Sentencing reform FAQs

Rationale for reform

1. Why has the NSW Government passed these sentencing reforms?

These reforms are built primarily upon recommendations made by the NSW Law Reform Commission in its *Report 139 – Sentencing*, published in July 2013. The reforms also draw on research conducted by the Bureau of Crime Statistics and Research (BOCSAR), Judicial Commission and Sentencing Council.

Some of the key findings of that research are as follows:

- Community supervision and programs are far more effective at reducing rates of reoffending than short-term gaol sentences (less than 2 years). Supervision has the greatest impact on offenders who are assessed as being at medium- or high-risk of reoffending.
- For example, offenders on an ICO are 11-31% less likely to reoffend than those who receive a full-time gaol sentence of less than 2 years. Even larger reductions in reoffending (25-43%) are observed when offenders on an ICO of less than 6 months are compared with those who receive a full-time gaol sentence of equivalent length.
- ICOs and home detention are underused sentencing options. They have important advantages over full-time imprisonment in terms of reducing costs, reducing reoffending and keeping offenders out of prison. But they have structural problems which make them inaccessible for many offenders who would otherwise be suitable (e.g. by including a mandatory community service work requirement on an ICO).
- The use of suspended sentences has increased dramatically since they were reintroduced in 2000. However, this rise appears to have been at the expense of community-based sentencing options such as community service orders and good behaviour bonds. The increase in the use of suspended sentences appears to have led to an increase in the prison population rather than a decrease as was intended.

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Introduction of new sentence orders

2. Which existing sentencing options have been abolished?	The following existing sentencing options have been abolished as a result of these reforms: home detention orders, suspended sentences (section 12 good behaviour bonds), community service orders, section 9 bonds with conviction and section 10(1)(b) bonds without conviction.
3. Which existing sentencing options have been retained?	The following existing sentencing options have been retained and form part of the new sentencing framework: section 10(1)(a) dismissals without conviction, section 10(1)(c) discharges to participate in an intervention program, section 10A convictions with no further penalty, section 11 deferrals of sentencing for rehabilitation, and fines. Intensive correction orders ('ICOs') have also been retained, although their structure has changed in significant ways.
4. What are the new sentencing options that are being introduced?	These reforms introduce two new community-based sentencing options: community correction orders (CCOs) and conditional release orders (CROs). Each of these orders consists of two 'standard' conditions (which are mandatory for all orders), as well as 'additional' and 'further' conditions which the court considers appropriate in the particular circumstances. They are both non-custodial orders; according to the Explanatory Note and Second Reading Speech, the CCO sits above the CRO in the hierarchy of sentence orders.
5. Who enforces a curfew condition, NSW Police or Community Corrections?	If an offender is subject to a supervision condition imposed by the court as part of the sentence order, it is the responsibility of Community Corrections, in the first instance, to monitor compliance with the order. They have officers who travel out to the field and conduct compliance checks, including by way of scheduled and unscheduled home visits. However, those officers do not the power to enter an offender's home (unless invited) and they do not have powers of arrest. Furthermore, they generally work business hours only, so they will be relying on assistance and intelligence from the NSW police to monitor certain conditions, including a curfew, place restriction or non-association condition. NSW Police do not have enforcement powers in respect of conditions of sentence orders. In the event of a police officer becoming aware of a breach of a sentence order, the officer would notify either Community Corrections (if the offender is subject to a supervision condition) and/or the court (if the offender is not subject to a supervision condition). Police officers do not have the legal authority to arrest an offender in respect of any such breach.
6. Is there any guidance as to how judicial officers are required to approach the task of imposing conditions on a community-based sentence order? Are there any restrictions on the type and number of conditions that the court is permitted to impose?	*CSPA* s 3A sets out an exhaustive list of 'the purposes for which a court may impose a sentence on an offender'. The imposition of sentence conditions is an element of the sentencing exercise, and therefore it would seem that the imposition of a particular sentence condition must be in furtherance of at least one of the purposes of sentencing in order to be a valid exercise of sentencing discretion. For example, a curfew of up to 12 hours could be imposed on a CCO in order to punish the offender, regardless of whether or not the offence occurred at night; in other words, a curfew could imposed on sentence even though such a condition is not referable to the nature of the offending.

	It is important to note that s 3A(a) incorporates the common law principle of proportionality, as acknowledged in *R v Scott* [2005] NSWCCA 152. That principle provides that the sentence imposed must ultimately reflect the objective seriousness of the offence and that there must be a reasonable proportionality between the sentence passed and the circumstances of the crime. The principle of proportionality operates to guard against the imposition of unduly lenient or unduly harsh sentences. This principle precludes a sentencing court from imposing a longer or more onerous sentence (in terms of the severity of the conditions imposed) merely for the purpose of protecting society, by ensuring treatment of an offender's mental abnormality or addiction to drugs or alcohol, if the resulting order would be disproportionate to the gravity of the offending: *Channon v The Queen* [1978] FCA 35, cited with approval in *Boulton v The Queen* [2014] VSCA 342. There is a comprehensive discussion of the impact of the principle of proportionality on the imposition of community-based sentence conditions in Boulton at [63]-[76].
7. What happens if the judicial officer does not specifically note for the record whether a CRO is imposed with or without conviction? Is there a default position? There is a concern that if the bench forgets to specifically note that a conviction is not being recorded, the default position may be that a conviction is recorded.	The draft of the Local Court bench sheet requires the Magistrate to tick 'not convicted' if he or she is not recording a conviction on a CRO; there is a separate tick box for 'Conditional release order (with conviction)'. In other words, the judicial officer will have to specifically turn his or her mind, at the time of sentence, to the issue of whether a conviction is being recorded.
8. Given that the court can now impose conditions such as non-association and place restriction as part of a sentence order, does this mean that orders pursuant to *CSPA* s 17A ('Non-association and place restriction orders') are being abolished?	No, *CSPA* s 17A is being retained in the new sentencing framework. Sentencing courts will be empowered to impose a non-association and/or place restriction condition (amongst other conditions) on a community-based sentence. However, courts will also still be permitted to impose a non-association and/or place restriction order pursuant to s 17A. In fact, there does not seem to be any impediment to the court imposing a non-association/place restriction condition on an offender's sentence *and also* imposing an order under s 17A in respect of that offender. The key difference between non-association/place restriction as *conditions* of a community-based sentence and the availability of an *order* pursuant to s 17A is that a contravention of a s 17A is a discrete offence, whereas a breach of a sentence condition is not (although the breach behaviour may be as a result of the commission of a fresh offence).
9. Is it possible to have different sentence conditions in force for different periods of time throughout the duration of the sentence order?	The two 'standard' conditions of a sentence order are mandatory and must remain in force for the duration of the order. However, the legislation provides that the sentencing court "may limit the period" during which an 'additional' or 'further' condition is in force. This means that the court can tailor a sentence to the particular circumstances of the offender. For instance, the court could impose a 12 hour curfew on an offender for the first 3 months of a 6 month CCO, after which time the curfew ceases to operate. Another example is that a court imposing a 12 month ICO on an offender could tailor a sentence such that during the first 3 months the offender is subject to a home detention condition, the next 3 months the offender is subject to an electronic

	monitoring condition, the next 3 months the offender is subject to a curfew condition and the final 3 months the offender the offender is subject only to the 'standard' (mandatory) conditions of the ICO. This would enable to court to manufacture a sentence which both punishes the offender, given the onerous nature of the sentence, and also allows the offender to demonstrate rehabilitation by gradually reducing the restrictions on his or her liberty.
10. In order to obtain a CRO without conviction in respect of a traffic offence for an offender for whom the mandatory licence disqualification would be disastrous, it was suggested that the court could impose a 'further' condition on the CRO that the offender not drive between Monday and Friday from 7pm and 7am (so as to allow the offender to drive for essential purposes only and not for leisure purposes). How would compliance with such a condition be monitored, and how would the court enforce the condition?	It was suggested by a police prosecutor at one of the training sessions that the court could impose an ancillary 'further' condition requiring the offender to report to NSW Police within a specified time (e.g. 12 hours) to notify them of the conditions of the sentence. That would enable police to place a warning on the COPS system as to the precise conditions of the sentence order, including the timed restriction on the offender's ability to drive, such that officers would be able to monitor compliance with the condition in the event that the offender came into contact with police in the field (e.g. during an RBT licence check). In the event of NSW Police becoming aware of this type of condition, they would notify Community Corrections (if the offender is subject to a supervision condition) and/or the court (if not subject to a supervision condition). Police officers do not have the legal authority to arrest an offender in respect of any such breach.
11. How would a curfew condition, available as an 'additional' condition of a CCO (for up to 12 hours in any 24 hour period) and an ICO (up to 24 hours), be enforced?	Unlike the power of the court to impose an 'enforcement condition' as part of a set of bail conditions pursuant to *Bail Act* 2013 s 30, there is no express power in the amended *CSPA* to impose an enforcement condition for the purpose of monitoring or enforcing compliance with a sentence condition such as a curfew. However, the court may be minded to impose an enforcement condition as a 'further' condition of a sentence order in order to monitor compliance with the order. For instance, the court could impose an 'additional' condition on a CCO of a 12 hour curfew, with a 'further' condition imposed in the nature of an enforcement condition (e.g. "that the offender present himself at the front door of his premises at the direction of any Community Corrections officer to confirm compliance with the curfew condition"). This would not appear to infringe any of the purposes of sentencing for which a condition of a community-based sentence order may permissibly be imposed pursuant to *CSPA* s 3A. It may be prudent that the enforcement condition includes a qualification to ensure that the enforcement power is not exercised unreasonably (e.g. "such a direction may only be given by a Community Corrections officer who believes on reasonable grounds that it is necessary to do so having regard to the rights of other occupants of the premises to peace and privacy").
12. What is the difference between a condition 'to be of good behaviour', as is commonly imposed on good behaviour bonds (s 9 and s 10(1)(b)), and a condition 'not to commit any offence',	The imposition of a 'standard condition' "not to commit any offence" makes clear that only the commission of a fresh offence will constitute a breach of that condition. Contrast this with the prior requirement to be of 'good behaviour', which could potentially have the effect that an offender who misbehaves (e.g. uses illicit drugs) is in breach of the order even in the absence of having committed a fresh offence.

as is being introduced as a 'standard' condition of the new sentence orders?	The practical effect of this change may be that fewer breaches, other than by way of fresh offending, need to be reported by Community Corrections to the sentencing court (in respect of a CRO or CCO) or to the State Parole Authority (in respect of an ICO).
13. Can the court impose a condition that the offender pay compensation/ restitution to the victim as part of one of the new sentence orders?	Section 95(c) of the former *Crimes (Sentencing Procedure) Act* 1999 (NSW) previously prohibited a sentencing court from imposing a condition pursuant to a good behaviour bond which required an offender to make any payment – whether in the nature of a fine, compensation or otherwise. However, that provision is being repealed in these reforms, and there is nothing in the amending legislation which expressly prohibits a sentencing court from imposing a condition which requires the offender to pay compensation as part of a sentence order. This could potentially be imposed as a 'further' condition of a community-based sentence order. Query whether this would be permissible in respect of a CRO given that a CRO cannot be imposed *in combination with a fine* for a single offence (whereas a CCO *can be imposed in combination with a fine* for a single offence).
14. Could the court impose a 'further' condition that the offender apologise to the victim of the offence?	The legislation provides that the court "may impose further conditions" on any of the community-based sentence orders. There is no legislative restriction about the sorts of 'further' conditions that the court is entitled to impose, other than that they not be inconsistent with the 'standard' or 'additional' conditions of the order; the further conditions appear to be at large. That would appear to permit the court to impose a 'further' condition requiring the offender to apologise to the victim, although query whether that would be an appropriate exercise of the sentencing discretion in many cases.
15. Has there been any case law (e.g. from Victoria) on the legitimate imposition of 'further' conditions by the sentence court?	NSW appears to be one of the few jurisdictions in which the sentencing court is specifically empowered to impose conditions on a sentence order which are at large. The Victorian sentencing legislation doesn't contain a similar provision. It would seem reasonable to suggest that any 'further' condition imposed by the sentencing court must be referable to at least one of the purposes of sentencing set out in *CSPA* s 3A (e.g. punishment, deterrence, rehabilitation etc).

Sentencing reform FAQs

Abolition of some sentencing options

16. Are section 11 adjournments being retained in the reforms?	Yes. The clear legislative intent of these reforms, as outlined in the Second Reading Speech, is to promote community safety and reduce reoffending by focusing on the rehabilitation of offenders, particularly those at medium and high risk of reoffending. Given this intention, arguably section 11 adjournments may have an increased role to play in the overall sentencing framework.

Sentencing reform FAQs

Breach of new sentence orders

17. What are the main differences between a conditional release order (CRO) and a community correction order (CCO)?	There are several important differences between a CRO and a CCO. A CRO can be imposed with or without conviction, whereas a CCO necessarily carries a conviction. A CRO can be imposed for a fine only offence or an offence which carries a term of imprisonment, whereas a CCO can only be imposed for an offence which carries imprisonment (not for a fine only offence). A CRO can be made for up to 2 years, whereas a CCO can be made for up to 3 years.
18. Can the new sentence orders be imposed in addition to (ie. in combination with) a fine?	A fine can be imposed in addition to a CCO but not in addition to a CRO. In other words, a fine is an alternative to a CRO but can be imposed in combination with a CCO. This is because of section 9(3)(a) of the Crimes (Sentencing Procedure) Act 1999, which provides that "a fine and a conditional release order cannot be imposed in relation to the offender in respect of the same offence", whereas there is no such limitation expressed in section 8 in respect of a CCO.
19. Are the new sentence orders able to be imposed for a fine only offence?	A CRO can be imposed for a fine only offence, but a CCO cannot. This is because the introductory words of section 8(1) of the Crimes (Sentencing Procedure) Act 1999 provide that a CCO is imposed "[i]nstead of imposing a sentence of imprisonment", which, as a matter of logic, limits its application to those offences which carry a sentence of imprisonment. This is in contrast to the introductory words of section 9(1), which provide that a CRO is imposed "[i]nstead of imposing a sentence of imprisonment or a fine (or both)".
20. What factors does the court consider when deciding whether to impose a conviction on a CRO?	In deciding whether or not to impose a conviction on a CRO, the court must have regard to the following factors set out in section 9(2) of the *Crimes (Sentencing Procedure) Act* 1999: (a) the person's character, antecedents, age, health and mental condition; (b) whether the offence is of a trivial nature; (c) the extenuating circumstances in which the offence was committed and (d) any other matter that the court thinks proper to consider. These are identical to the factors that a court was previously required to consider in deciding whether to impose a section 10(1)(b) bond. The court is also subject to the same exclusions as previously applied to the use of section 10 orders where the offender has previously been dealt with without conviction for certain prescribed offences. See, e.g., *Road Transport Act* 2013 s 203.
21. What is the procedure following an alleged breach of a CRO or CCO?	The procedure following an alleged breach of one of the new sentencing orders is substantially the same as the former procedure in respect of a breach of a section 9 or 10(1)(b) good behaviour bond. If a community corrections officer is satisfied that an offender has failed to comply with any of the conditions of an order, he or she may file a 'breach report' with the sentencing court: see cl 329(1) of the *Crimes (Administration of Sentences) Regulation* 2014. The court may then call on the offender to appear before it in order to determine whether a breach has occurred. If the court is satisfied that the offender has failed to comply with any of the conditions of the order, it has a range of options. These are substantially similar to the court's former options in respect of a breach of a good behaviour bond. The court may take no action; vary or revoke any

	conditions of the order (other than standard conditions), or impose further conditions; or revoke the order: see *Crimes (Sentencing Procedure) Act* 1999 section 107C(5) in respect of a CCO and section 108C(5) in respect of a CRO. If a court revokes the order, it may resentence the offender for the offence to which the order relates. Upon resentencing, the court has the option of increasing the severity of the order by adding or varying conditions rather than escalating to a heavier form of sentence. This means that courts can issue the same sentence order multiple times with different conditions, depending on the offence and the offender's personal circumstances. This represents a substantial departure from the way in which the court was constrained in resentencing an offender who had breached a suspended sentence pursuant to section 99 of the former Act.
22. Can the court impose a CRO and/or CCO on an offender who resides or proposes to reside outside of NSW but near the border?	That depends on which condition(s) the court is considering imposing on the order. The court cannot impose a supervision conditions on an offender who resides or proposes to reside outside of NSW unless the other State or Territory is declared by the Regulations to be an approved jurisdiction: *Crimes (Sentencing Procedure) Act* 1999 s 89(4A). In addition, the court cannot impose a community service work condition on an offender who resides or proposes to reside outside of NSW unless (a) the court is satisfied that the offender is able and willing to travel to NSW to complete the community service work, or (b) the other State or Territory is declared by the Regulations to be an approved jurisdiction: s 89(4B). At present, the Regulations do not declare any other State or Territory to be an approved jurisdiction.
23. Does the Local Court have jurisdiction to hear proceedings for a breach of a sentencing order which was imposed by the District Court sitting in its appellate capacity?	It would appear so, having regard to the interpretation of section 20 of the *Crimes (Appeal and Review) Act* 2001 which was adopted by the NSW Court of Criminal Appeal in *Director of Public Prosecutions (NSW) v Jones, Dillon Michael* [2017] NSWCCA 164. That case dealt with a breach of a section 9 good behaviour bond – a sentencing option which has now been repealed – but there is no logical reason to suggest that the interpretation adopted by the court would not be similar in respect of a breach of one of the new sentence orders.
24. Can a judicial officer make a binding direction that any breach of sentence order be referred to him or her specifically?	It would appear not, having regard to the decision of the NSW Court of Criminal Appeal in *Director of Public Prosecutions (NSW) v Jones, Dillon Michael* [2017] NSWCCA 164. Basten JA (with whom Harrison and Hulme JJ agreed) stated at [9]-[10] of the judgment that such a direction: > [9] … was legally ineffective… even if it were effective as a direction, it could not diminish the statutory authority of any other court or judicial officer to deal with a breach of the bond. > [10] No doubt the direction reflected a course which is often taken as a matter of practice; such a course makes good sense, if practically available. However, the inclusion of the direction in the conditions of the bond had no legal effect and cannot effect the resolution of the remaining issues. That case dealt with a breach of a section 9 good behaviour bond – a sentencing option which has now been repealed – but there is no logical reason to suggest that the interpretation adopted by the court would not be similar in respect of a breach of one of the new sentence orders.
25. Are there circumstances in which Community Corrections has the discretion not to report a	The answer to this question depends on whether a supervision condition was imposed on the offender by the sentencing court.

breach of a community-based order (CRO or CCO) to the court?	If an offender is subject to a supervision condition, he or she will be supervised by Community Corrections. In the event of an alleged breach by way of a fresh offence, the sentencing court will automatically be notified of the breach and the offender will be called up to appear in relation to the breach. If the alleged breach is by way of something other than a fresh offence (e.g. evidence of drug use), Community Corrections will determine the appropriate action having regard to what is in the interests of community safety. In the event of a minor breach, Community Corrections have the discretion to take less punitive measures, such as issue a warning to the offender. In the event of a more serious breach or repeated breaches, Community Corrections will refer the breach to the sentencing court (in respect of a CRO or CCO) or the State Parole Authority (in respect of an ICO). The result is that not every breach of a sentence order will result in a referral by Community Corrections.

Sentencing reform FAQs

Changes to intensive correction orders (ICOs)

26. What are the main changes to intensive correction orders (ICOs)?	There are several important changes to ICOs. The safety of the community is now the paramount consideration for the court when deciding whether to impose an ICO. An ICO is now available not only for an individual sentence of up to 2 years but also an aggregate sentence of up to 3 years. Supervision is now a mandatory condition of an ICO, while community service work is no longer a mandatory condition and can instead be imposed as a discretionary condition for up to 750 hours. Home detention is also now able to be imposed as a discretionary condition. The range of offences for which an ICO is not able to be imposed has been expanded. Finally, the court is now required to consider specific matters when determining whether to impose an ICO for a domestic violence offence.
27. What is the maximum length of an ICO?	An ICO can be imposed in respect of a single offence for up to 2 years, or for an aggregate offence for up to 3 years.
28. Is an offender's eligibility to participate in community service work still a necessary requirement for the imposition of an ICO?	No, because community service work is no longer a mandatory component of an ICO. Instead, the court now has the discretion to impose community service work for up to 750 hours as an 'additional' condition of an ICO in appropriate circumstances. See *Crimes (Sentencing Procedure) Act* sections 73A in relation to the additional conditions of an ICO.
29. Are there any conditions which the court is required to impose when making an ICO?	Yes. Supervision is now a mandatory condition of an ICO. In addition to the two 'standard' conditions (which are mandatory), the court is required to impose at least one 'additional' condition, unless there are exceptional circumstances: see *Crimes (Sentencing Procedure) Act* 1999 section 73A(1) and (1A). The court can impose 'additional' and/or 'further' conditions it considers appropriate in the circumstances.
30. Are there still particular offences for which a sentencing court is not permitted to impose an ICO?	Yes. In fact, the range of exclusionary offences for an ICO has been expanded as a result of these reforms. Previously, the only exclusionary offences were a set of 'prescribed sexual offences'. Now, there are additional offences which preclude an offender from being sentenced to an ICO – for example, murder, manslaughter, terrorism offences and offences involving the discharge of a firearm. See section 67 of the amended *Crimes (Sentencing Procedure) Act* 1999 for a list of the excluded offences. In addition, the court is precluded from imposing an ICO on an offender in respect of a domestic violence offence in certain circumstances: see section 4B.
31. Can the court impose an ICO on an offender who resides or proposes to reside outside of NSW but near the border?	No, a sentencing court cannot impose an ICO in respect of an offender who resides, or intends to reside, outside NSW, unless the alternative State or Territory is declared by the Regulations to be an approved residential jurisdiction: see *Crimes (Sentencing Procedure) Act* 1999 section 69(3). Presently, the Regulations do not declare any other State or Territory to be an approved residential jurisdiction.
32. What is the procedure following an alleged breach of an ICO?	If a community corrections officer believes than an offender has failed to comply with any of the conditions of an ICO, he or she has a range of options set out in section 163(2) of the *Crimes (Administration of Sentences) Act* 1999. These include: record the breach and take no action; give an informal

	warning; give a formal warning that further breaches will result in referral to the Parole Authority; give a reasonable direction relating to the breach behaviour; or impose a curfew of up to 12 hours in any 24 hour period. An officer may decide to refer a more serious alleged breach to the Parole Authority: see section 163(3). This referral can include a recommendation as to any action to be taken in respect of the breach. If an alleged breach is referred to the Parole Authority, it conducts an inquiry as to whether a breach has occurred: see section 162. An inquiry can be held even if the ICO has expired: see subsection (1). The offender is entitled to make submissions to the inquiry. If the Parole Authority is satisfied that an offender has breached the ICO, it has a range of options set out in section 164. These include: record the breach and take no action; give a formal warning; impose any conditions on the ICO; vary or revoke conditions of the ICO; or make an order revoking the ICO. Some of the conditions that can be imposed by the Parole Authority include home detention for up to 30 days and electronic monitoring. If the Parole Authority revokes the ICO, a warrant is issued and the offender is taken into custody. The offender would ordinarily serve the remaining balance of the sentence in full-time imprisonment, because the sentencing court is not able to set a non-parole period when imposing an ICO. However, the Parole Authority can make an order reinstating the ICO: see section 165(1). A reinstatement application can be made by the offender after they have served at least 1 month in custody following revocation of the ICO: see subsection (2)(a). If a reinstatement order is made, the offender would serve the remaining balance of the sentence by way of ICO.
33. An offender subject to an existing ICO (which includes a mandatory community service work requirement of 32 hours per month) will be converted to a new ICO on the commencement date of the reforms. Will the offender, upon conversion, still be required to complete the remaining community service work allotment, given that the new ICO no longer contains a mandatory community service work component?	Yes. *CSPA* s 72(3) provides that the new/converted ICO is subject to: (a) the standard conditions of an ICO (not to commit any offence and to be subject to supervision); (b) any conditions imposed under *CSPA* s 81(3) and in force immediately prior to conversion; and (c) any other conditions prescribed by regulations. The effect of (b) above is that the community service work component of the ICO remains to be completed by the offender upon conversion. The legislation does permit an offender or Community Corrections to make an application to the State Parole Authority to vary the 'additional' conditions of an ICO (*CSPA* s 73A) or 'further' conditions (s 73B). But query whether a community service work condition, imposed under s 81(3) and in force immediately prior to conversion, constitutes an 'additional' or 'further' condition. And also query whether the Parole Authority may refuse to hear an application by an offender to revoke the existing community service work condition of the ICO on the basis that such an application is 'without merit' (s 100(1)).
34. Given that supervision is now a mandatory component of an ICO, what happens if an offender is ineligible for supervision and the court has found that a sentence of imprisonment is the only available option?	Community Corrections will not be assessing any offender as 'unsuitable' for supervision, even where an offender has a history of poor engagement with supervision. These reforms are intended to provide for more medium and high risk offenders to be under supervision in the community rather than serving short sentences of full-time imprisonment. This means that for many 'difficult' or medium-high risk offenders, supervision will in fact be recommended by Community Corrections. In the Sentencing Assessment Report (SAR) requested by the court, Community Corrections will provide a detailed case plan for each offender. This will provide the court with a framework of what supervision would look

	like for that offender, including a set of conditions that Community Corrections would propose the court impose in order to increase the chances of supervision proving effective.
35. Are there any parts of NSW, particularly remote and rural areas, where home detention and/or electronic monitoring are not available? This has been an issue in the past.	Home detention and electronic monitoring are now available in all parts of the state.
36. Is an offender required to pay for the cost of electronic monitoring if imposed by the court as part of an ICO?	No. In this way, electronic monitoring imposed as a sentence condition is different from when imposed as a bail condition. However, if an offender tampers with or damages the electronic monitoring equipment, it is likely that they will be required to pay the costs of replacement/repair.
37. What does 'community safety' mean?	Section 66 of the amended *Crimes (Sentencing Procedure) Act* 1999 (NSW) makes 'community safety' the paramount consideration for a sentencing court when considering whether to impose an ICO or full-time imprisonment in a particular case. That term is not defined in the legislation. However, section 66 requires the sentencing court to consider, in deciding whether to impose an ICO, which of an ICO or full-time imprisonment would be "more likely to address the offender's risk of reoffending". The Second Reading Speech by the Attorney General provides further guidance as to the meaning of 'community safety': "Community safety is not just about incarceration. Imprisonment under two years is commonly not effective at bringing about medium- to long-term behaviour change that reduces reoffending. Evidence shows that community supervision and programs are far more effective at this." This statement of legislative intent informs the court's interpretation.
38. Given the abolition of suspended sentences, and the legislative prohibition on the imposition of an ICO for prescribed sexual offences, does this mean that more sex offenders will be sentenced to full-time imprisonment?	The abolition of suspended sentences and home detention orders as part of these reforms will leave only two remaining custodial sentences available to sentencing courts: (1) full-time imprisonment; and (2) ICOs. There are a range of offences for which a court is not permitted to impose an ICO, including a set of 'prescribed sexual offences' set out in *CSPA* s 67(2). This means that if the sentencing court is of the view that there is no option other than imprisonment in respect of a particular prescribed sexual offence (i.e. that the 'section 5 threshold' has been crossed), the court will have no option other than to impose a sentence of full-time imprisonment. However, there are no excluded offences in respect of a CCO as a sentencing option. Given that a CCO can be a very onerous sentence order in a particular case – having regard to its maximum term of 3 years and to the variety of conditions which can be imposed (including up to 500 hours of community service work and a 12 hour curfew) – it may be that the sentencing court is willing to entertain that as a sentencing disposition for certain prescribed sexual offences rather than imposing a sentence of imprisonment.
39. If an offender is sentenced to an ICO, and the ICO is later revoked by the Parole Authority,	If the Parole Authority revokes an offender's ICO, the offender would be required to serve the remaining balance of the sentence in custody (subject to the Parole Authority reinstating the ICO upon application by the offender); he or she would not have to serve the entire duration of the ICO

would the offender be required to serve the *entire* duration of the sentence in custody regardless of how much of the ICO they had completed, or would they only be required to serve the *remaining balance* of the sentence?	in custody. For example, if an offender had their ICO revoked 12 months into an 18 month ICO, he or she would be required to serve the remaining 6 months in custody (subject to any reinstatement), not the entire 18 months. However, the offender can make a reinstatement application every month in custody, so in practice it would be very unlikely for the offender to be required to serve the entire remaining period of the sentence in custody.
40. Currently the legislation provides that an offender cannot be sentenced to a home detention order if they have ever been convicted of a prescribed set of offences (e.g. stalk/intimidate). Are those exclusions being retained for the new ICOs (which will include home detention as an available condition)?	No. An offender's *previous* convictions will not disqualify him or her from being sentenced to an ICO. The list of excluded offences for an ICO only relates to the *index* (present) offence for which the court is sentencing the offender.
41. Is there any information available about the electronic monitoring equipment used in NSW?	The NSW Government issued a media release on 11 December 2014 outlining the details of its new electronic monitoring equipment. The ABC Radio National program, 'The Law Report', also recently broadcast an episode about electronic monitoring in Australia and overseas which may be useful to practitioners.
42. Would a sentencing court be permitted to impose a condition on an ICO that the offender remain subject to home detention until such time as he or she is able to enter a residential rehabilitation program?	The court is empowered to impose 'additional' and 'further' conditions on an ICO, in addition to the two mandatory 'standard' conditions. One of the available conditions that the court can impose is home detention, subject to the offender's suitability for that condition. *CSPA* s 73A(4) provides that the sentencing court "may limit the period during which an additional condition", such as home detention, "is in force". In theory, the court need not be required to set a specific time limit on the operation of an 'additional' condition (e.g. "for 3 months"). Instead, the court could make the operation of that 'additional' condition itself conditional upon the existence of some state of affairs (e.g. "until he or she is able to enter a long-term residential rehabilitation program").

Changes to sentencing assessment reports

43. What are the main changes to assessment reports?	One of the main changes to the pre-sentence assessment reports prepared by Community Corrections is in their format. Previously, reports were named according to the type of order being considered by the court – for instance, an 'ICO assessment report', 'home detention assessment report', 'community service assessment report' or general 'pre-sentence report' ('PSR'). Now, a community corrections officer provides information about an offender at the time of sentencing via a single report, called an 'assessment report'. This report aims to assist the sentencing court to determine the appropriate sentencing options and conditions to be imposed on an offender. There are also changes to the circumstances in which a court is required to obtain an assessment report before imposing sentence. See *Crimes (Sentencing Procedure) Act* 1999 Division 4B and *Crimes (Sentencing Procedure) Regulation* 2017 Division 3 for the new provisions relating to assessment reports.
44. Does the sentencing court have to obtain an assessment report before imposing one of the new types of sentence order?	That depends on which type of sentencing order, and which conditions, are being contemplated by the sentencing court. A court is not required to obtain an assessment report before sentencing an offender to a CCO or a CRO. However, the court cannot impose an ICO without first obtaining an assessment report, unless the court is satisfied that there is sufficient information before it to justify the making of the ICO without obtaining an assessment report: see section 17D(1) and (1A) of the *Crimes (Sentencing Procedure) Act* 1999 (NSW). Furthermore, the court cannot impose a community service work condition or a home detention condition on any order unless it has obtained an assessment report in relation to the imposition of such a condition.
45. What is the process that a court must follow when imposing a sentence of imprisonment (including an ICO)?	In *R v Zamagias* [2002] NSWCCA 17 at [25]-[26], Howie J (with whom Hodgson JA and Levine J agreed) set out a three-stage process that a court must follow when considering the imposition of a sentence of imprisonment. The preliminary question for the court, in accordance with section 5(1) of the *Crimes (Sentencing Procedure) Act* 1999, is whether there are any alternatives to the imposition of a sentence of imprisonment. Having determined that no penalty other than a sentence of imprisonment is appropriate, the court must then determine the term of the sentence. Once the term of the sentence of imprisonment has been determined, the court must consider whether any alternative to full-time imprisonment is available and should be utilised. Given that suspended sentences and home detention orders have been abolished, an ICO is the only remaining sentence of imprisonment which exists as an alternative to full-time imprisonment. A sentencing court may request an assessment report on an offender at any time during the sentence proceedings, whether before or after imposing a sentence of imprisonment (ie. at any point prior to the finalisation of the third stage above): see section 17C(1(b)). The court is not required to obtain an assessment report in every matter in which it is contemplating a sentence of imprisonment, but it must not make an ICO unless it has obtained an assessment report: see section 17D(1)). In addition, the court must not impose a home detention condition or a community service work condition unless it has obtained an assessment report relating specifically to that condition: see section 17D(2) and (4). Furthermore, the court is not

	permitted to request an assessment report for a home detention condition unless it has already imposed a sentence of imprisonment for a specified term: see section 17D(3).
46. Is an offender who does not have a stable residence precluded from being sentenced to an ICO with a home detention condition?	Not necessarily. Obviously, an offender may not be suitable for home detention if he or she does not have a stable residence (e.g. if he or she is homeless). However, a sentencing court contemplating imposing a home detention condition on an ICO would request an assessment report addressing the offender's suitability for home detention: see section 17D(2) *Crimes (Sentencing Procedure) Act* 1999. And clause 12B(1) of the *Crimes (Sentencing Procedure) Regulation* 2017 provides that such a report is not to be finalised until "reasonable efforts have been made by a community corrections officer . . . to find accommodation" for the offender.
47. Will Community Corrections still be providing duty assessment reports at court on the day of request?	Community Corrections will still be providing an officer at certain Local Courts in NSW for the purposes of preparing duty sentencing assessment reports (SARs) which are available to the court on the same day. Officers are allocated to particular courts based on perceived demand. Therefore, there are some courts in NSW where no duty officer has been provided thus far. If practitioners believe that there would be utility in an officer being allocated to a particular Local Court at which there is presently no duty service available, he or she should contact the manager of the local Community Corrections office.
48. Will Community Corrections release the sentence assessment report to the offender's solicitor before court?	Community Corrections policy provides that "offenders, defence representatives and prosecutors may obtain a copy of a sentencing assessment report from the relevant Community Corrections Office after 10am on the business day prior to the sentencing or hearing date". Although there is no specific requirement that a request to be provided with a report be made in writing, such an approach would be prudent. The Magistrate or Judge referring the offender for the assessment report would ordinarily direct the offender to report to a particular office of Community Corrections. The practitioner should make contact with that office to request a copy of the report. A list of all Community Corrections offices and their contact details is available here.
49. What does it mean when the author of a pre-sentence report writes that an offender is low/ medium/high risk of reoffending? How ought that information be used by the sentencing court?	Corrective Services NSW uses the Level of Service Inventory – Revised (LSI-R) actuarial assessment tool to assess an offender's risk of reoffending and to identify their criminogenic needs (i.e. the factors related to their offending behaviour). The LSI-R consists of 54 questions grouped into 10 topics: criminal history; education/employment; finances; family/marital; accommodation; leisure/recreation; companions; drugs and alcohol; emotional/personal; and attitude/orientation. The LSI-R relies on principles of risk, needs and responsivity (RNR), which identifies the key factors related to an offender's reoffending behaviour and aims to respond to them with effective strategies. The intensity of supervision and the types of programs applied to a particular offender are based on his or her risk of reoffending: if the offender is low risk, supervision will either not be suggested or will be low dosage; if the offender is medium or high risk, supervision will be much more intensive. Practitioners should not assume that an offender with a risk of reoffending of 'medium' or above ought inevitably receive a custodial sentence. On the contrary, if an offender is assessed as being medium or high risk of reoffending, they would be an especially appropriate candidate for intensive supervision in the community.

Sentencing reform FAQs

50. If a court orders a sentencing assessment report without specifying the precise conditions for which it wants Community Corrections to assess the offender, what will the report look like? Which conditions (if any) will the report writer assess?	The sentencing court can order a general sentencing assessment report (SAR) which will address the offender's suitability for various orders/conditions, including community service work. This will be the default option if the court does not specify a particular type of report that it wishes to be prepared. A general report of this type will take 6 weeks to be completed. If the court wants a SAR to assess whether an offender is suitable for the imposition of a home detention condition, it must first set the term of imprisonment before referring the offender for the assessment. A home detention condition can either be requested as part of a general SAR (which would take 6 weeks) or as a follow up report after receiving an initial SAR (which would take a further 3 weeks).
51. In the event that a sentencing assessment report is requested by the court in respect of a child who is to be sentenced in the District or Supreme Court, would the report be prepared by Juvenile Justice or Community Corrections?	The report would be prepared by Juvenile Justice.

Supervision

52. What sort of 'reasonable directions' can be given by a Community Corrections officer pursuant to a supervision condition on a sentence order? For example, if the sentencing court does not impose a curfew or a place restriction condition, can the Community Corrections officer make a 'reasonable direction' of that sort regardless?	The exercise of an officer's power to give 'reasonable' directions to an offender in the management of that offender's supervision is subject to guidelines set out in the Community Corrections Officer Handbook. As a starting point, the obvious requirement for reasonableness is that the officer is capable of providing sound, fair, sensible reasons as to why the direction was imposed. Officers are directed that they should be prepared to justify the reasons for the direction to the court which imposed the sentence. In doing so, particular consideration must be given to whether the direction is fair to the offender and whether a less onerous or punitive alternative could achieve the same outcome. For example, directing an offender to attend residential rehabilitation may be unreasonable where their level of drug use is low and could just as easily be managed through outpatient treatment. The officer must also consider the relationship of the behaviour to the index offence. For example, if the offender drinks heavily, but this has little or no connection to the index offence, it may be unreasonable to direct them to treatment. This is because the court's sentence is not imposed in order to mandate intervention in other areas of the offender's life that do not contribute to their index offence or their ongoing risk of reoffending, even if the behaviour might be harmful in other ways (note the sentencing principle of proportionality). Conversely, if the drinking is clearly associated with offending, there can be little dispute that such a direction would be both appropriate and fair. If an offender disagrees with a direction given to them, in the first instance they should raise the issue with the officer or their manager.
53. What avenue of redress (if any) does an offender have if they are aggrieved by a decision made by their supervising Community Correction Officer? For example, what if an offender believes that a direction by their supervising officer not to allow them to associate with a particular person or to visit a particular place is unreasonable?	If an offender refuses to comply with a purportedly 'reasonable direction' given by his or her supervising officer, Community Corrections could refer the matter to the sentencing court (for a CRO or CCO) or to the State Parole Authority (for an ICO) as constituting the basis for a breach of the supervision condition on the sentence order. The court/Parole Authority would then be required to determine whether the offender had in fact breached the order, which would in turn require a determination as to whether or not the direction given by the supervising officer was 'reasonable'. It does not appear that an offender would have any other avenue for addressing a purportedly unreasonable direction given to him or her by Community Corrections (such as by seeking a determination of the matter at the NSW Civil and Administrative Tribunal – NCAT).
54. Is the Level of Service Inventory – Revised (LSI-R) publicly available?	Information about the LSI-R and other risk assessment tools used by Corrective Services NSW can be found via this link and this link.
55. Is Community Corrections permitted to suspend supervision on an ICO, given that supervision	Yes. *CSPA* s 73(1) provides that the sentencing court "must at the time of sentence impose… the standard conditions" on an ICO. The legislation provides that the sentencing court may limit the period during which any 'additional' or 'further' conditions are in force, but there is no such capacity

is a standard condition of an ICO?	for the court to limit the period during which a 'standard' condition, including supervision, is in force. However, *CASA* s 82A(2) provides that Community Corrections may, by order in writing, "suspend the application of a supervision condition to an offender for a period or periods or indefinitely".
56. If the sentencing court does not impose a particular type of 'additional' condition (e.g. place restriction or non-association condition) but it does impose a supervision condition, would Community Corrections be permitted to make a direction to the offender which essentially replicates that 'additional' condition (e.g. a direction not to go to a particular place or not to associate with a particular person)?	If the sentencing court had specifically contemplated the imposition of a particular condition and had declined to do so, it would seem unreasonable for Community Corrections to direct the offender to comply with such a condition immediately upon sentence or soon after. In the ordinary course, the SAR would identify potential conditions that the court may be minded to impose, and if the court specifically rejects the need for one or more of those conditions, it would be difficult for Community Corrections to justify, in accordance with their policy as set out in their Officer Handbook, the making of the direction. The situation may be different if the court simply did not consider the imposition of a particular type of condition; then it may be more open to Community Corrections to make a direction to the offender of that kind. In the event that the offender's circumstances change after the sentence is imposed, Community Corrections may feel justified in making a direction as to the offender's conduct that was not imposed by the sentencing court although it could have been by way of an 'additional' or 'further' condition. This could occur, for example, where the offender had previously been engaging well with supervision but had subsequently recommenced associating with known offenders and/or using illicit drugs, in which case Community Corrections may feel entitled to make a direction to the offender that he or she not associate with those identified persons.

Sentencing reform FAQs

Applications to vary, revoke or add conditions

57. When can a variation application be made?	A variation application can be made at any time after the sentence is imposed, during the term of the order. There is no statutory time limit for a variation application to be filed (in contrast to the time limit for the filing of an appeal).
58. Where is a variation application made?	A variation application in respect of a CRO or a CCO is heard by the court in which the sentence was imposed. For instance, a variation application in respect of a CRO imposed in the Local Court would be heard and determined by the Local Court. However, a variation application in respect of an ICO is made to the Parole Authority: see section 81(b) of the *Crimes (Administration of Sentences) Act* 1999.
59. Can an offender make repeated variation applications in respect of a CRO or CCO?	There is no statutory restriction on the number of variation applications that can be made during the term of a CRO or CCO. However, the sentencing court may refuse to consider a variation application *made by an offender* if satisfied that the application is "without merit": see *Crimes (Sentencing Procedure) Act* 1999 section 91(1) in respect of CCOs and section 100(1) in respect of CROs. The legislation does not provide any guidance on what constitutes a lack of merit in this context. Note also that a variation application *made by an officer of Community Corrections or Juvenile Justice* is not subject to a statutory merit test.
60. Does a variation application have to be heard by the judicial officer who imposed the original sentence order?	No. A court may deal with a variation application even though it is constituted differently from the court as constituted at the time of sentence: see *Crimes (Sentencing Procedure) Act* 1999 section 91(3) in respect of CCOs and section 100(3) in respect of CROs.
61. Can Community Corrections add a condition to a CRO, CCO or ICO of their own motion (i.e. without making an application to the court or State Parole Authority)?	In respect of a CRO and CCO, only the sentencing court (or a court on appeal) can vary the conditions of the order. In respect of an ICO, generally only the State Parole Authority (or a court on appeal) can vary the conditions of the order. However, amongst the actions that may be taken by a community corrections officer in the event of a breach of an ICO by the offender, the officer is empowered to impose a curfew on the offender of up to 12 hours in any 24 hour period (see *CASA* s 163(2)). The curfew can be imposed for the duration of the order or for any period within the order. That is the only type of condition that a community corrections officer may impose unilaterally; only the Parole Authority is permitted to add any other type of condition to an ICO (see *CASA* s 164).
62. Is there a difference in any time limit within which an offender is permitted to file an appeal against a Local Court sentence, as opposed to a variation application?	An offender is permitted to lodge an appeal against a sentence imposed in the Local Court within 28 days, as of right. However, there is no such statutory time limit for the filing of a variation application.
63. Will a grant of aid be available for an offender in	Legal aid is available for any offender who is a respondent to a variation application made by Community Corrections, so long as the original matter

respect of an application to vary the conditions of his or her sentence order?	type is one for which legal aid was available. However, legal aid is only available for an offender who is an *applicant* seeking to vary his or her sentence order if Legal Aid is satisfied that the application has reasonable prospects of success. Given that the legislation provides no guidance as to the circumstances in which a variation application ought appropriately be granted, the way in which the merit test ought be applied appears unclear at this stage.
64. Is there a limit on the number of variation applications that an offender can make?	There is no express limitation on the number or frequency of variation applications that can be made. There is also no time limit for the filing of a variation application following a sentence being imposed (in contrast to the time limit to file an appeal). The only restriction appears to be that the sentencing court can refuse to hear a variation application made by an offender if satisfied that the application is "without merit". Presumably, the court would refuse to hear repeat applications made by an offender without identifying a material change in circumstances.
65. Is it possible to appeal against a refusal by the court to hear a variation application on the basis that the application is without merit?	It would appear not. In respect of an appeal to the District Court, *CARA* s 11 provides that "any person who has been convicted or sentenced by the Local Court may appeal to the District Court against the conviction or sentence (or both)". Query whether an appeal against a decision to refuse to hear a variation application could constitute "an appeal against the sentence" imposed by the Local Court such as to permit an appeal to the District Court pursuant to s 11. (That interpretation seems unconvincing.) There does not appear to be any alternative avenue for an appeal to the District Court. In respect of an appeal to the Supreme Court, *CARA* s 53(1) provides that "any person who has been convicted or sentenced by the Local Court . . . may appeal to the Supreme Court against the conviction or sentence on a ground that involves: a. A question of fact, or b. A question of mixed law and fact, but only by leave of the court. It would seem unlikely that the Supreme Court would grant leave to appeal against a decision by the Local Court to hear a variation application. It therefore appears as though there may be no avenue of redress for an offender for whom the court refuses to hear a variation application, other than the ordinary avenue of appealing against the severity of the original sentence (subject to the time limits on the filing of the severity appeal as set out in *CARA*).
66. Is there a standard form for variation applications?	Not at this stage, but inevitably the court registry will at some point in the near future create a standard form. In the meantime, we have prepared a sample variation application form for practitioners to use. The form is available on the Legal Aid NSW 'Sentencing Reform' webpage.
67. What are the relevant considerations for the court in determining a variation application?	There is no guidance in the legislation about the permissible reasons for a court to vary the conditions of a community-based sentence upon application by the offender or Community Corrections. In Victoria, *Sentencing Act* 1991 s 48M(1) sets out an exhaustive list of 5 bases for varying a sentence condition:

1. The circumstances of the offender have materially altered since the order was made, and as a result the offender will not be able to comply with a condition of the order;
2. The circumstances of the offender were wrongly stated or were not accurately presented to the court or to the author of a sentencing assessment report before the order was made;
3. The offender no longer consents to the order;
4. The rehabilitation and reintegration of the offender would be advanced by the making of the decision to vary the order; or
5. The continuation of the sentence is no longer in the interests of the community or the offender.

NSW courts hearing variation applications may draw some guidance from the above Victorian provision.

Savings and transitional provisions

68. What happens to an existing sentence which is still in force on the day that the sentencing reforms commence?	That depends on which particular type of existing order. A number of existing sentences are automatically converted to a new form of sentence order on the commencement date: a home detention order will be converted to a new form of intensive correction order ('ICO'); an existing ICO will also be converted to the new form ICO; a community service order will be converted to a community correction order ('CCO'); a section 9 good behaviour bond will also be converted to a CCO; and a section 10(1)(b) bond will be converted to a conditional release order ('CRO'). A section 12 bond (suspended sentence) which is still in force on the commencement day will *not* be converted; the suspended sentence remains in force until it is either completed or breached.
69. What happens if an offender is alleged to have breached a suspended sentence after the reforms commence?	If an offender is alleged to have breached a suspended sentence after the reforms commence, the former provisions would apply in respect of a breach – namely, sections 98 and 99 of the *Crimes (Sentencing Procedure) Act* 1999 as were in force immediately prior to commencement. Practitioners will still be able to make submissions to the court, in appropriate circumstances, for the court not to revoke the suspended sentence on the basis that the breach is trivial or that there are good reasons to excuse the breach (section 98(3)). However, if the court revokes the suspended sentence and resentences the offender, upon resentence the court is only permitted to impose a sentence which is available under the new legislation: see section 76(4). In other words, a court that revokes a suspended sentence is required to re-sentence the offender to full-time imprisonment or impose an ICO, as home detention is no longer available as a separate sentence.
70. Is it possible to make a variation application in respect of a converted order?	Yes. An application can be made to vary, revoke or add conditions to a converted order at any time after the order is converted, during the term of the order. The application would be made to the sentencing court in respect of a converted CRO or CCO, or to the Parole Authority in respect of a converted ICO. A court dealing with a variation application in respect of a CRO or CCO must not, as far as practicable, make an order that would result in the conditions of the order being "more onerous" than the conditions that applied to the previous sentence prior to its conversion: see section 78(2) of the *Crimes (Sentencing Procedure) Act* 1999.
71. What happens if an offender is sentenced in the Local Court and he or she lodges a severity appeal to the District Court before the reforms commence, but the appeal is not determined until after commencement? What sentencing options are available upon resentence following a successful appeal? What	If the District Court upholds the appeal, the range of options available upon resentence are those which are set out in the new sentencing regime: see section 86(2)(a) of the *Crimes (Sentencing Procedure) Act* 1999. This means that upon resentence following a successful appeal against a term of full-time imprisonment which was imposed in the Local Court, the only alternative sentence to full-time imprisonment that may be imposed by the District Court is an ICO or a non-custodial penalty such as a CCO. This may assist an offender who was sentenced to a term of full-time imprisonment at first instance on the basis that he or she was ineligible for the mandatory community service work component of an ICO, given that this is no longer a mandatory condition of an ICO. If the severity appeal is refused, the court would confirm the original sentence. The savings and transitional provisions apply, which would mean

happens if the appeal is refused?	that the original sentence may be converted to a new form of sentence order: see sections 71-75 of the Act.
72. If an offender is sentenced to a section 12 bond prior to the commencement of the reforms, and he or she lodges an appeal against the severity of the sentence, can an appellate court which grants the appeal impose a section 12 bond *of shorter duration*?	No. Any court which sentences an offender on or after 24 September 2018 – including an appellate court imposing a sentence having granted the appeal – would only be permitted to impose a sentencing option which is available under the new regime. Given that section 12 suspended sentences are being abolished in the reforms, this will no longer be available as a sentencing option, whether at first instance or on appeal.
73. How will an offender know that their existing sentence has been converted if they are not subject to a supervision condition?	If an offender is not subject to supervision, it appears that they would not have been notified that their existing sentence has been converted to a new form of sentence. Presumably they would only become aware of the conversion if they are called up to appear before the court in relation to an alleged breach. However, if an offender is subject to supervision, they will receive notice in writing and in person about the conversion of their sentence order.
74. What happens if an offender pleads guilty before the reforms commence but is sentenced *after* commencement?	The offender will be sentenced according to the new sentencing regime if sentenced on or after 24 September 2018, regardless of the date of the offence or the date on which the guilty plea is entered.
75. When a Community Service Order is converted to a community correction order ('CCO') on 24 September, how does the court calculate the duration of the converted CCO?	CSPR cl 73(4) provides that a community service order converted to a CCO expires when the relevant maximum period for the original CSO would have expired. The relevant maximum period for CSOs, as set out in *CASA* s 107, serves as a default expiry date for a converted CSO where the offender has not completed all of the hours imposed on the order. If the original CSO had less than 300 hours imposed on it, then the converted CCO would expire 12 months after the original CSO was imposed, or if the relevant maximum period was extended, at the end of that extended period. If the original CSO had 300 or more hours imposed on it, then the converted would expire 18 months after the original CSO was imposed, or if the relevant maximum period was extended, at the end of that extended period. As an aside, query the legality of converting a CSO to a CCO given that the CCO has a 'standard' condition not to commit any offence, whereas a CSO has no such condition (meaning that the 'converted' sentence is arguably more onerous than the prior sentence).
76. What happens if an offender is subject to a section 9 bond with more than 3 years remaining on the bond as at the commencement date for the reforms? What length of CCO is the offender's bond converted to?	The legislation does not expressly provide for this circumstance. However, given that the maximum duration of a CCO is 3 years, presumably the section 9 bond would be converted to a CCO with 3 years remaining.

77. What happens if an offender is sentenced to a section 12 bond prior to the commencement of the reforms for an offence which is now excluded from the range of offences for which an ICO can be imposed (but which wasn't excluded prior to the reforms), and then the offender is found to have breached the section 12 bond after the reforms commence? Are there any options other than full-time imprisonment that the court may consider?	In the event that an offender breaches a section 12 bond after the reforms commence, the court would first need to determine whether to revoke the bond. This requires consideration of former *CSPA* s 98(3), which provides that the court must revoke the bond unless satisfied that the breach of the bond was trivial or that there are good reasons for excusing the breach. If the court revokes the bond, the only remaining sentencing option would be to impose a term of full-time imprisonment given the unavailability of an ICO for that type of offence and the abolition of home detention orders as a discrete sentencing option.

New provisions for domestic violence offences

78. Are all domestic violence offenders likely to be sentenced to full-time imprisonment?	No. A court sentencing an offender for a domestic violence offence must impose *either* full-time imprisonment *or* a supervised order, *unless* the court is satisfied that a different sentencing option "is more appropriate in the circumstances": *Crimes (Sentencing Procedure) Act* 1999 section 4A. Note that a 'supervised order' includes a CRO, CCO or ICO with a supervision condition. Thus courts retain a wide discretion to impose the most appropriate sentence in the circumstances. More medium- and high-risk domestic violence offenders will be supervised, but lower risk offenders can continue to receive less serious sentencing options such as fines or unsupervised CROs and CCOs.
79. Is it possible to receive an ICO for a domestic violence offence?	Yes. However, a court is not permitted to make an ICO for a domestic violence offence unless it is "satisfied that the victim of the offence, and any person with whom the offender is likely to reside, will be adequately protected (whether by conditions of the intensive correction order or for some other reason)": *Crimes (Sentencing Procedure) Act* 1999 section 4B(1). The onus is on the offender to establish that the victim *will be* adequately protected.
80. Can the court impose a home detention condition on a domestic violence offender who proposes to live with the victim of the offence?	No. See *Crimes (Sentencing Procedure) Act* section 4B(2).
81. Are there any restrictions on the court when sentencing an offender for a domestic violence offence?	Yes. The amended legislation provides that a court sentencing an offender for any domestic violence offence must impose either (a) full-time imprisonment or (b) a supervised order, "unless satisfied that a different sentencing option is more appropriate in the circumstances" (*CSPA* s 4A(1) and (2)). A 'supervised order' means any community-based order with a supervision condition attached – CRO, CCO or ICO. (Note that an ICO has a mandatory supervision condition attached, whereas the court has a discretion whether or not to impose a supervision condition on a CRO or CCO.) Furthermore, before imposing an ICO for a domestic violence offence, the court must be satisfied that the victim and any other person with whom they live "will be adequately protected" (*CSPA* s 4B(1)). In practical terms, a sentencing court will generally be unlikely to impose an ICO on an offender who proposes to reside with the victim of their offence if the offence was one involving a relatively serious instance of domestic violence. Furthermore, a sentencing court is not permitted to impose a home detention condition on an ICO if the offender will be residing with the victim of the offence (s 4B(2)). Before imposing a CRO or CCO for a domestic violence offence, a sentencing court must consider the safety of the victim. However, there is no requirement to be satisfied to the high degree as required before imposing an ICO; that is, to be satisfied that the victim *will be* adequately protected.

Advocacy

82. If an offender lodges an appeal against the severity of a community-based sentence imposed in the Local Court, would the District Court on appeal be permitted to impose more onerous conditions on the sentence order?	Given that the conditions imposed on a community-based sentence order are a measure of the relative severity of the sentence, the imposition of more onerous conditions by the District Court on appeal would amount to the appellate court increasing the severity of the sentence. In accordance with well-established principle, if the appellate court is contemplating increasing the severity of the sentence, it must indicate this fact so that the appellant can consider whether or not to apply for leave to withdraw the appeal: *Parker v DPP* (1992) 28 NSWLR 282 at 295.
83. Is it a relevant consideration for a person's immigration status to be taken into account when determining whether to impose a CRO with or without conviction?	The NSW Court of Criminal Appeal has held that an offender's immigration status (or, more accurately, the likelihood that he or she will be deported as a result of a particular sentence being imposed) is irrelevant as a sentencing consideration, it being a matter exclusively for the Executive Government: *R v Pham* [2005] NSWCCA 94 at [13]. Presumably NSW courts would follow this line of reasoning in concluding that the offender's immigration status is irrelevant in determining whether to impose a conviction. However, a line of authority has developed in Victoria which differs from the NSW position. In *Guden v R* (2010) 28 VR 288, the Victorian Court of Appeal held that the prospect of deportation is a personal circumstance of the offender that can be a mitigating factor on sentence. The principle in Guden has been applied in a number of Victorian cases. The High Court has not yet had cause to consider the divergent lines of authority in NSW and Victoria.
84. Will these reforms have any impact on where the 'section 5 threshold' sits?	The reforms introduce a range of more flexible community-based sentencing options, which can be used to ensure, simultaneously, the punishment and rehabilitation of the offender. The court will be empowered to impose onerous non-custodial sentences in the form of a community correction order ('CCO'). A CCO can remain in force for up to 3 years and can carry a range of conditions, including but not limited to community service work for up to 500 hours, a 12 hour curfew, place restriction and non-association conditions. This is a far more robust sentencing option than either a section 9 bond or a suspended sentence, despite not being classified as a sentence of imprisonment (as was a suspended sentence). These features of a CCO may mean that a sentencing court may more readily conclude that a term of imprisonment is not necessary in a particular matter. The sentencing purposes of deterrence, community protection and rehabilitation may be able to be satisfied by the imposition of a CCO in cases where, previously, imprisonment might have been thought to have been necessary to satisfy those purposes.
85. Do these reforms have any impact on bail? **If one of the key aims of these reforms is to have more offenders under supervision in the community rather than serving short sentences of**	The sentencing reforms may indeed have an impact on the likelihood of bail being granted in particular cases. *Bail Act* 2013 s 18(1) contains an exhaustive list of the relevant matters that a court may take into account in making an assessment of bail concerns. Ss 18(1)(i) provides that a relevant matter includes 'the likelihood of a custodial sentence being imposed if the accused person is convicted of the offence'. If the intention of the reforms is for more medium and high risk offenders to be sentenced to community-based orders with supervision rather than

full-time imprisonment, does that more people will be entitled to bail while awaiting trial/sentence?	sentences of imprisonment, that would, all other things being equal, reduce the likelihood of a custodial sentence being imposed in many cases. In turn, this ought to improve the prospects of bail being granted while awaiting trial or sentence in those cases. The likelihood of a custodial sentence being imposed may also be a relevant consideration for the show cause requirement in *Bail Act* s 16A.
86. Is the sentencing court only permitted to impose a curfew if such a condition is referable to the offending conduct (as is generally the case for a bail curfew in relation to an alleged offence committed at night), or can it be imposed regardless of the nature of the offence for which the offender is being sentenced?	*CSPA* s 3A sets out an exhaustive list of 'the purposes for which a court may impose a sentence on an offender'. The imposition of sentence conditions is an element of the sentencing exercise, and therefore it would seem that the imposition of a particular sentence condition must be in furtherance of at least one of the purposes of sentencing in order to be a valid exercise of sentencing discretion. It would seem to follow that a particular condition could be imposed to serve one or more of the purposes of sentencing, regardless of the nature of the offending conduct. For example, a curfew of up to 12 hours could be imposed on a CCO in order to punish the offender (*CSPA* s 3A(a)), regardless of whether or not the offence occurred at night.
87. Is a prosecutor permitted (and/or required) to make a submission on the conditions that the court should impose on a community-based sentence order?	In *Barbaro v The Queen; Zirilli v The Queen* [2014] HCA 2 at [39], the High Court held, by majority, that "[i]t is neither the role nor the duty of the prosecution to proffer some statement of the specific [sentencing] result" which the prosecution considers should be reached "or a statement of the bounds within which that result should fall". The prosecution's opinion about the bounds of the available range of sentences "is a statement of opinion, not a submission of law": at [42]. It is for "the sentencing judge alone to decide what sentence will be imposed": at [47]. Query whether this reasoning would apply to the imposition by the court of *conditions* pursuant to a *community-based* sentence order (as opposed to submissions as to the length of a sentence of full-time imprisonment, as in *Barbaro* and *Zirilli*), such as would prohibit any submission by the prosecution as to the precise conditions or range of conditions that the court ought impose.

Miscellaneous issues with new sentencing options

88. Are the new sentence orders going to be available for offenders who live interstate?	An offender who lives interstate can be sentenced to a CRO or CCO so long as supervision is not imposed as a condition. Even an offender who is directed to perform community service work as a condition of the sentence is able to live interstate, so long as the offender is able to travel back into NSW to complete the community service work component. However, an interstate offender cannot be sentenced to an order which has a supervision condition. Given that supervision is a mandatory condition of an ICO, this means that an interstate offender cannot be sentenced to an ICO. If such an offender wishes to seek an ICO, they would need to move to NSW prior to the imposition of sentence and to remain there for the duration of the ICO.
89. Are there still limitations on the maximum number of hours of community service that can be imposed by the court for a particular offence?	Yes. CSPR cl 14(1) sets out the maximum number of hours of community service work that the court is permitted to impose as an 'additional' condition of a CCO or ICO. (Note that community service work is not able to imposed as a condition of a CRO.) The court can impose up to 100 hours for an offence with a maximum penalty of 6 months' imprisonment; up to 200 hours for an offence with a maximum penalty of between 6 and 12 months' imprisonment; and up to 500 hours (for a CCO) or 750 hours (for an ICO) for an offence with a maximum penalty of more than 1 year. Cl 14(2) specifies the minimum term of sentence orders that the court must observe when imposing a particular quantity of community service work. This will have the effect of limiting the number of hours of community service work which are available for sentences of a particular duration. To impose an allotment of up to 100 hours of community service, the sentence must be at least 6 months in duration; for between 100 and 300 hours, the sentence must be at least 12 months; for between 300 and 500 hours, the order must be at least 18 months; and for between 500 and 750 hours (only available on an ICO), the sentence must be at least 2 years. It is important to note that the court does not set the term of the sentence *after* deciding on the appropriate quantity of community service work; the court must first set the term of the sentence and then abide by the limitation on the maximum number of hours of community service work which it may impose having regard to the term of the sentence.
90. Will the new sentencing options be available for Commonwealth offences?	*Crimes Act* 1914 (Cth) s20AB provides that State courts exercising federal jurisdiction (i.e. sentencing offenders for Commonwealth offences) are permitted to impose certain ('prescribed') State sentencing options. The list of prescribed State sentencing options is set out in *Crimes Regulations* 1990 (Cth) reg 6. Currently, the only NSW sentencing orders available to be imposed in respect of a Commonwealth offence are home detention orders and ICOs. Given that home detention orders are being abolished as a discrete sentencing option in NSW, this means that unless reg 6 is amended by the Commonwealth Parliament, the only NSW sentencing option that will be available for Commonwealth offences is an ICO.
91. What happens in the event of a conflict between the conditions of an AVO and the conditions of a	There is nothing in the legislation to address this potential situation. In order to avoid such a situation arising, it is incumbent upon practitioners to alert sentencing courts to the existence of any other court orders, such as an AVO, which may impact upon the sentencing exercise.

sentence order? For example, what happens if an AVO condition provides that the person is not permitted to attend the home he shares with his partner within 12 hours of consuming alcohol, if a curfew condition is also in force as part of an ICO?	In the event that it becomes clear that a condition imposed by the sentencing court is inconsistent with a pre-existing order such as an AVO, the offender or Community Corrections would make an application to the sentencing court (in respect of a CRO or CCO) or to the State Parole Authority (in respect of an ICO) to vary the conditions of the sentence order so as to remove any inconsistency.
92. Who decides how many of community service work hours the offender is required to complete each week?	In order for the court to impose a community service work condition (available on a CCO or ICO), it must first receive a sentencing assessment report (SAR) from Community Corrections which indicates that the offender is eligible and able to participate in community service work. The SAR will indicate the number of hours per week that the offender is capable of completing (based on his or her physical and mental condition and the availability of work in the local area). CSPR cl 14(2) specifies the minimum term of sentence orders that the court must observe when imposing a particular quantity of community service work. This will have the effect of limiting the number of hours of community service work which the offender can be required to complete in any given week/month. In addition, *CASA* cl 202 indicates that an offender cannot be directed to perform more than 8 hours of community service work in any one day.
93. If the District Court allows an appeal against the severity of a sentence imposed in the Local Court and imposes a fresh CRO or CCO, would the Local Court be permitted to call-up and deal with a breach of the fresh order even though it was imposed in the District Court?	In the event of a breach of a good behaviour bond under the former provisions of *CSPA* s 98(1), the sentencing court "or a court of like jurisdiction" could call on the offender to appear before it. The NSW Court of Criminal Appeal held in *DPP (NSW) v Jones* [2017] NSWCCA 164 at [28] that this provision empowered the Local Court to call up and, if satisfied of a failure to comply with a condition or conditions of the bond, to revoke the bond, even though the bond was imposed by the District Court on appeal. This is because the language of *CSPA* s 98 and CARA s 71 suggests that the Local Court and District Court are courts "of like jurisdiction" in circumstances where a bond, imposed in the District Court following a sentence appeal, is breached. Similarly to the provisions of former *CSPA* s 98(1), the amended *CSPA* provides that "the court that made the order, or any other court of like jurisdiction", may call on the offender to appear before it in respect of an alleged breach of a CRO (s 108C(1))) or CCO (s 107C(1)). Therefore, applying the reasoning in *Jones* to the new legislation, it would appear that the Local Court is empowered to deal with a breach of a CRO or CCO imposed by the District Court on appeal.
94. If the District Court allows an appeal against the severity of a sentence imposed in the Local Court and imposes a fresh CRO or CCO, would the Local Court be permitted to vary the conditions of the fresh order (pursuant to a variation application by the offender or Community	Unlike in respect of a *breach* of a CRO or CCO, the amended *CSPA* does not permit a "court of like jurisdiction" to vary the conditions of a CRO or CCO imposed by the Local Court. It therefore appears that the Local Court would not be empowered to vary the conditions of a CRO or CCO imposed by the District Court on appeal; any variation application would have to made before the District Court.

Corrections) even though it was imposed in the District Court?	
95. Would the District Court be permitted to deal with a breach of a CRO or CCO imposed in the Local Court?	It was held in *Yates v The Commissioner of Corrective Services*, NSW [2014] NSWSC 653 at [43] that the District Court does not have jurisdiction to deal with a breach of a good behaviour bond imposed in the Local Court (pursuant to the former provisions of the *CSPA*) without the express consent of the offender. It would appear that this reasoning would apply similarly to a CRO or CCO imposed in the Local Court. In other words, the District Court could only deal with a breach of a CRO or CCO imposed in the Local Court with the express consent of the offender.
96. Is there a minimum term of a CRO, CCO or ICO?	No, there is no minimum term of a community-based order, only a maximum term (2 years for a CRO and 3 years for a CCO, and 2 years for an ICO for a single offence and 3 years for an ICO for an aggregate offence).
97. If an offender breaches an existing ICO by committing a fresh offence, would the State Parole Authority deal with the breach of the existing ICO before or after the court sentences the offender for the fresh offence?	In *R v Cooke* [2007] NSWCCA 184 at [18], the NSW Court of Criminal Appeal held that, when dealing with an offender for a breach of a *section 12 bond* by way of the commission of a fresh offence, the court should determine what action to take in respect of the breach of the existing bond "before considering what, if any, penalty will be imposed for the conduct giving rise to the breach." The correct sequential approach is therefore to first revoke the suspended sentence pursuant and then to consider the appropriate sentence for the offence(s) for which the section 12 bond was originally imposed, and then to consider the sentences to be imposed for any later offences: *R v Taane* [2014] NSWCCA 330 at [39]. This approach is taken because it 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. In *R v Nicholson* [2010] NSWCCA 80 at [14], it was held that a District Court judge who is aware of an outstanding suspended sentence imposed in the Local Court should refuse to pass sentence for further offences until the offender has been sentenced for the breach of the original suspended sentence imposed by the Local Court. The breach must be dealt with before the proceedings for the further and subsequent offences are finalised, so that the court can have proper regard to issues of accumulation, concurrency and totality: *R v Dinh* [2010] NSWCCA 74 at [85]. Presumably this reasoning would apply equally to a breach of an ICO by way of the commission of a fresh offence, such that the Parole Authority would be required to deal with the breach of the existing ICO before the court could deal with the proceedings for the fresh offence.
98. Is there going to be a change to the Legal Aid NSW policy regarding grants of legal aid to appear for offenders in appeals from the Local Court to the District Court against the severity of sentence?	Legal Aid NSW criminal law policy 4.6.1 outlines the circumstances in which legal aid can be granted to represent offenders in appeals to the District Court. The primary components of the policy are: (1) the means test; (2) merit test A; (3) that the type of matter is one for which legal aid is available in the Local Court proceedings; and (4) for a severity appeal, that it is an appeal against a term of imprisonment or Legal Aid NSW is satisfied that there are exceptional circumstances. Merit test A is primarily concerned with the issue of whether the applicant has "reasonable prospects of success". In the context of a District Court appeal, this requires a consideration of the likelihood of the appeal being successful in some respect.

	Given that suspended sentences and home detention orders have been abolished as sentencing options, in effect part (4) above requires that the appeal be against the imposition of full-time imprisonment or an ICO; if the offender was sentenced to anything less than an ICO at first instance, legal aid will not be granted unless exceptional circumstances are identified. There is no current proposal to amend this policy.
99. Is there going to be a change to the Legal Aid NSW policy regarding grants of legal aid to appear for defendants in Local Court defended hearings?	Legal Aid NSW criminal law policy 4.3.5 outlines the circumstances in which legal aid can be granted to represent defendants in Local Court defended hearings (i.e. on a plea of not guilty in the Local Court). The primary components of the policy are: (1) the means test; and (2) that there is a "real possibility of a term of imprisonment being imposed" if convicted, or there are exceptional circumstances. Given that suspended sentences and home detention orders have been abolished as sentencing options, in effect part (2) above mandates that legal aid be refused for a defended hearing unless there is a real possibility that the offender will be sentenced to either full-time imprisonment or an ICO if convicted, unless there are exceptional circumstances. Given that a community correction order (CCO) is considered a non-custodial order, it would not be sufficient for the defendant to be at risk of being sentenced to a CCO if convicted. There is no current proposal to amend this policy.
100. *CSPA* Part 8A (ss 100A-100H) contains a number of provisions relating to the imposition of non-association and place restriction orders under s 17A. These are different to the availability of those types of *conditions* as part of a community-based sentence. Section 100A provides that non-association and place restriction orders are not to restrict certain associations or activities. For instance, a non-association order cannot be imposed so as to prevent the offender from associating with a "close family member", and a place restriction order cannot be imposed so as to prevent the offender from visiting a place or worship or place or regular employment. Will there be similar protections in respect of the non-association and place restriction conditions which the court will be able to impose as conditions of	No, there are no express protections contained in the legislation as to the imposition of non-association or place restriction conditions. Practitioners acting for offenders must therefore be alive to the potential for these conditions to inappropriately restrict the lives of their clients and to raise any such issue with the court prior to the court imposing such a condition as part of a community-based sentence.

sentence orders as a result of the new reforms?	
101. Is a CCO considered a custodial sentence? In other words, does it cross the section 5 threshold?	No, a CCO is considered a non-custodial sentence which does not cross the section 5 threshold. This is because the introductory words to *CSPA* s 8(1), where the court's power to impose a CCO is found, provides that a CCO may be imposed "[i]nstead of imposing a sentence of imprisonment on an offender . . ."
102. Is there any proposal to increase the range of placements available for offenders to complete community service work? Often there is no work available in the area where the sentencing court is located.	Community Corrections NSW acknowledges that community service work is not always available, which limits the sentencing options available to the court. They are in the process of a recruitment drive to find more community service work partner agencies.

Index:

CSPA = *Crimes (Sentencing Procedure) Act* 1999 (NSW)
CASA = *Crimes (Administration of Sentences) Act* 1999 (NSW)
CARA = *Crimes (Appeal and Review) Act* 2001 (NSW)
CSPR = *Crimes (Sentencing Procedure) Regulation* 2017 (NSW)
CASR = *Crimes (Administration of Sentences) Regulation* 2014 (NSW)

* This document is not intended to be comprehensive, nor does it constitute legal advice. As with any area of the law, these reforms are open to different interpretations, and we do not purport to be the authorities on the correct interpretation of the law. You should seek legal advice before acting or relying upon any of the content in this publication.

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