secretariat of two officers – the Executive Officer and the Policy and Research Officer.

1.15 In 2012, the positions were occupied as follows:

Sarah Waladan (to October 2012)	Executive Officer
Bridget O'Keefe (to June 2012)	Policy and Research Officer
Stephanie Button (from September 2012)	Policy and Research Officer

2. Projects for 2012

2.1 One of the functions of the Sentencing Council is to prepare research papers or reports on subjects connected with sentencing at the request of the Attorney General.[5]

Serious violent offenders

2.2 On 20 December 2010 the Attorney General requested the Council to advise on the most appropriate way of responding to the risks posed by serious violent offenders in accordance with the following terms of reference:

- Advise on options for sentencing serious violent offenders;
- Examine and report on existing treatment options for and risk assessment of serious violent offenders;
- Examine and report on the adequacy of existing post custody management including parole and services available to address the needs of serious violent offenders and to ensure the protection of the community on their release;
- Advise on the options for and the needs for post sentence management of serious violent offenders; and
- Identify the defining characteristics of the cohort of offenders to whom any proposal should apply.

2.3 The Council published its report, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options*, in May 2012. Among the report's recommendations for managing high-risk violent offenders were:

- A continuing detention and extended supervision scheme should be introduced for high-risk violent offenders.[6]
- High-risk violent offenders should be defined as those who are convicted of a serious indictable offence that involves the use of, or attempted use of, or show a propensity towards serious interpersonal violence; and have been assessed as presenting a high-risk of violent re-offending in accordance with the most accurate available risk-assessment tools, in conjunction with clinical assessment.[7]
- The Government should initiate an independent review to determine if the present violent offenders treatment plan (VOTP) effectively targets the diverse therapeutic needs of high-risk violent offenders and is accessible to

5. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100J(d).
6. NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012) Recommendation 4.
7. NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012) Recommendation 1.

them. If not, then determine what must be done to effectively meet the therapeutic needs of such offenders.[8]

- The Government should introduce legislation to require co-operation among State Government agencies in providing support services to high-risk violent offenders, and sharing information to assist this support.[9]

- The Government should create an independent body to review the best methods of regulating the risk-assessment and risk-management of high-risk violent offenders.[10]

- The *Habitual Criminals Act 1957* (NSW) should be repealed.[11]

- The option of parole for life sentences should be allowed.[12]

- BOSCAR should review and monitor trends in granting parole to serious violent offenders.[13]

2.4 Following the Council's report on high-risk violent offenders, an Act[14] was passed to amend the *Crimes (Serious Sex Offenders) Act 2006* (NSW) by expanding the existing scheme for the continued detention and supervision of serious sex offenders to cover high-risk violent offenders. It also extended the scheme to an adult convicted of a serious offence committed as a child. The high-risk violent offenders scheme applies to sentences imposed and offences committed before the scheme commenced on assent on 19 March 2013. This retrospectivity is consistent with that of the original serious sex offender scheme. The statutory title *Crimes (Serious Sex Offenders) Act 2006* (NSW) was changed to *Crimes (High Risk Offenders) Act 2006* (NSW) to reflect the expanded scheme. The Attorney General in his second reading speech to the Crimes (Serious Sex Offenders) Amendment Bill 2013 (NSW) acknowledged the contribution made by the Council:

> The New South Wales Sentencing Council in its report on high-risk violent offenders noted that there is a gap in the New South Wales legislative framework for dealing with high-risk violent offenders. This bill closes that gap by expanding the scheme in place for sex offenders that has been tested in the High Court. It does not try to reinvent the wheel, but picks up these tried provisions and extends them to high-risk violent offenders.[15]

8. NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012) Recommendation 5(a).
9. NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012) Recommendation 3(a).
10. NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012) Recommendation 3(b).
11. NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012) Recommendation 6.
12. NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012) Recommendation 7(a).
13. NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012) Recommendation 5(c).
14. *Crimes (Serious Sex Offenders) Amendment Act 2013* (NSW).
15. NSW, *Parliamentary Debates*, Legislative Assembly, 20 February 2013, 17680.

Assisting the NSW Law Reform Commission

Interim report on standard minimum non-parole periods

2.5 The Council also assisted the LRC with its 2012 interim report, *Sentencing: Interim Report on Standard Minimum Non-Parole Periods*,[16] in the wake of the High Court's decision in *Muldrock v The Queen.*[17] The interim report was published in May 2012. It made provisional recommendations to ensure the continued operation of the standard minimum non-parole period following *Muldrock*.

Review of the *Crimes (Sentencing Procedure) Act 1999* (NSW)

2.6 During 2012, the Council worked in close co-operation with the LRC on its review of the *Crimes (Sentencing Procedure) Act 1999* (NSW). The Council provided substantial support and advice to the LRC on the reference. In September 2013, the LRC's report on *Sentencing*[18] and its companion volume *Patterns and Statistics*[19] were tabled in Parliament.

2.7 The LRC report on sentencing recommends a revised Crimes (Sentencing) Act that will simplify NSW's existing sentencing provisions and make them more transparent.

2.8 The LRC has revised the purposes of sentencing (introducing the reduction of crime as an express purpose of sentencing) and recommends that the revised Act identify five well-established sentencing principles: proportionality, parity, totality, imprisonment as a last resort, and the *De Simoni* rule.

2.9 The LRC recommends replacing the 22 aggravating and 13 mitigating factors that courts must take into account when sentencing with six general factors: 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.

2.10 The LRC report on sentencing recommends improvements to simplify the rules that govern the setting of terms of imprisonment, including:

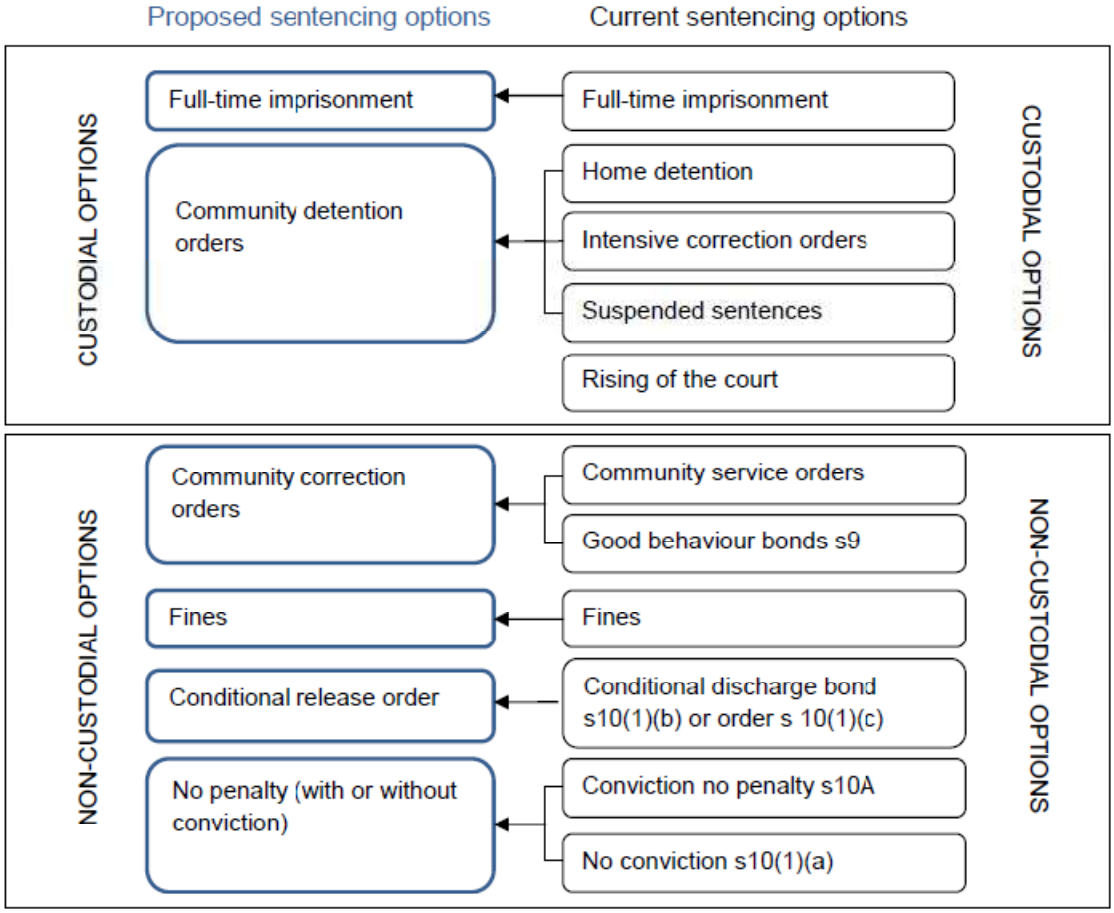
- A return to the top down approach which requires the court to set the head sentence first followed by the non-parole period, except where the court imposes a fixed term sentence.
- The adoption of a presumptive ratio that the non-parole period should be two-thirds of the head sentence.

16. NSW Law Reform Commission, *Sentencing: Interim Report on Standard Minimum Non-Parole Periods*, Report 134 (2012).
17. *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120.
18. NSW Law Reform Commission, *Sentencing*, Report 139 (2013).
19. NSW Law Reform Commission, *Sentencing – Patterns and Statistics,* Companion Report 139-A (2013).

- The replacement of the over-used and much criticised "special circumstances" test, so that a court can depart from the ratio only if, having regard to all the purposes of sentencing, it is satisfied that there are good reasons to do so.

- The preservation and clarification of aggregate sentencing, and the introduction of 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.

2.11 The LRC recommends four new flexible sentencing options of increasing intensity to replace the nine existing sentencing options other than full-time imprisonment and fines (including home detention, intensive correction orders, community service orders and good behaviour bonds).



2.12 The new sentencing options recommended by the LRC are:

- **Community detention order** (CDO): a community-based custodial order which can require offenders to submit to home detention and other restrictions as well as a work and intervention requirement aimed at addressing their offending behaviour (such as community service work, psychological or psychiatric treatment, intervention programs, educational programs, vocational or life skills programs, counselling, drug or other addiction treatment). The State Parole Authority would deal with breaches which would usually lead to the offender serving the rest of the sentence in full-time imprisonment.

- **Community correction order** (CCO): a community-based non-custodial order that includes an automatic condition that the offender not commit a further

offence and optional discretionary conditions concerning supervision, work and program participation and personal restrictions, or entry into an intervention plan. A court would deal with breaches which would result in the offender being resentenced.

- **Conditional release order** (CRO): a less intensive community-based non-custodial order that courts can impose with or without recording a conviction. It would include an automatic condition that the offender must not commit a further offence and optional conditions concerning supervision and personal restrictions.

- A "**no penalty**" sentence that can be imposed with or without conviction.

2.13 The LRC report on sentencing also includes a set of back-up recommendations to reform the existing sentencing options: to increase the number of offenders who can be sentenced to the under-used options of home detention, intensive correction orders and community service; to reduce the problems associated with suspended sentences; and to streamline the operation of the non-custodial sentences.

2.14 Finally, the LRC recommends changes for the Council, including changing its composition to include one person with expertise or experience in legal aid and one person with expertise or experience in law reform, and giving it the specific function of preparing research and advisory reports to assist guideline judgment proceedings in the Court of Criminal Appeal.

3. Monitoring and reporting

Standard Non-Parole Periods

3.1 The Standard Non-Parole Period scheme was introduced as an amendment to the *Crimes (Sentencing Procedure) Act 1999* (NSW). It took effect on 1 February 2003. The scheme provides statutory guidance[20] to sentencing courts on appropriate non-parole periods for specified serious indictable offences. These offences are set out in the Table to Division 1A of Part 4 of the CSPA.

3.2 The application of the SNPP scheme was considered just over a year later by the Court of Criminal Appeal in *R v Way.*[21] However, the *Way* approach to implementing the SNPP scheme changed significantly in October 2011 with the decision of the High Court of Australia in *Muldrock v The Queen*.[22] The High Court held in *Muldrock* that the CCA decision in *Way* had been wrongly decided.

3.3 As the Council commented in its November 2011 report on SNPPs and later in its 2011 Annual Report,[23] the High Court rejected the appellant's submission that the SNPP has no role in sentencing for an offence in the low (or high) range of objective seriousness. It accepted the respondent's submission that the effect of s 54B(2) of the CSPA is not to "mandate a particular [non-parole period] for a particular category of offence rather it preserves the full scope of the judicial discretion to impose a non-parole period longer or shorter than the [standard non-parole period]".[24]

3.4 The High Court observed, among other points, that:

> Section 54B(2) and s 54B(3) oblige the court to take into account the full range of factors in determining the appropriate sentence for the offence. In so doing, the court is mindful of two legislative guideposts: the maximum sentence and the standard non-parole period. The latter requires that content be given to its specification as "the non-parole period for an offence in the middle of the range of objective seriousness". Meaningful content cannot be given to the concept by taking into account characteristics of the offender. The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. It is to be determined wholly by reference to the nature of the offending.
>
> Nothing in the amendments introduced by the amending Act requires or permits the court to engage in a two-stage approach to the sentencing of offenders for Div 1A offences, commencing with an assessment of whether the offence falls within the middle range of objective seriousness by comparison with an hypothesised offence answering that description and, in the event that it does, by inquiring if there are matters justifying a longer or shorter period.[25]

20. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A.
21. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168.
22. *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120.
23. NSW Sentencing Council, *Standard Non-Parole Periods: A background report* (2011) [2.51]-[2.54] and NSW Sentencing Council, *Sentencing Trends and Practices: Annual Report 2011* (2012) [4.1]-[4.9].
24. *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120 [24].
25. *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120 [27]–[28].

3.5 The High Court overruling the CCA meant that many cases decided under *Way* were appealed following *Muldrock*.

3.6 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.[26]

Cases considering *Muldrock* in 2012

3.7 A number of cases in 2012 considered the principles put forward in *Muldrock* and the manner in which those principles should apply in sentencing for offences to which SNPPs apply.

Appeals against sentences imposed before Muldrock

3.8 Simply because a sentence was handed down in accordance with *Way*, prior to it being overruled by *Muldrock*, is not sufficient to demonstrate the sentence is wrong.

***Butler v R* [2012] NSWCCA 23**
The applicant pleaded guilty to malicious wounding with intent to do grievous bodily harm. Two other offences of malicious wounding in company were taken into account on a Form 1. He was sentenced to a total term of imprisonment of 8 years and 6 months, including a non-parole period of 5 years and 6 months. The applicant appealed on three grounds**.** Ground 3 was that the sentencing judge erred in the manner in which he had regard to the SNPP provided for the offence in the CSPA. Appeal dismissed. The basis of the complaint in Ground 3 was that, because the sentence was determined before *Muldrock*, with the sentencing judge accepting the authority of *Way* and using the standard non-parole period as a "guideline or yardstick", the sentencing miscarried. This was not so. The CCA held that "[m]erely showing that a sentencing judge sentenced pre-*Muldrock* following the dictates of *Way* will not be sufficient to demonstrate error. What should be ascertained in each case is whether a reliance on *Way* has sufficiently infected a sentence with such error that this Court must intervene": [26]. This "infection" is more likely in cases where a jury finds the applicant guilty; rather than in cases where the applicant pleads guilty. The CCA remarked that ordinarily, after a jury trial finding the applicant guilty, the sentencing judge would have considered the (now incorrect) "two-stage process" using the SNPP as a mandatory starting point. Whereas, if the applicant had pleaded guilty, the sentencing judge would more likely have used the SNPP as a "guideline or yardstick": [26].

3.9 To determine whether a sentencing judge before *Muldrock* has erred, the CCA must consider all the judge's remarks on sentence to determine how the SNPP was used.

26. NSW Law Reform Commission, *Sentencing: Interim Report on Standard Minimum Non-parole Periods*, Report 134 (2012) [2.25]-[2.29].

***Williams v R* [2012] NSWCCA 172**

The applicant pleaded guilty to the murder of his ex-partner. He was sentenced to a total term of imprisonment of 21 years and 9 months, including a non-parole period of 16 years, 3 months and 23 days. The applicant's sentence was imposed prior to *Muldrock*. The applicant appealed on four grounds. Ground 1 was that the sentencing judge engaged in a "two-stage approach" to sentencing; that is, a "mechanistic" approach commencing with the standard non-parole period and then seeking to find factors which could justify a variation from it. This two-stage approach was not permitted following *Muldrock*: [23], [25]. Instead, *Muldrock* held that the correct approach for a sentencing judge to determine a sentence is to identify all the factors that are relevant (including, among others, the legislative "guidepost" of the standard non-parole period) and then make his or her own value judgment as to the appropriate sentence given all the factors of the individual case: [30].

Appeal dismissed.

Ground 1 (on SNPPs and *Muldrock*): To determine whether a judge sentencing before *Muldrock* has erred, the CCA must consider all of the judge's remarks on sentence: [29]. After analysing the sentencing judge's remarks: [31], the CCA (by a majority; one judge not deciding: [5]) found that on a fair analysis of these remarks, the sentencing judge did not adopt a two-stage "mechanistic" process to sentencing, or that the standard non-parole period had determinative significance in the sentence. This included when the sentencing judge classified the murder as being "just above the mid-range", as after *Muldrock*, judges must still assess the objective seriousness of offences. Instead, the sentencing judge assiduously identified all of the factors relevant to sentencing, merely including as one factor, the SNPP as a "reference point" or "marker". The sentencing judge "did not treat her sentencing discretion as being tethered to the standard non-parole period": [32]-[33].

***Aldous v R* [2012] NSWCCA 153**

The applicant was found guilty at trial of wounding with intent to cause grievous bodily harm. The applicant had entered a poker competition run by the victim at the Jolly Frog Hotel. Upon losing all his chips, the applicant struck the victim over the head with a schooner glass and punched him. The applicant was sentenced to 6 years imprisonment, with a non-parole period of 3 years. The applicant appealed on three grounds. Ground 1 dealt with the SNPP. The applicant argued that the sentencing judge followed the two-stage process proscribed later on by the High Court in *Muldrock.*

Appeal dismissed.

The CCA noted that to determine if the proscribed method under *Muldrock* was employed by the sentencing judge "it is necessary to read fairly the entirety of a Sentencing Judge's Remarks to see how the standard non-parole period has been dealt with": [31]. On this basis, the CCA found that in the present case, the SNPP was used only to operate as a "benchmark" or "guidepost" in the exercise of sentencing discretion, and not as a "starting point": [31]. The sentencing judge

determined the sentence by considering all the circumstances and did not give "undue weight to the guidepost of the standard non-parole period or by structuring the sentences around it or by reference to it": [4]. The fact the sentencing judge went on to consider subjective matters did not indicate a two-stage approach to sentencing. Her Honour's approach was entirely consistent with the "instinctive synthesis" approach endorsed by *Muldrock*. That is, the sentencing judge arrived at a sentence having considered all matters relevant to the synthesis, including the maximum penalty and the SNPP: [34].

***Zreika v R* [2012] NSWCCA 44**

The applicant pleaded guilty to reckless wounding during a neighbourhood altercation. A lingering dispute existed between neighbouring families over loud music and late night partying by members of the other family. The applicant was a visiting friend of one family and got into a street fight with the father of the other family; stabbing him several times with a broken beer bottle. The applicant appealed on three grounds. Ground 1 was on the SNPP. That is, the sentencing judge erred in the approach to sentence in light of the subsequent decision in *Muldrock*: [34].

Appeal dismissed.

To arrive at a decision on the SNPP's consistency with the current law set out in *Muldrock*, the CCA must read the entirety of the sentencing judge's remarks on the SNPP issue as the law was then found in the decision of *Way*: [43]. The CCA found that the sentencing judge had correctly used the SNPP as a "reference point" and a "useful guide" and not as a "starting point" to assess the objective seriousness of the offence. As such, this was consistent with the later judgment of the High Court in *Muldrock*: [43].

3.10 In some cases, the CCA has found that, if the sentencing judge in effect used the SNPP as a "starting point", even though stating it was used as a "guide", then the sentence should be reviewed.

***Bolt v R* [2012] NSWCCA 50**

The applicant pleaded guilty to the offence of aggravated breaking and entering and committing a serious indictable offence; in this case being the assault of his ex-partner. He broke into her home one night and violently assaulted her, breaking her nose. The applicant was on a good behaviour bond at the time of the offence, and an apprehended violence order prohibiting him from contacting his ex-partner was in force. The applicant was a drug user with a mental illness, coming from an abusive childhood background. The applicant was sentenced to 5 years imprisonment, with a non-parole period of 3 years and 6 months, after the sentence had been discounted by 25% to reflect the utilitarian value of the guilty plea.

The applicant appealed the sentence on the basis that the sentencing judge's treatment of the SNPP entailed the incorrect approach identified in *Muldrock*: [6], [12]. The sentencing judge's determination was made seven months before *Muldrock*: [6].

Appeal allowed.

The CCA briefly set out the history of *Way*, and its overturning by *Muldrock*: [9]-[11]. The question for the CCA was whether, when determining the length of sentence, the sentencing judge applied the pre-*Muldrock* "two-stage approach" of:

(1st stage) beginning with an assessment of whether the offence fell in the "middle" of a hypothetical range of similar offences and, if it did,

(2nd stage) enquiring into whether any circumstances existed that would justify either a longer or shorter period: [11].

The CCA found, after an examination of the remarks on sentence and the mathematics involved in determining the sentence length, that the sentencing judge had applied s 54B(2) of the CSPA as being framed in "mandatory terms": [11], [35]-[37]. It noted the remarks on sentence by the judge which placed the offence as "just below the mid-range of objective seriousness for this type of offence": [27]. That is, the sentencing judge used the relevant statutory SNPP for this offence as the "starting point": [37]. The CCA held to its opinion despite evidence presented by the Crown of another remark by the sentencing judge that the SNPP was "a guideline only, as there was a plea": [34]. The Crown submitted that this remark pointed against the suggestion that the sentencing judge used the SNPP as a starting point: [34].

The CCA stated that on a "fair reading" of the sentencing remarks, it was difficult to resist the conclusion that the sentencing judge had used the SNPP of five years as a "springboard" from which to delve into the task of balancing the other factors in the case: [35], [37]. This was reinforced by the "neatness of the mathematics" involved in calculating the sentence length, which the CCA deconstructed to find it originated from a SNPP of "exactly five years" prior to the discount for the guilty plea and a small adjustment to the statutory ratio for special circumstances: [36].

The CCA held that the sentencing decision entailed error of the kind subsequently identified by *Muldrock*: [38]. A less harsh sentence of 4 years imprisonment, with a non-parole period of 18 months was imposed: [43].

Appeals against sentences imposed after Muldrock

3.11 Following *Muldrock*, the CCA has considered the extent to which matters personal to an offender (such as mental health) which are causally connected to the offending, should be considered as part of the assessment of the "objective seriousness" of the offence.[27] The Council notes that the LRC has addressed this issue in its recent *Sentencing* report and has made a recommendation on it.[28]

3.12 The following two cases examine this issue.

27. Section 54A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) defines an SNPP as being the "non-parole period for an offence in the middle of the range of objective seriousness" for offences set out in the Table to Division 1A of Part 4.

28. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) Recommendation 4.2.

***Yang v R* [2012] NSWCCA 49**

The applicant pleaded guilty to supplying heroin. Three other offences were listed on a Form 1: one dealing with the proceeds of crime and two of supplying other prohibited drugs. She was sentenced to a total term of 7 years, including a non-parole period of 2 years. The applicant appealed on three grounds. Ground 1 was that the sentencing judge erred in failing to adequately take into account the applicant's mental health condition at the time of the commission of the offence.

Appeal dismissed.

In the course of examining Ground 1, RA Hulme J at [28]-[36] summarised the divergent approaches that have become apparent in CCA decisions following *Muldrock* on the issue of how much, or even whether, matters personal to an offender, such as mental health, can affect the objective seriousness of an offence. At [37] his Honour determined that he did not need to decide this issue in the circumstances of the *Yang* case. The summary by RA Hulme J at [28]-[36] is provided as follows:

"28…the High Court of Australia in *Muldrock v The Queen* [2011] HCA 39; (2011) 85 ALJR 1154 at [27] appears to have rejected the notion propounded in *R v Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168 at [86] that matters personal to an offender, including a mental illness, can be said to affect the objective seriousness of an offence. I have said, 'appears to have rejected', because it has not been universally accepted.

29 In *MDZ v R* [2011] NSWCCA 243, Hall J (Tobias AJA and Johnson J agreeing) stated:

[67] In my opinion, in light of the High Court's judgment in Muldrock (supra), it is open to conclude that the mental condition of the applicant at the time of the offence may bear upon the objective seriousness of the offences: Muldrock (supra) at [27] and [29]. Certainly, in the present case, the sentencing judge, on the evidence, was required to expressly determine the moral culpability of the applicant in assessing the seriousness of the offences and in determining the appropriate sentences to be imposed in relation to them. In this case, the evidence required a finding that the applicant's moral culpability was reduced by his mental health issues.

30 In *Ayshow v R* [2011] NSWCCA 240 the point was referred to but not decided. Johnson J (Bathurst CJ and James J agreeing) said (at [39]):

To the extent that a question arises whether the Applicant's mental state at the time of the offence may bear upon objective seriousness (Muldrock at 1162-1163 [27], 1163 [29]), it remains a relevant factor on sentence in an assessment of moral culpability. Accordingly, if there is evidence to support a finding that an offender's moral culpability is reduced by a relevant mental condition, the offender is entitled to have it called in aid on sentence.

31 There are first instance decisions that reflect different approaches. In *R v Biddle* [2011] NSWSC 1262 at [88], Garling J, with reference to *Muldrock*, specifically excluded from an assessment of the objective seriousness of the offence the offender's mental health (an impaired capacity of the offender to control himself due to brain damage).

32 The point is not entirely clear, with respect, in the approach taken by Harrison J in *R v Mohammed Fahda* [2012] NSWSC 114. His Honour said:

[50] The objective seriousness of the offence is to be determined without reference to the personal attributes of the offender, but 'wholly by reference to the nature of the offending': Muldrock at [27]. However, such factors remain particularly relevant to any determination of the appropriate sentence to be imposed.

33 Earlier, however, his Honour said:

[38] I accept that the offender suffered from post-traumatic stress disorder that was caused and evident prior to the commission of the offence and that this was associated with hyper-vigilance, paranoia, auditory hallucinations, depression and inverted sleep patterns. I also find that the offender was substantially impaired by an abnormality of mind arising from an underlying condition in the form of post-traumatic stress disorder or an anxiety disorder and a probable psychotic illness. I have taken all of this into account in mitigation of the objective criminality of the offence.

34 In *R v Tuan Anh Tran* [2011] NSWSC 1480 at [13], Rothman J took into account in an assessment of objective seriousness, 'circumstances personal to the offender that are causally connected to the commission of the offence such as his state of mind'. The 'state of mind' he was speaking of does not appear to have been any mental condition. The case concerned a murder committed at a meeting between parties involved in an illicit drug transaction. The offender engaged another man (the actual killer) to provide protection because he was in fear of the deceased's notoriety for violence and it would appear that it was this that his Honour had in mind.

35 In *R v Cotterill* [2012] NSWSC 89, McCallum J (at [30]) said that the assessment of the objective seriousness of the offence may include consideration of circumstances personal to the offender that are causally connected to the commission of the offence. Her Honour added that she did not understand *Muldrock* to hold otherwise. It was concluded (at [45]) that the seriousness of the offence was mitigated by the offender's impaired control due to several psychiatric disorders.

36 Finally, I note that in *R v Koloamatangi* [2011] NSWCCA 288 at [18], Basten JA said that *Muldrock* limits the range of factors to be considered in determining the objective seriousness of the offence."

***Stewart v R* [2012] NSWCCA 183**

The applicant pleaded guilty to sexual intercourse without consent. He was sentenced to a total term of imprisonment of 4 years and 6 months, including a non-parole period of 2 years and 8 months. The applicant appealed against the sentence on four grounds. Ground 1 was that the sentencing judge failed to identify and assess the factors relevant to the objective seriousness of the offence.

Appeal dismissed.

The CCA acknowledged that *Muldrock* had brought "substantial changes" to sentencing in NSW. Since then, the CCA had been working out the "precise parameters" of the changes wrought by *Muldrock*. The CCA referred to the *Yang* paragraphs by RA Hulme J (see above) as being a helpful outline of these changes: [33].

The CCA discussed how *Muldrock* decided that the term "objective seriousness" used in association with the "legislative guidepost" of the SNPP under s 54(A)(2) of the CSPA could not be assessed by taking into account personal characteristics of the particular offender. "Objective seriousness" should be determined wholly by reference to the "nature of offending": [35]. The CCA concluded that since *Muldrock*, "the exercise of assessing the objective seriousness of the offence plays a lesser role in sentencing for SNPP offences": [41].

The CCA proceeded in this case on the basis that features personal to the offender should not be taken into account in assessing the objective seriousness of an offence: [37]. However, it also acknowledged the complexity of the issue cautioning, "[it] may be that with regard to some features [of a particular case], the dividing line between classification of them as objective or subjective cannot be sharply drawn": [38]. The CCA sought to overcome this difficult demarcation by observing that "so long as sentencing is founded on instinctive synthesis, whereby all relevant objective and subjective features will be accorded appropriate weight, that approach [being that personal features of the offender should not be taken into account in assessing the objective seriousness of the offence] disadvantages neither the Crown nor an offender": [37].

Although the sentencing judge did not express an assessment of the objective seriousness, the CCA inferred from his recitation of the objective facts, combined with the sentence that he later imposed, that he could only have regarded the offence as serious: [42]. As such, the CCA rejected Ground 1.

LRC recommendations post-*Muldrock*

3.13 The Council has commented earlier in its background report on SNPPs that following the decision in *Muldrock*, a number of issues remained for consideration, including whether the SNPP scheme should be maintained; whether it should be amended (and if so, how); or whether it should be repealed and replaced by an alternative scheme.[29]

3.14 The LRC in consultation with the Council considered these issues further in the context of its sentencing reference — in the interim report in relation to standard minimum non-parole periods[30] and in the recent sentencing report.[31] In both reports the LRC has made recommendations for reform of legislation in relation to SNPPs post-*Muldrock*.[32]

3.15 The Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Bill 2013 (NSW) which is currently before Parliament will clarify the application of the SNPP scheme.

29. NSW Sentencing Council, *Standard Non-parole Periods, A background report* (2011) [2.61] and Chapter 4.
30. NSW Law Reform Commission, *Sentencing: Interim Report on Standard Minimum Non-Parole Periods*, Report 134 (2012).
31. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) and *Sentencing - Patterns and Statistics*, Companion Report 139-A (2013) were tabled in Parliament in September 2013.
32. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) Recommendations 4.1, 4.2 and 7.1. NSW Law Reform Commission, *Sentencing: Interim Report on Standard Minimum Non-Parole Periods*, Report 134 (2012) Option 2 and Recommendation [2.60]-[2.79]; and discussion on the six options for reform [2.53]-[2.133].

3.16 Under the Bill:

- A court is to take the SNPP for an offence into account when determining the appropriate sentence for an offence (together with the other matters that a court can or must take into account, such as the maximum penalty, the aggravating and mitigating factors set out in s 21A of the CSPA, and the factors and principles arising at common law).[33]

- The SNPP "represents the non-parole period for an [SNPP] offence ... that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness".[34]

- The court must give reasons for setting a non-parole period that is different to the SNPP and must identify each factor that it took into account.[35]

Intensive Correction Orders

The role of Intensive Corrections Orders in the sentencing hierarchy, including the question of whether ICOs can be applied to offenders who have little or no risk of re-offending has received consideration in the courts. As noted most recently in the LRC's *Sentencing* report,[36] the question was definitively resolved by a CCA of five judges in *R v Pogson*.

***R v Pogson* [2012] NSWCCA 225**
The Crown appealed on two grounds against the sentences imposed on three respondents, Pogson, Lapham and Martin, for financial crimes committed as directors of a real estate development company. These crimes involved the directors issuing a company prospectus which dishonestly inflated the profitability of their corporate group to attract and retain funds from unsecured investors. A few years later, the corporate group went into liquidation and investors lost approximately half their money. Importantly, no nexus existed between the false profit figure in the company prospectus and the subsequent collapse of the corporate group. The three respondents were charged as directors of the subsidiary fund-raising company for knowingly and/or concurring in making a false or misleading statement in the prospectus. Each respondent pleaded guilty to making a false or misleading statement under NSW law and, for Pogson, under Commonwealth law as well. Two respondents were sentenced to 2 years imprisonment each, with one serving two custodial terms concurrently. The third respondent was sentenced to 1 year and 4 months imprisonment. The sentencing judge found all men to be contrite, of prior good character, and with a low risk of reoffending. He ordered that each of the terms of imprisonment

33. Proposed *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(2) in Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Bill 2013 (NSW) sch 1[3].
34. Proposed *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A(2) in Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Bill 2013 (NSW) sch 1[2].
35. Proposed *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(3) in Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Bill 2013 (NSW) sch 1[3].
36. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [9.12].

was to be served by way of an ICO in the community pursuant to s 7(1) of the CSPA.

The Crown appealed on two grounds. Ground 1 was that in the case of each respondent, an ICO was not, as a matter of law, an available sentencing option. In essence, the Crown argued that the availability of ICOs was confined to persons who have an identified need for rehabilitation, or of whom it can be positively said there is a risk of reoffending. Therefore, an ICO was not available in the present case, as for each respondent, no demonstrated need for rehabilitation was evident: [31].

The Crown, while accepting that the term of sentence for each respondent was appropriate, submitted that the sentencing judge was wrong in ordering that the sentences of imprisonment be served by way of ICOs. The Crown submitted that, as a matter of law, the sentencing judge was bound by, and should have followed, the judgment of the CCA (as a court of three judges) in *R v Boughen* [2012] NSWCCA 17: [30]-[31]. The Crown further submitted that even if the remarks were only *obiter dicta*, they were still a considered and clear statement of the operation of ICOs under s 7(1) of the CSPA: [81].

To determine this appeal, the CCA sat as a court of five judges.

Appeal dismissed.

Regarding Ground 1 all five judges of the CCA agreed: [126], [152], [155]-[156].

The CCA discussed the recent case of *Boughen* where Simpson J wrote the judgment of the court. The CCA noted that "[t]he essence of her Honour's conclusion appears to be that in relation to an offender who has '*no or minimal*' prospect of reoffending, rehabilitation is an irrelevant consideration. As the '*principal focus*' of an ICO is rehabilitation, an ICO is not relevant and accordingly not available to an offender assessed as unlikely to reoffend and with good prospects of rehabilitation": [81], [94]-[95]. The CCA agreed with the sentencing judge that the remarks in *Boughen* were *obiter dicta* only, and as such the sentencing judge was not bound by them: [32], [80].

With regard to considering when an ICO is applicable to an offender, the CCA did not agree with the view in *Boughen*: [96]. After examining the origins of, and purpose behind, the recent introduction of ICOs, the CCA concluded "[t]here is nothing in s 7 of the [CSPA] which confines the imposition of an ICO to persons who have an identified need for rehabilitation, or of whom it can be positively said there is a risk of reoffending": [99].

The CCA thus took a wider view of the concept of "rehabilitation" than contained in *Boughen*, stating "[r]ehabilitation is a concept which is broader than merely avoiding reoffending": [122]. In this broader sense, every offender is in need of rehabilitation, although some may need greater assistance than others: [125].

In relation to Ground 1, the CCA held that ICOs are not excluded, as a matter of law, from use in the sentencing of offenders such as the respondents: [112]. An ICO is a form of custodial sentence: [35]. It is an available sentencing option

for offenders who have committed what are described as “white-collar” crimes. However, the CCA cautioned that this broader approach to ICOs does not mean every offender would be suitable for an ICO, as judges must examine the general sentencing principles “which emphasise the various purposes of sentencing” in determining the type of sentencing option: [113].

Sentencing Principles

Parity Principle

***Arenilla-Cepeda* [2012] NSWCCA 267**

The applicant pleaded guilty to the offence of conspiracy with others to possess a commercial quantity of a border controlled drug, cocaine, which had been unlawfully imported from South America. He was sentenced to a total term of 14 years imprisonment, including a non-parole period of 8 years and 6 months. The applicant and his co-offender were sentenced by different judges, with the co-offender sentenced first. The applicant’s judge was not informed of the co-offender’s sentence. The applicant’s sole ground of appeal was a justifiable sense of grievance due to the disparity between the harsh sentence he received and the lower sentence imposed upon his co-offender.

Appeal allowed. The applicant was resentenced to a total term of 12 years and 6 months imprisonment, including a non-parole period of 7 years and 9 months.

The CCA discussed the factors operating both for and against the applicant on sentencing as compared with his co-offender. Factors against the applicant included, his more senior and controlling role in the enterprise, his agreement to take a larger quantity of cocaine, and his more senior age. Factors for the applicant included, his lack of a criminal history compared with his co-offender who was on parole at the time.

The CCA held an objective foundation existed for a sense of grievance with respect to the wide difference in the starting point of a 20 year sentence for the applicant compared with a 10 year sentence for his co-offender: [97]. In making this decision, the CCA adopted the statement of principles set out by Garling J in *Rees v R* [2012] NSWCCA 47: [50], including principle (3): “the discrepancy required to be identified between sentences is one which is not merely an arguable one, but one which is ‘marked’, or ‘clearly unjustifiable’, or ‘manifest … such as to engender a justifiable sense of grievance’ or else it ‘[appears] that justice has not been done’”: [85].

However, the CCA warned that its conclusion did not mean the heavier sentence should be adjusted to bring it in line with the lighter sentence. Rather, the “marked and unjustifiable 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”: [97].

The CCA noted that the offenders were sentenced in "separate sentencing hearings before different Judges, involving different bodies of evidence and different findings arising from the evidence in each case": [87]. Furthermore, the second judge did not have the advantage of the sentencing remarks of the first judge to aid the exercise of sentencing discretion: [87]. The CCA reiterated the significant advantages of having co-offenders sentenced by the same judge at the same time: [86].

General Deterrence – young offenders

***WW v R* [2012] NSWCCA 165**

On the first charge, the male applicant, aged 17 years and 3 months at the time of the offence, pleaded not guilty to driving in a dangerous manner causing the death of a cyclist. However the jury found him guilty of this offence at trial. The facts found at trial included that the collision was head-on on the wrong side of a straight stretch road with unobstructed visibility. The applicant's use of a mobile phone to send a text message while driving was implicated in the fatal accident. On the second charge, the applicant pleaded guilty to failing to stop after occasioning death. He was sentenced for each offence to a total of 8 years imprisonment, including a non-parole period of 5 years. The applicant appealed on 8 grounds. Grounds 6, 7 and 8 dealt with the sentences (both individually and collectively) being manifestly excessive.

Appeal dismissed.

The CCA held that the sentencing judge had not erred in connecting the applicant's youth to the need for general deterrence as a dominant factor in this case, rather than connecting his youth to the need for rehabilitation. General deterrence is to be regarded as more important than the need for rehabilitation in relation to offences of dangerous driving, because of the prevalence of young offenders: [65], [69], [73].

3.17 Also see the case of *WW v R* in relation to the guideline judgment in *R v Whyte* below.

Sentencing Procedures

Aggregate sentences

***R v Nykolyn* [2012] NSWCCA 219**

The respondent pleaded guilty to four offences covering breaking and entering, and stealing from different residences over the period of a week. A Form 1 document detailed some further offences associated with one of the main offences; while another Form 1 detailed several offences relating to the possession and disposal of stolen property. The respondent was a drug addict with a serious mental illness, and had a long history of prior convictions and imprisonment. Under s 53(A) of the CSPA, the sentencing judge imposed an

aggregate sentence of 7 years imprisonment with a non-parole period of 18 months. In sentencing, the judge did not set out the facts of the individual offences, and although stating that each offence was serious, he did not differentiate between them. The Crown appealed against the sentence on five grounds. Ground 1 was that the sentencing judge erred by categorising each offence as being of similar seriousness.

Appeal dismissed.

The CCA noted that s 53A(1) of the CSPA allows a court to impose an aggregate sentence instead of a separate sentence for each offence. Nevertheless, s 53A(2) requires the sentencing judge to inform the offender of the sentence that would have been imposed for each offence, had separate sentences been imposed instead of an aggregate sentence. This compels the sentencing judge to examine the criminality involved in each offence. However, s 53A(5) will save from invalidity any aggregate sentence imposed by a sentencing judge who has not complied with this section: [32].

The CCA therefore held that although the sentencing judge in this case should have considered and recorded the sentence to be imposed for each individual offence, as required under s 53A(2), the failure to do so did not invalidate the aggregate sentence, which was saved by the exoneration provided in s 53A(5): [33].

Hulme J (with Hall J agreeing) at [58] suggested four reasons why s 53A(2) was included as a statutory provision; requiring a sentencing judge to specify the separate sentences which would have been imposed had an aggregate sentence not been given:

"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."

Discounts

***KR v R* [2012] NSWCCA 32**

The applicant pleaded guilty to one count of murder and two counts of assault with intent to rob in company. He was sentenced to a total term of 19 years and 6 months imprisonment, including a non-parole period of 12 years and 9 months. The applicant appealed on two grounds. Ground 2 dealt with discounting. The applicant submitted that he was denied procedural fairness because the sentencing judge had previously indicated a discount of 20%; yet the judge had reduced the discount for the applicant's plea of guilty from 20% to 15% without hearing any submissions from him against this lower discount.

Appeal dismissed.

The sentencing judge did not at any stage exclude a lower discount being given; and in fact made overt comments during the sentencing proceedings that the discount might be less than 20%. The applicant's counsel did not make submissions on the level of discount in reply to these explicit comments by the sentencing judge. Discount percentages are based principally upon the time when the guilty plea is given. A discount of 15% is generally given where the guilty plea is made late in the proceedings, as occurred here: [30]-[37].

***Carroll v R* [2012] NSWCCA 118**

The applicant pleaded guilty to wounding with intent to cause grievous bodily harm for slashing another motorist with a knife in a road rage altercation. He was sentenced to a total term of 8 years and 3 months imprisonment with a non-parole period of 6 years. During sentencing proceedings, the judge indicated he would give a discount of between 15 and 20% for the applicant's plea of guilty; with a ratio of 50% for the non-parole period (rather than the statutory ratio of 33%) because of a finding of special circumstances. Despite these comments, the judge only discounted the total sentence by 10%. When counsel for both the prosecution and defence mentioned this discrepancy to the sentencing judge, his Honour revised the discount of the total sentence from 10% to 17.5%. However, without any explanation, his Honour made no change in amount to the non-parole period. So instead of the non-parole period being 50% of the total sentence, it was now just 37.5%. The applicant appealed on seven grounds of which two grounds (Grounds 4 and 6) relate to discounting and were dealt with together by the CCA.

Appeal allowed.

Normally if the total length of a sentence is altered, then the non-parole period is proportionately altered, so the ratio between the two remains the same. This was not done in this case, so the balance of the term, being the parole period, went from being 50% to 37.5% of the total sentence, without any reasons being given by the judge. The sentencing judge failed to reflect adequately the discount for the plea of guilty in the non-parole period which he ultimately imposed (Ground 6). In so doing, the sentencing judge did not adequately allow for his finding of special circumstances in the non-parole period which he fixed (Ground 4): [82], [85].

***RJT v R* [2012] NSWCCA 280; 218 A Crim R 490**

The applicant pleaded guilty to two offences of sexually assaulting his seven year old daughter over a period of time. An overall sentence of 10 years imprisonment was imposed, with a non-parole period of 6 years and 6 months. After commencing to offend, but before being charged, the applicant disclosed to police details of child abuse to which he had been subjected by his grandfather many years earlier.

The sentencing judge declined to give the applicant a discount on his sentence under s 23(1) of the CSPA for reporting to police the earlier crime in which he was the victim. Because the applicant was a victim of those earlier offences and not a co-offender, the judge held that "the rationale of the section" did not

extend to his circumstances: [2]. The applicant appealed on the ground that a discount for assisting authorities with another crime should have been given under s 23(1).

Appeal allowed (by majority).

The sentencing judge concluded incorrectly that the "rationale" of s 23(1) of the CSPA did not extend to the circumstances where the applicant was a victim in respect of those offences and not a co-offender. A discount of 10% for each of his offences under s 23(1) should have been allowed in the applicant's circumstances, which is a more limited discount than might otherwise be given: [10]. The applicant's circumstances included reporting to police as a victim of earlier offences, after being the perpetrator of later offences, but before being charged with them.

However, the availability of a discount, and its amount, where the assistance was provided before both the discovery and commission of the offences for which the beneficiary of the discount is being sentenced, should await a case in which they squarely arise. In consequence of the 10% discount being added, a new overall sentence of 9 years imprisonment was imposed, with a non-parole period of 5 years and 10 months: [11].

Operation of guideline judgments

3.18 Some cases considering promulgated guideline judgments during 2012 are set out below.

Subject	Guideline judgment	Consideration
High-range PCA	*Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) for a Guideline Judgment Concerning the Offence of High Range Prescribed Content of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (NSW) (No 3 of 2002)* [2004] NSWCCA 303; 61 NSWLR 305.	
Form 1	*Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 1 of 2002)* [2002] NSWCCA 518; 56 NSWLR 146.	
Guilty plea	*R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383	***Lee* v R** [2012] NSWCCA 123
Break, enter and steal	*R v Ponfield* [1999] NSWCCA 435; 48 NSWLR 327	
Armed robbery	*R v Henry* [1999] NSWCCA 111; 46 NSWLR 346; 106 A Crim R 149	***Ghobrial v R*** [2012] NSWCCA 221 ***R v Chandler; Chandler v R*** *[2012] NSWCCA 135* ***Gebara v R*** [2012] NSWCCA 107
Dangerous driving	*R v Jurisic* (1998) 45 NSWLR 209 reformulated in *R v Whyte* [2002] NSWCCA 343; 55 NSWLR 252	***Gommesen v R*** [2012] NSWCCA 226 ***WW v R*** [2012] NSWCCA 165

Guilty plea

***Lee v R* [2012] NSWCCA 123**
The applicant pleaded guilty to three offences under the Commonwealth *Crimes Act 1914* (relating his activities as the Melbourne-based "branch manager" of an illegal drug importing, trafficking and money-laundering syndicate. He pleaded guilty on the eleventh day of the trial towards the end of the Crown case. His aggregate sentence was imprisonment for a term of 12 years, including a non-parole period of 8 years. He appealed on 13 grounds relating to the sentences for each of the three counts. Grounds 4, 8 and 12 related to the sentencing judge failing to indicate the proportionality of discount to be applied in a sentence because the applicant pleaded guilty. He submitted that even though he entered a late plea of guilty, some discount should have been allowed. Appeal dismissed. The CCA stated that when sentencing for a Commonwealth offence, no requirement exists for the sentencing judge to specify a quantifiable discount for an offender's guilty plea. In particular, the principles set out in *R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383 at [155] do not apply. Rather, when a Commonwealth offence is involved, a sentencing judge must take the offender's guilty plea into account in accordance with the principles stated in *Cameron v R* [2002] HCA 6; 209 CLR 339: [58]. The CCA explained further that this plea of guilty is taken into account as recognition of the offender's willingness to facilitate the course of justice; but not on the basis that the plea has saved the community the expense of a contested hearing: [58]. As such, a relevant consideration in sentencing for a Commonwealth offence is the strength of the Crown case, since this may influence the question of whether the guilty plea was motivated by a "willingness … to facilitate the course of justice" or was "simply a recognition of the inevitable": [59]. The CCA found that the guilty plea by the applicant fell within the later description and that the sentencing judge was not bound to accept the late guilty plea as an indication of remorse: [59]-[60]. The grounds of appeal were not made out: [61].

Armed robbery

***Ghobrial v R* [2012] NSWCCA 221**
The applicant was sentenced to a total term of 2 years and 6 months imprisonment including a non-parole period of 1 year and 3 months for pleading guilty to one count of robbery in company. The crime took place in the car park of a Leagues Club where the victim was robbed of $900 in gambling winnings by the applicant and two associates. The sentencing judge considered the offender's subjective circumstances entitled him to a measure of leniency. However, the sentencing judge did not consider if the subjective circumstances amounted to "exceptional circumstances" under the guideline

judgment in *R v Henry* [1999] NSWCCA 111; 46 NSWLR 346, which would warrant a lesser punishment than a full time custodial sentence.

The applicant appealed against the sentence on 4 grounds – 3 of which relate to considerations in the guideline judgment in *Henry*. Ground 1 was that the sentencing judge erred in failing to find "exceptional circumstances". Ground 2 was that the sentencing judge's starting point in calculating the sentence was excessive. Ground 4 was that the sentencing judge erred in not imposing a suspended sentence.

Appeal dismissed.

Ground 1: The guideline in *Henry* is authority for the proposition that without exceptional circumstances, a sentence of full-time imprisonment is to be imposed for the offence of armed robbery: [21]. The CCA agreed with the sentencing judge that no exceptional circumstances were to be found in the applicant's case, stating this finding was "reasonably open to … [his] evaluative judgement" to make: [41].

Ground 2: The sentencing judge's starting point was a total term of 3 years and 4 months imprisonment with a non-parole period of 1 year and 8 months: [45]. This was before any discount for an early guilty plea: [48]. The CCA noted that the guideline in *Henry* indicates that an armed robbery with listed features similar to those of the present case requires a total term of sentence of between 4 and 5 years: [48]. As comparison of the two sentence terms (3 years and 4 months here; compared with 4 to 5 years in *Henry*) suggests that the sentencing judge's starting point in this case was not excessive: [49].

Ground 4: The CCA held that taking into account the maximum penalty of 20 years for armed robbery, the applicable guideline judgment in *Henry* (of 4 to 5 years), the limited planning and the degree of force used, the sentencing judge was entitled to impose the shorter total term of 2 years and 6 months imprisonment, rather than a suspended sentence: [46], [62]-[63].

***R v Chandler; Chandler v R* [2012] NSWCCA 135**

The applicant, aged 33 years, was found guilty at trial of committing four separate offences with a co-offender while on a good behaviour bond. These offences included armed robbery and assault with intent to rob while armed with an offensive weapon (knife). Three of his victims were elderly people, including an elderly couple attacked at home while opening their garage door. The applicant was also charged with a fifth offence of armed robbery with an offensive weapon (knife) after pleading guilty. The applicant was effectively sentenced for all these offences to a total term of 7 years and 6 months imprisonment, including a non-parole period of 5 years. In sentencing, the judge took into account the applicant's history of mental illness, as distinct from his history of drug abuse and intoxication. The applicant appealed his sentence on nine grounds; each on the basis that it was more severe than his co-offender's sentence (parity principle). The Crown appealed the sentence on three grounds relating to the sentences being manifestly inadequate.

Both the applicant's and Crown's appeals dismissed.

The CCA noted that the real issue in the Crown appeal on the manifest inadequacy of the sentences imposed was whether the sentencing judge had given undue weight to the applicant's mental illness: [51]. In this regard, the CCA noted the Crown's submissions that the objective circumstances of three of the offences for which the applicant was charged were more serious than those considered in the guideline judgment in *Henry*: [53]. Further, that the applicant's individual sentences or effective total sentence for three armed robbery offences was less severe than the 4 to 5 years for one offence of armed robbery indicated as appropriate in *Henry*: [48], [53]. However, the CCA noted that the sentencing judge had made specific findings that the applicant was substantially impaired by mental illness at the time of offending (as distinct from drug intoxication), which adversely affected his capacity to fully appreciate what he was doing: [55]-[56]. The CCA concluded that because of this finding of mental illness, the sentences passed, while towards the bottom of the range, were still adequate: [68].

***Gebara v R* [2012] NSWCCA 107**

The applicant was sentenced to a total term of 6 years imprisonment including a non-parole period of 4 years for two offences of aggravated armed robbery. The first offence occurred at a brothel where the applicant and a co-offender threatened the doorman with a handgun to obtain $2,300 in cash. The second offence occurred two days later at a supermarket where the applicant and two co-offenders pointed two pistols at employees to obtain $800 in cash and cigarettes. The applicant admitted to his involvement in both offences. Three grounds of appeal were raised. The third ground was that the sentencing judge erroneously categorised the facts of both offences as more serious than commonly experienced for offences being dealt with under the guideline judgment in *Henry*: [25].

Appeal dismissed.

Ground 3: The sentencing judge could plainly take the view that the offences in the present case were more serious than the category of offences addressed in the *Henry* guideline. The following reasons were given: 1. *Henry* was concerned with offences under s 97(1) of the *Crimes Act 1900* (NSW); whereas the offences in the present case were under s 97(2), being aggravated by the use of a dangerous weapon. 2. The amounts stolen were not small. 3. The offences were committed in company. 4. The first offence involved actual violence against a vulnerable person in the middle of the night. 5. The offence at the supermarket was the second offence committed within two days: [28].

Dangerous Driving

***Gommesen v R* [2012] NSWCCA 226**

The applicant pleaded guilty to dangerous driving causing death contrary to s 52A(2) of the *Crimes Act 1900* (NSW). He drove into a power pole, while

drunk at high speed, killing a passenger who was thrown from the car when it collided with the pole. The applicant was sentenced to a total term of imprisonment of 4 years, including a non-parole period of 2 years and 6 months. He appealed on two grounds. Ground 2 was that the sentencing judge had erred in his assessment of the objective seriousness of the offence, because he had improper regard to the applicant's prior criminal history when determining that his moral culpability was high.

Appeal dismissed.

Ground 2: The CCA briefly discussed the guideline judgment in *R v Whyte* [2002] NSWCCA 343; 55 NSWLR 252 Under this guideline, the CCA observed that a critical component of the objective circumstances of an offence of dangerous driving is the extent of an offender's "moral culpability": [30]-[31]. The CCA explained that the central element of "moral culpability" relates to the facts and circumstances of the offence itself, and where relevant, the facts and circumstances leading up to the offence, where they have relevance to the commission of the offence: [49].

The CCA agreed that to the extent the sentencing judge's consideration of "moral culpability" included any reference to the prior criminal record of the applicant, it was wrong: [51]. However, this error did not affect the sentencing judge's conclusion that the applicant's moral culpability was high, since it was supported by many other facts surrounding the offence itself, including his high blood alcohol level, excessive speed, and setting out with passengers: [53]-[55].

***WW v R* [2012] NSWCCA 165**

On the first charge under s 52A(1)(c) of the *Crimes Act 1900* (NSW), the male applicant, aged 17 years and 3 months at the time of the offence, pleaded not guilty to driving in a dangerous manner causing the death of a cyclist. However the jury found him guilty of this offence at trial. The facts found at trial included that the collision was head-on on the wrong side of a straight stretch road with unobstructed visibility. The applicant's use of a mobile phone to send a text message while driving was implicated in the fatal accident. On the second charge under s 52AB(1) of the *Crimes Act 1900* (NSW), the applicant pleaded guilty to failing to stop after occasioning death. He was sentenced for each offence to a total term of 8 years imprisonment, including a non-parole period of 5 years. The applicant appealed on eight grounds. Grounds 6, 7 and 8 dealt with the sentences (both individually and collectively) being manifestly excessive.

Appeal dismissed.

The CCA held that the sentencing judge had properly taken into account the guideline judgment in *Whyte*. In passing, the CCA noted that the list of factors set out in *Whyte* do not operate as a checklist; instead, they merely describe the "typical case": [74]. *Whyte* made no reference to the upper limits of sentences for typical cases; but endeavoured to indicate a lower limit for a typical case below which a sentence would not generally be appropriate: [76].

In this case, the CCA agreed with the sentencing judge that the applicant did not conform to a "typical case". He was not of good character with no or limited prior convictions (having a continuous criminal record, including previous driving offences: [34]), there was no plea of guilty (for the first offence: [2]), and the applicant's remorse was qualified: [75]. The CCA affirmed that the critical consideration to emerge from *Whyte* was an assessment of "moral culpability" — ranging along a continuum from low (momentary inattention) to high (abandonment of responsibility). The sentencing judge's assessment that the applicant's moral culpability was high on the facts was appropriate. An important factor in this assessment was the deliberate use of a telephone to text a message while driving: [77], [79]-[80].

3.19 Also see the case of *WW v R* in relation to "General Deterrence – young offenders" above.

4. Legislative amendments

Criminal Case Conferencing Trial Repeal Act 2012 (NSW)

4.1 This Act repealed the *Criminal Case Conferencing Trial Act 2008* (NSW) and its associated regulations. It commenced on assent on 14 March 2012. The repeal formally ended a legislative trial scheme of compulsory pre-committal conferences which began in May 2008 and was discontinued a short while later. Its aim was to encourage early guilty pleas through participation in early conference negotiations between prosecution and defence, including the early sharing of evidence. To promote early guilty pleas and to avoid the time and costs of continuing to trial, the 2008 Act codified mandatory sentence discounts which were to be given in return for early guilty pleas. The amount of the discount depended at what stage in the legal proceedings the guilty plea was made.

4.2 An evaluation by BOSCAR in 2010 found little evidence that the scheme had a direct impact on the outcomes measured, except for a modest decrease in trial registrations in the Sydney District Court in criminal case conference matters.[37]

Road Transport Legislation Amendment (Offender Nomination) Act 2012 (NSW)

4.3 This Act amended the *Road Transport (General) Act 2005* (NSW) and the *Road Transport (General) Regulation 2005* (NSW). The main purpose of the Act is to increase financial penalties five-fold (both court fines and penalty notices) for corporations that own motor vehicles which have been photographed in camera recorded traffic offences (such as speeding or running a red light), where the corporation fails to nominate the driver of the vehicle. This amendment is intended to make it harder for a company to shield its driver from the allocation of demerit points and possible licence suspension. The main provisions commenced on assent on 11 April 2012.

Bail Amendment (Enforcement Conditions) Act 2012 (NSW)

4.4 This Act amended the *Bail Act 1978* (NSW) to allow courts to impose an enforcement condition when granting bail to an accused, and was based on Law Reform Commission recommendations.

4.5 A new s 37AA(1) was inserted providing that a court may impose a bail condition that requires an accused to comply with one or more specified kinds of directions given by police officers for the purpose of monitoring or enforcing compliance with the bail. This amendment was introduced to provide clarity after a recent court decision, *Lawson v Dunlevy* [2012] NSWSC 48, put into question whether conditions, such as a requirement to submit to breath tests,

37. W Y Wan and others, *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).

could be imposed. The amendment commenced on assent on 20 November 2012.

Graffiti Legislation Amendment Act 2012 (NSW)

4.6 This Act amended the *Graffiti Control Act 2008* (NSW) and the *Young Offenders Act 1997* (NSW), among others. It limits the application of juvenile cautions and provides some changes to sentencing outcomes for graffiti offences. The amendment provides that pre-court diversion under the *Young Offenders Act 1997* (NSW) is no longer available for graffiti offences. Young offenders now must appear in court when charged with graffiti offences. The Act requires courts to impose a condition requiring graffiti clean-up work as part of community service orders for graffiti offences. It also extends the range of penalties for graffiti offences available to courts by providing driver licence sanctions for graffiti offences. The amendment commenced on 10 December 2012.

5. Review of Intensive Correction Orders

5.1 The Sentencing Council is required to conduct a comprehensive review of the Intensive Correction Order provisions of the *Crimes (Sentencing Procedure) Act 1999* (NSW) five years after their commencement.[38] That review is due to commence in 2015.

5.2 In the meantime, the Council reports annually to the Attorney General on the operation and use of ICOs, in accordance with the intention outlined in the second reading speech to the Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Bill 2010 (NSW).[39] This is the second such annual report.

5.3 In last year's report, the Council provided a comprehensive overview of the operation of ICOs, including a report on stakeholder submissions and a judicial survey, a statistical summary of their use, and a report of the administrative processes put in place by Corrective Services NSW. That comprehensive review informed the Law Reform Commission's recent recommendations concerning ICOs, including a proposal to replace ICOs and home detentions with a new community detention order (CDO).

5.4 This year, we provide an update on the use of ICOs.

5.5 This report covers the period from 1 October 2010, when ICOs first became available as a sentencing option in NSW, through to the end of December 2012. The Council has obtained statistical information on ICOs from Corrective Services NSW (CSNSW).

Background

5.6 In its 2007 *Review of Periodic Detention*,[40] the Council recommended that the sentence of periodic detention be replaced by a new sentencing option, a Community Corrections Order, or CCO, that would take its place within the sentencing hierarchy between a Community Service Order (CSO) and full-time imprisonment. This recommendation was implemented as the Intensive Correction Order, or ICO.

5.7 In making that recommendation, the Council noted its concern that periodic detention was not available uniformly throughout the State; that additional facilities to enable its expansion would be costly and may be underutilised; and that periodic detention made no provision for case management or rehabilitation of offenders.

5.8 The Council considered that the introduction of CCOs could remove inequalities for those whose place of residence acted as a barrier to periodic

38. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 73A.
39. NSW, *Parliamentary Debates*, Legislative Council, 22 June 2010, 24426.
40. NSW Sentencing Council, *Review of Periodic Detention* (2007).

detention, as well as providing case management support and addressing criminogenic needs through community work and program participation.[41]

5.9 As a result of the Council's recommendations, the NSW Government conducted public consultations on a proposed ICO model, resulting in the model put forward in the Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Bill 2010 (NSW), assented to 28 June 2010, with Government assurance that, unlike periodic detention, ICOs would be uniformly available across the State.[42] Periodic detention stopped being available as a sentencing option in NSW and ICOs became available instead.

Overview of ICOs

5.10 Provision for the imposition and operation of ICOs is made in the CSPA, the *Crimes (Sentencing Procedure) Regulation 2010* (NSW), the *Crimes (Administration of Sentences) Act 1999* (NSW) and the *Crimes (Administration of Sentences) Regulation 2008* (NSW). In summary, the ICO is characterised as follows:

- It is a sentence of imprisonment, of up to 2 years, which is served by way of intensive correction in the community under the supervision of CSNSW, rather than in a correctional facility.[43]
- It has 3 key components:
  - supervision in the community by CSNSW;
  - participation in tailored rehabilitation programs, as directed by CSNSW; and
  - completion of 32 hours per month of community service work.
- It sits between full-time custody and a suspended sentence in the sentencing hierarchy.
- The sentence is not available in relation to offenders who are under 18 years,[44] or who have committed a prescribed sexual offence.[45]
- It is not possible for a court to set a parole period for an ICO;[46] the offender must serve the entire length of the sentence, as outlined in the original order of the court.

41. NSW Sentencing Council, *Review of Periodic Detention* (2007) [9.3].
42. NSW, *Parliamentary Debates*, Legislative Council, 22 June 2010, 24426.
43. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7.
44. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(1)(a).
45. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 66. A prescribed sexual offence is defined under s 66 (2)(a) as an offence under Division 10 or 10A of Part 3 of the *Crimes Act 1900* (NSW), where the victim is a person under the age of 16 years or where the elements include sexual intercourse as defined by s 61H of the *Crimes Act 1900* (NSW). Under s 66, the definition of prescribed sexual offence also includes attempting, conspiracy and incitement, to commit such an offence.
46. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7(2).

- A court can only impose an ICO following a suitability assessment by CSNSW,[47] which occurs prior to sentencing.[48] The court must decide a sentence of 2 years imprisonment or less is appropriate and then refer the offender for assessment by CSNSW before imposing a sentence.

- During the reporting period of 2012, the Community Compliance and Monitoring Group (CCMG) within CSNSW carried out the assessment. However, over a transitional period from February to May 2013, CCMG and Community Offender Services (COS) merged into a new entity, Community Corrections, which now manages and assesses ICOs, among other programs.[49]

- The assessment criteria are set out in cl 14 of the *Crimes (Sentencing Procedure) Regulation 2010* (NSW), and include criteria such as the offender's mental and physical health, substance abuse issues and housing, so far as such matters impact on the ability of the offender to comply with the obligations of the order, as well any risks associated with managing the offender in the community.

- An offender must sign an undertaking to comply with the conditions of an ICO before an ICO may be made.[50]

Use of ICOs

5.11 During the period from 1 October 2010 to 31 December 2012, 1718 offenders were sentenced to 2690 ICOs.[51] However, ICOs represent a small proportion of all offenders. In 2012, 0.92% of all NSW offenders (898 people) sentenced in the Local, District or Supreme Courts received an ICO as their principal penalty.[52]

5.12 Although being an infrequently used sentencing option, ICOs tend to be used more readily than periodic detention orders were formerly used, for sentences longer than 12 months. See Table 1 below. In fact, 5.1% of all ICOs imposed from 1 October 2010 to 31 December 2012 were for the maximum duration of two years.[53]

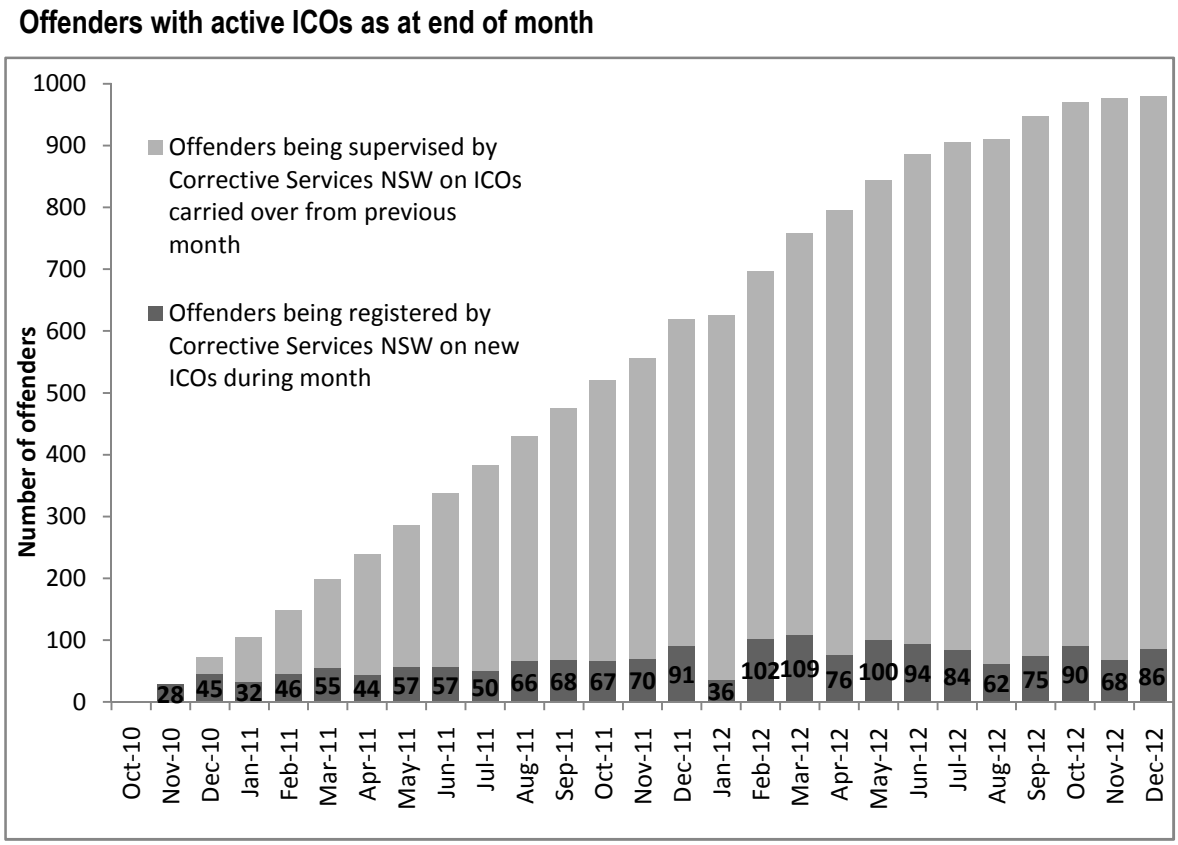
Table 1: Sentence length for periodic detention orders imposed in 2006 and ICOs imposed in the period October 2010 — December 2012[54]

47. *Crimes (Sentencing Procedure) Act 1999* (NSW) 70.
48. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(4).
49. Information provided by Corrective Services NSW, 2013.
50. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(1)(d).
51. Information provided by Corrective Services NSW, 2013.
52. NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics* (2012).
53. 5.1% being 138 out of 2690 orders. Data provided by Corrective Services NSW, 2013.
54. Data on periodic detention terms taken from: NSW Sentencing Council, *Review of Periodic Detention* (2007) [3.3] Table 2. Data on ICOs provided by Corrective Services NSW, 2013, and relate to the period October 2010 - December 2012.

Sentence length	Periodic detention %	ICO %
< 6 months	23.0	14.7
6-12 months	59.0	42.5
12-18 months	12.0	26.9
> 18 months	6.0	15.9

5.13 As can be seen from Figure 1 below, the 2012 trend continues the upwards trend in newly registered and accumulated numbers of offenders on ICOs being managed by CSNSW which was evident in 2011. However, the number of offenders being registered on new ICOs each month has slowed since March 2012 where it reached a peak of 109 offenders. The rate of growth in overall numbers of offenders being supervised by CSNSW on ICOs has slowed since June 2012. In December 2012, CSNSW had an intake of 86 new offenders on ICOs and a total of 980 offenders being supervised on ICOs at the end of the month.[55]

Figure 1: Number of offenders supervised on an ICO per month between November 2010 and December 2012[56]



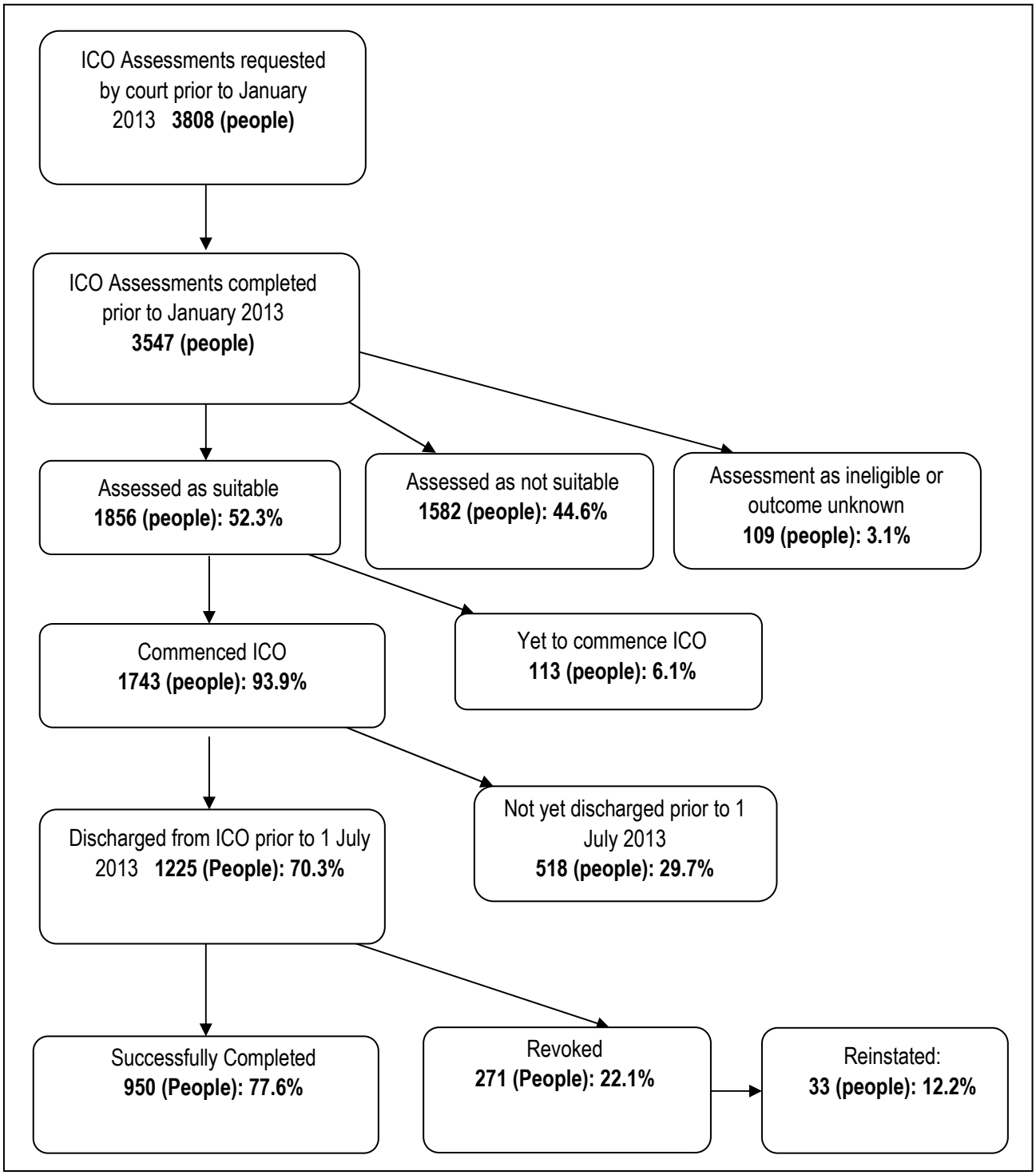
Note: The low intake figure during January 2012 can be attributed to the closure of courts in that month

55. Corrective Services NSW (unpublished data).
56. Data and graph provided by Corrective Services NSW, 2013.

ICO process from initial assessment to completion

5.14 Figure 2 below illustrates the flow of offenders from the initial ICO assessment process through to ICO completion, during the period from October 2010 to December 2012.[57]

Figure 2: Flow of offenders from ICO assessment request to completion of order



57. Data provided by Corrective Services NSW, 2013.

Offence characteristics

5.15 The most common offences, for which ICOs were imposed during the period from October 2010 to December 2012, were traffic and vehicle regulatory offences (30.6%), acts intended to cause injury (27.0%), and illicit drug offences (9.0%), as seen in Table 2 below.[58]

Table 2: The most common offences for which ICOs were imposed, October 2010 – December 2012

Offence classification[59]	Oct 2010 - Dec 2012	
	Offenders	%
1. Homicide and related offences	5	*0.3*
2. Acts intended to cause injury	458	*27.0%*
3. Sexual assault and related offences	23	*1.4%*
4. Dangerous or negligent acts endangering persons	110	*6.5%*
5. Abduction, harassment and other offences against the person	6	*0.4%*
6. Robbery, extortion and related offences	39	*2.3%*
7. Unlawful entry with intent/burglary, break and enter	77	*4.5%*
8. Theft and related offences	65	*3.8%*
9. Fraud, deception and related offences	117	*6.9%*
10. Illicit drug offences	152	*9.0%*
11. Prohibited and regulated weapons and explosives offences	30	*1.8%*
12. Property damage and environmental pollution	25	*1.5%*
13. Public order offences	24	*1.4%*
14. Traffic and vehicle regulatory offences	518	*30.6%*
15. Offences against justice procedures, government security and government operations	44	*2.6%*
16. Miscellaneous offences	2	*0.1%*
Total	**1695**	***100***

58. Data provided by Corrective Services NSW, 2013. This data was collated with reference to the most serious offence for which an ICO was imposed, where the offender was sentenced for more than one offence, based on the National Offence Index, which provides an ordinal ranking of offence categories in the Australian Standard Offence categories (ASOC). Note that the offence type data recorded by Corrective Services NSW differs from the offence type data recorded by BOSCAR due to their different counting rules in category 15.

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

5.16 The Council notes there is a discrepancy between CSNSW data and BOSCAR data in relation to ICO offence characteristics, particularly to the percentage of offences against justice procedures in category 15 of Table 2 above. CSNSW data[60] indicates that 2.6% of ICOs imposed between October 2010 and December 2012 were imposed for "offences against justice procedures". BOSCAR indicates that 26% of ICOs were imposed for "offences against justice procedures" in the calendar year 2012 alone.[61] CSNSW has previously advised that discrepancies in relation to this specific category of offence are a result of the different offence classification systems used by the two agencies. The system used by CSNSW relies on a national system that ranks breach of a justice order lower than under the BOSCAR scheme, which relies on its research into penalties. For purposes of consistency, we have adopted the CSNSW approach in this report.

Breach information

Breach process

5.17 All breaches of ICOs require a timely response and can be managed at a number of levels. In the first instance, breaches are managed by case management officers within the Community Compliance and Monitoring Group (CCMG). A large number of breaches can be resolved at this level, in accordance with CSNSW's practices, and without further referral. Where matters cannot be resolved by the CSNSW officer, breaches are referred to the ICO Management Committee within DCS, which was formed to oversee the administration of ICOs, and to promote consistency in their operational application.[62] Most of the breaches that cannot be resolved at the local level by a CSNSW officer can be resolved at this level. In a small number of cases, where a breach is not able to be resolved by either a CSNSW officer or by the ICO Management Committee, the matter is referred to the State Parole Authority (SPA) or the Commonwealth DPP, as appropriate. A matter may in some cases, be referred directly to SPA from the CSNSW officer, where a serious breach has occurred.

Breach rates

5.18 Of the 1309 ICOs finalised during the period from October 2010 to December 2012, CSNSW has advised that 264 ICOs, or 20.2%, have been revoked by SPA. CSNSW has advised it cannot provide data about how many breaches occurred that were resolved by CCMG or by the ICO Management Committee within this period.

5.19 In relation to the 264 ICOs revoked by SPA, the following breaches of key mandatory conditions led to revocation of the ICOs:[63]

60. Data provided by Corrective Services NSW, 2013.
61. NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics* (2012).
62. Information provided by Corrective Services NSW, October 2012.
63. Data provided by Corrective Services NSW, 2013.

- Breach of condition to be of good behaviour/not offend (25.5% of conditions breached);
- Breach of the work component of the order (23.5% of conditions breached) ;
- Breach of condition to comply with all reasonable directions of a supervisor (13.6% of conditions breached);
- Breach of condition to reside only at premises approved by supervisor (13.1% of conditions breached);
- Breach of condition to engage in programs/activities to address offending behaviour (6.6% of conditions breached); and
- Breach of condition to refrain from using prohibited drugs (6.6% of conditions breached).

Reinstatement process

5.20 In accordance with s 165 of the *Crimes (Administration of Sentences) Act* 1999 (NSW), the State Parole Authority (SPA) may, on application of the offender, reinstate a revoked ICO. An offender can apply for reinstatement after serving at least one month in full-time custody.[64] In order for SPA to make an order reinstating the offender, the offender must again be assessed for suitability for an ICO.[65]

5.21 In the period from 1 October 2010 to 31 December 2012, SPA reinstated ICOs for 28 offenders. As at 30 June 2013, 4 of these offenders had had their orders revoked and 12 offenders had successfully completed their ICOs. The remainder were still ongoing.[66]

Conclusion

5.22 This report provides an update on the numbers of ICOs used and their operation. The recently tabled reports[67] of the Law Reform Commission provide a comprehensive review of ICOs and their operation, drawing on the Council's earlier work. As outlined earlier in this report, the LRC in its report on *Sentencing* makes recommendations for replacing ICOs and home detentions with a new community detention order, or in the alternative, for improving the operation of ICOs.[68]

64. *Crimes (Administration of Sentences) Act 1999* (NSW), s 165(2).
65. *Crimes (Administration of Sentences) Act 1999* (NSW), s 165(3).
66. Data provided by Corrective Services NSW, 2013.
67. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) and *Sentencing - Patterns and Statistics,* Companion Report 139-A (2013).
68. See above at para [2.11]-[2.13].