Local Court Sentencing: A Practical Overview

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DISCLAIMER
I have made all inquiries I believe to be necessary in compiling this paper. The information, to the best of my knowledge and belief, is current as at 10 March 2011. You should, however, conduct your own independent research before relying on it. The paper is provided for educational purposes only and is not designed, or intended, to substitute for legal advice. It is a summary of laws pertinent to the issues discussed but it does not purport to be a definitive, or complete, statement of the relevant laws.

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Introduction

Representing a client on a sentence in the Local Courts is a complex task. In the Local Court, it is about identifying the central issues, articulating them clearly and concisely, the citation of relevant law where appropriate and presenting the sentence in a matter that endears you to the magistrate. In short, how are your client, and more often than not your client's behaviour, separated and more disserving of the Magistrate's attention than the other clients in that day's list?

It is not possible in this paper to discuss specific sentencing for specific charges. The paper concentrates on the principles of sentencing and provides some guidance as to how they are to be applied in Local Court cases. I have not gone into significant detail about topics such as structure of sentences, parole, drug court etc – these are topics in themselves. In preparing the paper, I have assumed that the vast majority of your sentencing work involves bonds, fines, community service orders, intensive correction orders, sentences of home detention and sentences of full time imprisonment.

Statutory framework outlining the purposes of sentencing:

The statutory framework outlining the purposes of sentencing sets out seven criteria to be considered by a judicial officer. These are:

1 I acknowledge the assistance in researching this paper provided by the library staff at Legal Aid NSW.

(a) To ensure that the offender is adequately punished for the offence,

(b) To prevent crime by deterring the offender and other persons from committing similar offences,

(c) To protect the community from the offender,

(d) To promote the rehabilitation of the offender,

(e) To make the offender accountable for his or her actions,

(f) To denounce the conduct of the offender,

(g) To recognise the harm done to the victim of the crime and the community.[2]

These purposes of sentencing will not apply in all cases, but they are a useful guide to use when you are constructing your sentence. It is not necessary, when addressing a court, to speak to each category, eg you don't need to refer to (d) and advise the judicial officer it is not applicable, but you should ensure you address all purposes of sentencing that apply to your case.

Once you have considered the purposes of sentencing, it is necessary to turn to the factors set out in Section 21A of the *Crimes (Sentencing Procedure) Act 1999*. The relevant sub-sections are extracted below:

> **"21 A Aggravating, mitigating and other factors in sentencing**
>
> (1) General In determining the appropriate sentence for an offence, the court is to take into account the following matters:
>
> (a) The aggravating factors referred to in subsection (2) that are relevant and known to the court,
>
> (b) The mitigating factors referred to in subsection (3) that is relevant and known to the court,
>
> (c) Any other objective or subjective factor that affects the relative seriousness of the offence.
>
> The matters referred to in this subsection are in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law.
>
> (2) Aggravating factors the aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows:
>
> (a) the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work,
>
> (b) The offence involved the actual or threatened use of violence,
>
> (c) The offence involved the actual or threatened use of a weapon,
>
> (ca) the offence involved the actual or threatened use of explosives or a chemical or biological agent,
>
> (cb) the offence involved the offender causing the victim to take, inhale or be affected by a narcotic drug, alcohol or any other intoxicating substance,

2 Section 3A *Crimes (Sentencing Procedure) Act 1999*

(d) the offender has a record of previous convictions (particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences),

(e) the offence was committed in company,

(ea) the offence was committed in the presence of a child under 18 years of age,

(eb) the offence was committed in the home of the victim or any other person,

(f) the offence involved gratuitous cruelty,

(g) the injury, emotional harm, loss or damage caused by the offence was substantial,

(h) the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability),

(i) the offence was committed without regard for public safety,

(ia) the actions of the offender were a risk to national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* of the Commonwealth),

(ib) the offence involved a grave risk of death to another person or persons,

(j) the offence was committed while the offender was on conditional liberty in relation to an offence or alleged offence,

(k) the offender abused a position of trust or authority in relation to the victim,

(l) the victim was vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim's occupation (such as a taxi driver, bus driver or other public transport worker, bank teller or service station attendant),

(m) the offence involved multiple victims or a series of criminal acts,

(n) the offence was part of a planned or organised criminal activity,

(o) the offence was committed for financial gain.

The court is not to have additional regard to any such aggravating factor in sentencing if it is an element of the offence.[3]

(3) Mitigating factors The mitigating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

(a) the injury, emotional harm, loss or damage caused by the offence was not substantial,

(b) the offence was not part of a planned or organised criminal activity,

(c) the offender was provoked by the victim,

(d) the offender was acting under duress,

(e) the offender does not have any record (or any significant record) of previous convictions,

(f) the offender was a person of good character,

(g) the offender is unlikely to re-offend,

(h) the offender has good prospects of rehabilitation, whether by reason of the offender's age or otherwise,

(i) the remorse shown by the offender for the offence, but only if:

(i) the offender has provided evidence that he or she has accepted responsibility for his or her actions, and

3 The bold is my emphasis. This is an important point to remember and listen out for when a prosecutor is making submissions.

(ii) the offender has acknowledged any injury, loss or damage caused by his or her actions or made reparation for such injury, loss or damage (or both),

(j) the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability,

(k) a plea of guilty by the offender (as provided by section 22),

(l) the degree of pre-trial disclosure by the defence (as provided by section 22A),

(m) assistance by the offender to law enforcement authorities (as provided by section 23).

(4) The court is not to have regard to any such aggravating or mitigating factor in sentencing if it would be contrary to any Act or rule of law to do so.

(5) The fact that any such aggravating or mitigating factor is relevant and known to the court does not require the court to increase or reduce the sentence for the offence.

(5A) Special rules for child sexual offences In determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.

(5B) Subsection (5A) has effect despite any Act or rule of law to the contrary."[4]

It is important to remember that, unlike other jurisdictions, criminal lawyers have no duty of disclosure to the court. **This does not mean you can mislead the court, but you are not under any obligation to adduce evidence unfavourable to your client's case.**

Preparation for sentence

At the time when you are preparing for sentence, your client has either pleaded guilty to the charge or charges or has been found guilty after a contested hearing. Sometimes there will be agreement as to the facts and sometimes there won't be. In either case, your client has admitted to, or has been found to have behaved in, a manner consistent with each element of the particular offence. [5]

When you prepare for a sentence, you need to start out with the end in mind. By this, I mean you need to know what result you are trying to achieve at sentence.

There are two ways a client will precede to sentence. The first, and more predictable, is when a plea of guilty is entered. The second, and often less predictable, is when a client is found guilty after a contested hearing. In both scenarios, it is imperative that you are aware of the maximum and minimum penalties the court can impose and that you have communicated these to your client, preferably in writing. It is the writer's opinion that it is essential, if your client is charged with an offence carrying a custodial sentence, that your client be advised of this in writing prior to entering any plea or, if this is not possible, immediately after the plea is entered.

4 Section 21A(1 -5B) *Crimes (Sentencing Procedure) Act 1999*

5 See factual disputes on sentence below for a discussion of what you can do if the facts are in dispute.

Once you are aware of the range of penalties facing your client, you have two further matters to consider. Firstly, does your case require any further supporting information and secondly, if so, what is required. Once you have determined what, if anything is required, you can then make an objective assessment of the seriousness of the allegations and give some thought to an appropriate range in which to pitch your sentencing submissions.

Factual disputes on sentence:

There are two ways these can be dealt with. If the factual dispute does not go to the major issues in dispute,, you can generally negotiate the facts with the prosecutor. Personally, I make two copies of the facts sheet and, with a black marker texter, cross out all material I don't want to be included in the statement of agreed facts. I then give a "clean" copy of the facts to the prosecutor, along with my marked copy and ask him or her if they will accept the changes. The benefit of preparing your amended facts sheet in this way is that if the police do not want to accept your changes in totality, they have to get a clean copy of the facts and re-cross out what they will accept.

If the factual dispute goes to more significant issues, and the police will not agree to amend the facts sheet, you can ask the court for a "disputed facts hearing". This means that relevant witnesses will give evidence and the court will determine those issues contained in the facts sheet that are in dispute.

Other matters relevant to sentence preparation:

If your client instructs you to plead guilty and there is insufficient time to prepare the sentence, inform the court that the instructions were only recently obtained and ask for a short adjournment to prepare the matter for sentence. If you are representing a client in a contested proceeding, you should be ready to proceed to sentence at the conclusion of the hearing.

Practitioners often think that if they proceed to sentence, the Magistrate **must** order a pre-sentence report before imposing a full time custodial sentence. This is not so. The Local Court's practice notes do not stipulate any requirement for Magistrates to obtain a pre-sentence report prior to sentence. In *R v Majors*, the judges made the following comments in relation to sentencing:

> "…much of the information gathering undertaken by officers who prepare pre-sentence reports involves work, which should have been undertaken by the legal representatives of the accused, prior to the conclusion of the trial. It is essential for the proper administration of the criminal justice system that those representing an accused person be in a position to adduce all relevant evidence for the purposes of a plea in mitigation of sentence at the conclusion of the trial. I refer here to such matters as the preparation of a family, work and medical history of the offender and the like. It is acknowledged that there are certain matters in respect of which probation officers may be of special assistance, for example, details of previous behaviour by the offender whilst on parole, but the principle remains that except in rare cases, those representing the offender should be in a position to adduce all relevant evidence in mitigation at the conclusion of the trial. Adjournment of the sentencing process to enable the preparation of a pre-sentence report should be confined to those cases where it is apparent to the judge that there is a clear and legitimate

> advantage to be obtained by this course. The pressures under which criminal courts in this State currently operate require adherence to these admonitions..."[6]

What is a pre-sentence report and how do they operate?

A pre-sentence report is a report prepared by a government agency authorized to do so, usually the Probation and Parole Service. The report considers the alternatives available to an offender other than full time custody. The report will, generally, provide background subjective material and, in some cases, will set out the client's version of the offence.

There are advantages and disadvantages of obtaining pre-sentence reports. Some advantages are:

- You will need a pre-sentence report if your client is to be sentenced to a community service order
- The report can often provide useful subjective information about your client's background, any drug or alcohol problems, family history, employment history etc;
- In my experience, I have never found a probation and parole officer who sets out to recommend clients be sentenced to full time gaol. If your client is contrite, remorseful and shows he or she has taken some responsibility for his or her actions, the report will almost invariably come back supportive of a non-custodial sentence.

Some disadvantages of obtaining a pre-sentence report are:

- You have no control over what is said in the report;
- Your client may say things that contradict your instructions or traverse the plea;
- Your client may not express remorse or contrition.

The quoting by pre-sentence report writers of a client's version of events is rarely helpful. In *R v Majors*, the court held that:

> "… in many cases, the pre-sentence report, the preparation of which invariably involves an interview with the offender, consists substantially of self-serving statements made by the offender, often involving unsubstantiated allegations. The Crown is obliged to tender the report, which obviates the need for the offender to give evidence before the sentencing judge and thereby deprives the Crown Prosecutor of the opportunity to cross-examine the offender. It also deprives the judge of the opportunity of hearing the offender give evidence of subjective matters. The sentencing judge is often then left in doubt as to how much weight may be given to all or any part of the report, particularly conclusions, suggestions and recommendations by the interviewing officer…"[7]

6 *R v Majors (1991) 27 NSWLR 62*

7 *R v Majors (1991) 27 NSWLR 624*

In practice, however, Local courts are often presented with pre-sentence reports which are admitted into evidence without objection by the prosecution. In busy lists, some magistrates are happy to accept your client's version of events from within the pre-sentence report.

One way you can assist your client to prepare for the pre-sentence report process is to obtain the relevant subjective and objective details from your client and compile these into written submissions. You can then provide a copy of these to the report writer prior to the client's attendance for his or her appointment. This reduces the amount of talking your client is required to undertake with the report writer. Usually, the less your client says to the report writer, the better off he or she will be.

Practical matters for tendering or objecting to pre-sentence reports in the Local Court

History given by your client to an expert witness, such as a psychiatrist, cannot be relied upon as a factual account unless the prosecution agrees for it to be tendered on that basis.[8]

The Crown also have a right to object to parts of a report, notwithstanding the Crown tenders the report as a matter of procedure.[9] Your client, or you as the legal representative, have a right to view and object to reports prior to sentencing. Your client may not be sentenced on a report that has not been shown to him or her. [10]

Options available to the court at the time of sentence

As a general rule, the court has the power to impose the following penalties:

- The court can find the offence proven but not proceed to conviction;
- Find the offence proven but not proceed to conviction and place an offender on a bond;
- Find the offence proven, record a conviction and impose no other penalty;
- Impose a fine;
- Impose non-association and place restriction orders on the defendant;
- Impose good behaviour bonds;
- Require the defendant to complete community service;
- Sentence an offender to full time imprisonment and either suspend the sentence or order it be served by way of home detention or intensive correction in the community.

8 *Sinika (Unreported, CCA 25 September 1995)*

9 *R v Palu* (2002) 134 A CRIMR 174

10 *Stanton v Dawson (1987) 31 A CRIM R 104*

Your decisions at the time of sentence:

The first forensic decision to be made is whether you have all material at your disposal to present the sentence. If you do not, you need to determine:-

- What information is needed;
- Who can provide that information to you; and
- How long will it take to provide the information.

Sometimes the information needed will be simple enough to obtain such as a character reference, a letter confirming an aspect of your client's subjective facts etc. At other times, you may feel your client should participate in a rehabilitation programme, be medically examined etc. If the rationale for the adjournment is the former, you can simply ask for an adjournment. If the purpose of the adjournment is to allow your client to participate in a rehabilitation programme, you should tell the court this.[11]

Deferral of sentencing for rehabilitation, participation in an intervention program or other purposes

A magistrate, prior to proceeding to conviction, has the power to adjourn proceedings for up to 12 months from the finding of guilt[12], and place the offender on bail,[13] to assess the following matters:

- The offender's capacity and prospects for rehabilitation;
- To allow the offender to demonstrate that rehabilitation has taken place;
- To allow the offender's capacity and prospects for participation in an intervention program to be assessed;
- To allow the offender to participate in an intervention program – the test to be applied in relation to this is whether the court is satisfied participation would reduce the likelihood of the person committing further offences by promoting the treatment or rehabilitation of the person; [14]
- For any other purpose the court considers appropriate.[15]

The first significant decision post the introduction of Section 11 into the *Crimes (Sentencing Procedure) Act 1999* was *Trindall's* case. In this case, Justice Smart, with whom Chief Justice Spigelman and Justice Grove agreed, provides insightful guidance in relation to the section. There Honours held:

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11 Please see the section of this paper entitled Deferral of Sentencing for Rehabilitation, Participation in an Intervention Program or other Purposes.

12 Section 11(2) *Crimes (Sentencing Procedure) Act 1999*

13 Section 11(1) *Crimes (Sentencing Procedure) Act 1999*

14 Section 11(2A*) Crimes (Sentencing Procedure) Act 1999*

15 Section 11(1*) Crimes (Sentencing Procedure) Act 1999*

"58. ... Parliament has accepted the Law Reform Commission's recommendation that there should be a statutory power to allow the sentencing court to defer a sentence for a period in order to assess the offender. Parliament in conferring the statutory power has used terms which are a little different from those suggested in the Commission's report. It saw the object of the remand as being to assess the offender's behaviour while on release and subject to bail conditions. Parliament specified the purposes as being assessing the offender's capacity and prospects of rehabilitation, allowing the offender to demonstrate that rehabilitation has taken place or for any other purpose the Court considers appropriate. An example of the last mentioned case would be a significant risk of suicide if the offender remained in custody, for example, arising from severe depression.

59. While the prospects of rehabilitation arise for consideration when considering whether an offender should be gaoled and the length of the head sentence they are also of great importance when fixing the non-parole period. That represents the court's view of the minimum period an offender must spend in gaol. The Parole Board in sentences exceeding three years mostly acts on the non-parole period fixed by the court.

60. Often a Court experiences difficulty when sentencing an offender in determining the offender's prospects of rehabilitation and whether the foreshadowed rehabilitation will occur. In many instances it will be of great assistance to the sentencing judge if there is an adjournment to enable the offender to demonstrate that rehabilitation has taken place or is well on the way. That was the present case. It is so much better for the court to have evidence of what has actually taken place than to have to base its decision on the opinions of experts, assertions by the offender and what has happened over a short period of time, that is, since the commission of the offence or the offender's arrest.

61. The addition in s11(1)(c) of any other purpose which may be appropriate as the basis for granting a Griffiths remand extends the generally understood purposes for which such a remand may be granted. I have earlier referred to one example. Another is to enable recommended and important surgery to take place. There would be other instances where it would be appropriate to grant a Griffiths remand.

62 I do not share the view that it necessarily imposes undue hardship on the offender to grant a Griffiths remand and warn him that he may still go to gaol, or that he will go to gaol and that the remand is for the purpose of determining a non-parole period. From my experience many offenders prefer to take their chances. Most believe that they will be able to demonstrate marked improvement or rehabilitation, for example, defeating a drug habit, obtaining employment, taking their medication regularly to keep a troublesome condition under control or as the case may be. After all, going straight to gaol gives them no opportunity of avoiding that devastating experience or reducing the extent of that experience. For many, almost anything is better than that experience. Given the unattractive alternative a period of waiting and uncertainty is preferred. A Griffiths remand is not granted against the will of an offender.

63. As the maximum period for which a Griffiths remand can be granted is 12 months, this option can be adequately controlled. That is an important additional provision.

64. The granting of a Griffiths remand is likely to arise for consideration in a relatively small number of cases. Generally, such a remand should not be granted unless there are good reasons for concluding that it is likely to assist the court in determining whether an offender should be sent to gaol or in fixing the length of the sentence or the non-parole period. If the latter be the case, the judge should, as here, make it clear to the offender that he will be going to gaol and that the purpose of the remand is to assist the court in fixing the non-parole period. This Court should not seek to circumscribe the wide statutory discretion given to the sentencing judge."[16]

In *Palu's* case, Justice Howie, with whom Justices Levine and Hidden concurred, noted the inevitable delay a Section 11 causes in finalizing cases and stated:

16 *R v Trindall [2002] NSWCCA 364 paragraphs 58 -64*

> "... Unless the further delaying of the sentencing of the offender is wholly justified in order to ensure that the sentencing discretion is properly exercised, there will be a miscarriage of justice..." [17]

In *Rayment's* case, by a majority of 2 to 1, the Court of Appeal, essentially, approved of the approach in *Trindall's* case but provided additional obita in relation to the judicial discretion available. Justice Tobias held that:

> "18 Once it was open to the sentencing judge, as I think it was, to find that the offender's rehabilitation had further to go before it could be demonstrated that it had *"taken place"*, then the exercise of his discretion was dependent upon whether his Honour considered than an adjournment would, in the circumstances, be of assistance to him in determining the appropriate sentence to impose.
>
> 21 I also acknowledge the force of the remarks of Johnson J at [113] of his reasons. As Rothman J also points out at [172] of his reasons, the offender should be under no illusions as to the outcomes that are available at the final sentencing hearing and which strongly point to a custodial sentence. But ultimately that will be a matter for the sentencing judge.
>
> 22. Even if one considered that a custodial sentence was all but inevitable, ... the question of rehabilitation arises when considering not only whether an offender should be jailed and the length of the head sentence, but also when fixing a non-parole period.
>
> 24 I accept that in the present case the sentencing judge was not required to base his decision upon what had happened over a short period of time as the offender had been in rehabilitation for some 20 months. Nevertheless, I do not understand that Smart AJ was seeking to limit the exercise of the s.11 discretion only to those cases where progress towards rehabilitation has only occurred over a short period of time.
>
> 25. No doubt, with some offenders rehabilitation will be a slower process than with others. Each case must be determined on its own circumstances. The discretion cannot be confined provided that the sentencing judge considers that an adjournment, for example, for the purpose of an offender demonstrating that rehabilitation has taken place, will b of assistance in determining the appropriate sentence to impose."[18]

Finding that an offence is proven but no conviction should be recorded:

This is what's known colloquially as a "section 10". In these cases, a Magistrate can find the offence proven and:

- Dismiss the charge unconditionally;[19]
- Dismiss the charge conditional upon the offender entering into a bond for a period of up to 2 years;[20]
- Dismiss the charge conditional on the offender entering into an agreement to participate in an intervention program and to comply with any intervention plan arising out of the program. [21]

A person who has charges dismissed under Section 10 of the Act has the sole advantage of not receiving a criminal conviction on their record. Apart from this, the

17 *R v Palu 2002) NSWCCA 381; paragraph paragraph 30*

18 *R v Rayment (2010(NSWCCA 85 paragraphs 18, 21, 22, 24 and 25*

19 Section 10(1)(a) *Crimes (Sentencing Procedure) Act 1999*

20 Section 10(1)(b) *Crimes (Sentencing Procedure) Act 1999*

21 Section 10(1)(3) *Crimes (Sentencing Procedure) Act 1999*

order has the same effect as a criminal conviction, in that a court can impose a victim's compensation levy, court costs etc. A court can also order that compensation for property be paid or that property is to be returned. [22]

If your client's case is dealt with under Section 10, they still have the same rights of appeal as if a conviction had been recorded. [23]

Section 10(3) of the Act sets out the matters a court is required to have regard to. These factors are:

> "(a) the person's character, antecedents, age, health and mental condition,
>
> (b) the trivial nature of the offence,
>
> (c) the extenuating circumstances in which the offence was committed,
>
> (d) any other matter that the court thinks proper to consider."

In *Hoffenberg v The District Court of New South Wales*, Justice Baston held that:

> "11 Despite its form, s10 should be understood as having the same general effect as s4 of the South Australian Act. That is, it will not be expedient for the Court to release a person guilty of an offence without proceeding to conviction unless one or more of the factors set out in sub-s(3)(a), (b) or (c) is satisfied or there are other circumstances, not clearly fitting within those characteristics, which would justify such a course. Thus, a court now has a broader discretionary power than in the past; relevantly for the question of jurisdictional error, there is no statement of impermissible considerations.
>
> 12 There is no doubt that the Chief Judge did consider relevant aspects of the applicant's character, antecedents, age, health and mental condition. He also considered factors which might fall within par (d), namely the potential consequences for the applicant if a conviction were recorded. His Honour's discussion of the particular offence, and the deliberate nature of the conduct in committing it, were clearly relevant to a consideration of whether it was trivial in nature and whether the circumstances of its commission were extenuating. In holding against the applicant, his Honour did not use that language. He did not need to. It is beyond doubt that the factors he considered were all material and that he did not place material weight upon any factor which was unavailable for consideration, according to law."[24]

Justice McClellan further held that:

> "25 ...pursuant to s10(3), his Honour was required to consider "the trivial nature of the offence." When considering that issue his Honour, in my view correctly, considered whether the applicant's actions were deliberate, in the sense of considered, pre-meditated or deliberated upon. His Honour took the view, as he was entitled to do, that a deliberate act of vandalism placed the nature of the offence beyond the trivial and may, depending on all the circumstances, deny an offender the benefit of an order pursuant to s10.
>
> 26 Having made this finding his Honour considered the relevant personal circumstances of the applicant referred to in s 10(3) and in particular, the impact of a conviction on his future prospects before reaching his conclusion: see s10(3)(d). His Honour determined that the personal circumstances of the applicant were not such that it was appropriate to make a s 10 order in relation to a deliberate act of vandalism.

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22 Section 10(4) *Crimes (Sentencing Procedure) Act 1999*

23 Section 10(5*) Crimes (Sentencing Procedure) Act 1999*

24 *Hoffenberg v The District Court of New South Wales (2010)* NSWCA 142 paragraphs 11 and 12

> 27 By approaching his decision in this manner, his Honour discharged his obligation to consider the matters raised by s10(3) of the *Sentencing Act* and in so doing carried out the task required of a sentencing judge ..." [25]

In *R v Price*, Justice Simpson provides authority for the proposition that a prior dismissal pursuant to Section 10 of the Act cannot be seen as an aggravating factor by a sentencing judge. Her Honour held:

> "36 In my opinion there are good reasons for interpreting s21A(2)(d) as proposed on behalf of the applicant, that is strictly, and excluding reference to an offence in respect of which the offender has been given the benefit of a s10 order, from s21A(2)(d). Firstly, s21A(2)(d) is, in effect, a penal provision, which ought to be construed strictly, and beneficially to those against whom it operates. That is a conventional principle of statutory construction. Secondly, a s10 order is intended, expressly, to permit an offender to retain the benefit of good character. To extend the meaning of "conviction" in s21A(2)(d) to include a finding of guilt for an offence in respect of which no conviction has been recorded would be to defeat at least part of the object of s10..."[26]

Conviction without further penalty:

The court also has the ability to find an offence proven, record a conviction and then impose no other penalty. [27] Personally, I never ask for a person to be sentenced in this way. If the offence is such that a Section 10 should be applied for, to then request, effectively, that the criminal record be noted is a poor outcome.

Fines

The power to impose fines as a sole penalty in the Local Court is charge specific. It is noted in the individual sections under which an offender is charged.

There is, however, provision for fines to be imposed in addition to good behaviour bonds. In this situation, the legislation requires that the fine imposed is not greater than the maximum fine prescribed under the section upon which the offender was charged. A fine cannot be imposed in conjunction with a Section 10 bond.[28]

Section 9 good behaviour bonds:

A bond pursuant to Section 9[29] is an order of the court. It requires an offender to do certain things. These often include:

- To be of good behaviour;
- To accept supervision of Probation and Parole;
- To notify the court of any change of address;
- To refrain from consuming alcohol or drugs.

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25 *Hoffenberg v The District Court of New South Wales (2010)* NSWCA 142 paragraphs 25 -27

26 *R v Price (2005) NSWCCA 285* paragraph 36

27 Section 10A *Crimes (Sentencing Procedure) Act 1999*

28 Section 14 Crimes (Sentencing Procedure) Act 1999

29 Section 9 *Crimes (Sentencing Procedure) Act 1999*

If an offender breaches his or her bond, the court can either choose to take no further action, impose other conditions on the bond, revoke the bond[30] or can re-sentence the offender for the original offence.[31] If the bond has expired, action can still be taken for a breach of any of the terms during the period to which the bond relates.[32]

What is the difference between a Section 10 and a Section 9 bond

A Section 9 bond is imposed with a criminal conviction – the imposition of a section 10 bond allows the offender to escape conviction. The other essential difference is that a bond under Section 9 can be imposed for a period of up to 5 years[33] where a Section 10 bond has a maximum period of two years.[34]

Community service orders

Community service orders are, essentially, a means by which an offender is punished by doing work for the community. A court, rather than imposing a sentence of imprisonment, can make a community service order requiring a person to do a maximum of 500 hours[35] of community service.[36]

Before a court makes an order requiring an offender to undertake community service, the court must refer the offender for an assessment as to the offender's suitability to undertake community service. [37] This assessment needs to consider:-

- The offender's suitability to undertake community service work; and
- That it is appropriate in all the circumstances that the offender be required to perform community service work; and
- That arrangements exist in the area in which the offender lives for the offender to perform community service work; and
- That community service work can be provided.[38]

Prior to making a community service order, a court **must** have regard to the recommendations of a Probation and Parole Officer's report.[39] . The court cannot make

30 Section 98 *Crimes (Sentencing Procedure) Act 1999*
31 Section 97 *Crimes (Sentencing Procedure) Act 1999*
32 Section 100 *Crimes (Sentencing Procedure) Act 1999*
33 Section 9 *Crimes (Sentencing Procedure) Act 1999*
34 Section 10(1)(b) *Crimes (Sentencing Procedure) Act 1999*
35 Or such other period of time as prescribed by the regulations from time to time.
36 Section 8(1) *Crimes (Sentencing Procedure) Act 1999*
37 Section 88 *Crimes (Sentencing Procedure)) Act 1999*
38 Section 86(1) *Crimes (Sentencing Procedure) Act 1999*
39 Section 86(2) *Crimes (Sentencing Procedure) Act 1999*

a community service order unless the reporter is of the opinion that the offender is suitable to undertake community service work. [40]

A Magistrate can, when sentencing an offender to community service, impose any conditions the magistrate deems appropriate, save for conditions requiring the offender to pay a fine, other payment or compensation.[41] These conditions can include, but are not limited to, the following:-

- Condition or conditions that require an offender to participate in intervention programmes;
- A condition that the offender undergo testing for alcohol or drugs by the offender's assigned officer;[42]
- A requirement that the offender remove graffiti and then restore the effected area.[43]

A community service order requiring an offender to participate in a development programme must require the participation to be for 20 hours or more, but cannot require participation for more than three times weekly with the time for such participation in any one week not to exceed 15 hours.[44]

The offender must, as soon as practicable, sign an undertaking to comply with the offender's obligations under the community service order. If this is not done, an offender can be brought back before the court whereupon the community service order is revoked and the offender re-sentenced.[45]

Concurrent and consecutive community service orders:

If an offender is already undertaking one period of community service, and is again sentenced (for separate matters) to a further period of community service, the total hours of community service cannot exceed 500.[46] When you calculate the total number of hours, any orders for two sets of community service orders to run concurrently don't count twice toward the total number of hours.[47] If a Magistrate does not stipulate that the second sentence of community service orders is to run consecutively with the old order, then the sentence is taken to run concurrently.[48]

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40 Section 86(5) Crimes (Sentencing Procedure) Act 1999
41 Section 90(1) *Crimes (Sentencing Procedure) Act 1999*
42 Section 90(2) *Crimes (Sentencing Procedure) Act 1999*
43 Section 91 *Crimes (Sentencing Procedure) Act 1999*
44 Section 90(3) *Crimes (Sentencing Procedure) Act 1999*
45 Section 86(5) *Crimes (Sentencing Procedure) Act 1999*
46 Section 87(1) Crimes (Sentencing Procedure) Act 1999
47 Section 87(2) Crimes (Sentencing Procedure) Act 1999
48 Section 87(3) Crimes (Sentencing Procedure) Act 1999

Sentences of full-time imprisonment:

The Local Court can sentence offenders to full time imprisonment for a maximum of two years. When passing sentence, the Magistrate must not sentence an offender to a term of imprisonment unless he or she is satisfied, having considered all other alternatives, that no penalty other than imprisonment is appropriate. [49]This is significant and is commonly overlooked by practitioners when making submissions in those borderline cases where a client is on the cusp of being sentenced to a full time period of incarceration.

If a court sentences your client to a period of less than 6 months imprisonment, the court **must** indicate to the offender and make a record of its reasons for doing so. The reasons should include why no other penalty apart from imprisonment is appropriate and why it was decided not to give the offender an opportunity to participate in a rehabilitation program.[50] Unfortunately from the defence lawyer's perspective, failure to comply with this section does not invalidate the sentence.[51]

Importantly, if a sentence is six months or less, a court must not set a non-parole period.[52] In some cases, it may well be preferable to attempt to obtain a sentence of say seven months for your client which will then allow the Magistrate to set a non-parole period.

A Magistrate who sentences a person to imprisonment will usually specify the commencement date of the sentence. This can be the day of actual sentencing, a date prior to sentencing or a date subsequent to sentencing.[5354] If the sentencing Magistrate does not specify the date of commencement, the date is taken to be the date the sentence is imposed. It is, therefore, important if your client has served a period of time on remand to request that his or her sentence be back dated to the date they were first taken into custody.

Additionally, a Magistrate is required to advise the offender, based on the information before the court, of the offender's date of release from custody or the date upon which the offender will become eligible for parole. If there are more than one sentence, the Magistrate must advise the offender in respect of each sentence.[55]

A Magistrate who sets a non-parole period can specify conditions of parole. If your client is unlikely to reside in New South Wales upon release, it may be worthwhile

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49 Section 5(1) Crimes (Sentencing Procedure) Act 1999

50 Section 5(2) Crimes (Sentencing Procedure) Act 1999

51 Section 5(4) Crimes (Sentencing Procedure) Act 1999

52 Section 46 (*Crimes (Sentencing Procedure) Act 1999*

53 S47 *Crimes)Sentencing Procedure) Act 1999*

54 See also *Whan v McConaghy* (1984) 153 CLR 631 at 636; *R v Hall* [2004] NSWCCA 127 at [28]

55 Section 48 *Crimes (Sentencing Procedure) Act 1999*

asking the court to specifically state that no supervision is required. This will save your client from having the parole revoked on the ground that they have nowhere to stay upon release.[56]

What to do if your client is sentenced to a term of imprisonment

When a Magistrate sentences your client to a period of full time imprisonment, you have options. Obviously, you can appeal. You can also:

- Apply for appeals bail;
- Ask that the sentence be suspended;[57]
- Ask that the sentence be served by way of intensive correction in the community;[58]
- Ask that the sentence be served by way of home detention.[59]

These matters will now each be explored in turn.

Appeals bail

If a person is sentenced to a period of imprisonment, he or she can apply for appeals bail.[60] The criteria to be applied in such a bail application are contained in s32 of the *Bail Act 1978*. This section states:-

> **"32 Criteria to be considered in bail applications**
>
> (1) In making a determination as to the grant of bail to an accused person, an authorised officer or court shall take into consideration the following matters (so far as they can reasonably be ascertained), and the following matters only:
>
> (a) the probability of whether or not the person will appear in court in respect of the offence for which bail is being considered, having regard only to:
>
> (i) the person's background and community ties, as indicated (in the case of a person other than an Aboriginal person or a Torres Strait Islander) by the history and details of the person's residence, employment and family situations and the person's prior criminal record (if known), and
>
> (ia) the person's background and community ties, as indicated (in the case of an Aboriginal person or a Torres Strait Islander) by the person's ties to extended family and kinship and other traditional ties to place and the person's prior criminal record (if known),
>
> (ii) any previous failure to appear in court pursuant to a bail undertaking or pursuant to a recognizance of bail entered into before the commencement of this section, and
>
> (iii) the circumstances of the offence (including its nature and seriousness), the strength of the evidence against the person and the severity of the penalty or probable penalty, and

56 Section 51(1A) *Crimes (Sentencing Procedure) Act 1999*

57 Section 12 *Crimes (Sentencing Procedure) Act 1999*

58 Section 7 *Crimes (Sentencing Procedure) Act 1999*

59 Section 6 *Crimes (Sentencing Procedure) Act 1999*

60 Section 13 *Bail Act 1978*

(iv) any specific evidence indicating whether or not it is probable that the person will appear in court, and

(v) (Repealed)

(b) the interests of the person, having regard only to:

(i) the period that the person may be obliged to spend in custody if bail is refused and the conditions under which the person would be held in custody, and

(ii) the needs of the person to be free to prepare for the person's appearance in court or to obtain legal advice or both, and

(iii) the needs of the person to be free for any lawful purpose not mentioned in subparagraph (ii), and

(iv) whether or not the person is, in the opinion of the authorised officer or court, incapacitated by intoxication, injury or use of a drug or is otherwise in danger of physical injury or in need of physical protection,

(v) if the person is under the age of 18 years, or is an Aboriginal person or a Torres Strait Islander, or has an intellectual disability or is mentally ill, any special needs of the person arising from that fact, and

(vi) if the person is a person referred to in section 9B (3), the nature of the person's criminal history, having regard to the nature and seriousness of any indictable offences of which the person has been previously convicted, the number of any previous such offences and the length of periods between those offences, and

(b1) the protection of:

(i) any person against whom it is alleged that the offence concerned was committed, and

(ii) the close relatives of any such person, and

(iii) any other person the authorised officer or court considers to be in need of protection because of the circumstances of the case,

(c) the protection and welfare of the community, having regard only to:

(i) the nature and seriousness of the offence, in particular whether the offence is of a sexual or violent nature or involves the possession or use of an offensive weapon or instrument within the meaning of the *Crimes Act 1900*, and

(ii) whether or not the person has failed, or has been arrested for an anticipated failure, to observe a reasonable bail condition previously imposed in respect of the offence, and

(iii) the likelihood of the person interfering with evidence, witnesses or jurors, and

(iv) whether or not it is likely that the person will commit any serious offence while at liberty on bail, but the authorised officer or court may have regard to this likelihood only if permitted to do so under subsection (2), and

(v) if the offence for which bail is being considered is a serious offence, whether, at the time the person is alleged to have committed the offence, the person had been granted bail, or released on parole, in connection with any other serious offence, and

(vi) if the offence for which bail is being considered is an offence that involves the possession or use of an offensive weapon or instrument within the meaning of the *Crimes Act 1900*, any prior criminal record (if known) of the person in respect of such an offence.

(2) The authorised officer or court may, for the purposes of subsection (1) (c) (iv), have regard to whether or not it is likely that the person will commit one or more serious offences while at liberty on bail if the officer or court is satisfied that:

(a) the person is likely to commit the offences, and

(b) that likelihood, together with the likely consequences, outweighs the person's general right to be at liberty.

(2A) The following matters are to be considered in determining for the purposes of subsection (1) (c) or (2) whether an offence is a serious offence (but do not limit the matters that can be considered):

(a) whether the offence is of a sexual or violent nature or involves the possession or use of an offensive weapon or instrument within the meaning of the *Crimes Act 1900*,

(b) the likely effect of the offence on any victim and on the community generally,

(c) the number of offences likely to be committed or for which the person has been granted bail or released on parole.

(3) For the purposes of this section, the authorised officer or court may take into account any evidence or information which the officer or court considers credible or trustworthy in the circumstances and, in that regard, is not bound by the principles or rules of law governing the admission of evidence.

(4) In having regard to the details of residence, as referred to in subsection (1) (a) (i), of an accused person who is under the age of 18 years, the fact that the person does not reside with a parent or guardian of the person shall be ignored.

(5) The reference in subsection (1) (a) (i) to an accused person's residence includes a reference to the residential address at which the person may generally be found.

(6) This section applies to an offence to which section 8A, 8B or 8F applies, and a grant of bail to which section 8C or 8E applies, but does not prevent consideration of any matter accepted by the authorised officer or court as relevant to the question of whether bail should not be refused.

(7) This section applies to a grant of bail to which section 9C or 9D applies, but does not prevent consideration of any matter accepted by the authorised officer or court as relevant to the question of whether bail should be granted under that section."

Post conviction, there is no presumption in favour of bail. The appellant bears the burden of satisfying the court that the criteria for the granting of bail has been met.[61] Your argument in favour of bail is strengthened in cases where the appellant, should bail be refused, is likely to serve all or a significant portion of the sentence prior to the determination of the appeal or in circumstances where the strengths of the defence case on appeal are high.[62]

Suspended sentences

Obviously, if your client is currently serving a period of incarceration, they are not eligible to have the new sentence suspended.[63] A court deciding to impose a suspended sentence is required first to decide whether or not a sentence is to be served by way of home detention.[64] In practice, however, it is not necessary to ask a court to make this decision before asking a Magistrate for a suspended sentence.

A suspended sentence is an available penalty in virtually all cases heard in the Local Court. When a sentence is suspended, the whole of the sentence is suspended upon

61 *R v Hilton (1987) 7 NSWLR 745 Street CJ paragraphs 759-750*

62 *(2006) NSWSC 1103* for a discussion of these issues

63 Section 12(2) *Crimes (Sentencing Procedure) Act 1999*

64 Section 12(C) *Crimes (Sentencing Procedure) Act 1999*

the offender entering into a good behaviour bond. The suspended sentence, or the good behaviour bond, cannot exceed the length of the original custodial sentence.[65] *Zamagias's* case is authority for this. In that case, Justice Howie held that:

> "25. The preliminary question to be asked and answered is whether there are any alternatives to the imposition of a term of imprisonment. Section 5 of the Act prohibits a court from imposing a sentence of imprisonment unless the court is satisfied, having considered all possible alternatives, that no other penalty other than imprisonment is appropriate. It should be noted that at this stage in the process the only consideration is whether a sentence of imprisonment should be imposed and not whether that sentence should be suspended. Notwithstanding that s 12, which provides the power to suspend a sentence, is contained in Division 3 of Part 2 of the Act under the general heading "Non-custodial Alternatives", a suspended sentence is not an alternative to which s5 relates: JCE (2000) 120 A Crim R 18 at [15]. That is because a sentence cannot be suspended until it has been imposed: it is the execution of the sentence that is suspended not its imposition.
>
> 26. Having determined that there is no other penalty appropriate other than a sentence of imprisonment, the court is next to determine what the term of that sentence should be; *R v Foster* [2001] NSWCCA 215 at [30]. This has been regarded as the first step of a two-step approach in the imposition of a sentence of imprisonment, see *R v Blackman* and Walters [2001] NSWCCA 121 at [50] to [52]; JCE at [17]. The determination of the term is to be made without regard to whether the sentence will be immediately served or the manner in which it is to be served. This is because any of the alternatives available in respect of a sentence of imprisonment can only be considered once the sentence has been imposed, see s 6 (periodic detention order), s 7 (home detention order) and s 12. It follows that the term of the sentence cannot be influenced by what order might be made after the sentence has been imposed. For example it cannot be increased because it is to be served by way of periodic detention: *R v Wegener [1999]* NSWCCA 405, or by home detention: *R v Jurisic* (1998) 45 NSWLR 209 at 249. Nor can the term be reduced because an otherwise appropriate alternative is unavailable: *R v T (NSWCCA, 19 June 1995).*
>
> 27. The fact that a term of a sentence is to be determined without regard to the fact that it is to be suspended is consistent with the approach adopted in other jurisdictions ..."[66]

If a suspended sentence is more than 6 months in duration, the non-parole and balance of term are determined by the court dealing with any revocation proceedings and not by the original sentencing court. This allows the offender's conduct whilst on his or her suspended sentence to be considered.

Breach of suspended sentences

If your client breaches a suspended sentence, a Magistrate must revoke the order unless he or she is satisfied that:-

- The offender's failure to comply was trivial; or
- There are good reasons for excusing the offender's non-compliance.[67]

65 Section 12(1) *Crimes (Sentencing Procedure) Act 1999*

66 R v Zamagias [2002] NSWCCA 17 paragraphs 25 -27

67 Section 98(3) *Crimes (Sentencing Procedure) Act 1999*

In *Cook's* case, Justice Howie (with whom the other justices agreed) held that:

> "14 ... What the court is required to consider is whether there are good reasons to excuse the failure to comply with the conditions of the bond in circumstances where that failure is not trivial in nature. The focus must principally be upon the behaviour giving rise to the failure to comply with the conditions of the bond and whether that behaviour should be excused. ...
>
> 18 A Court exercising the jurisdiction to call an offender before it for breach of a good behaviour bond as provided for in s98(1) should, if it determines to revoke the bond under s98(2)(c) or s98(3), make that order before determining what, if any, further order will be made consequent upon the revocation and before considering what, if any, penalty will be imposed for the conduct giving rise to the breach. This has the virtue of making the exercise of discretion under s99 a demarked and separate sentencing exercise, although we note that s99(4) provides that this will be the effect of a sentence imposed under the section in any event. Sentencing for the breach first also allows for the principle of totality to operate in the event that both the breach and the conduct giving rise to it are punished by a term of imprisonment.
>
> 19 We wish to make it clear however, that a failure to order revocation of a good behaviour bond does not constitute an error of the kind that would otherwise invalidate any orders made consequential upon revocation. ..." [68]
>
> 21 But two matters should be emphasised... firstly the determination under s98(3)(b) should be made bearing firmly in mind that generally a breach of the conditions of the bond will result in the offender serving the sentence that was suspended and, secondly, the principal consideration, if not the only one, is upon the conduct giving rise to the breach. As to the first of those matters King CJ stated:
>
> > "I repeat what I said in *R v Buckman* (1987) 47 SASR, 303 at 304: "There is a clear legislative policy that in general a breach of a condition of a recognizance upon which a sentence has been suspended, should result in the offender serving the sentence which was suspended. A sentence of imprisonment is imposed and suspended only where imprisonment is fully merited but the court considers it appropriate to give the offender a last chance to avoid imprisonment by leading a law abiding life. It is intended to be a sanction suspended over the head of the offender which is to be activated if there is a lapse into non law abiding ways. The court will not lightly interfere with the ordinary consequence of a breach of the recognisance."
> >
> > It is of great importance that the courts adhere to that principle. Departure from it by the nonrevocation of suspended sentences tends to undermine the integrity of the system of suspended sentences and their effectiveness as a means of deterring future offenders.
>
> 22 Perry J stated:
>
> > "I agree with the observations which have fallen from His Honour the Chief Justice. In doing so, I would repeat the comments which I made in R v Lawrie, (unreported) (Court of Criminal Appeal) 16 November 1992, judgment No S3704: "To excuse or vary the consequences of the breach of bond, the grant of which resulted in the suspension of a term of imprisonment, has a tendency to undermine the integrity of the sentencing process generally. It follows that the power to do so should be exercised sparingly, and only in cases where proper grounds have clearly been made out."
>
> 23 With respect I would endorse those sentiments. There is nothing more likely to bring suspended sentences into disrepute than the failure of courts to act where there has been a clear breach of the conditions of the bond by which the offender avoided being sent to prison. Notwithstanding what has been stated about the reality of the punishment involved in a suspended sentence, if offenders do not treat the obligations imposed upon them by the bond seriously and if courts are not rigorous in revoking the bond upon breach in the usual case, both offenders and the public in general will treat them as being nothing more than a legal fiction designed to allow an offender to escape the punishment that he or she rightly deserved.

68 *DPP v Cook* (2007) NSWCCA 184 paragraphs 14, 18 and 19

24 As King CJ pointed out, it should not be forgotten that before suspending a sentence the court must have reached the view that nothing but a sentence of imprisonment was appropriate to punish the offender for that crime: see *R v Zamagias* [2002] NSWCCA 17. The suspended sentence is not an alternative to a bond and should not be treated as such. The suspension of the sentence of imprisonment was an act of mercy designed to assist the offender's rehabilitation or for some other purpose to benefit the offender on the understanding that, if the offender did not fulfil the conditions of the bond, the sentence would be imposed. Therefore, generally speaking, there can be no unfairness in requiring the offender to serve the sentence when the obligations under the bond have been breached.

25 Whatever else might be said about the reasons of the Judge in the present case, there appears to be no consideration at all of the policy behind suspended sentences. Nor is there any obvious appreciation of the intention of Parliament, that is made clear from the special provisions made for bonds under s12 and the need for "good reasons" to be found, that in the ordinary case a failure to comply with the conditions of the bond will result in its revocation. The court does not determine the existence of good reasons in a vacuum. It does so in the context of the policy and purpose behind the suspended sentence regime and by recognising that by excusing the breach the implicit threat made to the offender at the date of the imposition of the suspended sentence will not be carried out. If the realisation of this threat is avoided in inappropriate cases, it can only result in the lowering of respect for the orders of the court by the offender and the public in general."[69]

Justice Howie went on to set out the manner in which a court should deal with proceedings involving a breach of a Section 12 bond and the sentencing for a fresh offence. His Honour held that:

"27 It is important that a court in the position of the Judge in the present case recognise that there are two distinct jurisdictions being exercised when determining the sentence for an offence that is also a breach of a s12 bond. Each jurisdiction requires the court to exercise a discrete and independent discretion. Of course they are not completely independent jurisdictions and the exercise of the discretion to revoke the bond might indirectly influence the sentencing discretion. For example, if the court determines to revoke the bond and the sentence previously suspended thereby comes into operation, the court would not then have the power to impose a suspended sentence for the offence that brought about the breach, even if that were thought to be an otherwise appropriate sentence: see s12(2) of the Act. There are other ways in which the decision under s98(3)(b) can indirectly affect the sentence to be imposed for the offence by making a sentencing option either unavailable or inappropriate.

28 It is clearly preferable that, wherever possible, the one court should consider both the breach and the sentence for the offence causing the breach: there may be overlapping findings of fact to be made in the two proceedings and questions of totality would arise if the bond were revoked and a further term of imprisonment imposed for the offence. But it is of crucial importance that the breach proceedings be resolved before the sentence is imposed for the offence. This is because, as I have indicated, the result of the breach proceedings can affect the sentence to be imposed for the offence but the sentence for the offence is irrelevant to a determination of whether there are good reasons to excuse the breach.

29 This is not what happened in the present case and it is a good example of how the proceedings can miscarry if the court does not keep the two issues to be decided separate and distinct. It is obvious from both the reasons given for excusing the failure under s98(3)(b) and the manner in which the Judge approached the issue of whether to excuse the breach that the sentence for the wounding offence was determined before the issue of the breach was resolved. The judge decided to excuse the breach in order to give effect to the sentence he imposed for the offence. This resulted in the Judge failing to ask himself the correct question in relation to the breach proceedings and in determining those proceedings by taking into account exclusively an irrelevant consideration."[70]

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69 *R v COOKE; COOKE v R [2007]* NSWCCA 184 paragraphs 21 -25

70 *R v COOKE; COOKE v R [2007] NSWCCA 184 paragraphs 27 -29*

Justice Howie then turned to the impact an offender's objective and subjective matters should have on the sentencing process. His Honour held that:

> "34 Hidden J in *Burrows* held that the subjective circumstances of the offender are generally irrelevant in determining whether there are good reasons to excuse the breach under s98(3)(b) except to the extent that those subjective circumstances are relevant to a consideration of the breach itself. So, for example, the fact that the offender suffers from a mental disorder that may account for the failure to comply with the conditions of the bond will be a relevant factor in determining whether to excuse the breach: see *Marston*. But subjective features of the offender at the time of the breach proceedings are irrelevant to the decision whether good reasons exist to excuse the breach. They may of course have some role to play in what order is made after revocation when determining whether the consequential sentence is to be served by way of full-time custody, or an available alternative and the length of the non-parole period to be imposed. But they cannot affect the decision whether to revoke the bond.
>
> 35 In the present case it was an error of law for the Judge to take into account the need for rehabilitation of the offender by supervision of the probation service when deciding whether to excuse the breach. The error is a result of the Judge both approaching the determination of the breach proceedings in light of the sentence imposed for the wounding offence and by determining the breach proceedings by focusing on the consequences of the revocation of the bond to the exclusion of any other consideration."[71]

If your client has served pre-sentence custody, this is taken into account when or if the Section 12 bond is breached. *Pulitano's* case is authority for this. In that decision, Justice Giles held that:

> "9 However, the former course, that is, backdating at the time of sentence, is not available when a sentence is suspended pursuant to s12(1) of the *Crimes (Sentencing Procedure) Act*, and by s12(3) Part 4 of the Act (within which is s47, which would otherwise dictate a day of commencement of the sentence and allow for backdating) does not apply to a sentence the subject of an order suspending its execution. Thus any pre-sentence custody must either be taken into account by reducing the sentence imposed, in which I include in prescribing the manner in which the sentence is to be served, or by backdating at the time there is revocation of the bond and the sentence descends."[72]

Finally, there is a right of appeal, as with any other sentence, against the decision of a Magistrate to revoke a bond pursuant to Section 12 of the Act.

Intensive Correction orders

The new intensive correction order regime replaces periodic detention in the *Crimes (Sentencing Procedure) Act 1999*. Section 6 of the Act[73] is repealed and section 7 relating to home detention is re-numbered as section 6. A new Section 7 is then inserted. This section states:

> "(1) A court that has sentenced an offender to imprisonment for not more than 2 years may make an intensive correction order directing that the sentence be served by way of intensive correction in the community. ...

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71 R v COOKE; COOKE v R [2007] NSWCCA 184 paragraphs 34 and 35

72 Pulitano v R [2010] NSWCCA 45 paragraph 9

73 *Crimes (Sentencing Procedure) Act 1999*

[Note here that the court has to sentence the offender to imprisonment for not more than 2 years before an intensive correction order can be made. The Act does not stipulate that a specific time period needs to be included and the legislation does not make this clear. The writer is of the opinion that the court can still make an intensive correction order even if the Magistrate or Judge has fixed the length of the sentence prior to obtaining a suitability assessment.)

(2) If a court makes an intensive correction order directing that a sentence be served by way of intensive correction in the community, the court is not to set a non-parole period for the sentence.

(3) This section is subject to the provisions of Part 5."

Prescribed sexual offences excluded from intensive correction:

An intensive correction order cannot be made for a prescribed sexual offence.[74] A "prescribed sexual offence is defined[75] as:

"(2) In this section, ***"prescribed sexual offence"*** means:

(a) an offence under Division 10 or 10A of Part 3 of the *Crimes Act 1900*, being:

(i) an offence the victim of which is a person under the age of 16 years, or

(ii) an offence the victim of which is a person of any age and the elements of which include sexual intercourse (as defined by section 61H of that Act), or

(b) an offence that includes the commission of, or an intention to commit, an offence referred to in paragraph (a), or

(c) an offence that, at the time it was committed, was a prescribed sexual offence within the meaning of this definition, or

(d) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in paragraph (a), (b) or (c)."

How to obtain an intensive correction order:

An intensive correction order will not be made with respect to your client's sentence of imprisonment unless the court is satisfied that:-

- The offender is aged 18 years or more;
- The offender is a suitable person to serve a sentence by way of intensive correction in the community;
- It is appropriate in all the circumstances for the sentence to be served in the community; and
- The offender has signed an undertaking to comply with the intensive correction order.[76]

An assessment report is prepared by Corrective Services to assist the court in making this decision.

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74 Section 66(1) *Crimes (Sentencing Procedure) Act 1999*

75 Section 66(2) *Crimes (Sentencing Procedure) Act 1999*

76 Section 67(1) *Crimes (Sentencing Procedure) Act 1999*

Compulsory matters to be addressed in assessments

The Regulations[77] set out what must be included in an assessment report. Clause 14[78] states:

> "(1) An offender's assessment report must take into account, and specifically address, the following matters:
>
> (a) any criminal record of the offender, and the likelihood that the offender will re-offend,
>
> (b) any risks associated with managing the offender in the community (taking into account the offender's response to supervision in the community on previous occasions),
>
> (c) the likelihood that the offender will commit a domestic violence offence,
>
> (d) whether the offender will have suitable residential accommodation for the duration of an intensive correction order (see sub-section 3 below),
>
> (e) whether any circumstances of the offender's residence, employment, study or other activities would inhibit effective implementation of an intensive correction order,
>
> (f) whether the persons with whom it is likely the offender would reside, or continue or resume a relationship, understand the requirements of an intensive correction order and are prepared to live in conformity with them, so far as may be necessary,
>
> (g) whether the making of an intensive correction order would place at risk of harm any person who would be living with or in the vicinity of the offender,
>
> (h) any dependency of the offender on alcohol or drugs, or other substance abuse, that would affect the offender's ability to comply with the offender's obligations under an intensive correction order,
>
> (i) any physical or mental health conditions of the offender that would affect the offender's ability to comply with the offender's obligations under an intensive correction order,
>
> (j) the existence and extent of any self-harm risk, including the likely impact of an intensive correction order on that risk, and the availability in the community of the support and treatment services necessary to manage the risk.
>
> (2) If a child under the age of 18 years would be living with an offender serving a sentence of imprisonment by way of intensive correction, the assessment report must take into account, and specifically address, the effect on the child of that fact.
>
> (3) If it appears to the officer preparing the assessment report that the offender is homeless:
>
> (a) all reasonable efforts must be made by the Commissioner of Corrective Services, in consultation with the offender, to find suitable accommodation for the offender, and
>
> (b) the report is not to be finalised until those efforts have been made.
>
> (4) An offender's assessment report must also include an assessment of:
>
> (a) factors associated with his or her offending that would be able to be addressed by targeted interventions under an intensive correction order, and
>
> (b) the availability of resources to address those factors by targeted interventions under an intensive correction order, and
>
> (c) any issues relevant to the administration of an intensive correction order in respect of the offender that may be relevant to the court's determination of an appropriate date to be fixed for the commencement of the sentence."

77 *Crimes (Sentencing Procedure) Regulation 2010*

78 Cl14 *Crimes (Sentencing Procedure) Regulation 2010*

Non-compulsory matters to be addressed in assessment reports

Both the Act[79] and the Regulations[80] are silent as to the non-compulsory matters that reports can address. The author, therefore, presumes that the reporter can report on any aspect of the offender requested by the court.

How does the court arrive at its decision

The Act[81] is very prescriptive in relation to what a court can, and must, take into account when making an intensive correction order. The court is required to "have regard to" the following matters:-

a. The contents of the assessment report prepared by correctives on the offender; [82]and

b. Any other evidence from the Commissioner of Corrective Services as the court considers necessary for the purpose of deciding whether to make such an order.[83]

A court must not make an intensive correction order unless a report is received from corrective services stating that, in the opinion of the author, the person is suitable to serve the sentence by way of intensive correction in the community.[84]

On the other hand, the legislation gives the court power to decline to make an intensive correction order for any reason, irrespective of what corrective services recommend.[85] If corrective services have assessed an offender as suitable for an intensive correction order and the court determines not to impose an intensive correction order, the court must give reasons.[86] Failure to give reasons, however, does not invalidate the sentence.[87]

Concurrent and consecutive sentencing involving intensive correction

Concurrent and consecutive sentences, in the context of intensive correction orders, contemplate an offender being subject to an original sentence which is an intensive correction order. A client cannot receive an intensive correction order as a penalty if the client is currently serving a custodial sentence for another offence.

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79 *Crimes (Sentencing Procedure) Act 1999*

80 *Crimes (Sentencing Procedure) Regulation 2010*

81 *Crimes (Sentencing Procedure) Act 1999*

82 Section 67(2) *Crimes (Sentencing Procedure) Act 1999*

83 Section 67(2) *Crimes (Sentencing Procedure) Act 1999*. It is also noteworthy that this "evidence" will not be subject to the rules of evidence.

84 Section 67(4) *Crimes (Sentencing Procedure) Act 1999*

85 Section 67(3) *Crimes (Sentencing Procedure) Act 1999*

86 Section 67(5) *Crimes (Sentencing Procedure) Act 1999*

87 Section 67(6) *Crimes (Sentencing Procedure) Act 1999*

If your client, however, is subject to an intensive correction order and the court seeks to sentence him or her for a fresh offence to another intensive correction order, the court can only do this if the date on which the new sentence ends is less than two years after the date it was imposed.[88]

By way of case study, Michelle is serving a sentence of 12 months by way of an intensive correction order. This becomes her first sentence. Two months into the sentence, she is charged with her seventh major driving offence in the past five years. The courts decide to sentence her to a further intensive correction order of nine months to be served consecutively. This sentence is valid, because the second sentence will end prior to the expiration of two years.

Although intensive Correction orders can be extended by the Parole Authority, for the purposes of calculating concurrent and consecutive sentences, it is the original court-imposed sentence which is used for the purposes of the calculation.[89]

Commencement date of intensive correction order after sentence

When a court makes an intensive correction order, the court must stipulate a date upon which the order will commence. This date must be no more than 21 days after the date of sentence.[90] This does not apply if the intensive correction order has been ordered to be served consecutively, partly consecutively or partly concurrently with another sentence of imprisonment being served by way of intensive correction.[91]

Mandatory conditions imposed by intensive correction orders

The Act[92] allows the legislation of mandatory and additional conditions of intensive correction orders to be provided for in the regulations. Clause 175 of the Regulations[93] states:

> "The following are the mandatory conditions of an intensive correction order to be imposed by a court under section 81 of the Act:
>
> (a) a condition that requires the offender to be of good behaviour and not commit any offence,
>
> (b) a condition that requires the offender to report, on the date fixed as the date of commencement of the sentence or on such later date as may be advised by the Commissioner, to such local office of Corrective Services NSW or other location as may be advised by the Commissioner,
>
> (c) a condition that requires the offender to reside only at premises approved by a supervisor,

88 Section 68(1) *Crimes (Sentencing Procedure) Act 1999*

89 Section 68(2) *Crimes (Sentencing Procedure) Act 1999*

90 Section 71(1) *Crimes (Sentencing Procedure) Act 1999*

91 Section 71(2) *Crimes (Sentencing Procedure) Act 1999*

92 See Section 81 *Crimes (Administration of Sentences) Act 1999*

93 *Crimes (Administration of Sentences) Regulation 2008*

(d) a condition that prohibits the offender leaving or remaining out of New South Wales without the permission of the Commissioner,

(e) a condition that prohibits the offender leaving or remaining out of Australia without the permission of the Parole Authority,

(f) a condition that requires the offender to receive visits by a supervisor at the offender's home at any time for any purpose connected with the administration of the order,

(g) a condition that requires the offender to authorise his or her medical practitioner, therapist or counsellor to provide to a supervisor information about the offender that is relevant to the administration of the order,

(h) a condition that requires the offender to submit to searches of places or things under his or her immediate control, as directed by a supervisor,

(i) a condition that prohibits the offender using prohibited drugs, obtaining drugs unlawfully or abusing drugs lawfully obtained,

(j) a condition that requires the offender to submit to breath testing, urinalysis or other medically approved test procedures for detecting alcohol or drug use, as directed by a supervisor,

(k) a condition that prohibits the offender possessing or having in his or her control any firearm or other offensive weapon,

(l) a condition that requires the offender to submit to such surveillance or monitoring (including electronic surveillance or monitoring) as a supervisor may direct, and comply with all instructions given by a supervisor in relation to the operation of surveillance or monitoring systems,

(m) a condition that prohibits the offender tampering with, damaging or disabling surveillance or monitoring equipment,

(n) a condition that requires the offender to comply with any direction given by a supervisor that requires the offender to remain at a specified place during specified hours or that otherwise restricts the movements of the offender during specified hours,

(o) a condition that requires the offender to undertake a minimum of 32 hours of community service work per month, as directed by a supervisor from time to time,

(p) a condition that requires the offender to engage in activities to address the factors associated with his or her offending as identified in the offender's assessment report or that become apparent during the term of the order, as directed by a supervisor from time to time,

(q) a condition that requires the offender to comply with all reasonable directions of a supervisor."

Additional conditions imposed by intensive correction orders

The Regulations prescribe additional conditions which a court may choose to impose when sentencing a person to a sentence of intensive correction. Clause 176[94] states:

"The following are the additional conditions that may be imposed on an intensive correction order by the sentencing court under section 81 of the Act:

(a) a condition that requires the offender to accept any direction of a supervisor in relation to the maintenance of or obtaining of employment,

(b) a condition that requires the offender to authorise contact between any employer of the offender and a supervisor,

(c) a condition that requires the offender to comply with any direction of a supervisor as to the kinds of occupation or employment in which the offender may or may not engage,

(d) a condition that requires the offender to comply with any direction of a supervisor that the offender not associate with specified persons or persons of a specified description,

(e) a condition that prohibits the offender consuming alcohol,

94 *Crimes (Administration of Sentences) Regulation 2008*

(f) a condition that requires the offender to comply with any direction of a supervisor that the offender must not go to specified places or districts or places or districts of a specified kind.

Note. Section 81 of the Act provides that the sentencing court may also impose any other condition that the court considers necessary or desirable for reducing the likelihood of the offender re-offending."

Practical way in which conditions will be imposed

Corrective Services NSW policy is to manage offenders subject to intensive correction orders by way of a four level approach. The Community Compliance Group within Corrective Services NSW are responsible for the administration of the system. The four levels are set out in Appendix 1 of this paper. Offenders will, at the sole discretion of Corrective Services NSW, start on either level 1 or 2. They will progress, or regress, through the levels of supervision according to the offender's behaviour throughout the intensive correction order.

Other powers of the court in relation to intensive correction orders

Offenders or Corrective services can apply to have an intensive correction order varied by either adding or deleting from conditions prescribed as "additional conditions", as set out above[95], or such other conditions as the court considers necessary or desirable to reduce reoffending.[96] A court cannot, however, impose any additional condition in this regard unless it is satisfied there are sufficient resources available, or sufficient resourses will be made available, to allow compliance with the condition.[97] Further, the sentencing court is not to make additional conditions which would render functus or operate inconsistently with any of the mandatory conditions.[98]

Courts can determine applications to vary intensive correction orders in the absence of the parties or in open or closed courts.[99] A court can also determine not to hear an application by an offender if it is of the view that the application is frivolous or vexatious.[100] Predictably, no such barrier exists to the Commissioner of Corrective Services when he or she makes an application to a court to vary an order.

Court's obligations upon making an intensive correction order

Once a court imposes an intensive correction order on an individual, the court must, as soon as practicable after the order is made, ensure that all reasonable steps are taken to explain to the defendant in language the defendant can understand:

95 Section 81(3) *Crimes (Administration of Sentences) Act 1999*

96 Section 81(4)(b)*Crimes (Administration of Sentences) Act 1999*

97 Section 81(7) *Crimes (Administration of Sentences) Act 1999*

98 Section 81(8) *Crimes (Administration of Sentences) Act 1999*

99 Section 81(6) *Crimes (Administration of Sentences) Act 1999*

100 Section 81(5) *Crimes (Administration of Sentences) Act 1999*

a. The obligations an intensive correction order places upon the person; and

b. The consequences that may follow if an intensive correction order is not complied with.[101]

As with so many of the other provisions relating to this legislation, the court's obligation to explain this information to the defendant is qualified because failure to explain the obligations an intensive correction order creates does not invalidate the order.[102]

Additionally a court must, as soon as practicable after the order is made, cause a copy to be served on the defendant and the Commissioner of Corrective Services.[103] Failure, also, to comply with this section is not a ground for invalidating the order.[104]

Unsuitability for intensive correction not a bar to home detention

If your client is assessed and found unsuitable for an intensive correction order, your client can, once the matter returns to court, apply to serve his or her term of imprisonment by way of home detention. It is not, however, possible to have both assessments completed at the same time.[105] The matter then follows the familiar pathway - a report assessing suitability is then prepared etc. This occurs in the same way as it always has.

Permission for non-compliance with intensive correction order

The Commissioner of Corrective services may grant an offender permission to not comply with a condition of an intensive correction order.[106] This can be granted on compassionate grounds, for health grounds or any other reason the commissioner deems appropriate.[107]

Applications must be made prior to the offender being unable to comply with the condition,[108] although permission for non-compliance can be granted after the date and time scheduled for compliance.[109]

If a client cannot comply with a condition of an intensive correction order, they can advise of the inability to comply in one of two ways. The client can telephone a telephone number as directed from time to time by the Commissioner of Corrective Services and, within seven days of the date compliance was due, give the

101 Section 72(1) *Crimes (Sentencing Procedure) Act 1999*

102 Section 72(2) (*Crimes (Sentencing Procedure) Act 1999*.

103 Cl12(2) *Crimes (Sentencing Procedure) Regulation 2010*

104 Section 73 *Crimes (Sentencing Procedure) Act* 1999

105 Section 80(1A) *Crimes (Sentencing Procedure) Act 1999*

106 Section 85(1) *Crimes (Administration of Sentences) Act 1999*

107 Section 85(2) *Crimes (Administration of Sentences) Act 1999*

108 Section 85(3) *Crimes (Administration of Sentences) Act 1999*

109 Section 85(4) *Crimes (Administration of Sentences) Act 1999*

Commissioner of Corrective Services a document setting out the reasons for the inability to comply with the order.[110]If illness or injury is the reason for non-compliance, a medical certificate needs to be provided with the written explanation. The medical certificate must set out the nature of the illness or injury and must state that the nature of the illness or injury is such as to justify the offender's inability to comply with the requirement.[111]

The commissioner has overriding power to exempt an offender from compliance with the above requirements when they are unable to comply with an intensive correction order in exceptional cases.[112]

An offender must "make up" for any work or activity missed due to non-compliance with an intensive correction order. If the work or activity is unable to be made up by the offender complying with additional directions of the Commissioner of Corrective Services, the Commissioner can apply to the "sentencing court" for the intensive correction order to be extended. The court has discretion to further extend the intensive correction order in such manner as the sentencing court deems appropriate for ensuring the offender complies with the intensive correction order.[113] A sentencing court considering an application to extend an intensive correction order must take into account the following matters:

(a) Any hardship likely to be experienced by the offender if the order is extended;

(b) The likelihood of the offenders intensive correction order being revoked if the order is not extended and the consequences this will have on the offender; and

(c) Such other matters as the court considers relevant.[114]

There are two limitations on the court's power to extend an intensive correction order. The court can grant one extension for a period not longer than six months.[115] Additionally, the court cannot grant an extension of time if the original sentence has already expired.[116]

Review of commissioner's decisions

There is a right of review from the decision of the Commissioner of Corrective Services. This review is to the Intensive Correction Orders Management Committee. The committee is comprised of staff from Corrective Services appointed by the Commissioner. The Intensive Correction Orders Management Committee can make

110 Section 85(6) *Crimes (Administration of Sentences) Act 1999*
111 Section 85(7) *Crimes (Administration of Sentences) Act 1999*
112 Section 85(8) *Crimes (Administration of Sentences) Act 1999*
113 Section 86(3) *Crimes (Administration of Sentences) Act 1999*
114 Section 86(4) *Crimes (Administration of Sentences) Act 1999*
115 Section 86(6) *Crimes (Administration of Sentences) Act 1999*
116 Section 86(5) *Crimes (Administration of Sentences) Act 1999*

non-binding recommendations to the commissioner. If the applicant for review is not satisfied with the outcome of this process, he or she can apply for review of the decision to the Parole Authority. The Authority may refuse to hear the application if they are of the view it is frivolous or vexatious. Any determination of the Parole Authority is, however, binding on the Commissioner.[117]

Breach of intensive correction orders

If an intensive correction order is breached, the commissioner can:-

(a) take no action;

(b) give the offender a warning;

(c) apply the conditions of the order more stringently; or

(d) refer the breach to the Parole Authority.[118]

The legislation dealing with breaches of intensive correction orders is reproduced at appendix 2 of this paper.

Home detention

If a court has sentenced an offender to a period of full time custody not exceeding 18 months, the offender, prima facie, is eligible to serve the sentence by way of home detention.[119]

Prior to imposing a sentence of home detention, a Magistrate must be satisfied that no sentence other than imprisonment is appropriate. A Magistrate must then set the term of the sentence without regard to the manner in which the sentence is to be served. In *Douar's* case it was held (in the context of an appeal relating to the now repealed periodic detention provisions) that:

> "70 The first question to be asked and answered is whether there are any alternatives to the imposition of a term of imprisonment. Section 5 prohibits a Court from imposing a sentence of imprisonment unless the Court is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate. At this stage in the process, the only consideration is whether a sentence of imprisonment should be imposed, and not the manner in which that sentence of imprisonment is to be served: *Zamagias* at paragraph 25.
>
> 71 The second step is reached where the Court has determined that no penalty is appropriate other than a sentence of imprisonment. The Court is next to determine what the term of that sentence should be. This has been regarded as the first step of a two-step approach: *Foster* at paragraph 30; *Zamagias* at paragraph 26. The determination of the term is to be made without regard to whether the sentence will be immediately served or the manner in which it is to be served. This is because any of the alternatives available in respect of a sentence of imprisonment can only be considered once the sentence has been imposed. It follows that the term of the sentence cannot be influenced by what order might be made after the sentence has been imposed. The

117 Section 87 *Crimes (Administration of Sentences) Act 1999*

118 Section 89 *Crimes (Administration of Sentences) Act 1999*

119 Section 7(1) Crimes (Sentencing Procedure) Act 1999

sentence cannot be increased because it is to be served by way of periodic detention: *Wegener* at paragraph 22; *Zamagias* at paragraph 26.

72 The third stage is reached once the length of the sentence of imprisonment has been determined. The Court is then to consider whether any alternative to full-time imprisonment is available in respect of that term and whether any available alternative should be utilised. The availability of an alternative to full-time custody will generally be governed by the length of the term that has been determined, subject to the restrictions or preconditions imposed by the legislature on a particular sentencing alternative. The appropriateness of an alternative to full-time custody will depend upon a number of factors; one of importance being whether such an alternative would result in a sentence that reflects the objective seriousness of the offence and fulfils the manifold purpose of punishment. The Court in choosing an alternative to full-time custody cannot lose sight of the fact that the more lenient the alternative, the less likely it is to fulfil all the purposes of punishment: *Zamagias* at paragraph 28.

73 This Court has acknowledged the logical difficulty arising from the statutory requirement to choose a term of imprisonment before selecting the manner in which the imprisonment is to be served. Periodic detention is more lenient than full-time custody. Such an approach, however, is that required by the statute: *Wegener* at paragraphs 31-32; *Schodde* at 311 (paragraph 16); *R v Strahan* [2003] NSWCCA 397 at paragraph 18.

74 Having determined the appropriate sentence, the Court must explain the sentence imposed. This may require, in an appropriate case, some discussion of the alternatives available and why a particular alternative has been chosen. However, it is unnecessary that a sentencing court expressly state that it has applied these two steps in arriving at the sentence imposed. In particular, merely because a court has not expressly indicated that it has taken the two-step approach to the determination of the sentence of imprisonment, it does not follow that it has failed to carry out the sentencing exercise in this manner..."[120]

Suitability for home detention

Some offenders are excluded from participation in home detention. This is set out at Part 6 of the Crimes (Sentencing Procedure) Act 1999. Sections 76, 77 and 78 of the Act are extracted below due to their importance. These sections state:

"76. **A home detention order may not be made in respect of a sentence of imprisonment for any of the following offences**:

(a) murder, attempted murder or manslaughter,

(b) sexual assault of adults or children or sexual offences involving children,

(c) armed robbery,

(d) any offence involving the use of a firearm,

(e) assault occasioning actual bodily harm (or any more serious assault, such as malicious wounding or assault with intent to do grievous bodily harm),

(f) an offence under section 13 of the *Crimes (Domestic and Personal Violence) Act 2007* or section 545AB or 562AB of the *Crimes Act 1900* of stalking or intimidating a person with the intention of causing the person to fear personal injury,

(g) a domestic violence offence against any person with whom it is likely the offender would reside, or continue or resume a relationship, if a home detention order were made,

(h) an offence under section 23 (2), 24 (2), 25 (2), 26, 27 or 28 of the *Drug Misuse and Trafficking Act 1985* involving a commercial quantity of a prohibited plant or prohibited drug within the meaning of that Act,

(i) any offence prescribed by the regulations for the purposes of this paragraph.

120 *Douar v R (2005)* 159 A Crim R 154 paragraphs 70 -74

77. Home detention not available for offenders with certain history

(1) A home detention order may not be made for an offender:

(a) who has at any time been convicted of any of the following offences:

(i) murder, attempted murder or manslaughter,

(ii) sexual assault of adults or children or sexual offences involving children, or

(b) who has at any time been convicted of an offence under section 13 of the *Crimes (Domestic and Personal Violence) Act 2007* or section 545AB or 562AB of the *Crimes Act 1900* of stalking or intimidating a person with the intention of causing the person to fear personal injury, or

(c) who has at any time within the last 5 years been convicted of a domestic violence offence against any person with whom it is likely the offender would reside, or continue or resume a relationship, if a home detention order were made, or

(d) who has at any time been convicted of any offence prescribed by the regulations for the purposes of this paragraph, or

(e) who is (or has at any time within the last 5 years been) subject to an apprehended violence order (within the meaning of the *Crimes (Domestic and Personal Violence) Act 2007*), or an apprehended violence order made under Part 15A of the *Crimes Act 1900* before its repeal, being an order made for the protection of a person with whom it is likely the offender would reside, or continue or resume a relationship, if a home detention order were made.

(2) Offences prescribed by regulations made for the purposes of subsection (1) (d) may include offences under a law of the Commonwealth or of another State or a Territory.

78. Suitability of offender for home detention

(1) A home detention order may not be made with respect to an offender's sentence of imprisonment unless the court is satisfied:

(a) that the offender is a suitable person to serve the sentence by way of home detention, and

(b) that it is appropriate in all of the circumstances that the sentence be served by way of home detention, and

(c) that the persons with whom it is likely the offender would reside, or continue or resume a relationship, during the period of the offender's home detention have consented in writing to the making of the order, and

(d) that the offender has signed an undertaking to comply with the offender's obligations under the home detention order.

(2) In deciding whether or not to make a home detention order, the court is to have regard to:

(a) the contents of an assessment report on the offender, and

(b) such evidence from a probation and parole officer as the court considers necessary for the purpose of deciding whether to make such an order.

(3) A court may, for any reason it considers sufficient, decline to make a home detention order despite the contents of an assessment report.

(4) A court may make a home detention order only if an assessment report states that, in the opinion of the person making the assessment, the offender is a suitable person to serve a term of imprisonment by way of home detention.

(5) For the purposes of subsection (1) (c):

(a) the consent of children below a prescribed age, and

(b) the consent of persons suffering a prescribed disability,

may be given on their behalf by such other persons as the regulations may determine or may, if the regulations so provide and subject to any prescribed conditions, be dispensed with.

(6) A home detention order must not be made if the court considers it likely that the offender will commit any sexual offence or any offence involving violence while the order is in force, even though the offender may have no history of committing offences of that nature.

(7) If a court declines to make a home detention order with respect to an offender's sentence of imprisonment despite an assessment report that states that the offender is a suitable person to serve the sentence by way of home detention, the court must indicate to the offender, and make a record of, its reasons for doing so."

Finally, a home detention order cannot be made if the offender is already serving a sentence by way of home detention and the combined effect of the sentence would mean the total period of home detention exceeded 18 months.[121]

Assessment as to suitability for home detention

Assessment reports must take into account and address the following matters:

- any criminal record of the offender, and the likelihood that the offender will re-offend;
- any dependency of the offender on illegal drugs;
- the likelihood that the offender will commit a domestic violence offence;
- whether any circumstances of the offender's residence, employment, study or other activities would inhibit effective monitoring of a home detention order;
- whether the persons with whom it is likely the offender would reside, or continue or resume a relationship, understand the requirements of the order and are prepared to live in conformity with them, so far as may be necessary;
- whether the making of the order would place at risk of harm any person who would be living with, or in the vicinity, of the offender;
- any matter prescribed by the regulations.

Reports are prepared by the Probation and Parole Service.

It has been held that a refusal of a judge to grant an adjournment for an assessment report as to the offender's suitability for home detention was a miscarriage of discretion.[122]

There is a right of appeal both against the sentence of imprisonment and the refusal to make a home detention order.

If there is an alleged breach of a home detention order, the State Parole Authority has the power to investigate and revoke home detention orders.

121 Section 79 Crimes (Sentencing Procedure) Act 1999

122 *R v Tikas (1999)* NSWCCA 83 paragraph 18

Practicalities of home detention

A person who is subject to a sentence of home detention is strictly supervised by the Community Compliance Group. They are electronically monitored. They must comply with the conditions set out in the regulations[123] as "standard conditions," extracted below:

"(a) the home detainee must be of good behaviour and must not commit any offence,

(b) the home detainee must advise a supervisor departmental if he or she is arrested or detained by a police officer,

(c) the home detainee must reside only at premises approved by a supervisor,

(d) the home detainee must remain at the approved residence at all times otherwise than:

(i) when engaged in activities approved or arranged by a supervisor, or

(ii) when faced with immediate danger (such as in a fire or medical emergency),

(e) the home detainee must adhere to an approved activity plan during approved absences from the approved residence,

(f) the home detainee must advise a supervisor as soon as practicable after leaving the approved residence due to immediate danger,

(g) the home detainee must submit to searches of places or things under his or her immediate control, as directed by a supervisor,

(h) the home detainee must submit to electronic monitoring of his or her compliance with the home detention order, and must comply with all instructions given by a supervisor in relation to the operation of monitoring systems,

(i) the home detainee must not tamper with, damage or disable monitoring equipment,

(j) the home detainee must comply with any direction of the supervisor in relation to association with specified persons,

(k) the home detainee must not consume alcohol,

(l) the home detainee must not use prohibited drugs, obtain drugs unlawfully or abuse drugs lawfully obtained,

(m) the home detainee must submit to breath testing, urinalysis or other medically approved test procedures for detecting alcohol or drug use, as directed by a supervisor,

(n) the home detainee must authorise his or her medical practitioner, therapist or counsellor to provide information about the home detainee to a supervisor,

(o) the home detainee must accept any direction of a supervisor in relation to the maintenance of or obtaining of employment,

(p) the home detainee must inform any employer of the home detention order and, if so directed by a supervisor, of the nature of the offence that occasioned it,

(q) the home detainee must authorise contact between any employer of the home detainee and a supervisor,

(r) the home detainee must engage in personal development activities or in counselling or treatment programs, as directed by a supervisor,

(s) when not otherwise employed, the home detainee must undertake community service work (not exceeding 20 hours per week), as directed by a supervisor,

(t) the home detainee must not possess or have in his or her control any firearm or other offensive weapon

(u) the home detainee must comply with all reasonable directions of a supervisor.

123 *CL200 Crimes (Administration of Sentences) Regulations 2008*

Non-association and place restriction orders

These are orders, as their name suggests, preventing an offender from associating with a certain person or persons or from frequenting a certain place or places. A court can make either a non-association order or a place restriction order in relation to any offence where the maximum penalty is imprisonment for six months or more. [124] A Magistrate can make either or both orders when sentencing an offender. The test is whether it is reasonably necessary to make such an order to ensure the offender does not commit any further offences. [125] An order made under this section can be made for a maximum period of 12 months.[126] A Magistrate cannot make a place restriction or non-association order if the only other penalty being imposed is pursuant to Section 10[127] or 11[128] of the Act.[129]

Another restriction on non-association orders is that they cannot be made against close family members of the offender[130] unless exceptional circumstances exist and the court is of the view that, having regard to the ongoing nature and pattern of criminal activity in which the member of the family and offender have both participated, that there is risk the offender may be involved in conduct that could lead to the commission of a further offence.[131]

A place restriction order cannot include the places listed below unless exceptional circumstances exist and the court is satisfied that if such places are not included, the pattern of criminality of the offender is such that a criminal offence is likely to be committed.[132] The relevant portion of Section 100A(2)[133] states:

> (2) The places or districts specified in a place restriction order as places or districts that the offender must not frequent or visit may not include:
>
> (a) the offender's place of residence or the place of residence of any member of the offender's close family, or
>
> (b) any place of work at which the offender is regularly employed, or
>
> (c) any educational institution at which the offender is enrolled, or
>
> (d) any place of worship at which the offender regularly attends, or
>
> (e) any place at which the offender regularly receives a health service or a welfare service, or

124 Section 17A(1) *Crimes (Sentencing Procedure) Act 1999.*

125 Section 17A(2) *Crimes (Sentencing Procedure) Act 1999*

126 Section 17A(5) *Crimes (Sentencing Procedure) Act 1999*

127 Section 10 refers to s10 of the *Crimes (Sentencing Procedure) Act 1999* and, essentially, allows a court to find an offence proven but chooses to not record a conviction.

128 Section 11 refers to s11 of the *Crimes (Sentencing Procedure) Act 1999* and, essentially, allows a court to defer sentencing for rehabilitation participation in an intervention program or other purposes.

129 Section 17A(4) *Crimes (Sentencing Procedure) Act 1999*

130 Section 100A(1) *Crimes (Sentencing Procedure) Act 1999*

131 Section 100A(1A) *Crimes (Sentencing Procedure) Act 1999*

132 Section 100A(2) *Crimes (Sentencing Procedure) Act 1999*

133 Section 100A(2) *Crimes (Sentencing Procedure) Act 1999*

(f) any place at which the offender is provided with legal services by an Australian legal practitioner or by an organisation employing or otherwise using at least one Australian legal practitioner to provide such services, as at the time the order is made.

A non-association order can:

- Prohibit a person from associating with another person for a set period of time; or
- Prohibit a person from associating with another person, except during certain times and for certain periods specified in the order; or
- Prohibit a person from communicating with another person by any means.

A place restriction order can:

- Prohibit an offender from visiting a certain place or district for a specific period of time; or
- Be a limited place restriction order – this is an order prohibiting the offender from visiting a specified place or district except or at the times or in the circumstances as specified by the order;
- Be an unlimited place restriction order which prevents absolute the attendance at a place or in a particular district.

It is the obligation of the court to ensure that a non-association or place restriction order is explained to the offender in language that the offender can readily understand.[134] Section 100E of the Act sets out the procedure if a non-association or place restriction order is contravened. [135]

Parole

I do not propose to enter into a detailed discussion of parole in this paper. That is, effectively, a topic in itself. I do, however, make some general points which may assist you when representing clients in sentence proceedings before local courts.

If a sentence is for three years or less, as is the case with all sentences imposed by a Local Court the sentencing court, and not the Parole Authority, must make an order directing release on parole at the end of the parole period.[136] Unless the sentencing court states otherwise, the offender is subject to supervision.[137] In his paper update on Parole and the State Parole Authority (updated September 2009), Wil Hutchins, in relation to court imposed parole, made the following observations:

134 Section 100B *(Crimes (Sentencing Procedure) Act 1999*

135 Section 100F 100G and 100H of the *Crimes (Sentencing Procedure) Act 1999* sets out other provisions relating to these orders.

136 Section s50 and 51 *Crimes (Sentencing Procedure) Act 1999*

137 Section 51(1AA) *Crimes (Sentencing Procedure) Act 1999*

"In relation to parole ordered by courts for sentences of 3 years or less, it is commonly assumed to be automatic parole because it does not have to go before the Parole Authority for a grant of parole. However, this is very wrong or, more accurately, can turn out to be wrong. By s130 *Crimes (Administration of Sentences) Act* and clause 232 of the Regulation, the Authority can revoke a parole order before release if decides that the offender is unable to adapt to normal lawful community life. This usually applies where the Parole Authority has granted parole and then something occurs before release which causes the Authority to revoke the parole order. However, it also applies to court made parole orders. For example, a recent positive urinalysis or a sex offender who does not have accommodation acceptable to Probation and Parole - a report will be submitted to the Authority which will revoke parole before release. In its Annual Report for 2006, the Authority revoked 80 court based parole orders prior to release [for 2007: 97 were revoked prior to release]. Immediately after sentencing, the client should be warned of this and advised to behave and not draw adverse attention to themselves and, do any courses available, especially offence related courses."[138]

138 Hutchins W. Update on Parole and the State Parole Authority; a paper presented to Legal Aid updated September 2009.

Appendix 1

Extract from the brochure produced by the Department of Community Services NSW on levels of supervision:

Level 1	**Level 2**	**Level 3**	**Level 4**
Curfew	Discretionary curfew	No curfew	No curfew
Electronic monitoring	Discretionary electronic Monitoring	No electronic monitoring	No electronic monitoring
Minimum of 32 hours per month of work supervised by CSNSW*.	Minimum of 32 hours per month of work supervised by CSNSW*.	Minimum of 32 hours per month of work supervised by CSNSW*.	Minimum of 32 hours per month of work supervised by community work organisation sponsors with CSNSW limited spot checks*.
Programs as directed by CSNSW.	Programs as directed by CSNSW.	Programs as directed by CSNSW.	Programs as directed by CSNSW.
Drug testing	Drug testing	Drug testing	Drug testing
Alcohol testing on work and program sites – and home if non-consumption of alcohol is imposed by the Court as an additional condition.	Alcohol testing on work and program sites – and home if non-consumption of alcohol is imposed by the Court as an additional condition.	Alcohol testing on work and program sites – and home if non-consumption of alcohol is imposed by the Court as an additional condition.	Alcohol testing on work and program sites – and home if non-consumption of alcohol is imposed by the Court as an additional condition.
Minimum face-to-face contact with CSNSW supervisor: **weekly**.	Minimum face-to-face contact with CSNSW supervisor: **fortnightly**.	Minimum face-to-face contact with CSNSW supervisor: **monthly**.	Minimum face-to-face contact with CSNSW supervisor: **six-weekly**.

*Offenders with special needs or offenders with a disability may be placed with community work organisation sponsors with regular CSNSW checks.

Appendix 2

Division 3 Breach of intensive correction order

88 Definition

In this Division:

breach of an intensive correction order means a failure by an offender to comply with any of his or her obligations under an intensive correction order.

89 Commissioner powers to deal with breach of ICO

(1) If the Commissioner is satisfied that an offender has breached an intensive correction order, the Commissioner can decide to impose a sanction on the offender under this section or can decide to take no action in respect of the breach.

(2) The Commissioner can impose either or both of the following sanctions on the offender:

(a) a formal warning,

(b) a more stringent application of the conditions of the

intensive correction order in accordance with the terms of those conditions (for example, further restrictions on association with other persons).

(3) As an alternative or in addition to imposing a sanction on the offender, the Commissioner can decide to refer the breach to the Parole Authority because of the serious nature of the breach.

(4) In deciding whether and what action should be taken in respect of an offender's breach of an intensive correction order, the Commissioner may have regard to any action previously taken in respect of the breach or any previous breach of the order by the offender.

90 Parole Authority powers to deal with breach

(1) The Parole Authority may, on its own motion or on the

application of the Commissioner, deal with an offender's breach of an intensive correction order by:

(a) imposing any sanction that the Commissioner could

impose under section 89, or

(b) imposing a period of up to 7 days' home detention on the offender by imposing as a condition of the offender's intensive correction order a requirement that the offender remain at his or her place of residence for the period of home detention, or

(c) revoking the intensive correction order pursuant to

Division 1 of Part 7.

(2) In deciding whether and what action should be taken in respect of an offender's breach of an intensive correction order, the Parole Authority may have regard to any action previously taken (by the Parole Authority or by the Commissioner) in respect of the breach or any previous breach of the order by the offender.

91 Interim suspension of ICO

(1) On the application of the Commissioner, a judicial member of the Parole Authority:

(a) may make an order suspending an offender's intensive correction order, and

(b) if the offender is not then in custody, may issue a warrant for the offender's arrest.

(2) An application under subsection (1) may be made in person or by telephone, electronic mail or facsimile transmission.

(3) Action under subsection (1) may be taken in relation to an offender's intensive correction order only if the judicial member is satisfied:

(a) that the Commissioner has reasonable grounds for believing that:

(i) the offender has failed to comply with the offender's obligations under the intensive correction order, or

(ii) there is a serious and immediate risk that the offender will leave New South Wales in contravention of the conditions of the intensive correction order, or

(iii) there is a serious and immediate risk that the offender will harm another person, or

(iv) there is a serious and immediate risk that the offender will commit an offence, and

(b) that, because of the urgency of the circumstances, there is insufficient time for a meeting of the Parole Authority to be convened to deal with the matter.

(4) If an application under this section is made otherwise than in person, the judicial member may furnish the applicant with a suspension order or arrest warrant:

(a) by sending a copy of the order or warrant to the applicant by electronic mail or facsimile transmission, or

(b) by dictating the terms of the order or warrant to the applicant by telephone.

(5) A document:

(a) that contains:

(i) a copy of a suspension order or arrest warrant that the judicial member has sent by electronic mail or facsimile transmission, or

(ii) the terms of a suspension order or arrest warrant that the judicial member has dictated by telephone, and

(b) that bears a notation:

(i) as to the identity of the judicial member, and

(ii) as to the time at which the copy was sent or the terms dictated, has the same effect as the original suspension order or arrest warrant.

(6) A suspension order may be revoked by any judicial member of the Parole Authority or by the Commissioner.

(7) Unless sooner revoked, a suspension order ceases to have effect at the end of 28 days after it is made or, if the offender is not in custody when it is made, at the end of 28 days after the offender is taken into custody.

(8) While a suspension order is in force, the intensive correction order to which it relates does not have effect.

(9) An arrest warrant is sufficient authority for a police officer to arrest the offender named in the warrant, to convey the offender to the correctional centre specified in the warrant and to deliver the offender into the custody of the general manager of that correctional centre.