THE ROLE OF THE MAGISTRATE AND DISCRETION: CREATING EQUALITY, FAIRNESS AND JUST OUTCOMES IN THE LOCAL COURT OF NSW

Plenary Address, Legal Studies Association of NSW Annual Conference

DEPUTY CHIEF MAGISTRATE THEO TSAVDARIDIS[1]

27 March 2024

Introduction

1. It is a great honour to be invited to deliver the plenary address for the Legal Studies Association of NSW. I want to thank all of you — the Legal Studies teachers of this State — for the incredible work you do in educating students about the justice system. I have emphasised elsewhere, previously, that courts do not have armies or their own police forces.[2] Instead, respect for the orders of a court depends on a reservoir of goodwill and trust from the public.[3] Community confidence in the judiciary is essential for courts to operate and perform their public functions. That is why your role in educating students is so important. For many students, particularly those from first-generation migrant families, the Preliminary part of the Legal Studies course can sometimes be their first opportunity to learn about the *Australian Constitution*, our nation's system of government, landmark court decisions such as *Mabo*[4] and the role of the legal and non-legal mechanisms in creating change in society. By teaching them about the legal system and its effectiveness and limitations, you are helping the next generation of leaders understand the work we do and build up that reservoir of trust and confidence.

2. In this address, I will focus on the HSC part of the syllabus and, more specifically, the sentencing process in the Crime unit. I will begin by discussing the role of the Magistrate in the Local Court and judicial discretion more broadly. I will then discuss the types of penalties available to courts in sentencing an offender, and some of the diversionary programs available.

---

[1] Deputy Chief Magistrate, Local Court of New South Wales. I acknowledge the considerable assistance of Dane Luo, former intern; Bachelor of Laws (Hons I) and Bachelor of Commerce (Hons I), University of Sydney; Bachelor of Civil Law, University of Oxford.

[2] Theo Tsavdaridis, 'The Rule of Law: Small Steps in a Long Journey' (Speech, Parramatta and Regional Law Society Annual Dinner, 18 October 2023) <https://localcourt.nsw.gov.au/documents/judicial-speeches/Speech_-_The_Rule_of_Law_-_Small_Steps_in_a_Long_Journey_-_DCM_Tsavdaridis_-_Parramatta_and_Regional_Law_Society_Annual_Dinner_-_18.10.2023.pdf>.

[3] See Stephen Gageler, 'Judicial Legitimacy' (2023) 97 *Australian Law Journal* 28.

[4] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

The Role of Courts

3. Courts exist to ensure that the law of the land, including the *Constitution* and legislation made by Parliament, is given effect. This is done by adjudicating disputes about what the law is and dealing with the consequences of breaking the law, including punishment for an offender. Courts provide a forum where people come with their legal disputes. Every person with an interest is given an opportunity to be heard and the dispute is resolved by an independent judicial officer. Interestingly, the traditional proclamation for the opening of a court is that "all persons having business before this Honourable Court draw nigh and give your attendance and you shall be heard. God save the King." My research reveals that this probably dates back to the Middle Ages, where towns in England had a town crier whose job it was to read out aloud public announcements, Royal decrees, proclamations, and other important news to the populace.

4. Courts are very different to the legislative and executive branches of government. Judicial officers do not decide cases based on individual impulse or majority public opinion. Nor do judicial officers decide cases based on whether or not a party is a sympathetic litigant, or whether or not we think an outcome is fair. Since I began on the Local Court bench over 14 years ago, there have been cases that I personally wish went the other way. But that is part and parcel with the role of being a judicial officer: our job is to apply and follow the law faithfully and fearlessly wherever it leads us. It is this reason why I recently said in a separate speech, 'For a judicial officer who likes every outcome, he or she might well be a bad judge, stretching for policy results he or she prefers rather than those the law compels.'[5]

5. Our job involves safeguarding and protecting fundamental common law liberties of every individual, including of those who may be seen as unpopular or notorious. Persons accused of very serious crimes, or who may be caught up in a scandal of some kind, may not find politicians or the media very kind to them. But when they step into a courtroom in this nation, they are entitled to an impartial judge or magistrate who will deliver individualised justice, on the merits of that specific case, according to law. In criminal matters, they are entitled to the presumption of innocence unless and until proven guilty. They are entitled to know the prosecution's case against them, be given the opportunity to test that case, and to put their own case to the court. Above all, they are entitled to be treated fairly and with respect.

---

[5] Theo Tsavdaridis, 'The Rule of Law: Small Steps in a Long Journey' (Speech, Parramatta and Regional Law Society Annual Dinner, 18 October 2023) <https://localcourt.nsw.gov.au/documents/judicial-speeches/Speech_-_The_Rule_of_Law_-_Small_Steps_in_a_Long_Journey_-_DCM_Tsavdaridis_-_Parramatta_and_Regional_Law_Society_Annual_Dinner_-_18.10.2023.pdf>.

6. When students come and visit the Local Court on school excursions or as part of work experience or internships, they can sometimes observe a short criminal hearing. Students have said to me that, after seeing and hearing the evidence, they had a hunch or suspicion that an accused committed an offence. But they were surprised, and perhaps even disappointed, when the Magistrate acquitted the accused. The answer I give to those students is simple: a court finds an accused guilty if and only if the prosecution has proven, beyond reasonable doubt — an appreciably high standard — all the elements of the offence and negatived any defences that an accused might have raised in discharging any evidential burden. I have no hesitation ruling against the prosecution, and acquitting an accused, if the prosecution has not met this legal burden. Equally, I have no hesitation finding an accused guilty of an offence if the evidence, viewed as a whole, proves, beyond reasonable doubt, all the elements and negatives any defences raised.

The Local Court in Context

7. There are three main courts in New South Wales, each with their own jurisdiction: the Local Court, District Court and Supreme Court. There are also specialist courts, such as the Land and Environment Court, the Children's Court, the Coroner's Court, the Drug Court and the soon-to-be re-established Industrial Court. The Local Court is the lowest court in the judicial hierarchy. We have about 150 Magistrates. We sit at approximately 130 locations across New South Wales. We are the busiest court in the Commonwealth.

8. For civil matters, its jurisdiction to hear disputes, in the General Division, is limited to $100,000 (or $60,000 in relation to a claim for damages arising from personal injury or death).[6] In 2022, 51,770 civil actions were commenced in the Local Court.[7]

9. The vast majority of these — 41,716 — are commenced in the Court's Small Claims Division,[8] which hears claims with a monetary value up to $20,000.[9] Proceedings in the Small Claims Division are conducted with as little formality and technicality as is needed for the proper

---

6 *Local Court Act 2007* (NSW) ss 29(1)(a), (2).

7 Local Court of New South Wales, *Annual Review 2022* <https://localcourt.nsw.gov.au/documents/annual-reviews/Local_Court_Annual_Review_2022.pdf>.

8 Ibid.

9 *Local Court Act 2007* (NSW) s 29(1)(b).

consideration of the issues in dispute.[10] A small claims hearing is generally an informal process where the Court considers statements and documents provided by the parties. The parties are given the opportunity to comment upon the evidence. In the main, small claims hearings are held remotely.

10. In the criminal jurisdiction, the Local Court can hear summary offences or certain indictable offences that legislation allows to be dealt with summarily.[11] When sentencing an offender, the Local Court has a jurisdictional limit of 2 years' imprisonment for single offences[12] and 5 years' imprisonment for multiple offences.[13] In 2022, 369,158 criminal matters were commenced in the Local Court, which represents an increase of 31.7% since 2011.[14] In 2022, 88.3% of criminal matters were completed within 6 months of commencement and 96.7% of matters were completed within 12 months of commencement.[15]

11. Criminal hearings in the Local Court are conducted differently to that in the higher courts. In the District Court and Supreme Court, criminal trials usually involve a jury although there are limited circumstances where a judge-alone trial can be ordered. In the Local Court, there is no jury. If an accused wishes to have a jury trial for an indictable offence, they may elect to have the matter dealt with in a higher court.

12. In the Local Court, a Magistrate must resolve questions of fact and questions of law. That is different to criminal matters in the District and Supreme Courts where the jury usually resolves questions of fact, and a Judge has the responsibility of giving directions to the jury about the law.

The Role of Discretion

13. In many aspects of the criminal justice system, there is an important role for discretion. One example where there is a large degree of judicial discretion is in the sentencing process. Judicial officers have the ability to tailor the sentence for an individual offence.

---

10 Ibid s 35.

11 *Criminal Procedure Act 1986* (NSW) ss 6–7.

12 Ibid ss 267(2), 268(1A).

13 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 53B, 58.

14 Local Court of New South Wales, *Annual Review 2022* <https://localcourt.nsw.gov.au/documents/annual-reviews/Local_Court_Annual_Review_2022.pdf>.

15 Ibid.

14. That is not to say that judicial officers can do whatever they like. The power of the court to issue sentences are subject to limits set by Parliament. For example, the maximum penalty for an offence not only provides a limit as to the court's power but is also a yardstick for Parliament's assessment of the seriousness of the offence.[16] Another example is that Australian courts today cannot order the death penalty because that penalty has been abolished by legislation[17] in recognition of Australia's international human rights obligations.[18] As I have said, the Parliament has set boundaries for what courts can do, but within those boundaries, judicial officers have wide discretion.

15. That discretion must be exercised according to legislation, well-established common law principles and consistently with the purposes of sentencing. The fact is, however, that these principles and the purposes of sentencing often pull in different directions. The ability of the court to tailor the sentence ensures that the court can arrive at an appropriate outcome that resolves these competing factors.

16. Before imposing any sentence, a court must give the prosecution, offender and, in some cases, the victim or their family, an opportunity to be heard. In my experience, I begin forming my initial view after reading the facts and written material. After hearing from the prosecution (which usually makes its submissions first) and any victim impact statements, my mind can completely change. After hearing from the lawyer for the offender or the actual offender, in cases where the offender is self-represented, my mind can completely change again. I then reconsider all the material together and I can sometimes reach a new and different view. Procedural fairness is a fundamental aspect to the exercise of discretion for this simple reason: we make better, more informed decisions after hearing from everyone. Justice Button eloquently explained the fundamental principle of the right to be heard in the following terms:

> First, in an adversarial system it is essential that each party have an opportunity to give evidence and make submissions. Secondly, hearing both sides of an issue or story 'tends to quell controversies and discontents', and helps to prevent the judicial officer from 'reaching unsound conclusions'. Thirdly, 'hearing both sides ... respects human dignity and individuality'. Fourthly, … affording each party an opportunity to be heard in proceedings helps ensure that they respect and abide by the final decision made.[19]

---

16 *Markarian v The Queen* (2005) 228 CLR 357, [31] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

17 See *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth).

18 See the Second Optional Protocol to the International Covenant on Civil and Political Rights.

19 *Director of Public Prosecutions (NSW) v Gatu* [2014] NSWSC 192, [26] (Button J).

17. Importantly, a court must give reasons for orders they make. The requirement to give reasons has been described as an 'incident of the judicial process'.[20] Without adequate reasons, justice will not be seen to be done. Reasons do not necessarily need to be lengthy or written. Magistrates may need to deliver sentences whilst managing a heavy workload in a busy list. It is common in the Local Court for reasons to be delivered orally (which is termed '*ex tempore*'). What is required is that reasons provide an intelligible explanation of the process or path of reasoning to the conclusion reached.[21]

Types of Penalties in Sentencing

18. I now turn to address the 'Sentencing and Punishment' part of the Crime unit. The Legal Studies syllabus has remained unchanged since 2009. Since then, there have been reforms to the law regarding the types of penalties that a court may impose. Some of the terminology used in the syllabus does not reflect the terminology used in current legislation. For example, the syllabus refers to a 'suspended sentence', 'periodic detention' and 'home detention'. In this State, those types of penalties have been abolished and were replaced with a more flexible penalty known as an Intensive Correction Order (**ICO**). Home detention, as I will explain below, can be a condition of an ICO.

19. The following is an overview of the types of penalties available to courts in NSW and their place in the sentencing hierarchy.

20. At the lowest, courts have the power to **dismiss a charge without recording a conviction**.[22] This means that a person does not have a conviction or criminal record and incurs no other penalty.

21. In the same vein, without recording a conviction, courts can discharge a person under a **Conditional Release Order** (**CRO**) (for State offences; up to 2 years)[23] or a **recognizance** (for federal offences; up to 3 years).[24] A CRO was previously called a good behaviour bond. This reflects the fact that a standard condition of a CRO is that the offender must not commit any

---

[20] *Public Service Board of NSW v Osmond* (1986) 159 CLR 656, 667 (Gibbs CJ).

[21] *ACN 087 528 774 Pty Ltd (formerly Connex Trains Melbourne Pty Ltd) v Chetcuti* (2008) 21 VR 559, 566 [20] (Hargrave AJA, with whom Ashley and Dodds-Streeton JJA agreed), cited with approval in *Transport for NSW v Chapoterera* [2022] NSWSC 976, [21] (Walton J).

[22] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(1)(a); *Crimes Act 1914* (Cth) s 19B(1)(c).

[23] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(1)(b).

[24] *Crimes Act 1914* (Cth) s 19B(1)(d).

offence.[25] If the offender does commit an offence during the period of the CRO, they can be charged with both the offence itself and be called up to appear before the Court for failure to comply with the CRO.

22. A court has the discretion to add certain additional or further conditions to a CRO. This can include a rehabilitation or treatment condition, requiring the offender to participate in a rehabilitation program or to receive treatment, or an abstention condition, requiring abstention from alcohol or drugs.[26]

23. For State offences, a court can discharge a person without recording a conviction on the condition that the person enter into an agreement to **participate in an intervention program** and to comply with any intervention plan arising out of the program.[27]

24. All other types of penalties imposed by a court require the court to record a conviction. A court has the discretion to impose **a conviction without any other penalty**.[28]

25. A court can impose a **CRO with a conviction** for up to 2 years.[29] However, a fine and a CRO (whether with or without conviction) cannot be imposed in relation to an offender in respect of the same offence.[30]

26. A court can **impose a fine**. In legislation, it is common for the maximum fine for an offence to be expressed not as a dollar amount but, instead, as a **number of penalty units**. The maximum fine is then calculated by multiplying the number of penalty units by $110 (for State offences)[31] or $313 (for federal offences).[32] The reason is so that Parliament can more easily change the maximum fine across the board by simply adjusting the value of a penalty unit, rather than amending the maximum penalty for every single offence.

---

25 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 98(2)(a).

26 See ibid s 99(2).

27 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(1)(c).

28 Ibid s 10A.

29 Ibid s 9(1)(a).

30 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9(3)(a).

31 The value of a penalty unit at a State level is fixed by legislation: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17. This value can only be changed by amending legislation.

32 In contrast, the value of a penalty unit at a federal level increases on 1 July each year as a result of indexation: *Crimes Act 1914* (Cth) s 4AA. A new value is declared by a legislative instrument each year. The most recent instrument is the *Crimes (Amount of Penalty Unit) Instrument 2023* (Cth).

27. It can sometimes be tempting for the media or individuals to compare fines side-by-side as an indication of the seriousness of the offending conduct in each case. This would be wrong because a fine is determined by a range of factors. It is not fixed just by the seriousness of the offending conduct. To give one as an example: in fixing a fine, the financial means of the offender to pay a fine is a mandatory consideration but it is not the decisive or dominant factor. Using information about the offender's financial circumstances, a court may increase or decrease a fine so that it can be a specific deterrent.[33] Indeed, a court has a general power to reduce penalties in appropriate circumstances[34] and is required to give consideration to an accused's means to pay.[35]

28. A court can impose a **Community Correction Order** (**CCO**) for up to 3 years (for State offences)[36] or **conditional release on recognizance** for up to 5 years (for federal offences).[37] Unlike a CRO, which a court has the discretion to make with or without a conviction, a court that imposes a CCO must convict the offender. A court has the discretion to add a number of additional or further conditions to a CCO. They can impose a CCO with a community service work condition or a curfew condition.[38] They can also impose a CCO together with or without a fine. The terms of the CCO, including its length and conditions are examples of judicial discretion. A court can tailor the penalty to best address the objects of sentencing, which include rehabilitation and specific deterrence.

29. All other penalties are termed **imprisonment or a custodial sentence**. Crucially, a court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate.[39] That is to say that imprisonment is a last resort. There are two main ways of serving a sentence of imprisonment.

30. The first is by an **Intensive Correction Order** (**ICO**), where the offender serves the sentence of imprisonment 'in the community'.[40] This is available where the sentence of imprisonment is

---

33 *Jahandideh v The Queen* [2014] NSWCCA 178, [17] (Rothman J, Hoeben CJ at CL agreeing at [1]).

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

35 *Fines Act 1996* (NSW) s 6.

36 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8.

37 *Crimes Act 1914* (Cth) s 20(1)(a).

38 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 89(2).

39 Ibid s 5(1); *Crimes Act 1914* (Cth) s 17A(1).

40 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7; *Crimes Act 1914* (Cth) s 20AB(1AA)(a)(ix).

under 2 years (for a single offence) or 3 years (for aggregate offences).[41] It is not available for certain prescribed offences, such as sexual offences or offences that involve the discharge of a firearm.[42] Like a CCO, a court can impose an ICO with a community service work condition or a curfew condition. An ICO can be imposed with more onerous conditions than a CCO. A court can also impose an electronic monitoring condition or home detention condition;[43] the latter requires an offender to remain at their address unless engaged in activities approved by a Community Corrections officer or when faced with imminent danger.[44] Much like a CCO, a court can impose a fine with an ICO for State offences and for federal offences.[45] Similarly, like a CCO, a court has a wide discretion to tailor the conditions of an ICO to meet the objects of sentencing.

31. The fact that an ICO is available as a sentencing option does not mean that courts automatically impose it. Section 66 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) tells sentencing courts that, in deciding whether to impose an ICO, community safety must be the paramount consideration. When considering community safety, the sentencing court is to assess whether making an ICO or serving the sentence by way of full-time detention is more likely to address the offender's risk of reoffending. This provision was recently the subject of consideration by the High Court in *Stanley v Director of Public Prosecutions (NSW)* [2023] HCA 3. It was explained that when a court is deciding the discrete question of whether to make an ICO, the legislation requires that other considerations must be subordinated to the consideration of community safety.[46] A majority of the High Court held that community safety will 'usually have a decisive effect on the decision to make, or refuse to make, an ICO, unless the relevant evidence is inconclusive'.[47]

32. This is an example of Parliament regulating judicial discretion in one aspect of the sentencing process. In the absence of s 66, community safety would be one of many factors that a court must consider when deciding whether to impose an ICO. But under s 66, courts are required to elevate the consideration of community safety and subordinate other considerations.

---

41 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 68.

42 Ibid s 67.

43 Ibid s 73A(2).

44 *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 189(1)(a).

45 See *Crimes Act 1914* (Cth) s 20AB(4)(a).

46 *Stanley v Director of Public Prosecutions (NSW)* [2023] HCA 3, [73] (Gordon, Edelman, Steward and Gleeson JJ).

47 Ibid [76] (Gordon, Edelman, Steward and Gleeson JJ).

33. The second is **full-time imprisonment**. Where a court imposes a sentence of imprisonment over 6 months, it can set a **non-parole period**.[48] This is the minimum period that an offender must be held in gaol. During the **balance of the term** of imprisonment (that is, the period after the non-parole period has expired but before the head term of imprisonment has ended), the offender is **eligible for parole**, which is the temporary or permanent release of the offender under conditions. The determination of whether to grant parole during this period then falls, at that time, to the State Parole Authority.

34. Under s 44 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), the ordinary statutory ratio is to impose a non-parole period equal to 75% or more of the head term of imprisonment unless there is a finding of special circumstances.[49] For example, special circumstances can include a need for a longer period of rehabilitation in the community or factors that might make detention more onerous than normal. If special circumstances are found, the court has a wide discretion to determine the appropriate ratio between a non-parole period and the head term of imprisonment.

Conditions in CROs, CCOs and ICOs

35. The kinds of conditions that a court can impose for CROs, CCOs and ICOs are as follows. There are two **standard conditions** that must be imposed for all three kinds of orders: that the offender must not commit any offence; and that the offender must appear before the court if called on to do so.[50]

36. A court has discretion to impose **additional conditions**. For an ICO, a court must impose one additional condition unless there are exceptional circumstances.[51] For all three kinds of orders, a court can impose one or more of the following: -

    a. A rehabilitation or treatment condition requiring the offender to participate in a rehabilitation program or to receive treatment;

---

[48] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 46. The court does have a discretion to decline to set a non-parole period: s 45(1).

[49] The court does have a discretion to decline to set a non-parole period: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 45(1).

[50] *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 73, 88, 98.

[51] Ibid ss 73A(1)–(1A).

b. An abstention condition requiring abstention from alcohol or drugs or both;

c. A non-association condition prohibiting association with particular persons;

d. A place restriction condition prohibiting the frequenting of or visits to a particular place or area.[52]

37. For CCOs and ICOs, a court can also impose a curfew condition and/or community service work condition.[53]

38. For ICOs only, a court can impose an electronic monitoring condition or home detention condition.[54]

39. A court has a broad power to impose **further conditions** to any of the three orders.[55]

40. Before a court can impose a community service work condition or home detention condition, it must obtain first obtain a Sentencing Assessment Report prepared by a Community Corrections officer and that report needs to state that the offender is suitable for such a condition.

41. Sometimes, the ability of a court to make a particular type of order or condition may not be available because of limited resources. For example, in *Bresnahan v The Queen* [2022] NSWCCA 288, the offender was assessed as unsuitable for a community service work condition because community service work was unavailable in his catchment area. Justice Yehia considered an ICO with a community service work condition was the appropriate sentence but held that, under the legislation, that condition could not be imposed as an additional condition.[56] Her Honour would have instead imposed a further condition that the offender undertake volunteering work with a registered charity, provided that a Community Corrections officer confirms the registered status of the charity and monitors compliance.[57]

---

52 Ibid ss 73A(2), 89(2), 99(2).

53 Ibid ss 73A(2), 89(2).

54 Ibid s 73A(3).

55 Ibid ss 73B, 90, 99A.

56 *Bresnahan v The Queen* [2022] NSWCCA 288, [151] (Yehia J).

57 Ibid [161] (proposed order (3)(d)(i)) (Yehia J).

It is noted that Yehia J delivered a dissenting judgment. A majority of the Court of Criminal Appeal held that an ICO was not appropriate in the circumstances: at [4] (Beech-Jones CJ at CL, as his Honour then was), [38], [44] (Walton J). Their Honours also held that a community service work condition could not be imposed: at

42. This is an example of how a court can use its broad discretion to fashion a condition so that the objects of sentencing would not be defeated by the unavailability of community service work in circumstances where there was no concern with the offender's capacity or willingness to perform such work. Justice Yehia explained that, if the court imposed full-time imprisonment merely because of the unavailability of work, this 'could result in severe consequences, including net widening and penalty escalation.'[58]

Other Available Remedies and Diversionary Programs

43. In addition to the above types of penalties, there are other kinds of orders that a court may make. It can, for example, make an **Apprehended Violence Order** (**AVO**) for the protection of a person where the court is satisfied on the balance of probabilities that the person in need of protection has reasonable grounds to fear and in fact fears either the commission of a domestic or personal violence offence, or intimidation or stalking.[59]

44. The Court's AVO jurisdiction has increased over recent years. In 2022, there were 41,816 lodgements for AVOs for domestic violence (for people in a domestic relationship) and 7,157 lodgements for personal violence.[60] As compared to 2018, there were 33,248 and 6,272 lodgements, respectively.[61]

45. The Court can make a **direction to pay compensation** (formerly known as a compensation order) by specifying a sum to be paid out of the property of the offender.[62] It appears from the legislation that the purpose of making such a direction is to compensate a victim for any injury[63] or loss[64] sustained from the offence committed by the offender. A direction can lead to the

[46] (Walton J, Beech-Jones CJ at CL, as his Honour then was, agreeing at [5]). However, their Honours did not criticise or opine on the suggestion by Yehia J that, where a community service work condition was considered unsuitable merely because of the unavailability of work, a condition requiring an offender undertake volunteering work for a charity can be imposed.

58 *Bresnahan v The Queen* [2022] NSWCCA 288, [157] (Yehia J).

59 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 15, 18.

60 Local Court of New South Wales, *Annual Review 2022* <https://localcourt.nsw.gov.au/documents/annual-reviews/Local_Court_Annual_Review_2022.pdf>.

61 Ibid.

62 *Victims Rights and Support Act 2013* (NSW) s 97.

63 Ibid s 95.

64 Ibid s 97.

possibility of streamlined enforcement under the *Victims Rights and Support Act 2013* (NSW).[65]

46. The Court of Criminal Appeal in *Upadhyaya v The Queen* [2017] NSWCCA 162 held that the essence of such a direction can also be 'in the nature of a claw-back (disgorgement) of an offender's "ill-gotten gains" which "the offender should be required to disgorge"'.[66] On this view, a court can make a direction to pay compensation so as to strip the offender of the benefit they derived from committing the offence. Accordingly, such orders can have a deterrent effect because it makes clear that a court can deprive an offender of any gains they make from their criminal offending. Put simply, crime does not pay.

47. Where an offender is eligible, the Local Court can make a **referral to the Drug Court**. The Drug Court is a specialist court that provides an alternative to prison for eligible participants with drug dependencies, who have committed certain crimes. The Drug Court can make an order that an offender serve a term of imprisonment by way of **compulsory drug treatment detention**.[67] Under this order, an offender is committed to a specialist Drug Treatment Correctional Centre and the Drug Court approves a personal plan that contains conditions specifically tailored for the offender.[68] Some conditions can include attending counselling, drug treatment and rehabilitation, and being involved in activities, courses, training or employment.[69] The latter kind of condition can serve the important purpose of promoting the re-integration of the offender into the community. An offender begins in closed detention (known as Stage 1) and, with appropriate monitoring and supervision by registered medical professionals, the Drug Court can make orders allowing the offender to move to semi-open detention (Stage 2) and then to community custody (Stage 3).[70] If an offender fails to comply with a condition in a serious respect at Stages 2 and 3, the Drug Court may order that an offender regress to an earlier stage (for example, from semi-open detention in Stage 2 to closed detention in Stage 1).[71]

---

65 *Upadhyaya v The Queen* [2017] NSWCCA 162, [12] (Leeming JA).

66 Ibid [65] (Campbell J, Latham J agreeing at [24]).

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

68 *Crimes (Administration of Sentences) Act 1999* (NSW) s 106F.

69 Ibid s 106F(6).

70 Ibid ss 106L, 106M(1)–(2).

71 Ibid s 106M(3).

48. A 2010 study found that compulsory drug treatment detention has been successful in effectively treating drug dependency.[72] That conclusion should not be understated. The study noted that eliminating illegal drug use among chronic drug users is 'a very ambitious objective' because addiction is a persistent, long-term affliction.[73]

49. I believe that the flexibility and discretion of the Drug Court to tailor the conditions on an offender's personal plan and the ability to regularly review and amend those conditions based on the offender's compliance and progress is a critical aspect of the success and effectiveness of compulsory drug treatment detention in addressing a challenging problem. Such problem, if left unaddressed, may leave offenders without effective means of rehabilitation and, potentially, perpetuate a cycle of addiction and further offending. If the discretion of the Drug Court was significantly curtailed by inflexible rules, there is a risk that the Drug Court may be required to make orders that are not in the best interests of assisting a particular offender to rehabilitate, or orders that are inconsistent with specialist medical advice.

50. The Local Court is currently piloting a **Specialist Domestic and Family Violence List** at a number of metropolitan and regional locations. This specialist list works to ensure that domestic and family violence matters are dealt with in a timely, culturally respectful and trauma-informed manner.

51. The Local Court is working to establish a **Youth Adult Court** for offenders aged between 18 and 25 years.[74] The inspiration for this reform comes from brain science and neurobiological research that shows the frontal lobe can still be developing up until the mid-20s in a person's life. The goal of this project is to focus on rehabilitation and address risk factors related to root causes of offending to prevent young adults from becoming enmeshed in the legal system.

52. The Local Court, Children's Court and Coroner's Court are working together to expand initiatives such as **circle sentencing and the Youth Koori Court** for offenders who are First Nations people. By involving First Nations Elders and respected persons in the process, these initiatives hope to provide an alternative approach to the strictures of the more conventional adversarial sentencing process.

---

[72] Joula Dekker, Kate O'Brien and Nadine Smith, *An Evaluation of the Compulsory Drug Treatment Program* (NSW Bureau of Crime Statistics and Research) <https://www.bocsar.nsw.gov.au/Publications/Legislative/l20.pdf>

[73] Ibid.

[74] Offenders under 18 years of age are usually dealt with in the specialist Children's Court.

Conclusion

53. I draw your attention to all these kinds of orders to emphasise the width of judicial discretion. The range of criminal offending varies considerably. The circumstances of offenders, including their likelihood to reoffend and prospects of rehabilitation, also vary. The types of penalties must be capable of responding to minor offences, where an offender has shown remorse, compensated the victim and apologised for their offending, at one end of the spectrum, as well as to very serious offending, committed with impunity, where the offender has shown no remorse and would likely reoffend, at the opposite end of the spectrum. This is why it is necessary to have such a broad range of orders that vary in severity and afford judicial officers an opportunity to consider what best addresses the manifold purposes of sentencing outlined in s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

54. I conclude by extending an invitation to the Legal Studies teachers of this State to consider taking your students on an excursion to the Local Court. Except for some proceedings, or perhaps more specifically, portions thereof, such as when a complainant in domestic violence allegations or a child or vulnerable witness in sexual impropriety allegations might be giving evidence, all sittings of the Local Court are open to the public and students are welcome to sit at the back of a court to observe what is happening. When advance notice is given, and wherever possible, the Court will try to facilitate a Magistrate who can briefly speak to students and answer any questions they may have. Community confidence in the justice system begins at this level, where students and teachers can witness the application of well-established legal principles in full operation.

55. I know that teachers have found this to be particularly valuable for the Crime unit within the syllabus. In particular, school visits to the Downing Centre Local Court, where I currently preside, and other court complexes and regional courthouses, where I have previously presided, can give students an opportunity to move between a criminal trial in one courtroom and a criminal list in another. Students may find seeing a short criminal trial as valuable for the 'criminal trial process' of the Crime unit. They may also find it helpful to observe a criminal list — where criminal matters are case managed or, if there is a guilty plea, a sentence may be delivered with the Magistrate giving short reasons for decision. I understand that arrangements for school excursions can be made with the Rule of Law Education Centre. Alternatively, teachers or students can write to the Chief Magistrate's Office,[75] marked to my attention, and I will do my best to accommodate.

[75] Email: cmo@justice.nsw.gov.au.

56. I leave you with this parting thought. Continue to educate, to broaden horizons and to push boundaries. Continue to inspire, to motivate and to engender independence. Inspiration leads to curiosity. Curiosity leads to critical thinking. Critical thinking leads to motivation. Motivation leads to success. Do not lose focus of your role as educators, or become complacent with academic accomplishment in some students, while frustrated with failure in others. Persevere just as you would seek perseverance from your students. It is in these classrooms, under your guidance and stewardship, that future leaders are shaped.

57. On behalf of the Chief Magistrate, Judge Peter Johnstone, and myself, I thank all of you for the valuable and important work you do, and commend you on your commitment and enthusiasm in imparting your knowledge of the law and our legal system to high school students in this State.