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New South Wales sentencing reforms: results from a survey of judicial officers

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AIM This study aims to assess whether, from the perspective of the judiciary, the New South Wales (NSW) sentencing reforms, commencing in September 2018, are operating as intended and to identify any impediments to implementation.

METHOD Data were sourced from an online survey of 93 judicial officers across NSW. The survey was designed to gauge their level of understanding and confidence in the sentencing reforms.

RESULTS Overall, the majority of judicial officers agreed that the sentencing reforms are operating as intended. Seventy-one per cent of judicial officers believed the new penalty regime has increased the opportunity for offenders to serve supervised community-based orders, 57 per cent agreed (and 19% disagreed) that the new community-based options provide more flexibility in sentencing decisions and 47 per cent agreed (and 26% disagreed) that the new penalty options have increased the opportunity for offenders to participate in rehabilitation programs. Nearly 90 per cent of judicial officers reported that the Sentencing Assessment Reports are provided on time and almost two-third agreed these reports provide sufficient information to determine the appropriateness of orders. Judicial officers expressed a number of concerns arising from the reforms including the way in which supervision conditions are implemented in NSW, the deterrent value of community-based orders, certain intensive correction order (ICO) offence exclusions, removing the mandatory community service work condition for ICOs, and a lack of services particularly in rural locations to permit the full range of conditions to be imposed.

CONCLUSION The results suggest that while there is support from the judiciary that the reforms are operating as intended, a number of practical issues remain that may affect the extent to which the community-based sentencing options are utilised.

KEYWORDS sentencing reforms | survey | judicial officers | legislative change

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INTRODUCTION

The *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (the amending Act) commenced on 24 September 2018. This amending Act was the Government's response to the NSW Law Reform Commission's (NSWLRC) recommendations in its 2013 Sentencing report (NSWLRC, 2013). The amending Act made significant changes to the community-based sentencing options previously available under the *Crimes (Sentencing Procedure) Act 1999* and many of the recommendations made by the NSWLRC were adopted.

One of the aims of the amending Act was to introduce a range of community-based sentencing options intended to be flexible to the circumstances of an individual offender so as to promote the prevention of, and reduction in, reoffending.

Promoting community safety was a key rationale for implementing these changes and is demonstrated, in part, by the enactment of s 66 which provides that community safety is the paramount consideration when a court is deciding whether to order that a sentence of imprisonment be served by way of an intensive correction order (ICO). Another key driver for implementing the sentencing reforms was the cost-effectiveness of community-based sentencing options over prison sentences, with Wang and Poynton (2017) noting a reduction in reoffending especially for ICOs.

In summary, the amending Act:

- abolished home detention orders (previous s 6), community service orders (previous s 8), good behaviour bonds (previous s 9) and suspended sentences (previous s 12) from the Crimes (Sentencing Procedure) Act;
- replaced community service orders and good behaviour bonds with community correction orders (CCOs) and conditional release orders (CROs);
- made various changes to the structure of ICOs principally by enabling a sentencing court to determine for itself the appropriate conditions with respect to a particular offender. Previously, the sentencing court had no such discretion because the conditions of an ICO were mandatory and applied regardless of whether they were appropriate for the offender or met that offender's particular needs – a concomitant of that being that community service work (CSW) was no longer a mandatory condition;
- conferred powers on Community Corrections Officers[1] to suspend supervision[2] and certain other conditions imposed at sentence by a court for a community-based sentencing option during the period of the particular order;[3]
- conferred powers on the State Parole Authority (SPA) to impose, vary or revoke conditions of an ICO (other than standard conditions) on the application of a community corrections officer or the offender;[4] and
- conferred broader powers on Community Corrections and the SPA with respect to dealing with breaches of ICOs.

Sentence assessment reports (commonly referred to as SARs and previously known as pre-sentence reports) prepared by Community Corrections are intended to provide an evidentiary basis for choosing a particular community-based sentencing option and assist a court in determining the conditions which may best address the criminogenic needs of a particular offender. The provisions which set out the requirements as to assessment reports are found in Pt 2, Div 4B (ss 17B–17D) Crimes (Sentencing Procedure) Act and Division 3 of the *Crimes (Sentencing Procedure) Regulation 2017*.[5] When a SAR is ordered

1 Community Corrections is a unit within Corrective Services NSW (CSNSW) responsible for community supervision of offenders.
2 The supervision condition is not terminated; supervision can recommence if an offender comes into contact with police.
3 See s 82A Crimes (Administration of Sentences) Act 1999.
4 See s 81A Crimes (Administration of Sentences) Act.
5 See the Sentencing Bench Book at [3-510] Requirements for assessment reports, for a general discussion of these provisions.

by a judicial officer, the matter is normally adjourned for approximately 6-8 weeks to enable Community Corrections to conduct an interview with the offender and prepare a report.

To an extent, these reforms have resulted in some streamlining of the process of obtaining a report as previously there were several types of report, depending on the type of order being considered. There are also changes to the circumstances in which a court is required to obtain an assessment report before imposing sentence. A SAR is generally required before making an order for an ICO, and must always be obtained before imposing home detention as a condition of an ICO, or imposing CSW as a condition of either an ICO or CCO. While not compulsory, given the importance of considering whether, and what, appropriate conditions would meet the needs of an individual offender, it is reasonable to assume a report would be requested in most cases.

The Community Corrections risk assessment included in the SAR (and provided to the court) is based on a comprehensive standardised assessment of an offender's risk, need and responsivity (RNR) to treatment using the Level of Service Inventory – Revised (LSI-R) (Watkins, 2011).[6] Consistent with RNR principles higher risk offenders managed by Community Corrections receive higher intensity interventions and lower risk offenders receive lower intensity interventions. This approach has been adopted by correctional settings worldwide and is based on evidence from a number of reviews suggesting that offender treatment programs incorporating RNR principles are effective in reducing reoffending for a range of different offenders (Andrews et al., 1990; Dowden & Andrews, 1999; Dowden & Andrews, 2000; Hanson, Bourgon, Helmus & Hodgson, 2009) and further, evidence that actively supervising low-risk offenders may have a criminogenic effect (Lowenkamp & Latessa, 2004).

To assist judicial officers, the Judicial Commission of NSW (the Commission) developed and delivered a number of educational programs to address key aspects of the reforms before their commencement. These included a series of evening seminars for all courts specifically addressing both the sentencing changes and the community corrections reforms throughout 2018 and then subsequently in 2019; together with presentations at the District Court and Local Court Annual Conferences. Other initiatives included the development of a series of short videos introducing the reforms, podcasts explaining supervision under the new system and articles published in the *Judicial Officers' Bulletin*, the monthly newsletter of the Commission. These are listed in Appendix 1.

Judicial officers in NSW rely on the Commission's bench books for guidance as to sentencing procedure and to the relevant law. These are published in a number of formats by the Commission. To coincide with the commencement of these amendments, significant updates were made to two of these key resources, the Sentencing Bench Book[7] and the Local Court Bench Book,[8] facilitating immediate access to critical information about the operation of the new regime from its commencement. The material could not be published before the amending Act commencing on Monday 24 September 2018 because judicial officers had to apply the existing law until Friday 21 September 2018 and the final regulations underpinning the amending Act were not promulgated until then.

Twelve months on, the Court of Criminal Appeal[9] has now considered certain aspects of the reforms, principally insofar as this study is concerned, in relation to the requirement to give primacy to the concept of community safety when considering whether to order an ICO.

THE CURRENT STUDY

As discussed above, a key element of the sentencing reforms is to increase opportunities for offenders to be supervised and to engage in rehabilitative and therapeutic programs through more flexibility in sentencing. This depends not only on the legal practitioners taking full advantage of the new, expanded

6 Before the reforms commenced, an article discussing the model used by Corrections was published in the Judicial Officers' Bulletin: see Caruana, R. (2018). Community Corrections' service delivery model: and evidence-based approach to reduce reoffending. *Judicial Officers' Bulletin, 30*, pg. 57.
7 Access at: https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/index.html.
8 Access at: https://www.judcom.nsw.gov.au/publications/benchbks/local/index.html.
9 See, for example, R v Pullen [2018] NSWCCA 264; 275 A Crim R 509; R v Fangaloka [2019] NSWCCA 173; Casella v R [2019] NSWCCA 201; Karout v R [2019] NSWCCA 253; Blanch v R [2019] NSWCCA 304.

range of sentencing options (by making submissions on sentence as to what may be appropriate for a particular offender and offence) but also on suitable programs being available to offenders. A judicial officer imposing a sentence can then be confident a community-based sentence adequately reflects the punishment appropriate for the individual offence while also addressing the specific needs of the offender. To assess whether the sentencing reforms are operating as intended and identify any impediments to implementation (including unanticipated consequences), an online survey of judicial officers assessing their level of understanding and confidence in the reforms was undertaken.[10] The survey sought data and opinions on:

1. Judicial officers' perceptions of the sentencing reforms;
2. Whether judicial officers feel there is more flexibility in sentencing decisions;
3. Whether the process of obtaining a SAR for a community-based order had improved; and
4. Any barriers to imposing the new ICOs, CCOs and CROs.

METHOD

Survey Instrument

The survey was undertaken by the NSW Bureau of Crime Statistics and Research (BOCSAR), in partnership with the Judicial Commission of NSW (the Commission). The survey had the support of the Chief Magistrate and the Chief Judge, who sent letters endorsing the survey to all currently serving NSW magistrates in the Local Court and judges in the District Court. Following this, BOCSAR emailed the survey link to all identified survey participants. The survey was hosted by the Commission on their custom-built platform. Responses to the survey were anonymous. Data collection took place in October 2019 for 4 weeks, with two reminder emails sent during this time.

The survey collected a total of 93 responses, equating to a response rate of 42.8 per cent.[11] This response rate is the average for online/email surveys among a variety of poulations (e.g., general population, professionals, university students, patients etc.) (Shih & Fan, 2009) and was comparable with other surveys of judicial officers (Anleu & Mack, 2014; Poynton, 2012; Schrever, Hulbert & Sourdin, 2019). Over 50% of judicial officers who completed the survey reported presiding over a court in regional or remote areas in the past 12 months.

Respondents were informed that the purpose of the questionnaire was to capture judicial officers' views and experiences of the NSW sentencing reforms and assist in understanding how well the reforms are working, any barriers to implementation, and unanticipated consequences. The questionnaire included the following sections: preliminary questions (i.e., jurisdiction, location, pre-reform information and transitional provisions), ICOs (i.e., offence exclusions, CSW, supervision, length, SARs, conditions, challenges), CCOs and CROs (i.e., supervision, additional conditions, flexibility, challenges) and general questions (i.e., flexibility, opportunities, barriers).

Responses to each question were measured on a five-point Likert scale ('strongly agree', 'agree', 'neither agree/disagree', 'disagree', 'strongly disagree') and each question included an optional open-ended text field for respondents to provide additional comments. The questionnaire is reproduced in full in Appendix 2.

10 BOCSAR is undertaking two further studies evaluating the sentencing reforms: (1) examining the immediate impact of the reforms on penalty outcomes and quantify any increase (or reduction) in the probability of receiving a supervised community-based order (or short-term prison sentence); and (2) assessing whether the reforms have achieved their primary long-term objective of reducing reoffending.

11 To calculate the response rate the Judicial Commission of NSW identified the number of respondents 'eligible' to receive the survey (i.e., those judges and magistrates currently sitting and hearing criminal, not just civil, matters; any judicial officer hearing civil matters only was not asked to respond). All 'eligible' judicial officers were invited to participate.

Analysis

Quantitative survey data were analysed using SPSS 20.0. For ease of interpretation (considering the relatively small sample size), responses to each question were collapsed into three categories (agree: 'strongly agree / agree', neutral: 'neither agree / disagree', disagree: 'strongly disagree / disagree'). Significant differences between responses from the District and Local Courts were identified using Pearson chi-square test of independence, and are presented in Appendix 3 (Tables A1-A5). Qualitative responses (from the open-ended text fields) were grouped and tallied to identify common themes. Eight-four judicial officers (90% of all respondants) provided at least one qualitative response.

RESULTS

Preliminary questions

Table 1 presents the results of two preliminary questions regarding the level of information provided about the sentencing reforms. The majority of judicial officers (67.7%) agreed that sufficient information about the sentencing reforms was made available before they commenced. However, one in five judicial officers disagreed. The open-ended responses (*n*=6) to this question suggested some judicial officers considered that the legislation was not finalised in a timely manner, resulting in feelings of being unprepared and overwhelmed. On a more positive note, one judicial officer cited the article published in the Judicial Officers' Bulletin on the sentencing reforms (Mizzi, 2018) as "very useful", and another judicial officer noted that the regional conference held after implementation of the reforms had focussed on the changes and "increased confidence, knowledge and ability".[12]

Fifty-six per cent of judicial officers agreed that the transitional provisions outlined in Part 29 of Schedule 2 of the Crimes (Sentencing Procedure) Act were sufficient. Around a third of judicial officers (34.4%) reported "neither agree / disagree". The open-ended responses (*n*=3) suggested some judicial officers had not seen the transitional provisions, or thought they were initially insufficient but had since been amended. There was also some confusion concerning those parts of the transitional provisions which related to the s 12[13] revocation.

Table 1. Preliminary questions (*n*=93)

	% Agree	% Neutral	% Disagree
1. Sufficient information was made available to judicial officers on the sentencing reforms prior to their commencement	67.7	9.7	22.6
2. The transitional provisions outlined in Part 29 of Schedule 2 of the *Crimes (Sentencing Procedure) Act 1999* are sufficient	55.9	34.4	9.7

Intensive correction orders (ICOs)

Section 7 of the Crimes (Sentencing Procedure) Act provides that a court that has sentenced an offender to a term of imprisonment may order that the sentence be served by way of intensive correction in the community. An ICO is not an available sentencing option for those offences set out in s 67 of the Act. These include, but are not limited to, murder, manslaughter, prescribed sexual offences (including

12 The Judicial Commission of NSW hosted a conference which included a session on the new sentencing reforms for magistrates, which was co-ordinated with the Local Court Education Committee, in the metropolitan and regional areas in February and March 2019.
13 The power to impose a suspended sentence and direct an offender to enter into a s 12 bond was repealed with effect from 24 September 2018: Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act, Sch 1[14] ("the amending Act").

offences where the victim is a child and terrorism offences (see s 67(1)). An ICO cannot exceed two years when it is made in respect of an individual offence and cannot exceed three years when it is made for an aggregate sentence (see s 68). When determining whether to make an ICO the court is to have regard to any assessment report obtained in relation to the offender. An ICO cannot be made in respect of an offender who does not live in NSW, though the legislation allows for other jurisdictions to be added by regulation (see s 69(3)).[14] Supervision is a mandatory requirement of an ICO (see s 73(2)). A sentencing court may impose a range of additional conditions which are set out in s 73A(2). It is not possible to impose a home detention or CSW condition unless an assessment report has first been obtained which provides that the offender is suitable (see s 73A(3)).

Offence exclusions

The first set of questions relating to ICOs probed whether the offence exclusions specified under the new sentencing regime were appropriate (Table 2, question 1). Most judicial officers agreed it was appropriate to exclude 'murder' (87.1%) and 'terrorism' (74.2%) offences (although it should be noted these offences are dealt with in the Supreme Court, not the Local or District Courts). The majority also supported ICO offence exclusions for 'sexual offences involving children' (67.7%), 'manslaughter' (61.3%), 'offences involving the discharge of a firearm' (61.3%), 'sexual assault against an adult' (58.7%), and 'contraventions of serious crime prevention orders' (57.6%). Less than half (48.4%) supported excluding offences for 'contraventions of public safety orders'. Scrutiny of the open-ended responses[15] suggests that those judicial officers who disagreed with the offence exclusions were concerned that there are exceptions under most categories of offending[16] and that more (rather than less) discretion and flexibility in sentencing is needed. Two judicial officers expressed concerns that the ICO offence exclusions mean the current law is too rigid, may act as a form of "mandatory sentencing", which is problematic, and can lead to "injustice". It was also suggested that not having an ICO sentencing option available may result in offenders receiving a less severe penalty, or conversely that an offender may be sentenced to full-time imprisonment when there were significant reasons to keep them in the community under supervision (or home detention). One judicial officer suggested the restriction on imposing an ICO for minor sex offences be re-considered.

There were some marked differences in the responses from magistrates and judges in relation to particular offences. For example, magistrates were significantly more likely to support the following offence exclusions for ICOs compared to the judges: manslaughter, sexual assault against an adults, sexual offences involving children, offences involving the discharge of a firearm, and contraventions of serious crime prevention orders and public safety orders (see Appendix Table A3).

Community Service Work (CSW)

Seventy-four per cent of judicial officers agreed that removing the mandatory requirement that an offender undertake CSW has enabled them to use ICOs as a penalty for more offenders (Table 2, question 2). Six judicial officers provided an open-ended response to this question. Judicial officers who 'disagreed' with this statement and provided an open-ended response (*n*=3) felt that the lack of mandatory CSW reduces the punitive value of the new ICO penalty. Despite selecting 'agree' to the statement, one judicial officer added that they prefer s 11 remands as they provide more flexibility (i.e., allow the judicial officer to set the conditions such as attend rehabilitation, and monitor for themselves the level of participation). Another judicial officer who selected 'agree' provided a free text response suggesting that without CSW, ICOs are similar to a suspended sentence.

14 See s 69(3) states that an ICO cannot be made in respect of an offender who does not live in NSW unless the State or Territory is declared by the regulations to be an approved jurisdiction. No states or territories are currently declared.
15 See Table 2 for the number of judicial officers who gave an open-ended response to each question regarding offence exclusions.
16 For example, in Director of Public Prosecutions (NSW) v Burton [2020] NSWCCA 54 the offender was sentenced to a CCO for an offence of sexual intercourse without consent contrary to s 61I of the Crimes Act 1900. In dismissing the Crown appeal against sentence, the Court recognised that this sentencing outcome was exceptional given the offence but concluded it was justified in the particular circumstances of this case.

ICO length

Less than half of judicial officers (48.4%) agreed that the two-year restriction on the length of ICOs is appropriate (Table 2, question 3). Eight of the ten judicial officers who gave an open-ended response 'disagreed' with the two-year restriction and suggested it should be at least three years to allow for rehabilitation, especially since suspended sentences are no longer available. The two-year jurisdictional limit[17] for custodial penalties for a single offence in the Local Court was identified (*n*=3) as a more general barrier for magistrates.

ICO as an alternative to imprisonment

Across both courts, judicial officers were evenly split on whether they thought an ICO was a sufficiently punitive alternative to imprisonment (38.7% agreed; 38.7% disagreed) (Table 2, question 4). Magistrates in the Local Court were less likely than judges in the District Court to regard an ICO as sufficiently punitive (30.9% compared to 60.0%, respectively) (see Appendix Table A3, question 4).

Seventeen open-ended responses were provided for this question. Most of those who 'disagreed' indicated that the punitive value of an ICO was determined by the conditions that could be imposed and the extent to which these conditions would be enforced. In this regard, commonly cited concerns included the discretion of Community Corrections to suspend supervision, reliance on the SPA to breach an offender, and the removal of CSW as a mandatory condition. One judicial officer suggested it would be beneficial to be able to impose time standards on conditions (e.g., the offender must enter full-time rehabilitation within 14 days of the orders; the offender must attend psychological counselling within 21 days) and if these are not adhered to, it is considered in breach of the ICO. It is noted, however, that s 73B of the Act is sufficiently broad to permit this.

Only 14 per cent of judicial officers agreed that the deterrent effect of an ICO is equivalent to imprisonment (Table 2, question 5). Seven open-ended responses were provided. Similar to above, judicial officers felt the deterrent effect of an ICO is only equivalent to imprisonment when the ICO conditions and/or any ICO breaches are enforced. These concerns are summed up by the following response:

> *"Depends on the offender and whether a breach is going to be taken seriously. It is the enforcement of the conditions that provides the deterrence and that is out of the hands of the Judiciary".*

Since the commencement of these reforms, the Court of Criminal Appeal has made some observations concerning the deterrent effect of an ICO. In R v Pullen (2018) 275 Crim R 509, the Court found that an ICO has the capacity to operate as substantial punishment, because of the number of obligations that may be imposed on an offender as a consequence of the order, although the Court also recognised that it may reflect a significant degree of leniency because it does not involve immediate incarceration (see at [53], [66]; see also Crimes (Administration of Sentences) Regulation 2014, cll 186, 187 and 189). The Court in R v Fangaloka [2019] NSWCCA 173, at [67], accepted that what was described as "the significant element of leniency" inherent in an ICO might make the imposition of such an order inappropriate in certain cases.

Sentencing Assessment Report (SAR)

Most judicial officers (72.8%) agreed that the time taken by Community Corrections to complete the new SAR is not an impediment to imposing an ICO (Table 2, question 6). A small number of open-ended responses (*n*=7), however, suggested some judicial officers feel SARs take too long, and that the variability in the quality of reports is problematic. One judicial officer suggested s 17D(3)[18] should be repealed as it can create unnecessary delays in having to obtain a report concerning the availability of home detention only after imposing a sentence of imprisonment. In fact, one judicial officer was of the opinion that home

17 Criminal Procedure Act 1986, s 267.

18 Section 17D(3) of the Crimes (Sentencing Procedure) Act provides that an assessment report relating to imposing a home detention condition on an ICO should not be requested unless the court has first imposed a sentence of imprisonment for a specified term.

detention as a condition of an ICO is largely unused because of the delay caused by the requirement to obtain a second report. Most judicial officers agreed the SAR is typically provided within 6 weeks of request (89.2%) (Table 2, question 7).

Almost two-thirds of judicial officers agreed the SAR provides sufficient information to determine both the appropriateness of imposing an ICO (65.2%) (Table 2, question 8) and the suitability of ICO conditions (64.5%) (Table 2, question 9). However, most of the open-ended responses (*n*=10) were critical of the SAR and its ability to provide sufficient information. The criticisms focused on the variability in quality of the SARs and a belief that the methods (i.e., the LSI-R) used to calculate reoffending risk are flawed. Some judicial officers (*n*=9) felt the SAR lacked the necessary detail required to determine the suitability of conditions, and some felt that knowing whether the offender would be suitable for home detention would assist their sentencing decision.

Mandatory supervision

Only one-third of judicial officers (33.0%) agreed that the mandatory supervision condition of an ICO is adequate to address issues of community safety (Table 2, question 10). Forty-one judicial officers provided an open-ended response to this question and the overwhelming majority disagreed, and felt suspension of supervision by Community Corrections for offenders assessed as low-medium risk was the biggest barrier to addressing issues of community safety. As described above, some judicial officers were of the opinion that the risk assessment in the SAR is based on a flawed methodology. Six judicial officers explicitly questioned why supervision is a mandatory requirement of the legislation if it can be suspended for the majority of offenders. Other concerns included that the court is not informed when an ICO is breached which makes it difficult to assess how successfully ICOs are at addressing issues of community safety, and, further, there is too much leniency when ICOs are breached. One judicial officer commented:

> *"...there is no adequate supervision in most cases so judges in frustration are turning to s11[19] deferral so they can personally supervise offenders".*

On a positive note, two judicial officers highlighted that imposing other conditions, such as abstaining from drug use and domestic violence (DV) conditions, can assist in addressing issues of community safety when supervision is likely to be suspended.

ICO conditions

Sixty-five per cent of judicial officers agreed the available range of ICO conditions under the new sentencing regime can be used effectively to address an offender's likelihood of reoffending (Table 2, question 11). The majority of open-ended responses (*n*=11) stressed that ICO conditions will only be effective if they are implemented and enforced as intended (including supervision, rehabilitation and breaches). A number of judicial officers considered more programs were needed for ICOs to be effective, or that conditions needed to be available in practice, particularly in rural areas (as opposed to the conditions only being available in the legislation). In fact, one judicial officer felt the reforms should not have been enacted without a significant increase in community based rehabilitation programs. Similarly, another judicial officer specifically suggested that there needs to be 'ice' and 'methamphetamine' residential rehabilitation facilities separate from other recreational drug rehabilitation facilities. As noted above, judicial officers also report struggling to know whether an ICO reduced reoffending as outcomes are not seen by the sentencing court (compared with suspended sentences where breaches were dealt with by the courts). One respondent suggested that the supervisory role should be given to the judicial officer who sentenced the offender (rather than Community Corrections).

One in three judicial officers (36.6%) disagreed that there are sufficient local services available for the full range of ICO conditions to be imposed (Table 2, question 12). This appeared particularly problematic in non-metropolitan areas. Judicial officers who had spent some time presiding over regional or remote

19 Crimes (Sentencing Procedure) Act, s 11 "Deferral of sentencing for rehabilitation, participation in an intervention program or other purposes".

courts in the past 12 months (compared to those who have spent no time in those courts in that period) were significantly less likely to agree that sufficient local services are available (39.5% vs. 60.5%, $p<0.05$).[20] The open-ended responses (*n*=27) also suggested rural locations were most likely to lack local services, particularly in relation to CSW. One judicial officer raised a unique issue with interstate offenders:

> *"...there is a real problem with respect to border locations. We have many interstate offenders and cannot impose ICOs because they reside out of NSW. It is unfair and ridiculous".*

The majority of judicial officers (67.7%) agreed that generally the ICO conditions they impose accord with those recommended in the SAR (Table 2, question 13). The open-ended responses (*n*=16) suggested the biggest concern with imposing the conditions recommended in the SAR arises when the report states the offender is at a low-risk of reoffending and supervision will be suspended (even in circumstances where the offender has a prior criminal history). In fact, some judicial officers observed that if the SAR recommends that a particular offender requires no supervision or rehabilitation programs (for an offender with a long standing drug problem or history of offending), the assessment is rejected and they are then left with no option other than to impose a sentence of imprisonment. Other judicial officers indicated that while they do impose the conditions in accordance with the SAR, they add additional conditions (or amend conditions) where needed and available.

Unique challenges

Nearly half of all judicial officers (47.3%) surveyed indicated that there were unique challenges when considering whether to sentence DV offenders to an ICO. Thirty-eight open-ended responses were provided. The unique challenges cited included adequacy of supervision, lack of availability of programs, safety of victims (including the living situation of offender and any conditions of an apprehended violence order), and the perception that ICOs are not as severe as suspended sentences (given the perceived uncertainty of breach action by the SPA). Requirements specified under s 4A (requirement for full time detention or supervision), s 4B (protection of victims) and s 66 (community safety) of the Crimes (Sentencing Procedure) Act were also identified by judicial officers as challenges unique to sentencing DV offenders to an ICO. The issues regarding community safety particularly in relation to sentencing DV offenders were summed up by this response:

> *"The area of greatest difficulty in my view relates to consideration of community safety in imposing an ICO. Unless one is confident that supervision of the offender will be at the level that justifies a sentence of imprisonment to be served in the community then it is difficult to be confident that community safety will be protected. Also, the requirement for a supervised order (or a sentence of full-time detention) in relation to domestic violence offences on its face does not recognise that offences will range in seriousness and again that supervision may very well be suspended so the causes of offending may not be addressed".*

The majority of judicial officers (73.9%) agreed it should be possible to impose an ICO for a sexual offence when the offender is a child and the matter is being dealt with in the District Court. The open-ended responses (*n*=15) largely focused on the need for sentencing discretion especially if there are factors which impact upon the offenders' moral culpability. One judicial officer suggested:

> *"...it is well recognised that mandatory sentencing, as this really is, leads to injustice and that is my real experience this year. This should be rethought".*

20 Significant difference based on a Pearson chi-square test of independence.

Table 2. Questions regarding Intensive Correction Orders (*n*=93)

	% Agree	% Neutral	% Disagree
1. The following offence exclusions for ICOs are appropriate:[a]			
a. Murder (open-ended responses *n*=3)	87.1	8.6	4.3
b. Manslaughter (open-ended responses *n*=5)	61.3	16.1	22.6
c. Sexual assault against an adult* (open-ended responses *n*=11)	58.7	13.0	28.3
d. Sexual offences involving children (open-ended responses *n*=9)	67.7	9.7	22.6
e. Offences involving the discharge of a firearm (open-ended responses *n*=5)	61.3	16.1	22.6
f. Terrorism offences (open-ended responses *n*=1)	74.2	15.1	10.8
g. Contraventions of serious crime prevention orders* (open-ended responses *n*=3)	57.6	27.2	15.2
h. Contraventions of public safety orders (open-ended responses *n*=2)	48.4	30.1	21.5
2. The removal of the mandatory requirement that an offender undertake community service work (previously a condition of an ICO), has enabled me to use ICOs as a penalty for more offenders*	73.9	12.0	14.1
3. The two year restriction on the length of ICOs is appropriate	48.4	16.1	35.5
4. The ICO is sufficiently punitive to be an alternative to imprisonment	38.7	22.6	38.7
5. The deterrent effect of an ICO is equivalent to imprisonment	14.0	14.0	72.0
6. The time taken by Community Corrections to complete the new Sentencing Assessment Report is not an impediment to imposing an ICO*	72.8	12.0	15.2
7. Sentencing Assessment Reports are typically provided within 6 weeks of request	89.2	3.2	7.5
8. Sentencing Assessment Reports provide sufficient information to determine the appropriateness of imposing an ICO*	65.2	14.1	20.7
9. Sentencing Assessment Reports provide sufficient information to determine the suitability of conditions that can be imposed on an offender	64.5	10.8	24.7
10. The mandatory supervision condition of an ICO is adequate to address issues of community safety**	33.0	22.0	45.1
11. The range of ICO conditions (in addition to supervision) that are available can be used effectively to address offenders' likelihood of reoffending*	65.2	19.6	15.2
12. There are sufficient local services for me to impose the full range of ICO conditions available	40.9	22.6	36.6
13. Generally, the ICO conditions I impose are in accordance with those recommended in the Sentencing Assessment Report	67.7	20.4	11.8

Notes. * 1 missing response; ** 2 missing responses.

[a] Brackets indicate number of judicial officers who gave an open-ended response to each question regarding offence exclusions.

Community Correction Orders (CCOs) and Conditional Release Orders (CROs)

The power to make a community correction order (CCO) or a conditional release order (CRO) is found in ss 8 and 9 of the Crimes (Sentencing Procedure) Act respectively. A court can only impose a CCO or CRO for a DV offence if that order includes a supervision condition: s 4A. When making a CCO or CRO in respect of a DV offender, the victim's safety must be considered before making the order: s 4B(3). Sentencing procedures associated with making a CCO and CRO are set out in Pt 7 and Pt 8 of the Crimes (Sentencing Procedure) Act. There is no requirement for a court to obtain an assessment report before imposing either a CCO or a CRO[21] unless, in the case of a CCO, CSW is to be made a condition of the order and the report states the offender is suitable (see s 89(4)). CSW cannot be a condition of a CRO.

The maximum period for a CCO is three years and for a CRO is two years (see ss 85(2) and 95(2) respectively). A CRO can be made with, or without proceeding, to conviction (see s 9).

Supervision condition

Less than half of all judicial officers (45.2%) agreed the supervision condition available for CCOs and CROs is adequate to address issues of community safety (Table 3, question 1).

The majority of judicial officers who provided an open-ended response (*n*=38) felt that for offenders likely to receive a CCO or CRO, the SAR will assess them as low-risk and supervision will be suspended by Community Corrections. The responses suggest this issue is highly problematic in addressing community safety if the judicial officer has decided supervision is necessary. The following open-ended responses from two judicial officers highlight these concerns:

> *"Community Corrections suspends supervision of many people subject to an CCO and CRO, and they state the intention to do so in the SAR; and the recipient of the SAR knows that from the SAR. If supervision is suspended, as it so often is, it's hardly adequate to address anything, let alone community safety"*

> *"Given the fact supervision is routinely suspended by CSNSW shortly after an order is made, it is hard to be confident counselling as was contemplated by the reforms, will address the criminogenic factors".*

Some of the open-ended responses were sympathetic to the need to suspend supervision for low-medium risk offenders as it was recognised that Community Corrections do not have the resources to cope with the sheer number of people requiring supervision under the new reforms. For example, one judicial officer stated:

> *"Supervision of those assessed as low risk in SARs is often suspended per s.189L. Community Corrections simply cannot cope with the amount of people requiring supervision, so they give greater attention to higher risk offenders. Judicial officers impose supervision on people including low risk assessed persons because they are drug users, alcoholics, thieves or violent offenders. With appropriate supervision, they might not reoffend..."*

Additional conditions

The majority of judicial officers (66.7%) agreed that the additional conditions (other than supervision) available for CCOs and CROs can be used effectively to address offenders' likelihood of reoffending (Table 3, question 2). From the open-ended comments (*n*=10) provided, judicial officers again noted that the effectiveness of conditions depend on the degree to which they can be applied in practice and their compliance actively monitored. Other judicial officers cited that limited resources can impact the effectiveness of certain conditions (e.g., "*'abstain drug' is not an effective condition without a greater network of drug rehabilitation facilities"*).

21 See generally s 17C(1) of the Crimes (Sentencing Procedure) Act and the Sentencing Bench Book at [3-510].

Less than half of all judicial officers (45.2%) surveyed agreed that there are sufficient local services to impose the full range of CCO and CRO conditions available (Table 3, question 3). However, judicial officers who had spent some time presiding over courts in regional or remote areas in the past 12 months (compared to those who had not) were significantly less likely to agree with this statement (42.9% vs. 57.1%, $p<0.05$[22]). Twenty open-ended responses were provided. Judicial officers who disagreed (and offered an open-ended response) were predominately based outside of Sydney, and felt that the greatest impediments to utilising the full range of conditions were lack of CSW providers, lack of transport options for offenders, and lack of drug rehabilitation services.

Breaches

It remains the case that breaches of CCOs and CROs are dealt with by the Court that imposed the original order (see ss 107C (for CCOs) and 108C (for CROs) of the Crimes (Admistration of Sentences) Act).

Fifty per cent of the judicial officers surveyed agreed (and 17.2% disagreed) that under the new sentencing regime they have more flexibility to respond to breaches of CCOs and CROs through the variation of conditions (Table 3, question 4). Eight open-ended responses were provided and, of those, the majority disagreed, with some judicial officers suggesting there was more flexibility under the old regime (e.g., the power to extend the time to complete CSW was lost in the amendments). One judicial officer highlighted the sentiment that varying conditions does not equate to more flexibility in responding to breaches observing "*the fact is that once non-compliant it rarely matters what additional conditions are imposed*".

Unique challenges

Similarly to the results for ICOs, 42.2 per cent of judicial officers surveyed[23] felt there are unique challenges when sentencing DV offenders to a CCO or a CRO. Thirty-five judicial officers provided open-ended responses citing similar challenges to those identified for ICOs including: victim safety and protection (e.g., choosing the appropriate living situation for the offender); CCOs and CROs regarded as too lenient and / or not appropriate as a sentencing option for a DV offender; the operation of ss 4A and 4B of the Crimes (Sentencing Procedure) Act (summarised above); and the suspension of supervision by Community Corrections when the particular judicial officer considered it necessary to prevent recidivism.

Table 3. Questions on Community Corrections Orders (CCOs) and Conditional Release Orders (CROs) (*n*=93)

	% Agree	% Neutral	% Disagree
1. The supervision condition available to me for CCOs and CROs is adequate to address issues of community safety	45.2	19.4	35.5
2. The additional conditions (other than supervision) available for CCOs and CROs can be used effectively to address offenders' likelihood of reoffending	66.7	18.3	15.1
3. There are sufficient local services for me to impose the full range of CCO and CRO conditions available	45.2	21.5	33.3
4. Under the new sentencing regime I have more flexibility in responding to breaches of CCOs and CROs through the variation of conditions	49.5	33.3	17.2

22 Significant difference based on a Pearson chi-square test of independence.
23 Noting there were 3 responses missing from the Local Court.

General questions

Flexibility in sentencing

Fifty-seven per cent of judicial officers agreed that, overall, the new community-based sentencing options provided them with increased flexibility to tailor an order to suit the individual circumstances (Table 4, question 1). In the open-ended responses (*n*=8), some judicial officers said there are additional and favourable conditions which can now be added to CCOs and ICOs (e.g., availability of a 'no drugs and alcohol' condition), and that there is more clarity around sentencing options. Those who disagreed made the following observations: it is unclear why the additional conditions introduced as part of these reforms could not have been made available as conditions for the previous s 9 and s 12 bonds; SARs vary greatly in quality which can be unhelpful; sentencing has become more complicated particularly when home detention is being considered; and it is unhelpful that the court does not deal with breaches of ICOs.

Opportunity to address community safety and offending behaviour

The majority (71.0%) of judicial officers agreed that overall the new penalty regime has increased the opportunity for offenders to serve supervised community-based orders (Table 4, question 2). However, several open-ended responses (*n*=14) were critical of the decisions made by Community Corrections to suspend supervision based on a formula (i.e., LSI-R). In addition, as was the case when addressing a similar question for ICOs, it was repeated that the inability to make a supervised order for interstate residents severely hampers the options available for those offenders residing in border towns.

Less than half (47.3%) of judicial officers surveyed agreed that overall the new penalty regime has increased the *opportunity* for offenders to participate in rehabilitation programs that address their offending behaviour (Table 4, question 3). Twenty-six per cent of judicial officers disagreed with this statement, and twenty-seven per cent were neutral. The majority of those who provided an open-ended response (*n*=15) disagreed with this statement, citing the following: limited supervision to ensure compliance with programs; limited resources for, or availability of, rehabilitation programs; that while rehabilitation programs can often seem helpful there is limited evidence of their effectiveness in reducing reoffending; and it is difficult for judicial officers to know whether the order has made a difference to future offending behaviour or for how long the offender continued with the programs stipulated in the order.

Table 4. General questions (*n*=93)

	% Agree	% Neutral	% Disagree
1. Overall, the new community-based sentencing options provide me with more flexibility in sentencing decisions to tailor an order to individual circumstances	57.0	23.7	19.4
2. Overall, the new penalty regime has increased the opportunity for offenders to serve supervised community-based orders	71.0	11.8	17.2
3. Overall, the new penalty regime has increased the opportunity for offenders to participate in rehabilitation programs that address their offending behaviour	47.3	26.9	25.8

Barriers and unexpected consequences associated with the new sentencing options

Forty per cent of judicial officers indicated 'yes' to the (yes/no) question 'are there any barriers to imposing the new ICOs, CCOs and CROs?' Forty-two responses were received for the open-ended question: 'In your experience, have the sentencing reforms produced any unexpected consequences (either positive or negative)?' and 32 responses were received for the question: 'Are there any other issues you would like to comment on?' The majority of the comments were *negative or critical* of particular aspects of the reforms. Concerns, raised again by the judicial officers here, have already been discussed elsewhere in this report including: the perceived decrease in the deterrent effect of community-based orders; the adequacy of SARs; inadequate information and training provided before reforms commenced; the limited availability of CSW opportunities in regional areas; the availability of support and rehabilitation programs; issues associated with making home detention a condition of an ICO; problems which arise in border towns where the court may be called upon to sentence an interstate offenders; procedures associated with dealing with breaches of orders (particularly ICOs); ICO length; offence exclusions; the limited feedback to judicial officers concerning compliance; and issues associated with the power of Community Corrections to suspend the supervision of offenders assessed as being low-risk.

Areas of concern raised for the first time in response to these three questions included limitations on the power to impose fines and suspended sentences. Two judicial officers felt it should be lawful to impose a fine and / or compensation with a CRO (i.e., a CRO is an insufficient sentence alone but the judicial officer does not think the imposition of a CCO is appropriate). It is noted that a direction for compensation may be made in circumstances where a court has convicted an offender (see s 97 *Victims Rights and Support Act 2013*), but no direction can be made in respect of a CRO without conviction. Loss of the power previously provided by s 12 to suspend a sentence was noted as an unexpected consequence (*n*=5) and labelled "regretful" by one judicial officer. It was suggested that suspended sentences with supervision were a more effective deterrent as any breach is brought back to the attention of the sentencing court and there was a real threat of imprisonment for the offender.

Conversely, five judicial officers expressed positive remarks regarding the reforms referring specifically to the increased flexibility and removal of the CSW requirement for ICOs.

DISCUSSION

The current study surveyed 93 NSW judicial officers to gauge their perceptions of the 2018 sentencing reforms and identify any impediments to implementation or opportunities for improvement. Overall, the survey found that the majority of judicial officers agreed that the sentencing reforms are operating as intended. Seventy-one per cent of judicial officers believed the new penalty regime has increased the opportunity for offenders to serve supervised community-based orders, 57 per cent agreed (and 19% disagreed) that the new community-based options provide more flexibility in sentencing decisions and 47 per cent agreed (and 26% disagreed) that the new penalty options have increased the opportunity for offenders to participate in rehabilitation programs. Furthermore, nearly 90 per cent of judicial officers reported that SARs are provided on time and almost two-thirds agreed these reports provide sufficient information to determine the appropriateness of orders. Most judicial officers reported that adequate information had been provided before implementation of the reforms, though almost a quarter felt unprepared and one in three were unaware or responded in a neutral manner regarding the transitional provisions.

While the majority of judicial officers surveyed believed the sentencing reforms had increased opportunities for supervision, a major recurrent theme which emerged was the frustration experienced by the judiciary with the way in which supervision conditions are implemented in NSW. Supervision is a mandatory condition of ICOs and an optional condition for CCOs and CROs. Community Corrections is responsible for supervising offenders who have been ordered to serve a community-based sentence and under the new arrangements have the power to suspend supervision if an offender is assessed

as at a low-medium risk of reoffending (based on the LSI-R score included in the SAR). Supervision can recommence if an offender comes into contact with police.

A number of judicial officers recognised that suspension of supervision is a necessary management tool that funnels the limited available resources of Community Corrections to those individuals deemed most at risk of reoffending. However, several judicial officers questioned the formulaic nature of the risk assessments, and considered that in many cases offenders were incorrectly assessed as low-risk when there was evidence before the court suggesting otherwise (see, for example, Vaughan v R [2020] NSWCCA 3 where the offender, who had committed serious offences of violence against his ex-partner and a work colleague and had a history of violence in relationships, although no criminal record, was assessed as being at a low-risk of reoffending – a proposition rejected by the first instance sentencing judge).

A critical issue for the judiciary is the requirement to consider community safety and the risk of reoffending in their sentencing decisions (under s 3A of the Crimes (Sentencing Procedure) Act for any sentence and s 66 for ICOs specifically, where community safety is said to be the paramount consideration). Nearly half of all judicial officers surveyed commented that the suspension of supervision, if the presiding officer has deemed it necessary, operates to reduce the effectiveness of an order in meeting the legislative requirements. Some considered that the suspension of supervision is particularly problematic in the case of ICOs because offenders who breach an ICO are not required to return to the court which made the order. This makes it difficult for judicial officers to assess the effectiveness of the ICO in reducing the risk of reoffending and protecting the community. Several judicial officers expressed concern that if breaches of ICOs are not adequately dealt with their deterrent value is reduced. There was a perception among some judicial officers that enforcement of ICOs by the SPA is more lenient than when the courts deal with breaches of such an order. These comments are also consistent with the survey results showing that nearly three-quarters of judicial officers disagreed that the deterrent value of an ICO is equivalent to prison and one in four judicial officers believed ICOs are not sufficiently punitive to be considered an alternative to custody. While the SPA has the power to modify the conditions of an ICO in real time to manage identified changes in risk and adopt a range of escalating sanctions to deal with breaches, the information concerning how matters are dealt with by the SPA is not provided to the courts nor is it publicly available.

As discussed above, the interpretation of s 66 was identified as an area of concern for a small number of judicial officers. The Court of Criminal Appeal has considered the construction of s 66, its relationship with the purposes of sentencing enumerated in s 3A of the Crimes (Sentencing Procedure) Act, and the implications of s 66 for magistrates considering an ICO as an alternative to full-time imprisonment in the Local Court where shorter sentences are more common. The most important of these cases are R v Pullen (2018) 275 A Crim R 509; [2018] NSWCCA 264, *R v Fangaloka* [2019] NSWCCA 173 and *Casella v R* [2019] NSWCCA 201. The latter two specifically addressed the potential impact on the Local Court (see *Fangaloka* at [56] and *Casella* at [105], [110]). Certainly, it seems apparent from the caselaw, given the way s 66 has been construed to date[24], that an argument can be made in individual cases that community safety is best served by a particular offender serving their sentence of imprisonment by way of an ICO in the community with appropriate conditions. Whether that order is made is ultimately a matter of discretion for the sentencing court. Another judicial officer queried whether the content of a SAR adequately engages the text of s 66. However, it is noted that an assessment report must address, among other things, an offender's risk of reoffending and the factors that may impact on their ability to address their offending behaviour.[25] These considerations are connected to the issue of community safety. Certainly there appears to be no specific requirement to address the provision directly in a SAR.

While one judicial officer identified the delay in the commencement of an ICO while an appeal is pending as problematic (i.e., the delay was said to result in the order being stayed[26]) s 63 of the *Crimes (Appeal and Review) Act 2001* appears to address this issue. Under s 63(2)(c) a sentence of imprisonment (defined in

24 See the Sentencing Bench Book at [3-632].
25 Crimes (Sentencing Procedure) Regulation 2017, cl 12A.
26 In this context, an order staying a sentence simply means that the sentence does not take effect until the appeal is finalised.

s 63(5) as including an ICO) is only stayed if a person is granted appeal bail. Accordingly, lodging a notice of appeal does not automatically result in a stay. Section 63 is found in Pt 6 of the Act which contains those provisions of the Act common to all appeals, regardless of whether the matter was finalised in the Local or District Courts.[27]

Turning to other aspects of the new ICOs, judicial officers generally agreed with the ICO offence exclusions and felt that the removal of mandatory CSW had enabled judicial officers to impose this penalty more frequently. However, a notable minority of judicial officers disagreed with exclusions for manslaughter, sexual offences and offences involving the discharge of a firearm, commenting that in some matters involving these offences the circumstances had not warranted prison but the ICO offence exclusions had precluded the use of other community-based options such as home detention. In particular, the restriction on imposing an ICO for minor sex offences was considered worthy of re-examination. Earlier in the survey, s 66C of the Crimes Act 1900 (sexual intercourse with a child between 10 and 16 years old) and the offence exclusion of 'sexual offences involving children' was identified by one judicial officer as problematic where the offender is also a child. Almost one in three judicial officers also indicated that extending the maximum length of ICOs beyond two years would facilitate greater use of this custodial alternative. Whether there is utility in this given some of the criticisisms made with respect to other aspects of an ICO would require separate evaluation.

Although the majority of judicial officers reported being satisfied in regard to the timeframes for completion of SARs by Community Corrections, a small proportion was less satisfied with the content of the SAR. Twenty per cent of judicial officers disagreed that the SAR provides sufficient information to determine the appropriateness of an ICO, and a quarter of judicial officers disagreed that the SAR provides sufficient information to determine the suitability of conditions. While most judicial officers agreed that the availability of additional conditions has allowed a more tailored approach to sentencing, several judicial officers noted that the extent to which these conditions can address the risk of reoffending depend heavily on successful application and effective enforcement. In this regard a considerable proportion (around a third) of judicial officers felt that there were insufficient services available to impose the full range of conditions for ICOs, CCOs and CROs. The survey highlighted, in particular, the need to improve local services in rural locations including the need to significantly increase the availability of CSW and rehabilitation programs. These gaps in service delivery have been recognised by Community Corrections who are currently working towards increasing the number of hours available for CSW in both metropolitan and rural locations, as well as increasing the diversity of CSW that is available in the community. Another consideration not explored in the current study, but requiring further attention is the development of culturally appropriate rehabilitation programs and CSW options for Aboriginal offenders, particularly those living in regional or remote locations (Jones, 2019).

Another issue flagged was the disadvantages caused to an offender who is dealt with in a NSW court but resides in another State. The responses received seemed largely directed to the situation that arises in border towns. However, prosecutions of offenders from interstate are not limited to border areas. The recent Court of Criminal Appeal decision in *Director of Public Prosecutions v Burton* [2020] NSWCCA 54 illustrates the potential issues (although the legal issue arising on the appeal did not concern the operation of the legislation *per se*). In this case the first instance judge had made a CCO in relation to an offender who had committed a sexual offence (which precluded the imposition of an ICO). In the course of its judgment, the Court observed that where there was a prospect of a non-custodial sentencing option it might be precluded because supervision for an interstate offender is not provided for by the legislation. In such a case, the Court observed that the only available option may be a full-time custodial sentence and discussed the possible constitutional ramifications of such a result (see 37ff and, in particular, [41]–[44]).

27 See Gelle v Director of Public Prosecutions (NSW) [2017] NSWCA 245.

Almost half of all judicial officers surveyed felt there are unique challenges in sentencing DV offenders to ICOs, CCOs or CROs. These challenges largely relate to issues of victim safety and the offender's living arrangements when determining appropriate conditions for a community-based order. Concerns regarding the adequacy of supervision in protecting the victim (as detailed above) were noted as especially relevant to DV offenders living with the victim. Judicial officers are aware that DV offenders are likely to be assessed by the SAR as low-risk especially when they are a first time offender. However, such an assessment may not reflect either the seriousness of the offence or the likelihood of reoffending given the negative relationship dynamics existing between DV offenders and their victims. Community and victim safety is of particular concern in rural communities where there is less anonymity, less availability of rehabilitation programs and/or infrequent supervision.

There are limits to which concerns such as those raised by judicial officers concerning the adequacy of supervision can be addressed as part of their ongoing education, particularly since the question of whether an individual offender is supervised is ultimately determined by Community Corrections. Sentencing DV offenders has long been a fraught area, even before the 2018 reforms, due to the many complex and varied relationship factors. The legal issues were identified and discussed in the 2016 Commission publication *Sentencing for domestic violence* (Gombru, Brignell, & Donnelly, 2016). However, recognising these specific issues, a number of Commission education sessions explicitly addressed sentencing of DV offenders following commencement of the reforms[28].

The survey results presented here suggest that while there is support from the judiciary for the reforms operating as intended, a number of practical issues exist that may affect the extent to which the expanded range of sentencing options are utilised and are able to achieve their longer-term objective of reducing reoffending. The findings underline the complexity and breadth of these reforms and underscore the value of continuing judicial education which may be targeted towards those issues identified in some of the responses to this survey.

The judicial officers surveyed provided several recommendations that could assist in addressing some of the identified barriers and if adopted, have the potential to successfully augment policy impact. These include (but are not limited to):

- Increasing resources to enable management of a greater number of offenders in the community and delivery of more community-based rehabilitation programs particularly in regional areas;
- Providing feedback to judicial officers on levels of compliance with ICOs;
- Providing greater clarification regarding the interpretation of s 66;
- Repealing s 17D(3) in order to increase the use of home detention;
- Reconsidering ICO exclusions for some offence categories;
- Consider extending the maximum length of an ICO; and
- Expanding the sentencing options to those interstate offenders who are eligible for a community-based orders.

The following limitations of the current study should be noted. This current study only surveyed judicial officers, and did not include surveys of other stakeholders, e.g., lawyers appearing before the Local and District Courts, and Community Corrections Officers. As such this reports on one source of opinions about whether the new sentencing practices are operating as intended. However, it is important to note that this study is unique in that the survey responses reflect the collective knowledge and extensive expertise of judicial officers specialising in criminal law. The narrative discussion is based on the answers given by those judicial officers who chose to provide a free text response. While these opinons may not always represent the broad view of the judiciary, they warrant discussion as they are made in the context of regularly making sentence decisions in criminal matters.

28 2018 Local Court Metropolitan Seminar Series II "New consistency in sentencing options", 12–16 November 2018; 2019 Local Court Southern and Northern Regional Conferences "New consistency in sentencing options", March 2019.

Two further studies examining the sentencing reforms will be undertaken by BOCSAR. The first, which is shortly forthcoming, will assess the immediate impact of the reforms on sentences imposed in NSW Criminal Courts and quantify any increase (or reduction) in the probability of receiving a supervised community-based order (or short-term prison sentence) (Donnelly, 2020). The second will consider whether the reforms have achieved their primary long-term objective of reducing reoffending and curtailing the rise in the NSW prison population. Taken together, these three studies will provide a comphrensive picture of the impact of the sentencing reforms.

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APPENDIX

APPENDIX 1

Below is a list of the education sessions developed and delivered by the Judicial Commission of NSW before the commencement of the 2018 sentencing reforms.

District Court of NSW Annual Conference, April 2018

- "Criminal Justice Reforms", Mr Lloyd Babb SC, The Director of Public Prosecution NSW, Office of the DPP and Mr Mark Ierace SC, Senior Public Defender, The Public Defenders.

District Court of NSW Annual Conference, April 2019

- "Criminal law review", The Honourable Justice Robert A Hulme, Supreme Court of NSW.
- "Indigenous justice - diversionary programs and other services" – 3 x presentations.

District Court of NSW Seminars

- "The New Sentencing and Community Corrections Reforms", Ms Larisa Michalko, Director, NSW Department of Justice and Ms Rosemary Caruana, Assistant Commissioner, Community Corrections, Corrective Services NSW, Twilight Seminar, 12 September 2018.

Local Court of NSW Annual Conference, August 2017

- "Management of Offenders by Community Corrections and the New Sentencing Reform", Ms Rosemary Caruana, Assistant Commissioner, Community Corrections, Corrective Services NSW.

Local Court of NSW Annual Conference, August 2018

- "A Review of the State Parole Authority Operating Practices", The Honourable James Wood AO QC, Chair, NSW State Parole Authority.
- "Preparation of Community Corrections assessment reports and management of order conditions under the new sentencing regime", Mr Jason Hainsworth, Director Strategy, Community Corrections, Corrective Services NSW.

Local Court of NSW Seminars and Workshops

- *Local Court of NSW Metropolitan Series II, 12–16 November 2018*
  - "New Consistency in Sentencing Options – Part 1", His Honour Deputy Chief Magistrate Michael Allen, Local Court of NSW and His Honour Magistrate Ian Guy, Local Court of NSW.
  - "Further updates on Community Corrections Reports", Ms Rosemary Caruana, Assistant Commissioner, Community Corrections, Corrective Services NSW.
- *Local Court of NSW Metropolitan Series I, 11–15 February 2019*
  - "New Consistency in Sentencing Options – Part 2", His Honour Deputy Chief Magistrate Michael Allen, Local Court of NSW and His Honour Magistrate Ian Guy, Local Court of NSW.
  - "Recent and Upcoming Legislative Amendments", His Honour Deputy Chief Magistrate Michael Allen, Local Court of NSW.
- *Local Court of NSW Metropolitan Series I, 10–14 February 2020*
  - "Sentencing Exercises – information, explanation and examples", His Honour Magistrate Philip Stewart, Local Court of NSW.

Local Court of NSW Southern Regional Conference, March 2019

- "New Consistency in Sentencing Options – Part 1", His Honour Deputy Chief Magistrate Michael Allen, Local Court of NSW and His Honour Magistrate Ian Guy, Local Court of NSW.
- "New Consistency in Sentencing Options – Part 2", His Honour Deputy Chief Magistrate Michael Allen, Local Court of NSW and His Honour Magistrate Ian Guy, Local Court of NSW.
- "Further updates on Community Corrections Reports", Mr Jason Hainsworth, Director Strategy, Community Corrections, Corrective Services NSW.
- "Recent and Upcoming Legislative Amendments", His Honour Deputy Chief Magistrate Michael Allen, Local Court of NSW.

Local Court of NSW Northern Regional Conference, March 2019

- "New Consistency in Sentencing Options – Part 1", His Honour Deputy Chief Magistrate Michael Allen, Local Court of NSW and His Honour Magistrate Ian Guy, Local Court of NSW.
- "New Consistency in Sentencing Options – Part 2", His Honour Deputy Chief Magistrate Michael Allen, Local Court of NSW and His Honour Magistrate Ian Guy, Local Court of NSW.
- "Further Updates on Community Corrections Reports", Ms Rosemary Caruana, Assistant Commissioner, Community Corrections, Corrective Services NSW.
- "Recent and Upcoming Legislative Amendments", His Honour Deputy Chief Magistrate Michael Allen, Local Court of NSW.

Local Court of NSW Southern Regional Conference, March 2020

- "Sentencing Exercises – information, explanation and examples", His Honour Magistrate Philip Stewart, Local Court of NSW.
- "Legislative Update – recent and upcoming changes", His Honour Deputy Chief Magistrate Michael Allen, Local Court of NSW.

Local Court of NSW Magistrates' Orientation Program, November 2017

- Sentencing principles, 3 x sessions of sentencing exercises.

Local Court of NSW Magistrates' Orientation Program, May 2018

- Sentencing principles, 3 x sessions of sentencing exercises.

Local Court of NSW Magistrates' Orientation Program, May 2019

- Sentencing principles, 3 x sessions of sentencing exercises.

Local Court of NSW Magistrates' Orientation Program, December 2019

- Sentencing principles, 3 x sessions of sentencing exercises.

Local Court of NSW Podcasts June 2019

- **A discussion about suspension of supervision under the reforms to the Crimes (Sentencing Procedure) Act 1999 - Part 1**

  A conversation between Deputy Chief Magistrate of the Local Court of NSW, his Honour Michael Allen, and Rosemary Caruana, former Assistant Commissioner, Community Corrections, about the reforms to the Crimes (Sentencing Procedure) Act 1999. This podcast is an opportunity to hear judicial officers' concerns about the operation of the reforms in practice. The term "supervision" emerges as a source of contention, between the judicial perspective and the practicalities of Corrective Services' management of offenders. Through dialogue, each side reaches a better understanding of the other. It can be seen that the objectives and procedures of the courts and Community Corrections will be enhanced by greater transparency in the use of specific terminology.

- **A discussion about suspension of supervision under the reforms to the Crimes (Sentencing Procedure) Act 1999 - Part 2**

  In the second part of the conversation between Deputy Chief Magistrate of the Local Court of NSW, his Honour Michael Allen, and Rosemary Caruana, former Assistant Commissioner — Community Corrections, the focus moves to the suspension of supervision under the reforms to the Crimes (Sentencing Procedure) Act 1999. As before, the different uses of the term "supervision" are relevant in the discussion of appropriate management of offenders, and the particular context of parole is also discussed. Demonstrating the benefits of open dialogue, this podcast captures a constructive sharing of concerns and information between two of the key institutions involved in sentencing law and practice in NSW.

APPENDIX 2

Appendix 2 is the survey instrument used in the current study

The questions that follow ask about your views and experience of the NSW sentencing reforms which commenced on 24 September 2018.

Your answers will help us understand how well the reforms are working, barriers to implementation and unanticipated consequences.

Please answer each question based on your views and personal experience.

If you would like to provide additional information, please include your comments under 'Further details'.

Preliminary questions

Please indicate whether you sit in the District Court or the Local Court.

District Court	❍
Local Court	❍

Please indicate how much time you have spent presiding over a court in the following locations in the past 12 months:

	No time	Up to 3 months (inclusive)	More than 3 and up to 6 months (inclusive)	More than 6 months	If you're happy to do so, please specify the location/s [free text]
Metropolitan (e.g. Sydney, Gosford, Newcastle, Wollongong)	❍	❍	❍	❍	
Regional (e.g. Coffs Harbour, Nowra, Orange, Tamworth, Wagga Wagga)	❍	❍	❍	❍	
Remote (e.g. Bourke, Broken Hill)	❍	❍	❍	❍	

Please indicate your level of agreement with the following statements:

	Strongly agree	Agree	Neither agree/ disagree	Disagree	Strongly disagree	Further details [free text]
Sufficient information was made available to judicial officers on the sentencing reforms prior to their commencement.	❍	❍	❍	❍	❍	
The transitional provisions outlined in Part 29 of Schedule 2 of the *Crimes (Sentencing Procedure) Act 1999* are sufficient.	❍	❍	❍	❍	❍	

Intensive Correction Orders

The following questions relate to the ICO introduced from 24 September 2018.

Please indicate your level of agreement with the following statements:	Strongly agree	Agree	Neither agree/ disagree	Disagree	Strongly disagree	Further details [free text]
1. The following offence exclusions for ICOs are appropriate:						
a. Murder	❍	❍	❍	❍	❍	
b. Manslaughter	❍	❍	❍	❍	❍	
c. Sexual assault against an adult	❍	❍	❍	❍	❍	
d. Sexual offences involving children	❍	❍	❍	❍	❍	
e. Offences involving the discharge of a firearm	❍	❍	❍	❍	❍	
f. Terrorism offences	❍	❍	❍	❍	❍	
g. Contraventions of serious crime prevention orders	❍	❍	❍	❍	❍	
h. Contraventions of public safety orders	❍	❍	❍	❍	❍	
2. The removal of the mandatory requirement that an offender undertake community service work (previously a condition of an ICO), has enabled me to use ICOs as a penalty for more offenders	❍	❍	❍	❍	❍	
3. The two year restriction on the length of ICOs is appropriate	❍	❍	❍	❍	❍	
4. The ICO is sufficiently punitive to be an alternative to imprisonment	❍	❍	❍	❍	❍	
5. The deterrent effect of an ICO is equivalent to imprisonment	❍	❍	❍	❍	❍	
6. The time taken by Community Corrections to complete the new Sentencing Assessment Report is not an impediment to imposing an ICO	❍	❍	❍	❍	❍	
7. Sentencing Assessment Reports are typically provided within 6 weeks of request	❍	❍	❍	❍	❍	
8. Sentencing Assessment Reports provide sufficient information to determine the appropriateness of imposing an ICO	❍	❍	❍	❍	❍	
9. Sentencing Assessment Reports provide sufficient information to determine the suitability of conditions that can be imposed on an offender	❍	❍	❍	❍	❍	

Please indicate your level of agreement with the following statements:	Strongly agree	Agree	Neither agree/ disagree	Disagree	Strongly disagree	Further details [free text]
10. The mandatory supervision condition of an ICO is adequate to address issues of community safety *If you disagree or strongly disagree with this statement please provide further details.*	❍	❍	❍	❍	❍	
11. The range of ICO conditions (in addition to supervision) that are available can be used effectively to address offenders' likelihood of reoffending	❍	❍	❍	❍	❍	
12. There are sufficient local services for me to impose the full range of ICO conditions available *If you have presided over a court in more than one location in the past 12 months, please respond in relation to the location where you have spent the most time. You can provide additional information under 'Further details'.*	❍	❍	❍	❍	❍	
13. Generally, the ICO conditions I impose are in accordance with those recommended in the Sentencing Assessment Report *If you disagree or strongly disagree with this statement please provide further details.*	❍	❍	❍	❍	❍	

14. Are there any unique challenges when considering sentencing domestic violence offenders to an ICO?

❍ Yes ❍ No

Further details: [free text]

15. Should it be possible to impose an ICO for a sexual offence when the offender is a child and the matter is being dealt with in the District Court?

❍ Yes ❍ No

Further details: [free text]

Community Correction Orders and Conditional Release Orders

The following questions relate to the CCOs and CROs introduced following the sentencing reforms.

Please indicate your level of agreement with the following statements:	Strongly agree	Agree	Neither agree/ disagree	Disagree	Strongly disagree	Further details [free text]
1. The supervision condition available to me for CCOs and CROs is adequate to address issues of community safety *If you disagree or strongly disagree with this statement please provide further details.*	❍	❍	❍	❍	❍	
2. The additional conditions (other than supervision) available for CCOs and CROs can be used effectively to address offenders' likelihood of re-offending	❍	❍	❍	❍	❍	
3. There are sufficient local services for me to impose the full range of CCO and CRO conditions available *If you have presided over a court in more than one location in the past 12 months, please respond in relation to the location where you have spent the most time. You can provide additional information under 'Further details'.*	❍	❍	❍	❍	❍	
4. Under the new sentencing regime I have more flexibility in responding to breaches of CCOs and CROs through the variation of conditions	❍	❍	❍	❍	❍	

5. Are there any unique challenges when sentencing domestic violence offenders to a CCO or CRO?

❍ Yes ❍ No

Further details: [free text]

General Questions

Please indicate your level of agreement with the following statements:	Strongly agree	Agree	Neither agree/ disagree	Disagree	Strongly disagree	Further details [free text]
1. Overall, the new community-based sentencing options provide me with more flexibility in sentencing decisions to tailor an order to individual circumstances	❍	❍	❍	❍	❍	
2. Overall, the new penalty regime has increased the opportunity for offenders to serve supervised community-based orders	❍	❍	❍	❍	❍	
3. Overall, the new penalty regime has increased the opportunity for offenders to participate in rehabilitation programs that address their offending behaviour	❍	❍	❍	❍	❍	

4. a) Are there any barriers to imposing the new ICOs, CCOs or CROs?

❍ Yes ❍ No

b) If yes, what are they and did these same barriers exist prior to the introduction of the sentencing reforms? [free text]

5. In your experience, have the sentencing reforms produced any unexpected consequences (either positive or negative)? [free text]

6. Are there any other issues you would like to comment on? [free text]

Thank you for participating in this survey.

APPENDIX 3

Appendix 3 includes five tables (Tables A1-A5) detailing each of the survey questions. Responses are provided for judicial officers in the Local Court compared to the District Court.

Table A1. Please indicate how much time you have spent presiding over a court in the following locations in the past 12 months

	Local Court (*n*=68)			District Court (*n*=25)		
	No time %	<=6 months %	> 6 months %	No time %	<=6 months %	> 6 months %
Metropolitan (*n*=92*)	22.4	14.9	62.7	4.0	24.0	72.0
Regional (*n*=85**) ^	45.2	24.2	30.6	47.8	47.8	4.3
Remote (*n*=76***)	85.2	11.1	3.7	77.3	22.7	0

Notes. * 1 missing responses from District Court
** 2 missing responses from District Court; 6 missing responses from Local Court
*** 3 missing responses from District Court; 14 missing responses from Local Court
^ differences between District and Local Court significant at p<.05 using Pearson Chi-square test of independence

Table A2. Preliminary questions

	Local Court (*n*=68)			District Court (*n*=25)		
	Agree %	Neutral %	Disagree %	Agree %	Neutral %	Disagree %
1. Sufficient information was made available to judicial officers on the sentencing reforms prior to their commencement	70.6%	5.9%	23.5%	60%	20.0	20.0
2. The transitional provisions outlined in Part 29 of Schedule 2 of the Crimes (Sentencing Procedure) Act 1999 are sufficient	54.4	36.8	8.8	60.0	28.0	12.0

Table A3. Questions regarding Intensive Correction Orders

	Local Court (*n*=68)			District Court (*n*=25)		
	Agree %	Neutral %	Disagree %	Agree %	Neutral %	Disagree %
1. The following offence exclusions for ICOs are appropriate:[a]						
a. Murder (open-ended responses *n*=3)	83.8	10.3	5.9	96.0	4.0	0.0
b. Manslaughter^ (open-ended responses *n*=5)	69.1	14.7	16.2	40.0	20.0	40.0
c. Sexual assault against an adult*^ (open-ended responses *n*=11)	67.2	14.9	17.9	36.0	8.0	56.0
d. Sexual offences involving children^ (open-ended responses *n*=9)	76.5	10.3	13.2	44.0	8.0	48.0
e. Offences involving the discharge of a firearm^^ (open-ended responses *n*=5)	64.7	22.1	13.2	52.0	0.0%	48.0
f. Terrorism offences (open-ended responses *n*=1)	77.9	14.7	7.4	64.0	16.0	20.0
g. Contraventions of serious crime prevention orders* (open-ended responses *n*=3)	64.2	25.4	10.4	40.0	32.0	28.0
h. Contraventions of public safety orders^ (open-ended responses *n*=2)	54.4	32.4	13.2	32.0	24.0	44.0
2. The removal of the mandatory requirement that an offender undertake community service work (previously a condition of an ICO), has enabled me to use ICOs as a penalty for more offenders*	79.1	11.9	9.0	60.0	12.0	28.0
3. The two year restriction on the length of ICOs is appropriate	52.9	20.6	26.5	36.0	4.0	60.0
4. The ICO is sufficiently punitive to be an alternative to imprisonment	30.9	26.5	42.6	60.0	12.0	28.0
5. The deterrent effect of an ICO is equivalent to imprisonment	10.3	14.7	75.0	24.0	12.0	64.0
6. The time taken by Community Corrections to complete the new Sentencing Assessment Report is not an impediment to imposing an ICO**	75.0	11.8	13.2	66.7	12.5	20.8
7. Sentencing Assessment Reports are typically provided within 6 weeks of request	92.6	1.5	5.9	80.0	8.0	12.0
8. Sentencing Assessment Reports provide sufficient information to determine the appropriateness of imposing an ICO*	67.6	13.2	19.1	58.3	16.7	25.0

Table A3. Questions regarding Intensive Correction Orders

	Local Court (*n*=68)			District Court (*n*=25)		
	Agree %	Neutral %	Disagree %	Agree %	Neutral %	Disagree %
9. Sentencing Assessment Reports provide sufficient information to determine the suitability of conditions that can be imposed on an offender	67.6	10.3	22.1	56.0	12.0	32.0
10. The mandatory supervision condition of an ICO is adequate to address issues of community safety#	31.3	23.9	44.8	37.5	16.7	45.8
11. The range of ICO conditions (in addition to supervision) that are available can be used effectively to address offenders' likelihood of reoffending**	61.2	22.4	16.4	76.0	12.0	12.0
12. There are sufficient local services for me to impose the full range of ICO conditions available	45.6	19.1	35.3	28.0	32.0	40.0
13. Generally, the ICO conditions I impose are in accordance with those recommended in the Sentencing Assessment Report^	67.6	25.0	7.4	68.0	8.0	24.0

Notes. * 1 missing response from District Court
** 1 missing response from Local Court
# 1 missing response from District Court and 1 missing response from Local Court
^ differences between District and Local Court significant at p<.05 using Pearson chi-square test of independence
^^ differences between District and Local Court significant at p<.001 using Pearson chi-square test of independence

Table A4. Questions on Community Corrections Orders (CCOs) and Conditional Release Orders (CROs)

	Local Court (*n*=68)			District Court (*n*=25)		
	Agree %	Neutral %	Disagree %	Agree %	Neutral %	Disagree %
1. The supervision condition available to me for CCOs and CROs is adequate to address issues of community safety	44.1	17.6	38.2	48.0	24.0	28.0
2. The additional conditions (other than supervision) available for CCOs and CROs can be used effectively to address offenders' likelihood of reoffending	64.7	19.1	16.2	72.0	16.0	12.0
3. There are sufficient local services for me to impose the full range of CCO and CRO conditions available^	50.0	14.7	35.3	32.0	40.0	28.0
4. Under the new sentencing regime I have more flexibility in responding to breaches of CCOs and CROs through the variation of conditions	54.4	27.9	17.6	36.0	48.0	16.0

Notes. ^ differences between District and Local Court significant at p<.05 using Pearson chi-square test of independence.

Table A5. General questions

	Local Court (*n*=68)			District Court (*n*=25)		
	Agree %	Neutral %	Disagree %	Agree %	Neutral %	Disagree %
1. Overall, the new community-based sentencing options provide me with more flexibility in sentencing decisions to tailor an order to individual circumstances	58.8	23.5	17.6	52.0	24.0	24.0
2. Overall, the new penalty regime has increased the opportunity for offenders to serve supervised community-based orders	69.1	13.2	17.6	76.0	8.0	16.0
3. Overall, the new penalty regime has increased the opportunity for offenders to participate in rehabilitation programs that address their offending behaviour	45.6	27.9	26.5	52.0	24.0	24.0

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