sentencing
ADVISORY
COUNCIL

REVIEW UNDER SECTION 2 OF THE *SENTENCING AMENDMENT (PHASING OUT OF SUSPENDED SENTENCES) ACT 2017*

FINAL REPORT No. 11

November 2021

About this report

The Tasmanian Government has asked the Sentencing Advisory Council (the 'Council') to conduct a review under s 2 of the *Sentencing Amendment (Phasing Out Of Suspended Sentences) Act 2017* (Tas) examining home detention orders, community correction orders, drug treatment orders and the use of suspended sentences for specified offences. This report addresses these issues and provides information about the use and duration of the orders, as well as information about the breach of these orders.

The Council was also asked to consult with relevant stakeholders about the operation of these sentencing options. This feedback has been incorporated into this report.

Information on the Sentencing Advisory Council

The Council was established in June 2010 by the Attorney-General and Minister for Justice, the Hon Lara Giddings MP. The Council was established, in part, as an advisory body to the Attorney-General. Its other functions are to bridge the gap between the community, the courts and the government by informing, educating and advising on sentencing issues in Tasmania. At the time that this report was concluded, the Council members were Emeritus Professor Arie Freiberg AM (Chair), Mr Peter Dixon, Ms Kim Baumeler, Mr Vincenzo Caltabiano, Ms Jill Maxwell, Ms Kate Cuthbertson, Ms Rosalie Martin, Dr Isabelle Bartkowiak-Théron, Ms Linda Mason SC, Mr Peter Harriss and Dr Caroline Spiranovic.

This report was written by Dr Rebecca Bradfield.

Consultation

In the course of the preparation of this report, the Council released a consultation draft in August 2021 and sought feedback from stakeholders to allow it to respond to the Terms of Reference. The Council held consultation meetings with the following:

- The Office of the Director of Public Prosecutions (Tas), including the Director of Public Prosecutions, Mr Daryl Coates SC ('DPP')
- Tasmania Police
- Community Corrections
- The Law Society of Tasmania (the 'Law Society').

The Council also met with the Chief Justice of the Supreme Court, the Honourable Justice Alan Blow AO, and the Chief Magistrate of the Magistrates Court, her Honour Magistrate Catherine Geason.

Written feedback was received from:

- Mr Andrew Belpin, police officer, Geeveston Police Station
- Tasmanian Aboriginal Legal Service ('TALS')
- Tasmania Legal Aid ('TLA')
- Community Legal Centres Tasmania ('CLC (Tas)')
- Community Corrections.

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EXECUTIVE SUMMARY

Terms of Reference

In a letter dated 17 November 2020, the Attorney-General provided notice to the Council to undertake a review in accordance with the *Sentencing Amendment (Phasing Out Of Suspended Sentences) Act 2017* (Tas) s 2 and provided Terms of Reference for the review to the Council that had been approved by both Houses of Parliament as required by ss 2(3)–(4).

The Terms of Reference for the review are as follows:

Home Detention under Part 5A of the Sentencing Act 1997:

1. How many home detention orders have been made by the court, and for what offences?
2. What is the average duration of a home detention order?
3. With respect to 2, how does this compare to suspended sentencing orders for similar offending?
4. Have any breaches been committed by offenders while serving a home detention order that have resulted in an application to court to have the order varied or cancelled?
5. If the answer to 4 is yes, what was the outcome(s)?
6. With respect to 5, how does this compare to breaches committed by offenders serving a suspended sentence for similar offending?
7. What has been the perceived effectiveness of home detention as a sentencing option among relevant stakeholders?
8. Are any legislative amendments recommended that could be made to improve the operation of home detention, particularly if suspended sentences are phased out?

Community Correction Orders under Part 5B of the Sentencing Act 1997:

9. How many community correction orders have been made by the court, and for what offences?
10. What is the average duration of a community correction order?
11. With respect to 10, how does this compare to a suspended sentence for similar offending?
12. Have any breaches been committed by offenders while serving a community correction order that have resulted in an application to court to have the order varied or cancelled?
13. If the answer to 12 is yes, what was the outcome(s)?
14. With respect to 13, how does this compare to breaches committed by offenders serving a suspended sentence for similar offending?
15. What has been the perceived effectiveness of community correction orders as a sentencing option among agency stakeholders?
16. Are any legislative amendments recommended that could be made to improve the operation of community correction orders, particularly if suspended sentences are phased out?

Court Mandated Drug Diversion (CMD) – Drug Treatment Orders under Part 3A of the Sentencing Act 1997:

17. How many drug treatment orders have been made by the Supreme Court, and for what offences?
18. What is the average duration of a drug treatment order?
19. Should a court be able to extend the term of a drug treatment order, and if so, are there any limitations or conditions that should apply, e.g., a limit on the time for which a drug treatment order can be extended, that a drug treatment order can only be extended to allow for completion of a treatment program?
20. With respect to 18, how does this compare to a suspended sentence for similar offending?
21. Have any breaches been committed by offenders while serving a drug treatment order that have resulted in an application to court to have the order varied or cancelled?
22. If the answer to 21 is yes, what was the outcome(s)?
23. With respect to 22, how does this compare to breaches committed by offenders serving a suspended sentence for similar offending?
24. What has been the perceived effectiveness of the extension to the Supreme Court of drug treatment orders as a sentencing option among agency stakeholders?
25. Are any legislative amendments recommended that could be made to improve the operation of drug treatment orders, particularly if suspended sentences are phased out?

Phasing out of Suspended Sentences:

26. How many and how often are suspended sentence orders made for offences listed in Schedule 3 of the *Sentencing Amendment (Phasing Out Of Suspended Sentences) Act 2017*?
27. With reference to 26, for each offence, has the number of suspended sentence orders made declined since the commencement (in 2014) of the Government's project to phase out suspended sentences?
28. With reference to 26, are any offences listed in Schedule 3 incompatible with either drug treatment, home detention or community correction orders as a substitute sentencing option, in place of a suspended sentence?
29. Any other matters considered relevant.

The Council is to regard any reference to 'agency stakeholders' in terms 15 and 24 to be equivalent to 'relevant stakeholders'.

The Council's approach

In preparing this report, the Council has drawn on a range of resources to address the questions asked in the Terms of Reference. However, the Council observes that there are substantial issues in providing meaningful responses to several of the questions posed in the Terms of Reference, particularly in relation to the comparison of the duration of home detention orders ('HDOs'), community correction orders ('CCOs') and drug treatment orders ('DTOs'), and the outcome of breach applications for those orders with similar offending where suspended sentences were imposed.

This is due to the inherently different nature of the orders and the small number of offenders involved in each offence category (that is similar offending), making it impossible to discern any trend that can be attributed to the use of the order (as distinct from the circumstances of the particular offender) or attach any significance to the orders themselves arising from any observable differences, given the individual nature of sentencing. In many cases, the number of sentences

under consideration was too small to allow for meaningful statistical analysis.

In August 2021, the Council released a consultation draft, which set out information about the use of HDOs, CCOs, DTOs and suspended sentences in the Supreme Court of Tasmania and the Magistrates Court of Tasmania. The Council asked stakeholders for feedback on the operation of the sentencing orders in Tasmania, and any legislative amendments that may be required. In response to the consultation draft, the Council consulted with six stakeholders and received five written submissions. TALS raised concerns about the scope of the Terms of Reference for the project did not allow for the issues associated with sentencing practice and the over-representation of Aboriginal and Torres Strait Islander people in the prison population to be adequately considered. TALS was also concerned about the adequacy of the consultation period.

Sentencing patterns in Tasmania 2014–20

Over the period 2014 to 2020, in the Supreme Court, there has been a discernible change in sentencing patterns:

- The use of immediate imprisonment increased from 31.9% of sentences to 39.7% of sentences.
- There was a marked decrease in the use of fully suspended sentences (FSSs), from 38.1% of sentences imposed in 2014 to 23.4% of sentences imposed in 2020.
- The use of partly suspended sentences (PSSs) decreased from 19.8% of sentences imposed in 2014 to 15.7% of sentences in 2020.
- Overall, the use of suspended sentences (both FSSs and PSSs) decreased from 57.9% of sentences in 2014 to 39.1% of sentences in 2020.
- In 2020, 7.4% of sentencing orders imposed were CCOs.
- HDOs accounted for 7.7% of sentencing orders made in 2020 and DTOs accounted for 3.2% of orders.

It is noted that over the period 2013–14 to 2019–20, the average daily number of the prison population in Tasmania increased from 472 prisoners to 664 prisoners (a 40.7% increase).

In the Magistrates Court, fines continued to account for a majority of the sentences imposed, but their use decreased from 57.6% of sentences imposed in 2014 to 53.6% of sentences in 2020. The use of lower end orders such as undertakings and discharges also decreased from 18.9% of orders made in 2014 to 16.7% of orders in 2020. Over this period, the use of immediate imprisonment increased markedly from 3.5% of sentences in 2014 to 8.2% of sentences in 2020. There was also an increase in the use of PSSs from 2.1% of sentences to 2.7% of sentences.

Unlike the Supreme Court, where there was a marked decline in the use of FSSs, there was only a moderate decrease in the Magistrates Court from 10% of sentences imposed in 2014 to 9.6% of sentences imposed in 2020.

However, data from both the Supreme Court and Magistrates Court show that courts are still reliant on suspended sentences as a sentencing order.

Home detention orders

Terms of Reference 1–8 ask the Council to provide advice on the use and operation of HDOs, to report on stakeholder views on the effectiveness of

the order and to make recommendations for any legislative amendments that could be made to improve the operation of home detention, particularly if suspended sentences are phased out.

Supreme Court

In the Supreme Court, there have been 40 offenders sentenced to an HDO for an offence since the introduction of the order. Fourteen of the 40 offenders who received an HDO were also sentenced to a CCO. This accounted for 35% of HDOs imposed.

The most common offence category for which HDOs were imposed was non-sexual offences against the person (17 cases or 42% of cases), followed by drug offences (seven cases or 17%) and then sexual offences (four cases or 10%). Wounding/cause grievous bodily harm was the most common offence for which HDOs were imposed (nine cases), followed by assault (six cases) and trafficking in a controlled substance (five cases).

The longest operational period for which an HDO can be made is 18 months, and this was imposed in 13 of the 40 cases (32.5%). The minimum duration was three months' home detention, and the median duration was 12 months' home detention.

Magistrates Court

In the Magistrates Court, there were 190 offenders sentenced to an HDO for an offence or at a re-sentencing event (generally following a breach of a previous order of the court). Further, as with the Supreme Court, the utility of the combination order of an HDO and a CCO also appears to have been recognised in the Magistrates Court, with 93 offenders who received an HDO also being sentenced to an order that had a requirement for community service or supervision. This accounted for 44% of HDOs imposed in 2019 and 57% of HDOs in 2020.

The most common offence category for which HDOs were imposed was traffic and vehicle regulatory offences (95 cases or 39% of cases), followed by non-sexual offences against the person (45 cases or 18%), and then drug offences (28 cases or 11%).

The longest duration was 12 months' home detention (imposed in six cases), the median duration was four months' home detention (imposed in 48 cases) and the minimum duration was one month's home detention (imposed in four cases).

Applications to cancel

In the Supreme Court, the Council identified five cases where an application was made to cancel an HDO. In none of these cases was the application made as a result of new offending. In four of these five cases, the order was cancelled, with a CCO imposed in two cases (combined with a prison sentence in one case), a PSS with supervised probation imposed in one case and a FSS with supervised probation imposed in one case.

In the Magistrates Court, there were 32 finalised actions (for 27 offenders) by the end of 2020. The recorded outcomes were:

- Application Granted – 22
- HDO Cancelled – 2
- Application Dismissed – 7
- Application Withdrawn – 6.

Of the 22 applications finalised as 'Application Granted', 16 orders were terminated and two were cancelled, while six orders were not terminated. In the cases where the order was not terminated, the successful application resulted in an extension to the length of the order.

The Council's view and recommendations

Based on its research and stakeholder feedback, the Council's view is that HDOs are a valuable addition to the sentencing options in Tasmania. However, due to issues relating to the availability of the orders for a number of offenders arising from the technical limitations of electronic monitoring, as well as barriers for suitability as a result of substance dependency, mental health issues, housing instability and work and family constraints, the Council's view is that the HDO is likely to be used for a narrower cohort of offenders than currently receive suspended sentences.

The legislative maximum duration of 18 months for an HDO was an issue raised by stakeholders. It was suggested by TLA that an extension of the maximum length may allow an HDO to be imposed in a broader range of cases, and so as an alternative sanction if suspended sentences were phased out. However, concerns were expressed by Community Corrections about the detrimental impact of orders in the vicinity of 18 months on an offender. Given the need for more detailed consideration of the implications of such a reform, the Council's view is that any extension to the maximum length of the HDO would require further stakeholder consultation and makes no recommendation in relation to this reform at this time.

Community Correction Orders

Terms of Reference 9–16 require the Council to provide advice on the use and operation of CCOs, to report on stakeholder views on the effectiveness of the order and to make recommendations for any legislative amendments that could be made to improve the operation of CCOs, particularly if suspended sentences are phased out.

Supreme Court

In the Supreme Court, there were 41 offenders sentenced to a CCO as the most serious sentence imposed for an offence (19 in 2019 and 23 in 2020). This accounted for 5.4% of offenders sentenced in 2019 and 7.4% of offenders sentenced in 2020. There were 27 cases where a community service condition was imposed, 19 cases where a supervision condition was imposed and two cases where both community service and supervision conditions were imposed.

There were also 83 cases where CCOs were imposed in combination with other sentencing orders. A CCO was combined with a FSS in 46 cases, a PSS in 16 cases and imprisonment in six cases. The shortest sentence of imprisonment combined with a CCO was 10 months' imprisonment, the longest sentence was 24 months' imprisonment and the median was 16 months' imprisonment. As noted, there were 14 CCOs combined with an HDO. There was also one CCO combined with a DTO.

The most common offence category for which CCOs were imposed was non-sexual offences against the person (14 cases or 34%), followed by burglary/stealing and offences against good order (both six cases or 15%). Assault was the most common offence for which CCOs were imposed (nine cases), followed by trafficking in a controlled substance and perverting the course of justice (both four cases).

The longest operational period that can be made for a CCO is three years (36 months), and this was imposed in four of the 41 cases (9.7%). Further, the minimum duration of CCO was an order for six months and the median duration was an order for 18 months in relation to

all offenders who received a CCO as the most serious sentence.

Magistrates Court

In the Magistrates Court, there were 1,047 offenders sentenced to a CCO as the most serious sentence imposed for an offence (four in 2018, 596 in 2019 and 447 in 2020). Nearly 70% of offenders received a supervision condition (40% only supervision, and 27% both supervision and community service) and a third of offenders (33%) received community service only.

Overall, there were 2,351 CCOs imposed in the Magistrates Court from 14 December 2018 to 2020. Over half of the defendants who received a CCO had a higher level sentencing order from the same sentencing event (53%), with a CCO being most commonly combined with a suspended sentence.

The most common offence category for which CCOs were imposed was traffic and vehicle regulatory offences (290 cases or 28%), followed by non-sexual offences against the person (278 cases or 27%) and burglary/stealing (159 cases or 15%). As with the Supreme Court, the most common offence for which a CCO was imposed was assault (226 cases).

For offenders where a CCO was imposed as the most serious sentence, the minimum duration of CCO imposed was an order for four months and the longest duration was 24 months. The median duration was an order for 12 months in relation to all offenders who received a CCO as the most serious sentence.

Applications to cancel

In the Supreme Court, the Council has identified four cases where an application was made to vary or cancel a CCO following the breach of the conditions of a CCO. In all cases, the CCO was part of a combined sentence of a suspended sentence and a CCO. In none of these cases was the application made as a result of new offending. In all four cases, the order was cancelled. In three cases, the offender was re-sentenced and in one case, no further order was made but in relation to a separate application for breach of a suspended sentence, the PSS was activated.

The Council's view and recommendations

Based on its research and stakeholder feedback, the Council's view is that the CCO is a valuable addition to the range of sentencing options in Tasmania. However, stakeholder feedback indicated that CCOs may not be a sufficiently punitive sanction for a range of cases where suspended sentences had previously been imposed. The Council did not receive any feedback from stakeholders in relation to legislative changes to CCOs to improve their operation as a replacement for suspended sentences and so does not make any recommendation for legislative change.

Court Mandated Drug Diversion (CMD) – Drug Treatment Orders

Terms of Reference 17–25 ask the Council to provide advice on the use and operation of DTOs in the Supreme Court, to report on stakeholder views on the effectiveness of the order and to make recommendations for any legislative amendments that could be made to improve the operation of DTOs, particularly if suspended sentences are phased out. In particular, the Council was asked to consider whether a court should be able to extend the term of a DTO, and if so, whether any limitations or conditions should apply (for example, a limit on the time for which a DTO can be extended, or that a DTO can only be extended to allow for completion of a treatment program).

In the Supreme Court, there have been 35 offenders sentenced to a DTO as the most serious sentence imposed for an offence. There were four orders made in 2017 (1.4% of sentences) and 10 orders in 2020 (3.2% of sentences). It is noted that these are very small numbers of sentences.

The most common offence categories for which a DTO was imposed were drug offences (12 cases or 34%) and burglary/stealing (12 cases or 34%), then non-fatal offences against the person (six cases or 17%). Trafficking in a controlled substance was the most common offence for which DTOs were imposed (10 cases), followed by burglary (six cases) and aggravated burglary (five cases).

The maximum length of the custodial component of the order imposed in the Supreme Court was two years' (24 months') imprisonment. The minimum custodial component was nine months' imprisonment, and the median duration was an order for 18 months' imprisonment. However, this does not correspond to the time period that an offender will be on an order — the typical period that an offender is subject to the treatment component of the order is between 16 and 24 months, with many graduating in between 16 and 18 months.

Applications to cancel

Since DTOs have been available as a sentencing option in the Supreme Court, the Council identified six cases where an application was made to cancel the order. There were two cases where the application to cancel was as a result of new offending, three cases where the offender did not comply with the other requirements of the order and one case where the offender was unable to access rehabilitation services due to COVID-19. In all six cases, the order was cancelled with the full custodial component being activated in three of the cases.

The Council's view and recommendations

Based on its research and stakeholder feedback, the Council's view is that DTOs are a valuable addition to the sentencing options available in the Supreme Court. However, as noted, the current legislative framework means that without reform, a DTO cannot operate as a replacement sanction for a suspended sentence as this is expressly precluded by statute. Further, its utility as a replacement for a suspended sentence is limited by the restriction that a DTO can only be imposed when the harm caused is minor. Hence, this precludes many offences where suspended sentences are currently imposed.

Phasing out of suspended sentences

Terms of Reference 16–29 ask the Council to provide advice on the use of suspended sentences for specified offences contained in Schedule 3 of the *Sentencing Amendment (Phasing Out Of Suspended Sentences) Act 2017*, including whether the use of suspended sentences has declined. The Council was also asked whether any offences listed in Schedule 3 were incompatible with either DTOs, HDOs or CCOs as a substitute sentencing option, in place of a suspended sentence.

Supreme Court

In the period 8 February 2017 to 31 December 2020, there were 324 offenders sentenced to a FSS and 189 offenders sentenced to a PSS, as the most serious sentence imposed for an offence (or offences). The use of suspended sentences has declined over this period, with PSSs accounting for 18% of sentencing orders imposed in 2017 (from 8 February) and 15.7% of sentencing orders imposed in 2020. In the same

period, FSSs accounted for 32% of sentencing orders imposed in 2017 (from 8 February) and 23.4% of sentencing orders imposed in 2020.

A further observation that can be made about the recent use of suspended sentences in the Supreme Court is the increased use of suspended sentences that are combined with probation and/or community service and/or combined with a CCO. In its previous analysis of suspended sentences imposed in the Supreme Court in 2011, the Council found that a majority of offenders (70%) did not have any additional order imposed. However, there appears to have been a shift in the approach of the Supreme Court, with the Council's recent analysis of FSSs imposed in 2019 and 2020 indicating that 60% of offenders received an additional condition as part of the suspended sentence, or had another sentencing order imposed (in addition to the FSS) as part of the order made by the court.

This appears to suggest that there has been a shift in the way in which suspended sentences are used by the Supreme Court, with additional orders being imposed to increase the immediate punitive effect of a suspended sentence order (so it cannot be said that these offenders 'walked free', which is the negative perception of a suspended sentence), while at the same time relying on the deterrent and rehabilitative effect of a FSS.

Magistrates Court

From 2018 to 2020, there were 3,127 offenders sentenced to a FSS and 798 offenders sentenced to a PSS (of which 174 were balance served sentences. In 2020, FSSs accounted for 9.6% of sentencing orders in the Magistrates Court (by most serious sentence) and PSSs accounted for 2.7% of orders (by most serious sentence).

Further, as with the Supreme Court, in the Magistrates Court, there has been an increased use of suspended sentences combined with supervision and/or community service either as a condition of a suspended sentence or as a combination suspended sentence and CCO. In the Magistrates Court in 2014, 23% of defendants had community service or supervision imposed as part of a PSS and in 2020, this proportion had risen to 49% of defendants. In relation to FSSs, in 2014, 19% of defendants had community service or supervision imposed as part of a PSS and in 2020, this proportion had risen to 37% of defendants.

Applications to cancel

In the period 2019–20, the Council identified 56 applications for breach of a suspended sentence in the Supreme Court where the outcome of the application was known, with 55 applications based on new offending and one application for breach of a suspended sentence based on breach of another condition of the order.

In 42 of the 55 cases where the application was based on new offending, the suspended sentence was activated (76.4% of cases). In three cases, the offender was re-sentenced (in one case a DTO was imposed; in one case a PSS was imposed for the breach of the suspended sentence and a DTO imposed in respect of the new offending; and in the final case, an HDO was imposed for the breach of the suspended sentence and the new offending). In one case, the sentence was not activated but an extension to the order was made, and there were nine cases where no further order was made (16.4%). This activation rate can be contrasted with the findings of the Council in 2015 that only 42% of actioned cases were activated in full. In the case where the offender's breach related to a condition of the order (other

than reoffending), the offender was re-sentenced to a CCO.

In the period 2019–20, the Council identified 414 finalised breach applications in the Magistrates Court, with 390 having an 'application granted' finalisation. Of the 390 orders with an application granted, 224 (57%) had an activation of the suspended sentence for that order. It was not possible to determine the outcome in cases where the application was granted and the offender was re-sentenced or the suspended sentence order varied.

Schedule 3 offences

Terms of Reference 26–27 ask the Council to provide information about the use of suspended sentences for Schedule 3 offences (how many and how often are suspended sentence orders made for these offences), and the extent to which usage has changed (in particular whether the number of suspended sentence orders made has declined since 2014). Term of Reference 28 asks whether there are any offences listed in Schedule 3 that are incompatible with either drug treatment, home detention or community correction orders as a substitute sentencing option, in place of a suspended sentence. Schedule 3 contains a list of offences where legislative changes (yet to be commenced) would limit the ability of a court to make an order a suspended sentence order, except in exceptional circumstances.

In addressing this issue, the Council notes that the use of suspended sentences for the specified offences contained in Schedule 3 needs to be viewed in the context of broader trends in relation to the use of suspended sentences and sentencing more generally. As noted, there has been an increase in the use of imprisonment from 31.9% of sentences in 2014 to 39.5% of sentences in 2020. In the same period, there has been an overall decline in use of FSSs and PSSs. Further, for a number of the sexual offences set out in Schedule 3, the discussion of the use of suspended sentences should be viewed in the context of the finding of previous research that shows there has been a decided upward trend in sentences imposed under the *Sentencing Act 1997* (Tas) for serious sexual offences against children.

Based on the Council's analysis of the use of suspended sentences for Schedule 3 offences, an observation that can be made is that many of these offences are not frequently used offences and/or that suspended sentences have not generally been imposed for the offences. Even in relation to offences where suspended sentences have been imposed, there are generally only a relatively small number of offenders and a small number of suspended sentences imposed in each year and so it is difficult to make observations in relation to trends from 2014 to 2020. Random variation is more noticeable when numbers are small, which might affect the appearance and interpretation of trends, which should therefore be interpreted with caution.

Accordingly, given the small number of cases sentenced in each year for many of the offence categories, it was not possible to make firm observations about any trends relating to the decline in the use of suspended sentences for most offences. This is because it was not possible to determine whether any changes in sentencing were attributable to a change in approach of the court or to the particular circumstances of the cases that were sentenced by the court in any given year.

Tentative observations are made in relation to a possible decline in the use of suspended sentences for penetrative sexual abuse of a child or young person contrary to the *Criminal Code* (Tas) s 125A, wounding or causing grievous bodily harm contrary to the *Criminal Code* (Tas) s 172, aggravated armed robbery contrary to the *Criminal Code* (Tas)

s 240(4), and arson contrary to the *Criminal Code* (Tas) s 268. However, it is repeated that these observations are only speculative, given the case numbers involved in each year. substance contrary to the *Misuse of Drugs Act 2001* (Tas) s 12(1), given the larger number of cases involved, it is possible to more confidently state that there has been an overall decline in the use of suspended sentences, particularly FSSs).

Further, based on the analysis of Schedule 3 offences (noting that the data for drug offences relates to all offences and not only those that would fall within the Schedule 3 restriction to drug offences involving trafficable quantities), there are a number of offences where suspended sentences were used as a sentencing option in nearly half or more of the cases sentenced between 2014 and 2020. These offences are:

- penetrative sexual abuse of a young person (52.9%)
- producing and/or distributing child exploitation material (76.9%)
- wounding or causing grievous bodily harm (46.2%)
- arson (61.6%)
- cultivating a controlled plant for sale (not limited to cases involving trafficable quantities) (86.9%)
- trafficking in a controlled substance (not limited to cases involving trafficable quantities) (68.7%).

Based on the Council's analysis, it is not possible to draw an unqualified conclusion about the overall number of cases where an offender received a suspended sentence in the period 2014 to 2020, but would be unlikely to receive a suspended sentence if the legislation (with Schedule 3 offences) were to come into force. However, a tentative observation is that, if the legislation were to come into force, based on the number of suspended sentences imposed between 2014 to 2020 for Schedule 3 offences, potentially up to 461 cases (or 47.7% of sentences imposed for these offences) would be unlikely to receive a suspended sentence and would either end up with a sentence of imprisonment, a DTO or receive a non-custodial order.

Comparisons of duration and breach outcomes of suspended sentences with other sentencing orders

The Terms of Reference ask the Council to compare suspended sentences with HDOs, CCOs and DTOs in terms of the duration of the orders imposed for similar offending and also to compare the outcomes of any breach application made for similar offending. The Council has done this by comparing duration for offences of the same offence type, and breach outcomes for applications where the breaches were committed by offenders serving a suspended sentence for the same category of offence.

However, the comparison is problematic due to the very small number of sentences imposed for the offences under consideration in the Supreme Court and the wide discretion that the court has in sentencing an offender. This means that it is likely that any differences can be attributed to the particular circumstances of each case (which are not necessarily comparable), rather than providing useful information about the use of the respective sentencing orders by the court. Due to the different nature of the orders, there are also inherent difficulties in making any meaningful comparisons or observations in relation to the operation of the different sentencing orders by focussing on the duration of the orders.

The Council's view and observations

Based on its research and the feedback received in consultations, the Council's view is that it is inappropriate to remove or restrict suspended sentences as a sentencing option at this time. The Council's view is that it is too early to fully assess the uptake of the new orders or their suitability as a replacement for suspended sentences for the following reasons:

- the small number of cases involved in the period 2019–20
- uncertainty created by recent legislative reforms in the *Justice Miscellaneous (Court Backlog and Related Matters) Act 2020* (Tas) that creates a number of 'mirror' summary offences and will likely have an impact on sentencing practice in both the Supreme Court and the Magistrates Court
- the implications of the COVID-19 pandemic on sentencing practice (for example, that community service was not available for the COVID-19 period or the concerns expressed by judges about the use of imprisonment during the pandemic).

In addition, it is necessary to understand the operation of current sentencing practice and the implications of any potential changes for Aboriginal and Torres Strait Islander people in relation to their over-representation in the criminal justice system.

Based on stakeholder feedback, it is also observed that while the new sentencing orders may be appropriate for some cases where suspended sentences have previously been imposed, there are other situations where a suspended sentence is the just and appropriate sentence in all the circumstances. Although HDOs and DTOs in the Supreme Court were viewed as useful additions to the existing sentencing options, the restricted scope of these orders meant that they were regarded by some stakeholders as not being a replacement for all circumstances where a suspended sentence may have been imposed.

Accordingly, the Council's view is that doubts are raised at this time about the phasing out of suspended sentences on the basis that it is too early to make a determination, and that any decision should be delayed until there is further time to assess the operation of the new orders (generally as well as in relation to any implications for Aboriginal and Torres Strait Islander people), the impact of recent legislative changes and to address the operational issues identified by stakeholders.

1 Introduction

1.1 Background to this review

In 2013, the Tasmanian Liberal Party made a pre-election commitment to abolish suspended sentences. Following its election to office in 2014, the Attorney-General requested that the Council undertake a reference in relation to the phasing out of suspended sentences. The Terms of Reference required that the Council provide advice on:

- the use of the current sentencing options, including suspended sentences
- the introduction of alternative sentencing options
- an approach to the phasing out of suspended sentences.

The Council was not asked for advice on the merits or otherwise of phasing out suspended sentences.

In August 2015, the Council released a consultation paper, *Phasing out of Suspended Sentences: Consultation Paper*. This set out the Council's preliminary views and draft recommendations, following its deliberations on the approach to be taken to the phasing out of suspended sentences in Tasmania and the possible replacement sanctions. At the same time, the Council released a companion document, *Phasing out of Suspended Sentences: Background Paper*, to provide contextual information to inform the phasing out of suspended sentences and the development of alternative sentencing options.

The Council also commissioned a report to advise on the costs of phasing out suspended sentences in Tasmania. This report was prepared in 2015 by John Walker, CEO, John Walker Crime Trends Analysis, and Lorana Bartels, University of Canberra. The report, *Exploring the Costs of Alternatives to Suspended Sentences in Tasmania*, examined alternative sentencing options through the use of a number of scenarios that might be hypothesised from the Council's proposed reforms. In terms of costs, the modelling conducted on behalf of the Council found that:

- Scenario 1, replacing fully suspended sentences ('FSSs') with equivalent terms of imprisonment, would cost around $50.9 million per annum.
- Scenario 2, replacing FSSs with community correction orders ('CCOs') of 12 or 24 months, would cost around $34.0 million per annum.
- Scenario 3, replacing FSSs with alternatives including fines, imprisonment, CCOs, home detention and treatment orders, according to the offence type, would cost around $30.6 million per annum.

In March 2016, after taking into account feedback provided in response to the consultation paper and associated documents, the Council released a final report, *Phasing Out of Suspended Sentences*. This report made recommendations for the introduction of home detention and CCOs in Tasmania as intermediate sanctions. As part of the proposed reforms, it was recommended that community service orders ('CSOs') and probation orders be abolished. Further, an additional sentencing option for the Supreme Court of Tasmania

was recommended through the expansion of the drug treatment order ('DTO') from an order that could only be made in the Magistrates Court of Tasmania to one that could be made in the Supreme Court.

The Council also made recommendations about the transitional arrangements that should be adopted in the phasing out of suspended sentences. These included:

1. There should be a transition period of at least five years during which time suspended sentences and any new sanctions should operate concurrently.
2. There needs to be ongoing monitoring and analysis of the use of suspended sentences, the use and effectiveness of new sanctions and the resource implications of the sentencing reforms.
3. Substantial and meaningful engagement with all sectors of the community is necessary to build confidence and support for the sentencing reforms.

It was also observed that additional resources would be required in the courts, prosecution and defence services, as well as non-government organisations, as a result of the increased workload created by the introduction of the new sentencing orders.

Following the release of the Council's report, the *Sentencing Act 1997* (Tas) ('*Sentencing Act*') pt 3A was amended to allow DTOs to be made by the Supreme Court, as well as by the Magistrates Court, effective from 8 February 2017.[1]

In 2017, the *Sentencing Amendment (Phasing Out Of Suspended Sentences) Act 2017* (Tas) was enacted. This Act amended the *Sentencing Act* by:

- removing probation orders and CSOs as sentencing orders available under the *Sentencing Act*[2]
- creating a home detention order ('HDO') and a CCO as sentencing orders available under the *Sentencing Act*.[3]

These provisions came into force on 14 December 2018.

In addition, other amendments to the *Sentencing Act* contained in the *Sentencing Amendment (Phasing Out Of Suspended Sentences) Act 2017* (Tas) were passed by Parliament. These amendments would:

- limit the ability of a court to make an order suspending the whole or a part of a sentence of imprisonment for specified offences except in exceptional circumstances[4]
- require a court to activate the sentence following a breach of a suspended sentence order unless there were exceptional circumstances.[5]

These amendments have not yet commenced. Instead, the *Sentencing Amendment (Phasing Out Of Suspended Sentences) Act 2017* (Tas) stipulated that these amendments did not come into force until a review was conducted by the Council and laid before both Houses of Parliament.

Accordingly, in a letter dated 17 November 2020, the Attorney-General provided notice to the Council to undertake a review in accordance with the *Sentencing Amendment (Phasing*

1 *Sentencing Act 1997* (Tas) s 27A as amended by the *Sentencing Amendment Act 2016* (Tas) s 7.

2 *Sentencing Amendment (Phasing Out Of Suspended Sentences) Act 2017* (Tas) s 5.

3 Ibid ss 5, 14, 15.

4 Ibid s 8 inserting s 23A in the *Sentencing Act 1997* (Tas). The offences are set out in Schedule 3 inserted by *Sentencing Amendment (Phasing Out Of Suspended Sentences) Act 2017* (Tas) s 19 (see [6.4]).

5 *Sentencing Amendment (Phasing Out Of Suspended Sentences) Act 2017* (Tas) s 10.

Out Of Suspended Sentences) Act 2017 (Tas) s 2 and provided Terms of Reference for the review to the Council that had been approved by both Houses of Parliament as required by ss 2(3)–(4).

1.2 Terms of Reference

The Terms of Reference for the review are as follows:

Home Detention under Part 5A of the Sentencing Act 1997:

1. How many home detention orders have been made by the court, and for what offences?
2. What is the average duration of a home detention order?
3. With respect to 2, how does this compare to suspended sentencing orders for similar offending?
4. Have any breaches been committed by offenders while serving a home detention order that have resulted in an application to court to have the order varied or cancelled?
5. If the answer to 4 is yes, what was the outcome(s)?
6. With respect to 5, how does this compare to breaches committed by offenders serving a suspended sentence for similar offending?
7. What has been the perceived effectiveness of home detention as a sentencing option among relevant stakeholders?
8. Are any legislative amendments recommended that could be made to improve the operation of home detention, particularly if suspended sentences are phased out?

Community Correction Orders under Part 5B of the Sentencing Act 1997:

9. How many community correction orders have been made by the court, and for what offences?
10. What is the average duration of a community correction order?
11. With respect to 10, how does this compare to a suspended sentence for similar offending?
12. Have any breaches been committed by offenders while serving a community correction order that have resulted in an application to court to have the order varied or cancelled?
13. If the answer to 12 is yes, what was the outcome(s)?
14. With respect to 13, how does this compare to breaches committed by offenders serving a suspended sentence for similar offending?
15. What has been the perceived effectiveness of community correction orders as a sentencing option among agency stakeholders?
16. Are any legislative amendments recommended that could be made to improve the operation of community correction orders, particularly if suspended sentences are phased out?

Court Mandated Drug Diversion (CMD) – Drug Treatment Orders under pt 3A of the Sentencing Act 1997:

17. How many drug treatment orders have been made by the Supreme Court, and for what offences?
18. What is the average duration of a drug treatment order?
19. Should a court be able to extend the term of a drug treatment order, and if so, are there any limitations or conditions that should apply, e.g., a limit on the time for which a drug treatment order can be extended, that a drug treatment order can only be extended to allow for completion of a treatment program?
20. With respect to 18, how does this compare to a suspended sentence for similar offending?
21. Have any breaches been committed by offenders while serving a drug treatment order that have resulted in an application to court to have the order varied or cancelled?
22. If the answer to 21 is yes, what was the outcome(s)?
23. With respect to 22, how does this compare to breaches committed by offenders serving a suspended sentence for similar offending?
24. What has been the perceived effectiveness of the extension to the Supreme Court of drug treatment orders as a sentencing option among agency stakeholders?
25. Are any legislative amendments recommended that could be made to improve the operation of drug treatment orders, particularly if suspended sentences are phased out?

Phasing out of Suspended Sentences:

26. How many and how often are suspended sentence orders made for offences listed in Schedule 3 of the *Sentencing Amendment (Phasing Out Of Suspended Sentences) Act 2017*?
27. With reference to 26, for each offence, has the number of suspended sentence orders made declined since the commencement (in 2014) of the Government's project to phase out suspended sentences?
28. With reference to 26, are any offences listed in Schedule 3 incompatible with either drug treatment, home detention or community correction orders as a substitute sentencing option, in place of a suspended sentence?
29. Any other matters considered relevant.

The Council is to regard any reference to 'agency stakeholders' in terms 15 and 24 to be equivalent to 'relevant stakeholders'.

1.3 The Council's approach and views

In preparing this report, the Council has drawn on a range of resources to address the questions asked in the Terms of Reference. Information has been obtained from the Supreme Court, the Department of Justice and Department of Communities Tasmania. In addition, sentencing decisions of the Supreme Court as well as decisions of the Court of Criminal Appeal have been used to explain the use and nature of the orders. Information from the Supreme Court was obtained from three sources: (1) the Criminal Case Management System; (2) a database for internal use; (3) sentencing comments. In relation

to the Supreme Court, the quantitative data is supplemented by qualitative data obtained from the published decisions of the Court.

In the Magistrates Court, only quantitative data that was obtained from the CRIMES database is provided, as comments on passing sentence are not routinely published by the Court. Consequently, the same analysis that was conducted in relation to the use of orders in the Supreme Court was not possible. An analysis of records held by Community Corrections was conducted to determine the outcome of breach applications for HDOs. This exercise was resource intensive and was not able to be replicated for other orders.

In this report, the Council has sought to explore the use of suspended sentences by Tasmanian courts and the use of the new sentencing orders, as well as to identify any changes that can be seen in sentencing practices. Key observations arising from this research are:

- although the use of FSSs has decreased in the Supreme Court, there is a continued reliance by the Supreme Court and the Magistrates Court on suspended sentences as a sentencing option
- greater use of additional conditions of community service or supervision or the imposition of a combination orders (typically a CCO) with FSSs
- an increase in the use of imprisonment
- a majority of offenders who breach the conditions of their suspended sentence have the sentence activated.

A key message apparent from the decisions of the Supreme Court is the need to have as broad a range of sentencing options as possible to provide the court with the flexibility to impose the appropriate penalty in the individual case. This was supported by stakeholder feedback from the Director of Public Prosecutions ('DPP'), Community Corrections, Tasmania Legal Aid ('TLA') and the Law Society.

The Council also observes that there are substantial issues in providing meaningful responses to several of the questions posed in the Terms of Reference, particularly in relation to the comparison of the duration of HDOs, CCOs and DTOs, and the outcome of breach applications for those orders with similar offending where suspended sentences were imposed. This is due to the inherently different nature of the orders and the small number of offenders involved in each offence category (that is similar offending) making it impossible to discern any trend that can be attributed to the use of the order (as distinct from the circumstances of the particular offender) or attach any significance to the orders themselves arising from any observable differences, given the individual nature of sentencing.[6] In many cases, the number of sentences under consideration was too small to allow for meaningful statistical analysis.

Based on its research and the feedback received in consultations, the Council's view is that it is inappropriate to remove or restrict suspended sentences as a sentencing option at this time. The Council believes that it is too early to fully assess the uptake of the new orders or their suitability as a replacement for suspended sentences given the small number of cases involved in the period 2019–20.

In addition, there is uncertainty created by recent legislative reforms in the *Justice Miscellaneous (Court Backlog and Related Matters) Act 2020* (Tas) that will likely have an

[6] See discussion further at [2.2].

impact on sentencing practice in both the Supreme Court and the Magistrates Court. These include the creation of 'mirror' summary offences for the following indictable offences contained in Schedule 3: cultivating a controlled plant for sale (*Misuse of Drugs Act 2001* (Tas) s 22A ('*Misuse of Drugs Act*')); trafficking in a controlled substance (*Misuse of Drugs Act* s 27AA). Mirror summary offences are also created for the crimes contained in the *Criminal Code Act 1924* (Tas) ('*Criminal Code*') of robbery (see *Police Offences Act 1935* (Tas) s 38B — stealing with force) and unlawfully setting fire to property (see *Police Offences Act 1935* (Tas) s 37AA). This means that a determination needs to be made if a matter is to be charged on indictment (more serious and heard in the Supreme Court) or as a summary offence (less serious and heard in the Magistrates Court).

Further, the implications of the COVID-19 pandemic on sentencing practice (for example, that community service was not available for the COVID-19 period or the concerns expressed by judges about the use of imprisonment during the pandemic) mean that caution should be exercised. Tasmanian Aboriginal Legal Service ('TALS') and Community Legal Centres Tasmania ('CLC (Tas)') also considered that there should be an extension to the review period considering the limitations in the available data and the uncertain effect of the COVID period.

An additional issue raised in TALS' submission was the need for there to be 'an examination of how current sentencing laws, practice and administration impact on the over-representation of Aboriginal and Torres Strait Islander adults and young people in the criminal justice system' as well as on the 'potential impacts of sentencing changes to achieving the justice targets in the National Closing the Gap Agreement'. This concern was also raised by CLC (Tas) with its submission recommending that 'any further review … consider the impact on Aboriginal and Torres Strait Islander people'.

Based on stakeholder feedback, it is also observed that while the new sentencing orders may be appropriate for some cases where suspended sentences have previously been imposed, there are other situations where a suspended sentence is the just and appropriate sentence in all the circumstances. Although HDOs and DTOs in the Supreme Court were viewed as useful additions to the existing sentencing options, the restricted scope of these orders meant that they were regarded by some stakeholders as not being an appropriate replacement for all circumstances where a suspended sentence may have been imposed.

Accordingly, the Council's view is that doubts are raised at this time about the phasing out of suspended sentences on the basis that it is too early to make a determination. Any decision should be delayed until there is further time to assess the operation of the new orders, the changes introduced by the *Justice Miscellaneous (Court Backlog and Related Matters) Act 2020* (Tas) and to address the operational issues identified by stakeholders. The Council also considers that an understanding of the operation of current sentencing practice and the implications of any potential changes for Aboriginal and Torres Strait Islander people in the criminal justice system is necessary to inform any sentencing reform in this area.

It is also noted that the change in the use of suspended sentences in Tasmania goes some way to address concerns that previously existed about the sentence lacking an appropriate element of punishment or consequence. There is now greater use of additional conditions of community service or supervision, or the imposition of combination orders (typically a CCO) with FSSs. In addition, a majority of offenders who breach the conditions of their suspended sentence have the sentence activated.

1.4 Chapter overview

Chapter 2 sets out the sentencing orders that are available in Tasmania under the *Sentencing Act*, including combination orders, and also considers the sentencing hierarchy in Tasmania. It details the use of different sentencing options in the Supreme Court and Magistrates Court between 2014 and 2020.

Chapter 3 addresses the Terms of Reference in relation to HDOs. It examines the operation of HDOs in Tasmania, including the number of orders made, the offences for which the orders are made, the duration of the orders and the number of offenders that have breached the order. It also makes comparisons with suspended sentences for similar offending. It reports on stakeholder feedback and sets out the Council's views and recommendations.

Chapter 4 addresses the Terms of Reference in relation to CCOs. It examines the operation of CCOs in Tasmania, including the number of orders made, the offences for which the orders are made, the duration of the orders and the number of offenders that have breached the order. It also makes comparisons with suspended sentences for similar offending. It reports on stakeholder feedback and sets out the Council's views and recommendations.

Chapter 5 addresses the Terms of Reference in relation to DTOs. It examines the operation of DTOs in the Supreme Court, including the number of orders made, the offences for which the orders are made, the duration of the orders and the number of offenders that have breached the order. It also makes comparisons with suspended sentences for similar offending. It reports on stakeholder feedback and sets out the Council's views and recommendations.

Chapter 6 addresses the Terms of Reference in relation to the phasing out of suspended sentences. It sets out information about the use of suspended sentences for the period 2014–20, and examines the use of suspended sentences for the offences contained in Schedule 3 of the *Sentencing Amendment (Phasing Out Of Suspended Sentences) Act 2017* (Tas). It reports on stakeholder feedback and sets out the Council's views and conclusions.

2 Overview of sentencing in Tasmania

This chapter sets out the sentencing orders that are available in Tasmania (including combination orders) and also considers the current sentencing hierarchy in Tasmania. It sets out the use of the different sentences in the Supreme Court and the Magistrates Court for the period 2014 to 2020.

2.1 Sentencing orders in Tasmania

2.1.1 Current orders under the Sentencing Act

The *Sentencing Act* applies to matters heard in the Supreme Court and the Magistrates Court in relation to all adult offenders. It does not generally apply to youth offenders,[7] unless the youth is dealt with in the Supreme Court and the court exercises its discretion to sentence the youth under the *Sentencing Act*.[8] The sentencing reforms introduced by the *Sentencing Amendment Act 2016* (Tas) and the *Sentencing Amendment (Phasing Out Of Suspended Sentences) Act 2017* (Tas) do not apply to sentencing orders available for youth offenders under the *Youth Justice Act 1997* (Tas).[9]

There are a number of sentencing options available to courts in Tasmania under the *Sentencing Act*. The commonly used orders are set out in Table 2.1.[10]

Table 2.1: Sentencing orders in Tasmania under the *Sentencing Act*

Disposition	Description
Imprisonment (Section 7(a), pt 3 div 1–3 ss 12–23)	The Supreme Court can impose sentences of imprisonment for all crimes. The general maximum is 21 years' imprisonment, except for murder and treason, where the

7 *Sentencing Act 1997* (Tas) s 5. The authority of a court to make an area restriction order, under the *Sentencing Act 1997* (Tas) div 3 pt 9, applies to offenders regardless of their age or the court hearing the matter.

8 Ibid s 107. A youth is a person who is aged 10 or more and under the age of 18 at the time that the offence was committed: *Youth Justice Act 1997* (Tas) s 3. Most offences committed by youths are heard in the Magistrates Court (Youth Justice Division) and the sentencing options and principles that apply are set out in the provisions of the *Youth Justice Act 1997* (Tas). Youth offenders are dealt with in the Supreme Court for 'prescribed offences', which are listed offences that vary depending on the age of the offender: at ss 3, 161. A youth aged 15 years or older who is charged with an indictable offence that is not a prescribed offence has the option of having the matter heard by a jury in the Supreme Court: at s 161(2). For further information, see Sentencing Advisory Council, Tasmania ('TSAC'), *Sentencing Youth Offenders: Research Paper* (forthcoming).

9 Sentencing under the *Youth Justice Act 1997* (Tas) is the subject of a separate project of the Council: see TSAC, *Sentencing Youth Offenders: Research Paper* (forthcoming).

10 The *Sentencing Act 1997* (Tas) also provides the court with power to order a driving disqualification order, orders for restitution, compensation and area restriction. There are also orders that can be made in relation to a person suffering from a mental illness (assessment, continuing care, supervision and restriction orders).

Disposition	Description
	penalty is imprisonment for natural life or such other term as the court decides.[11] The Supreme Court can also declare that an offender is a dangerous offender, which results in imprisonment until the offender satisfies the court that he or she is no longer a danger to the public.[12] The ability of a magistrate to impose a sentence of imprisonment depends on the specific penalty provisions for the offence. There are also limits on the term of imprisonment that a magistrate can impose for an indictable offence — a sentence of up to three years' imprisonment for a first offence and five years for a subsequent offence.[13] The court must record a conviction.
DTO (Section 7(ab), pt 3A ss 27A–27X)	There are two parts to a DTO: (1) a term of imprisonment that is not immediately activated; and (2) a treatment and supervision component. An offender must agree to the making of the order and to comply with the treatment and supervision part of the order. The court must record a conviction.
Suspended sentence of imprisonment (Section 7(b), pt 3 div 4 ss 24–27)	A term of imprisonment is imposed and then suspended (in whole or in part), on condition that the offender does not commit another offence punishable by imprisonment during the period the order is in force. The court can also impose other conditions, including community service, supervision and attendance at a rehabilitation program. The court must record a conviction.
HDO (Section 7(c), pt 5A ss 42AB–42AL)	Home detention is an order that involves the detention of an offender in specified premises during specified times for the duration of the sentence. A court can only make an HDO if it would have sentenced the offender to a term of imprisonment, including to a FSS or PSS. The operational period of an HDO may not be more than 18 months. The court must record a conviction.
CCO (Section 7(d), pt 5B ss 28–36A)	A community based order that has core conditions including that an offender not commit another offence punishable by imprisonment. There are several special conditions that may be imposed. These include community service and supervision. The court must impose either of these special conditions. This order may be appropriate in circumstances where a court would have imposed a suspended sentence.

11 *Criminal Code Act 1924* (Tas) sch 1 s 389 (general sentence), s 158 (murder), s 56 (treason) ('*Criminal Code*').

12 *Sentencing Act 1997* (Tas) pt 3 div 3.

13 Ibid s 13.

Disposition	Description
	The operational period of a CCO may not be more than 36 months. The court may record a conviction.
Fine (Section 7(e), Part 6 ss 43–53)	A fine is a sum of money payable by an offender under an order of a court made on the offender being convicted of an offence. The court may record a conviction.[14]
Rehabilitation Program Order (Sections 7(ea), 54A) [family violence offences]	An order to attend and participate in a rehabilitation program. This is a structured treatment program designed to reduce the likelihood of a person who has committed a family violence offence reoffending. This order can be imposed with or without a recorded conviction.
An adjournment with an undertaking (s 7(f) order) (Sections 7(f), 58–64)	Release (unsupervised) with conditions relating to good behaviour. The term cannot exceed 60 months.
Conviction only (Sections 7(g), 58, 64)	The court can record a conviction and order the discharge of the offender.
Dismissal without conviction (Sections 7(h), 58, 63–64)	The court cannot record a conviction and dismisses the charge for the offence.

Further, as part of the sentencing reforms made in 2017, the *Sentencing Act* s 7(eb) now allows a court to adjourn proceedings and defer imposing sentencing on an offender. This may be for a period of no more than two years.[15]

2.1.2 Hierarchy of sentencing orders

Unlike the position in some other jurisdictions,[16] the *Sentencing Act* does not expressly create a hierarchy of sentencing orders that sets out the relative severity of sentences.[17] It has generally been accepted that *Sentencing Act* s 7 sets out the sentencing orders in decreasing order of severity from imprisonment to discharge.[18] Following the introduction of the HDO, the position of this new order in the hierarchy and its relative severity compared to a suspended sentence was considered by the Court of Criminal Appeal in *Director of Public Prosecutions (Tas) v King* ('*King*').[19] In this case, Blow CJ accepted that the 'provision for home detention orders clearly belongs where Parliament has put it, in [the *Sentencing Act*] s 7(c), below sentences of imprisonment simpliciter, below drug treatment orders, which are essentially suspended sentences with onerous requirements, and below wholly or partly suspended sentences'.[20] However, his Honour expressed the view that '[i]t simply cannot be

[14] This was a recommendation of TSAC, *Non-conviction Sentences: Not Recording a Conviction as a Sentencing Option* (Final Report, 2014) Recommendation 30.

[15] *Sentencing Act 1997* (Tas) s 7A.

[16] See eg, *Sentencing Act 1991* (Vic) ss 5(3)–(4), (4B)–(4C), (5)–(7).

[17] Lorana Bartels, '"Sword or Feather": The Use and Utility of Suspended Sentences in Tasmania' (PhD Thesis, University of Tasmania, 2008) 109, 7.

[18] The hierarchy is recognised by the Tasmania Law Reform Institute ('TLRI') in TLRI, *Sentencing* (Final Report No 11, 2008) [3.7.1], [3.8.1], [3.9.1], [3.10.1].

[19] [2020] TASCCA 8 ('*King*').

[20] Ibid [28].

said that suspended sentences are or are not more severe than home detention orders'.[21] This is because:

> [w]hether a particular suspended sentence is more onerous than a particular home detention order will depend on whether the suspended sentence is suspended wholly or in part, the length of any suspended component of the sentence, whether it is ever activated wholly or in part, the length of any unsuspended component of the sentence, whether it is ever activated wholly or in partly, the length of the head sentence, and the length of the operational period of home detention order.[22]

In this case, Wood J also considered the approach to be taken to determining the severity of a penalty. Her Honour observed:

> The relative severity of a penal sanction can be assessed by reference to the extent to which it impacts on an offender's rights and interests, particularly fundamental rights such as freedom of movement and privacy: *Boulton v The Queen* [2014] VSCA 341, 46 VR 308, 248 A Crim R 153 at [90].[23]

Relying on the approach of the Victorian Court of Appeal in the guideline judgment for sentencing courts on CCOs in *Boulton v The Queen*,[24] her Honour highlighted the severity of imprisonment as a sanction:

> [104] Imprisonment is uniquely punitive because of that feature which distinguishes it from all other forms of sanction, namely, the complete loss of liberty. But imprisonment has a number of other punitive features, apart from the loss of physical freedom.
>
> [105] There is the loss of personal autonomy and of privacy, and the associated loss of control over choice of activities and choice of associates. The prisoner is subject to strict discipline, restriction of movement, forced association with other prisoners and — for a substantial part of each day — confinement in a small cell (in many instances, a cell shared with a cellmate not of the prisoner's choosing). There is, moreover, exposure to the risks associated with the confinement of large numbers of people in a small space — violence, bullying, intimidation.[25]

Due to the distinctively severe nature of imprisonment, it has been accepted by Tasmanian courts that imprisonment should be used as a sanction of last resort.[26] This was affirmed by Wood J in *King*, who stated:

> Imprisonment is severe punishment (*Power v The Queen* (1974) 131 CLR 623 at 627) and should be the last available punitive resort in any civilised system of criminal justice (*Mainwaring v The Queen* [2009] NSWCCA 207 at [71]). It is a fundamental principle of sentencing that a custodial sentence is a punishment of last resort and should not be imposed unless it is 'necessary', and when no other punishment is appropriate: *Underwood v Schiwy* [1989] Tas R 269 per Nettlefold J; *James v Turner* [2006] TASSC 54, 15 Tas R 375 at [6] per Evans J; *Parker v Director v of Public Prosecutions Public Prosecutions* (1992) 28 NSWLR 282 at 296.[27]

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21 Ibid.

22 Ibid.

23 Ibid [51].

24 (2014) 46 VR 308.

25 *King* (n 19) [59].

26 Kate Warner, *Sentencing in Tasmania* (Federation Press, 2nd ed, 2002) [3.301]–[3.302], [9.118]–[9.119]; TLRI (n 18) [3.2.15]–[3.2.18].

27 *King* (n 19) [60].

Her Honour stressed that the harm associated with imprisonment does not only apply to an offender but also extends to the community more generally, and this harm is the explanation as to why imprisonment should be considered a penalty of last resort:[28]

> The disadvantages and cost to the individual and the community associated with imprisonment were referred to in *Boulton*:
>
> '[107] Importantly for present purposes, these features of the restrictive prison environment also have the consequence that the opportunities, and incentives, for rehabilitation are very limited. For example, there is no access to sustained treatment for psychological problems or addiction. Access to anger management and sex offender treatment programs is rationed, and such programs are often unavailable to those sentenced to short prison terms.
>
> [108] In addition, imprisonment is often seriously detrimental for the prisoner, and hence for the community. The regimented institutional setting induces habits of dependency, which lead over time to institutionalisation and to behaviours which render the prisoner unfit for life in the outside world. Worse still, the forced cohabitation of convicted criminals operates as a catalyst for renewed criminal activity upon release. Self-evidently, such consequences are greatly to the community's disadvantage.'[29]

In *King*, Wood J also acknowledged the new sentencing options available to the court meant that there was need to reconsider the pre-existing approach to sentencing. Her Honour observed a '"degree of recalibration of sentencing approach"' was required to determine the appropriate penalty to achieve the purposes of punishment.[30]

2.1.3 Global and single sentences

In Tasmania, when offenders are sentenced for multiple counts, a judge or magistrate has the power to impose one sentence for all offences (a global or general sentence) or to impose separate sentences for each offence (a single count sentence) or a combination of global and single count sentences.[31] In practice, in the Supreme Court and the Magistrates Court, when an offender is convicted of multiple counts, a global sentence is usually imposed.

However, some recent statutory restrictions have been introduced which apply in relation to child sexual offences and the offence of evading police. Under the *Sentencing Act* s 11(3), if an offender is convicted of more than one child sexual offence and the court imposes a single sentence for all offences, the court must identify the sentence that would have been imposed had separate sentences been imposed. In relation to the offence of evade police, the court cannot include the sentence for this offence in a global sentence and under the *Police Powers (Vehicle Interception) Act 2000* (Tas) s 11A(3C) it must impose a separate sentence.

2.1.4 Combination orders

Under s 8 of the *Sentencing Act*, the court has the power to combine a number of sentencing orders. The range of combination orders is set out in Table 2.2.

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28 Ibid [61].

29 Ibid [62].

30 Ibid [65], quoting *R v Lean* [2017] SASCFC 101, [59] (Hinton J).

31 See *Sentencing Act 1997* (Tas) s 11; Warner (n 26) [1.1.02].

Table 2.2: Combination orders in Tasmania under the *Sentencing Act*

Disposition	Combination orders
Imprisonment (Section 8(1))	CCO (if imprisonment is not for a term of more than 2 years) Fine Rehabilitation program order Driving disqualification order
HDO (Section 8(2))	CCO Fine Rehabilitation program order Driving disqualification order
CCO (Section 8(3))	Fine Rehabilitation program order Driving disqualification order (if court records a conviction)
Fine (Section 8(4))	Rehabilitation program order Driving disqualification order (if court records a conviction)

2.2 The sentencing discretion

As part of this review, the Council has been asked in the Terms of Reference to compare the duration of the new sentencing orders of home detention and CCOs, as well as the duration of DTOs in the Supreme Court, with the duration of suspended sentences for similar offending. In this report, the Council has done this by comparing the sentences imposed for the same offences according to offence type. However, this comparison is problematic due to the small number of sentences imposed for the offences under consideration and the wide discretion that the court has in sentencing an offender.

Recognition that sentencing is an 'individualised task and involves a wide sentencing discretion'[32] means that '[s]entencing is not a process that leads to a single correct answer … A "range of legitimate outcomes is inevitable"'.[33] Further, as noted by the Tasmania Law Reform Institute ('TLRI'), '[s]entencing can never be uniform because of the vast range of facts to be considered when sentencing an offender with the consequence that it is unlikely that any two cases will be identical'.[34] Accordingly, in making comparison about the duration of the average sentence imposed for different sentencing orders but for similar offences, caution is needed in making any assessment of the appropriateness or comparability on this basis alone given the complexity of the sentencing discretion.

2.3 Sentencing orders imposed in Tasmania

This section provides information on the use of the sentencing options available under the *Sentencing Act* in both the Supreme Court and the Magistrates Court. These data are presented on the basis of the number of offenders sentenced in the period 1 January 2014 to 31 December 2020, and reports on the most serious sentence imposed on an offender for the offence or a number of offences.[35] It excludes orders made under the *Criminal Justice*

[32] *Le v Tasmania* [2017] TASCCA 21, [4] (Wood J).

[33] *Sweetman v Tasmania* [2016] TASCCA 5, [12] (Wood J).

[34] TLRI (n 18) 77 [1.1.5].

[35] In Tasmania, when offenders are sentenced for multiple counts at the same time, they commonly receive a single global or general sentence to cover all the relevant offending conduct: see *Sentencing Act 1997* (Tas) s 11; Warner (n 26) [1.102], [2.501]–[2.512].

(Mental Impairment) Act 1999 (Tas) and the *Youth Justice Act 1997* (Tas), as well as sentences imposed for Commonwealth offences.

2.3.1 Implications of COVID-19 for sentences imposed in 2020

At the outset, the impact of COVID-19 on the operation of the courts and sentencing needs to be acknowledged.

As with all aspects of society, the operation of Tasmanian courts has been affected by the COVID-19 pandemic. Jury trials were suspended for a period of time in 2020, with no criminal trials held in the Supreme Court between 28 February and 21 July, and with other changes to Supreme Court and Magistrates Court procedure also introduced in response to COVID-19.[36]

Statistical analysis of the operation of courts in Australia has stressed that, overall, the introduction of COVID-19 restrictions affected the number of defendants finalised in 2020 and resulted in a fall in the number of offenders proceeded against by police for the same period.[37] Despite this, in the Supreme Court, a greater number of offenders were finalised with a guilty outcome in 2019–20 compared with 2018–19 (357 in 2019–20 compared with 298 in 2018–19).[38] This means that there were more sentences imposed in this period. In contrast, in the Magistrates Court, there was a decrease in the number of offenders finalised with a guilty outcome in the same period (7,764 in 2019–20 compared with 9,355 in 2018–19).

Tasmanian courts have accepted the relevance of the COVID-19 pandemic to the exercise of the sentencing discretion, and the use of sentencing orders in 2020 needs to be viewed in this context. In other jurisdictions, research examining the relevance of COVID-19 to the imposition of sentence has identified judicial acceptance of its relevance in a number of ways, including:

- the prisoner may be more susceptible to contracting the virus — the age of the defendant and any underlying medical conditions being most relevant — and the lack of ability to social distance in prison
- significant lockdown restrictions in custody preventing family and friends of the defendant to support him or her while in custody
- social distancing measures that limit the prisoner's time outside of his or her cell
- social distancing measures that prevent prisoners from participating in appropriate prison programs
- generalised stress and anxiety about the pandemic and its potential impact on relatives.[39]

Concerns about the effect of imprisonment on the health of an offender and the nature of imprisonment during the pandemic have been accepted as relevant sentencing factors by

[36] Supreme Court of Tasmania, *Annual Report 2020* (Report, 2020); Magistrates Court of Tasmania, *Annual Report 2019 to 2020* (Report, 2020).

[37] Australian Bureau of Statistics ('ABS'), *Criminal Courts, Australia* (Catalogue No 4513.0, 25 March 2021).

[38] In this period, there was a proactive approach adopted by the Office of the DPP to facilitate the resolution by guilty pleas in appropriate matters.

[39] Natalia Antolak-Saper, 'COVID-19: An Exceptional or Surrounding Circumstance for the Purposes of Bail or Sentencing?' (2020) 30 *Journal of Judicial Administration* 81, 92. See also Judicial College of Victoria, *Coronavirus Jurisprudence* (Web Page) <https://www.judicialcollege.vic.edu.au/resources/coronavirus-jurisprudence>.

the Supreme Court.[40] In *Tasmania v Stadnicka*,[41] Pearce J stated that 'despite my confidence that the corrections authorities will be taking every reasonable step to minimise the risk of exposure to the COVID-19 virus, sentences of actual imprisonment should be avoided unless no alternative is appropriate'.[42] In addition, the COVID-19 pandemic has been accepted as being particularly relevant to the utilitarian value of the guilty plea.[43] Community service was not available during the COVID-19 period and the Supreme Court has considered the availability of community service programs as relevant to the determination of the appropriate sentence.[44]

2.3.2 Supreme Court

In the period 1 January 2014 to 31 December 2020, 2,084 offenders were sentenced in the Supreme Court to either a single sentence (for a single offence) or global sentence (for multiple offences) for an offence.

Figure 2.1 sets out the use of the different sentencing orders under the *Sentencing Act* (by most serious sentence imposed) and shows a discernible change in sentencing patterns during this period as follows:

- While custodial sentences (imprisonment and suspended sentences) continue to account for a majority of the sentences imposed in the Supreme Court, their use has decreased from 89.8% of sentences in 2014 to 78.8% of sentences in 2020, with this reduction being attributable to the decrease in the use of suspended sentences rather than imprisonment.
- The use of immediate imprisonment has increased from 31.9% of sentences to 39.7% of sentences. In the period 2017 to 2020, there have been 546 offenders imprisoned by the Supreme Court (110 in 2017, 150 in 2018, 162 in 2019 and 124 in 2020).
- There has been a marked decrease in the use of FSSs, from 38.1% of sentences imposed in 2014 to 23.4% of sentences imposed in 2020.
- The use of PSSs has decreased from 19.8% of sentences imposed in 2014 to 15.7% of sentences in 2020.
- Overall, the use of suspended sentences (both FSSs and PSSs) has decreased from 57.9% of sentences in 2014 to 39.1% of sentences in 2020.

Although still only accounting for a small proportion of sentences imposed, there appears to be greater use of the new CCO when compared to the use of probation orders and CSOs previously. In 2020, 7.4% of sentencing orders imposed were CCOs compared to use of CSOs and probation orders in 2018 (the last year that CSOs and probation orders were imposed), where these orders accounted for 4.6% of sentencing orders.

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40 See *Tasmania v Siely* (Supreme Court of Tasmania, Geason J, 18 May 2020); *Tasmania v JPW* (Supreme Court of Tasmania, Wood J, 21 April 2020); *Tasmania v D'Monte*, (Supreme Court of Tasmania, Porter AJ, 9 April 2020).

41 (Comments on passing sentence ('COPS'), Supreme Court of Tasmania, Pearce J, 22 April 2020).

42 See also *Tasmania v Domarecky* (COPS, Supreme Court of Tasmania, Pearce J, 19 June 2020).

43 See discussion in Antolak-Saper (n 39) 92–3; also Judicial College of Victoria, *Coronavirus Jurisprudence* (n 39). See for example, *Tasmania v Adcock* (COPS, Supreme Court of Tasmania, Blow CJ, 20 November 2020); *Tasmania v Siely* (n 40); *Tasmania v Eilander* (COPS, Supreme Court of Tasmania, Pearce J, 8 May 2020); *Tasmania v Riley* (COPS, Supreme Court of Tasmania, Pearce J, 22 May 2020).

44 *Tasmania v Fitzpatrick* (COPS, Supreme Court of Tasmania, Blow CJ, 22 April 2020).

The other new sentencing orders have also been used by the Supreme Court, with HDOs accounting for 7.7% of sentencing orders made in 2020 and DTOs accounting for 3.2% of orders.

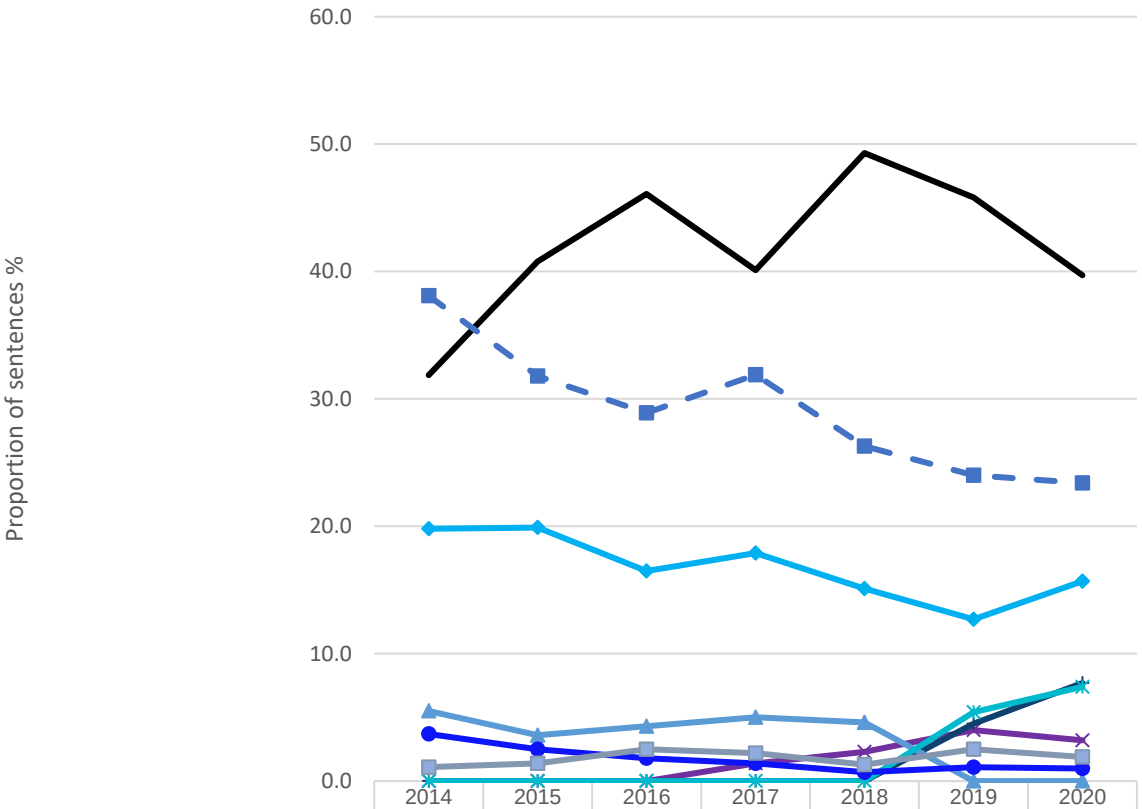
Overall, the proportion of sentences of immediate imprisonment has increased. While the use of suspended sentences has decreased, and they appear to have been replaced by the other non-custodial sanctions in some cases, the data show that the Supreme Court is still reliant on them as a sentencing order. The DPP identified several explanations for these changes, including the decrease in the use of suspended sentences and the increase in the use of imprisonment:

- The greater use of remittals to the Magistrates Court, which is a power under the *Criminal Code* s 308 to have matters dealt with in the lower court instead of the Supreme Court, if it can be appropriately dealt with in the lower court.[45] These are less serious indictable matters, where suspended sentence might have been used in the Supreme Court.
- The approach of the Office of the DPP to discharge indictable matters and proceed with summary offences, where appropriate. Again, these offences were likely to be less serious offences.
- The use by the Supreme Court of HDOs where previously a suspended sentence may have been imposed.

According to the DPP, increases in imprisonment sentences can in part be attributed to greater use of indictable offences for family violence offences (including the introduction of the offence of persistent family violence), and by the approach of the Supreme Court to sentencing for dangerous driving offences with the imposition of heavy sentences of imprisonment.

[45] See Supreme Court of Tasmania, *Practice Direction No 2 of 2015: Remitting of Criminal Matters to the Magistrates Court*, 27 October 2015 ('*Practice Direction No 2 of 2015*').

Figure 2.1: Sentences imposed by offenders sentenced, most serious sentence, Supreme Court, 2014–20



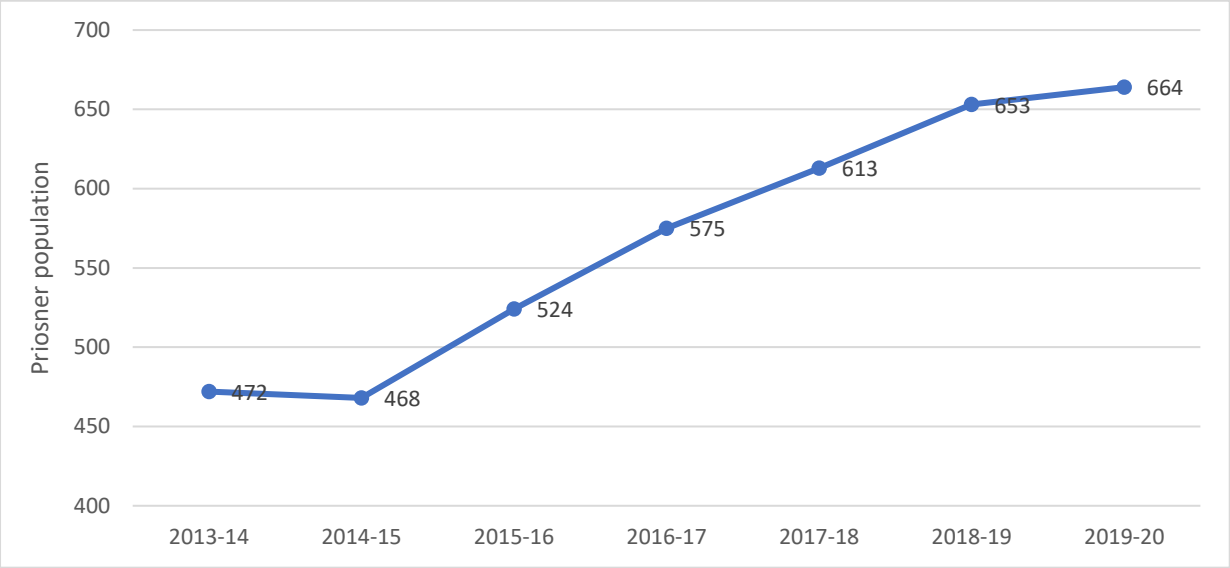
	2014	2015	2016	2017	2018	2019	2020
Imprisonment	31.9	40.8	46.1	40.1	49.3	45.8	39.7
DTO	0	0	0	1.4	2.3	4	3.2
PSS	19.8	19.9	16.5	17.9	15.1	12.7	15.7
FSS	38.1	31.8	28.9	31.9	26.3	24	23.4
HDO	0	0	0	0	0	4.5	7.7
CSO/Probation	5.5	3.6	4.3	5	4.6	0	0
Community Correction Order	0	0	0	0	0	5.4	7.4
Fine	3.7	2.5	1.8	1.4	0.7	1.1	1
Other non-custodial order	1.1	1.4	2.5	2.2	1.3	2.5	1.9

As shown by Figure 2.2, over the period 2013–14 to 2019–20, the average daily number of the prison population in Tasmania has increased from 472 prisoners to 664 prisoners (a 40.7% increase).[46] Over this period, the proportion of offenders who are unsentenced increased from 21.7% of the prison population in 2014 to 29% of the prison population in 2020.[47]

[46] Steering Committee for the Review of Government Service Provision, Productivity Commission, *Report on Government Services* (2021), Corrective Services — Data Tables: Table 8A.4 <https://www.pc.gov.au/research/ongoing/report-on-government-services/2021> (‘*RoGS*’).

[47] ABS, *Prisoners in Australia* (Catalogue No 4517.0, 3 December 2020) Table 15.

Figure 2.2: Prisoner population (average daily number), Tasmania, 2013–14 to 2019–20[48]



It is also noted that the Supreme Court (as discussed further at [6.1.3] and [6.2.1]) has altered its use of FSS orders by including additional conditions on the order, or combining the order with another sentence, so it can no longer be said that the majority of offenders who receive a FSS 'walk free'.

2.3.3 Magistrates Court

In the period 1 January 2014 to 31 December 2020, 66,126 offenders were sentenced in the Magistrates Court.[49]

Figure 2.3 sets out the use of the different sentencing orders under the *Sentencing Act* (by the most serious sentence imposed) and shows that fines continue to account for a majority of the sentences imposed in the Magistrate Court, but their use has decreased from 57.6% of sentences imposed in 2014 to 53.6% of sentences in 2020. The use of lower end orders such as undertakings and discharges also decreased from 18.9% of orders made in 2014 to 16.7% of orders in 2020. Over this period, the use of immediate imprisonment has increased markedly from 3.5% of sentences in 2014 to 8.2% of sentences in 2020. In the period 2017 to 2020, there were 2275 offenders sentenced to immediate imprisonment (522 in 2017, 581 in 2018, 600 in 2019, and 572 in 2020). There has also been an increase in the use of PSSs from 2.1% of sentences to 2.7% of sentences.

Unlike the Supreme Court, where there was a marked decline in the use of FSSs, there has only been a very moderate decrease in the Magistrates Court from 10% of sentences imposed in 2014 to 9.6% of sentences imposed in 2020.

There has only been a small change (a reduction) in the use of the new CCO in the Magistrates Court when compared to the use of probation orders and CSOs previously. In 2020, 6.4% of sentencing orders imposed were CCOs compared to use of CSOs and probation orders in 2018 (the last year that CSOs and probation orders were imposed),

[48] *RoGS* (n 46) Corrective Services — Data tables: Table 8A.4.

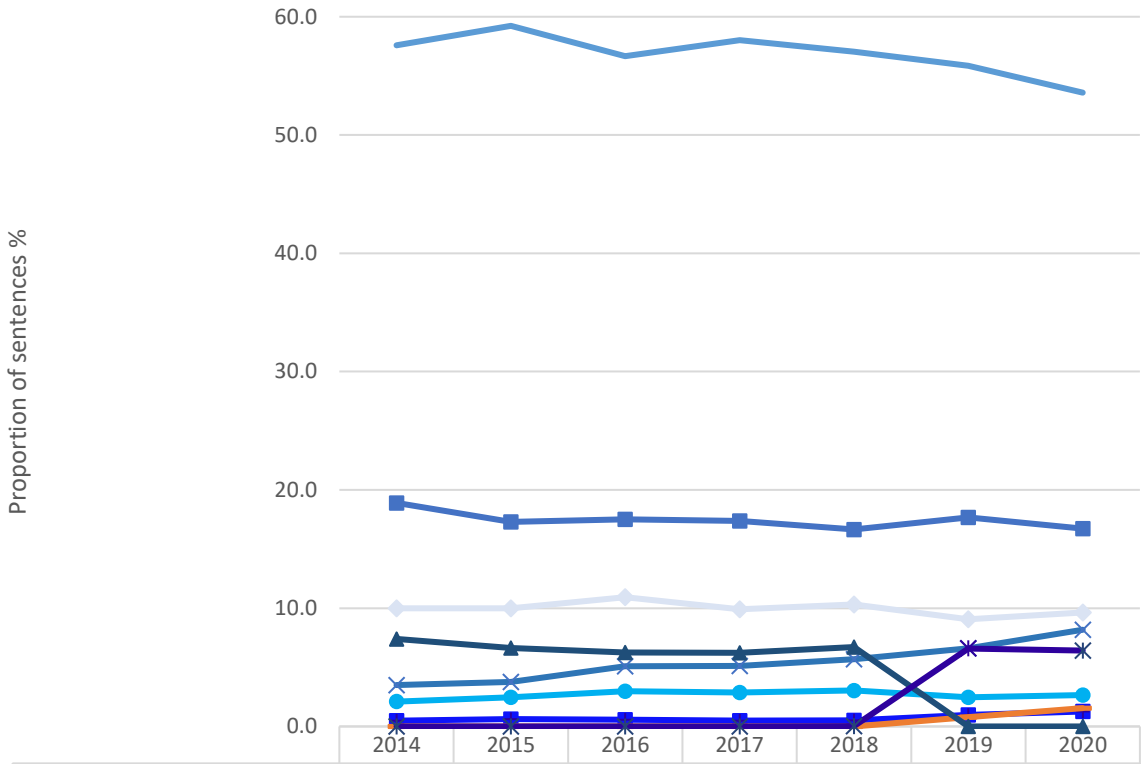
[49] This is on the basis of finalised defendants counted as a person with one or more charges finalised on a day and by most serious sentence received. It is noted that there were an additional 73 orders that were recorded as DTO Imprisonment (not suspended) that were not included in this count. It was not possible to determine if these were sanction days (days in custody imposed for a breach of a DTO: see [5.3]), or sentences that were DTOs.

where these orders accounted for 6.7% of sentencing orders. This is only a small change and is likely to reflect the limitations in accessing community service during the COVID-19 pandemic in 2020.

As with the Supreme Court, HDOs have also been increasingly used by the Magistrates Court, accounting for 1.5% of sentencing orders made in 2020, up from 0.8% of orders in 2019.

Overall, sentences of immediate imprisonment and PSSs have increased, without any real change in the use of FSSs in the Magistrates Court. Accordingly, the data show that the Magistrates Court is still reliant on suspended sentences as a sentencing order.

Figure 2.3: Sentences imposed by offenders sentenced, most serious sentence, Magistrates Court, 2014–20



	2014	2015	2016	2017	2018	2019	2020
Imprisonment	3.5	3.8	5.1	5.1	5.7	6.6	8.2
DTO	0.5	0.6	0.6	0.5	0.5	1.0	1.3
PSS	2.1	2.5	3.0	2.9	3.0	2.5	2.7
FSS	10.0	10.0	10.9	9.9	10.3	9.1	9.6
HDO	0	0.0	0.0	0.0	0.0	0.8	1.5
CSO/Probation	7.4	6.6	6.3	6.2	6.7	0.0	0.0
CCO	0	0.0	0.0	0.0	0.0	6.6	6.4
Fine	57.6	59.2	56.7	58.0	57.1	55.8	53.6
Other non-custodial order	18.9	17.3	17.5	17.4	16.7	17.7	16.7

2.4 Breaches of sentencing orders

In relation to each sentencing order, the *Sentencing Act* sets out the circumstances in which the order can be breached and the options available to the court following a proven breach. These are discussed in more detail below.[50] Broadly speaking, an order may be breached by

[50] See [3.4], [4.5], [5.3], [6.4].

an offender committing a new offence that is punishable by imprisonment or by an offender failing to comply with another condition of the order. Applications may also be made to vary or cancel an order (without a breach of the order) where an offender's circumstances have changed or where the offender is no longer willing or able to comply with the order.

In the Terms of Reference, the Council has been asked to provide information on the number of breaches of orders that have resulted in applications being made to vary or cancel the order, and the outcome of those applications. This, however, is not an analysis of the total number of offenders who have breached an order or the rate at which breach proceedings are instituted.[51] In the Supreme Court, it was possible to identify whether the breach application related to new offending or a breach of another condition of the order. This was done by reading the comments on passing sentence or the details contained in the database provided by the Supreme Court to the Council. It was not possible to make this assessment in relation to breach applications in the Magistrates Court.

[51] This is in contrast with the analysis contained in TSAC, *Phasing out of Suspended Sentences* (Background Paper, August 2015) Chapter 5, which reported on the rate of breaches and the rate at which breach proceedings were instituted.

3 Home detention under Part 5A of the Sentencing Act

HDOs were introduced in Tasmania by amendments to the *Sentencing Act* and were available as a sentencing order in the Magistrates Court and Supreme Court from 14 December 2018.

As part of this review, Terms of Reference 1–8 require the Council to provide advice on the following:

1. How many home detention orders have been made by the court, and for what offences?
2. What is the average duration of a home detention order?
3. With respect to 2, how does this compare to suspended sentencing orders for similar offending?
4. Have any breaches been committed by offenders while serving a home detention order that have resulted in an application to court to have the order varied or cancelled?
5. If the answer to 4 is yes, what was the outcome(s)?
6. With respect to 5, how does this compare to breaches committed by offenders serving a suspended sentence for similar offending?
7. What has been the perceived effectiveness of home detention as a sentencing option among relevant stakeholders?
8. Are any legislative amendments recommended that could be made to improve the operation of home detention, particularly if suspended sentences are phased out?

This chapter addresses these questions and provides detailed information about the nature of the HDO, including the circumstances in which the order can be made, the use of combination orders, and the conditions that attach to the order. It sets out stakeholder feedback received in the consultation process and the Council's view and recommendations.

3.1 Nature of the order

An HDO is an order that involves the detention of an offender in specified premises during specified times for the duration of the sentence.[52] The Council has previously observed that an HDO is intended to be able to address multiple aims of sentencing through the core conditions of the order, as well as special conditions that may attach to an HDO.[53] The

[52] *Sentencing Act 1997* (Tas) ss 42AC(5), 42AF(1).

[53] See TSAC, *Phasing Out of Suspended Sentences* (Final Report No 6, 2016) [7.3.8] ('*Phasing Out of Suspended Sentences Report*').

punitive effect of an HDO, as well as its ability to promote rehabilitation and to deter, was recognised by the Court of Criminal Appeal in *King*, where Wood J stated:

> Home detention orders provide the option of a sentence which is both punitive and also promotes rehabilitation and enables the offender to maintain the continuity of personal, employment and family relationships. It avoids the harm of incarceration and promotes the best interests of the community and the offender.
>
> It is reasonable to expect that home detention will have efficacy as a general deterrent. Home detention is a tangible sentence with consequences that are visible, especially if the details of the conditions are known, such as electronic monitoring. Home detention is likely to be perceived by the community as a real punishment although, correctly, seen as significantly less punitive than imprisonment. The Sentencing Advisory Council in its *Phasing out Suspended Sentences*, Final Report No 6, March 2016 at 62–68 noted that home detention does have appropriate deterrent effect and is not a 'soft' option.[54]

The court recognised that while home detention was less onerous than a sentence of imprisonment, due to the restrictions that home detention places on the liberty of an offender, it was properly regarded as a type of imprisonment and as a very onerous sanction.[55] The onerous nature of an HDO was also affirmed by the Court of Criminal Appeal in *Director of Public Prosecutions (Tas) v Crisp* ('*Crisp*').[56]

Aligned with the recommendations of the Council, under the *Sentencing Act* pt 5A, home detention is not a substitutional sanction (that is an alternative means of serving a sentence of imprisonment) but a stand-alone sanction that is available independent of the imposition of imprisonment.[57] This has given rise to questions about its position in the sentencing hierarchy, and in particular the relative severity of home detention and a suspended sentence. In *King*, the court indicated that:

- There was no easy comparison between a suspended sentence of imprisonment and home detention given the different nature of the sanctions.[58]
- In terms of the severity of an HDO in the *Sentencing Act* s 7, it ranks after imprisonment, DTOs and suspended sentences of imprisonment, given that DTOs and suspended sentences have a term of imprisonment set as part of the sentence. However, the actual severity of a particular HDO or suspended sentence for an offender will depend on the circumstances of the particular case.[59]
- Home detention is likely to be more onerous for some offenders.[60]
- A common consideration between home detention and suspended sentences is that the more serious the criminal conduct, the less appropriate will be the order.[61]
- The public perception of home detention is likely to be that the offender did not 'walk free'.[62]

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54 *King* (n 19) [63]–[64].

55 Ibid [32] (Blow CJ), [52]–[55] (Wood J), [139] (Estcourt J).

56 [2021] TASCCA 6 ('*Crisp*').

57 For further discussion of this distinction, see TSAC, *Phasing Out of Suspended Sentences Report* (n 53) [7.3].

58 *King* (n 19) [28] (Blow CJ), [110] (Estcourt J).

59 Ibid [28] (Blow CJ), [47] (Wood J).

60 Ibid [31] (Blow CJ), [56] (Wood J).

61 Ibid [113] (Estcourt J, Blow CJ generally agreeing with the principles expressed by Estcourt J at [24]).

62 Ibid [118]–[119] (Estcourt J, Blow CJ generally agreeing with the principles expressed by Estcourt J at [24]); Wood J observed that home detention is likely to be perceived by the community as real punishment although, correctly, seen as significantly less punitive than imprisonment: at [64].

The maximum operational period for which an HDO can be imposed is 18 months.[63]

3.1.1 Circumstances in which an HDO can be imposed

Home detention is an order that is intended to be a suitable sentencing option for a broad range of circumstances.[64] Under the *Sentencing Act*, there are no offences that are precluded from an HDO provided the order is appropriate and the other statutory preconditions are met. As observed by Wood J in *King*, home detention may be the appropriate sentence in cases where a suspended sentence would previously have been imposed but also, perhaps combined with a CCO, in cases that would have been dealt with previously by an immediate sentence of imprisonment.[65] This flexible approach to the use of HDOs is evident in the use of the order by the Supreme Court.[66]

A court can only make an HDO if it convicts the offender and would have sentenced the offender to a term of imprisonment, including to a FSS and PSS.[67] This means that the court needs to be satisfied that imprisonment would be appropriate in the circumstances of the case. However, the court does not have be satisfied that the length of any hypothetical prison sentence that may have been imposed would have been less than the maximum operational period of an HDO of 18 months.[68] As Wood J wrote:

> I agree with the Chief Justice that there can be no arithmetical equivalence between the length of home detention and imprisonment. The learned sentencing judge was of the same view, describing it as problematic to arithmetically correlate periods of imprisonment and home detention given the substantive differences in the orders. The learned sentencing judge in the passage set out in the reasons of Estcourt J at [86], noted that lengthy sentences of imprisonment may allow eligibility to apply for parole. Home detention must be served in full but, on the other hand, is less onerous than imprisonment. Significantly, the legislative scheme allows the court to make a home detention order if imprisonment, immediate or suspended, wholly or in part, would otherwise have been imposed, but does not fix a maximum period for this hypothetical term of imprisonment. Rather, Parliament has only dictated a ceiling for the operational period of home detention orders. As Blow CJ has said at [34], while it may be useful to contemplate what period of imprisonment would be appropriate in a particular case, that can only be a factor, though sometimes an important factor, in determining whether a home detention order is appropriate.[69]

Additional legislative preconditions contained in the *Sentencing Act* are that:

- it is appropriate in all the circumstances to make the order
- the court has considered a pre-sentence report in relation to the making of the order
- the offender consents to the order being made
- the premises where the offender will live during the order are suitable

63 *Sentencing Act 1997* (Tas) s 42AF(2).

64 Tasmania, *Parliamentary Debates,* House of Assembly, 19 October 2017*,* 44 (Elise Archer, Minister for Justice) (‘*Second Reading Speech*’) quoted by Wood J in *King* (n 19) [44].

65 *King* (n 19) [65].

66 See [3.2].

67 *Sentencing Act 1997* (Tas) s 42AC(1). This includes offences for which the court will be precluded from making a suspended sentence order, other than in exceptional circumstances, if the amendments to *Sentencing Act 1997* (Tas) are commenced: see [6.5].

68 *King* (n 19).

69 Ibid [50].

- other people living at the premises (other than group premises)[70] aged 18 years or over have consented to the order
- relevant circumstances do not exist in relation to the offender.[71]

The statutory definition of 'relevant circumstances' means that an HDO is not to be made in either of two situations:

(1) the offender is being sentenced for a family violence offence, a violent offence or a sexual offence and the victim lives at premises where the offender would reside during the operational period of the order, or

(2) the court is of the opinion that there is a significant risk that the offender may commit a violent offence or a sexual offence during the operational period.[72]

As recognised by Wood J, this provision demonstrated that it was 'envisaged that home detention may be made in some cases of violent or sexual offences providing that there is not a significant risk of reoffending'.[73]

Under the *Sentencing Act* s 82, a court may order a pre-sentence report and assessments for eligibility and suitability for HDOs are undertaken by Community Corrections as part of the pre-sentence report process.[74]

3.1.2 HDOs combined with other sentencing orders

Under the *Sentencing Act* s 8, an HDO can be combined with other sentencing orders including a CCO, fine, rehabilitation program order or driving disqualification order.[75] In the Supreme Court, there were 14 cases where an HDO was combined with a CCO (35% of HDOs). The utility of a combined HDO and CCO was recognised by the Court of Criminal Appeal in *Crisp*, where Blow CJ stated that the combination order with a 'substantial period of home detention, coupled with a requirement to perform a substantial amount of community service, [could] create a very substantial punishment'.[76] In the Magistrates Court, 44% of HDOs in 2019 and 57% of HDOs in 2020 had an element of community service or supervision.

In contrast, an HDO cannot be combined with a suspended sentence as part of a single sentence for a single offence or global sentence for multiple offences. However, where an offender is charged with more than one offence, although it would not be the usual approach, in an appropriate case a judge may impose a suspended sentence for one or several of the counts and an HDO for another count(s).[77]

The validity of this approach was recognised in *King*, where Wood J observed that while an HDO was intended to be an alternative to immediate or wholly or partly suspended terms of

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70 Group premises means boarding premises, premises that are provided for the purposes of enabling care, or mental health rehabilitation or treatment, to be provided to persons, or are provided for the purpose of assisting in the rehabilitation of persons who are addicted to alcohol or drugs, or are situated in a caravan park, or are a type of premises that has been prescribed: *Sentencing Act 1997* (Tas) s 42AB.

71 Ibid s 42AC(2).

72 Ibid s 42AC(3).

73 *King* (n 19) [45].

74 The details relevant to an offender's eligibility and suitability are set out in Appendix E.

75 See [2.1.4].

76 *Crisp* (n 56) [29].

77 *King* (n 19) [29] (Blow CJ), [71] (Wood J). In this case, the accused was sentenced for aggravated burglary, wounding and assault. The offence arose out of a home invasion and a FSS was imposed for aggravated burglary and an HDO was imposed on the wounding and assault charge.

imprisonment, in the exceptional case (such as existed in *King*), the imposition of the two orders 'was fashioned to be as punitive as it could be without imposing imprisonment'.[78] Her Honour observed that 'the wider the range of sentencing orders and the more flexibility in fashioning sentencing orders to achieve the objectives of sentencing, the greater the scope for producing a just sentence in an individual case'.[79] This was also the approach of the court in *Tasmania v Wright*,[80] where the offender was sentenced to an HDO for wounding and a FSS for the offence of dangerous driving.

3.1.3 Conditions of home detention

The *Sentencing Act* s 42AD sets out the core conditions that are a part of all HDOs. These require that the offender:

- Not commit an offence punishable by imprisonment.
- Reside at the prescribed premises.
- Remain at the premises as required by the terms of the order. Reasons for leaving the premises include absence without prior approval in the case of urgent medical or dental treatment, or to avoid or minimise a serious risk of death or injury to the offender or another person. In other cases, an offender may be absent with prior approval of a probation officer for employment purposes, educational or training purposes, to attend a rehabilitative or reintegrative activity or program, to attend court or to allow the offender to comply with a special condition of the order.
- Permit a police officer or probation officers to enter the premises, and allow the police officer to search the premises, frisk search the offender and take samples of substances found at the premises.
- Comply with reasonable and lawful directions as to employment.
- Submit to electronic monitoring, including by wearing a device, unless the court determines that there are suitable reasons not to require monitoring.[81]
- Submit to testing to detect the presence of alcohol or illicit drugs.
- Engage in personal development activities, counselling or treatment, if directed by a probation officer.

Many of these core conditions of home detention are punitive and place considerable restrictions on the freedom of the offender.[82] As Wood J observed in *King*, '[t]he core conditions … materially encroach on an offender's ordinary liberty and freedom of movement. Some of the conditions are also intrusive and affect an offender's privacy'.[83] Yet, there is still a focus on rehabilitation in the core conditions as a probation officer is allowed to direct an offender to take part in treatment and personal development.

78 Ibid [71].

79 Ibid.

80 (COPS, Supreme Court of Tasmania, Estcourt J, 3 February 2020). These charges arose from the same incident.

81 It is noted that as at 30 June 2020, there were 61 orders subject to electronic monitoring under an HDO, an increase of 30 orders from the first year of operation, Department of Justice, *Annual Report 2019–20* (Report, 2020) 32.

82 TSAC, *Phasing Out of Suspended Sentences Report* (n 53) [7.3.8]; Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) 161.

83 *King* (n 19) [52].

In addition to the core conditions, the court is also able to impose special conditions on the offender that allow for:

- judicial monitoring
- a requirement to take medication as specified by a psychiatrist or medical practitioner
- a requirement that the offender not to consume alcohol
- conditions that the court considers appropriate to reduce the likelihood of the offender reoffending during the term of the order.[84]

The scope of the requirements that can be included by these special conditions means that the order can be 'fashioned to the offender's particular circumstances',[85] and depending on the conditions attached can 'add to the punitive burden of the order'.[86] The special conditions also allow the court to focus on rehabilitation.

In this way, as the Council has observed, an HDO is intended to be able to address multiple aims of sentencing and provides an onerous sentencing order that punishes an offender, deters the offender and others from committing offences, and assists in addressing the offender's rehabilitative needs. In addition, as noted above, an alternative way for a court to impose rehabilitative conditions on an offender in addition to the punitive components of the HDO would be to sentence an offender to a combination order of an HDO and a CCO.

3.2 Use of HDOs in the Supreme Court

3.2.1 Number of orders

As noted above, the introduction of new sentencing orders has required a recalibration in the court's approach, and it has been accepted that home detention may be an appropriate sentence where previously a term of imprisonment (as well as a suspended sentence) would have been imposed.[87]

In the Supreme Court, there have been 40 offenders sentenced to an HDO for an offence since the introduction of the order (16 in 2019 and 24 in 2020).[88] As indicated at Figure 2.1, there has been an increase in the proportion of offenders sentenced to HDOs, from 4.5% of sentencing orders in 2019 to 7.7% of sentencing orders in 2020. Further, the utility of the combination order of an HDO and a CCO also appears to have been recognised, with 14 of the 40 offenders who received an HDO also being sentenced to a CCO. This accounted for 35% of HDOs imposed.

3.2.2 Offences

As noted at [3.1], home detention was intended to be an order used for a wide range of offending, and in appropriate circumstances, for serious offences, including offences of violence and sexual offences. This is evident in the offences set out in Appendix A, Table A.1.

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84 *Sentencing Act 1997* (Tas) s 42AE.

85 *King* (n 19) [54] (Wood J).

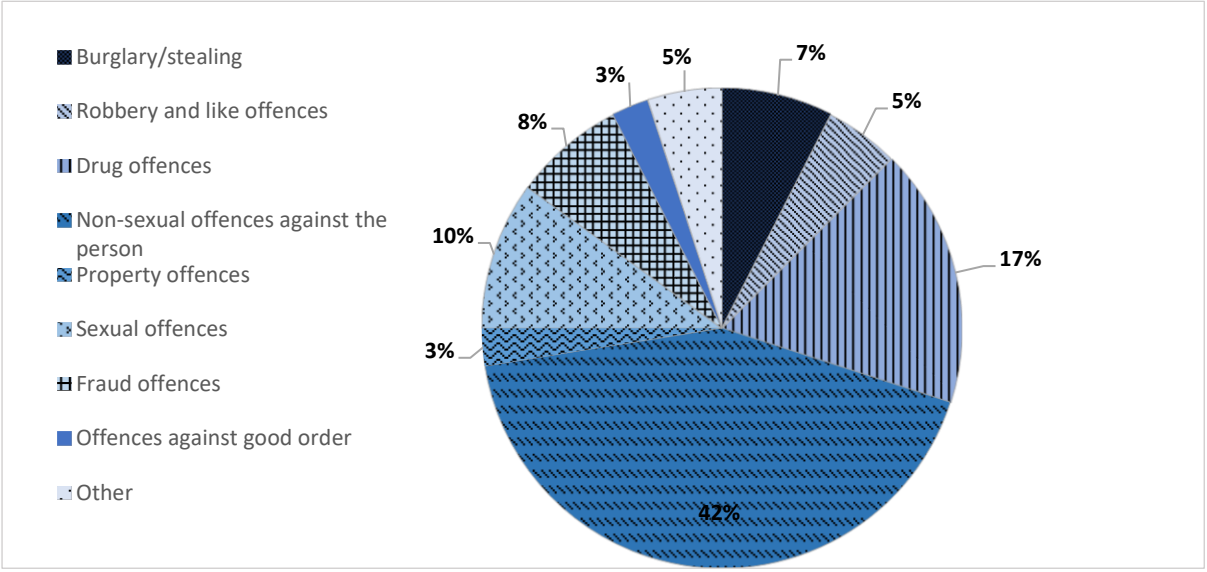
86 Ibid [54].

87 See for example, *Tasmania v Eaton* (COPS, Supreme Court of Tasmania, Wood J, 14 May 2019); *Tasmania v Dittman* (COPS, Supreme Court of Tasmania, Estcourt J, 13 June 2019); *Tasmania v Cooper* (COPS, Supreme Court of Tasmania, Pearce J, 2 September 2019).

88 There was also one offender sentenced to an HDO for a breach of a CCO. It is noted that a breach of CCO is not an offence.

Figure 3.1 sets out the offences for which HDOs were imposed in the Supreme Court, classified by most serious offences and offence categories. The most common offence category for which HDOs were imposed was non-sexual offences against the person (17 cases or 42% of cases), followed by drug offences (seven cases or 17%) and then sexual offences (four cases or 10%). Wounding/cause grievous bodily harm was the most common offence for which HDOs were imposed (nine cases), followed by assault (six cases) and trafficking in a controlled substance (five cases). Full details of individual offences for which HDOs were imposed are set out in Appendix A.[89]

Figure 3.1: HDOs imposed, proportion of orders by offence category, most serious offence, Supreme Court, 2019–20



The Court of Criminal Appeal in *Crisp*[90] accepted the availability of an HDO for serious offending in appropriate circumstances. In this case, the offender stabbed the complainant six times which left him seriously injured and at risk of death. The offender was sentenced to an HDO for 12 months imposed for the charge of committing an unlawful act intended to cause bodily harm contrary to the *Criminal Code* s 170(1). This is a particularly serious offence under the structure of the *Criminal Code*, where crimes of wounding or causing grievous bodily harm contrary to s 170, that involve a specific intent to do grievous bodily harm, are generally considered more serious than the crimes of wounding or causing grievous bodily harm contrary to s 172.[91]

The Court recognised that for most cases contrary to the *Criminal Code* s 170, 'the only appropriate course is to send the offender to prison',[92] with penalties ordinarily 'within the range of three to seven years' imprisonment' (although this not being 'a hard and fast rule').[93] However, while increasing the length of the HDO to 18 months and also imposing a CCO for 36 months with 240 hours community service (by majority), it was accepted that in the unusual circumstances of the case an HDO was an appropriate order.[94] It was an

89 See Table A.1.

90 *Crisp* (n 56).

91 Ibid [18] (Blow CJ).

92 Ibid [19].

93 Ibid [22].

94 Ibid [26] (Blow CJ, Brett J agreeing at [34]). All judges agreed that the original sentence was manifestly inadequate. However, Geason J did not consider that the residual discretion required the Crown appeal to be

exceptional case because of the events leading up to the crime (where the offender found the complainant apparently about to rape his partner) and the offender's excellent character.

3.2.3 Duration of orders

The longest operational period for which an HDO can be made is 18 months, and this was imposed in 13 of the 40 cases (32.5%). The minimum duration was three months' home detention, and the median duration was 12 months' home detention. Further details are set out in Appendix A.[95]

The shortest operational period of three months was imposed in one case where the offender pleaded guilty to a charge of trafficking in a controlled substance contrary to the *Misuse of Drugs Act* s 12.[96] In this case, the conduct involved selling edible cannabis products over a period of seven months at a lower than usual price with no accumulation of assets or savings as a result of the enterprise. The offender had no significant prior convictions. The offender was also sentenced to a CCO with a requirement that she perform 42 hours' community service.

The median sentence of 12 months' home detention was imposed in eight cases for a range of offences including possession of child exploitation material (two cases), burglary (one case), cultivating a controlled plant (one case), assault (one case), wounding (one case), aggravated armed robbery (one case) and arson (one case). Although the circumstances of the offending differed in these cases, seven out of eight of the offenders entered a plea of guilty. In some cases, at the time of sentencing, the offender had already taken significant steps to address underlying mental health or addiction issues, and the court focused on the benefit of this continued rehabilitation in the circumstances of the case with corresponding conditions attached to the order.[97] For example, in *Tasmania v Cunningham*,[98] an assault case, Martin AJ stated:

> [I]t is to your credit that you have established a stable and loving home for your family and that you have made significant progress with your rehabilitation from drug addiction. It is in the best interests of the community that your progress be permitted to continue. However, you must understand that you committed a serious offence of violence which has had serious consequences for the victim. These types of assaults are far too common and cause disquiet within the community. Punishment and general deterrence, that is, deterring others who are minded to commit these types of offences, are [important] features of the sentencing process, as is expressing the community's strong disapproval of this type of conduct. So too is personal deterrence a factor, that is, imposing a penalty which will deter you from offending again. In my view, the biggest deterrent from further offending by you, is your child and your family and the fear of losing them if you are imprisoned. It would become counter-productive to the best interests of the community to interrupt your progress and your family by requiring you to serve a sentence of imprisonment.

allowed, given that he did not consider that the sentence was '"an affront to the administration of justice" which risks undermining community attitudes': at [43]; and there were no principles to be added to the operation of HDOs: at [40]–[45].

95 See Table A.2.

96 *Tasmania v Hahn* (COPS, Supreme Court of Tasmania, Blow CJ, 3 July 2019).

97 See *Tasmania v Dittman* (COPS, Supreme Court of Tasmania, Estcourt J, 13 June 2019); *Tasmania v Curbishley* (COPS, Supreme Court of Tasmania, Pearce J, 15 June 2020); *Tasmania v JH* (Supreme Court of Tasmania, Pearce J, 13 October 2020); *Tasmania v Cunningham* (Supreme Court of Tasmania, Martin AJ, 18 December 2019).

98 (COPS, Supreme Court of Tasmania, Martin AJ, 18 December 2019).

> I am satisfied you have reached a critical point and that this Court should fashion a sentence which will both punish and promote your rehabilitation which is, in itself, the best way of protecting the public in the long-term.[99]

In other cases, the offender was a young offender and/or otherwise of good character.[100] The Council's view is that the circumstances where the courts have used HDOs provide good evidence of the utility of the order as a sanction.

The maximum operational period of 18 months has been imposed in 13 cases. In four of these cases, the HDO was also combined with a CCO, and in one case, the offender received an HDO for some offences and a fully suspended sentence of imprisonment for other offences. An HDO with an operational period of 18 months was imposed in relation to non-sexual offences against the person (seven cases), sexual offences (two cases), fraud (two cases), drug offences (one case) and robbery (one case).

Although not present in all cases, common features that can be identified in the sentencing comments were the recognition of the serious nature of the offending, but also the need to focus on rehabilitation of a youthful offender who has pleaded guilty.[101] Other cases involved the recognition of the need for a punitive sanction that also allowed for the offender to maintain employment and participate in rehabilitative programs,[102] or the need to recognise the particular personal circumstances of the offender.[103]

3.3 Use of HDOs in the Magistrates Court

3.3.1 Number of orders

Since the introduction of the order to 31 December 2020, there were 190 offenders sentenced in the Magistrates Court to an HDO for an offence or at a re-sentencing event (generally following a breach of a previous order of the court). It is noted that some offenders were sentenced to multiple HDOs with the Magistrates Court making 245 HDOs imposed at 198 sentencing events (that is, persons sentenced on a date). In relation to these 198 sentencing events, 53 were re-sentencing events and 145 related to the original sentence imposed for an offence.

Further, as with the Supreme Court, the utility of the combination order of an HDO and a CCO also appears to have been recognised in the Magistrates Court, with 93 offenders who received an HDO also being sentenced to an order that had a requirement for community service or supervision. This accounted for 44% of HDOs imposed in 2019 and 57% of HDOs in 2020.

3.3.2 Offences

Figure 3.2 set out the offence categories for which HDOs were imposed in the Magistrates Court, classified by most serious offence. The most common offence category for which

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99 Ibid.

100 See *Tasmania v Michaelson* (COPS, Supreme Court of Tasmania, Brett J, 12 February 2020); *Tasmania v Dupree* (COPS, Supreme Court of Tasmania, Estcourt J, 10 November 2020).

101 See, eg, *Tasmania v Farnell* (COPS, Supreme Court of Tasmania, Estcourt J, 27 September 2019); *Tasmania v Jones* (COPS, Supreme Court of Tasmania, Estcourt J, 16 October 2019); *Tasmania v Rowe-Brown* (Supreme Court of Tasmania, Brett J, 23 September 2019); *Tasmania v Penneyston* (COPS, Supreme Court of Tasmania, Pearce J, 2 July 2019); *Tasmania v Bennett-Scrimshaw* (COPS, Supreme Court of Tasmania, Brett J, 9 December 2020).

102 See *Tasmania v MSL* (COPS, Supreme Court of Tasmania, Wood J, 21 December 2020); *Tasmania v Wright* (COPS, Supreme Court of Tasmania, Estcourt J, 3 February 2020).

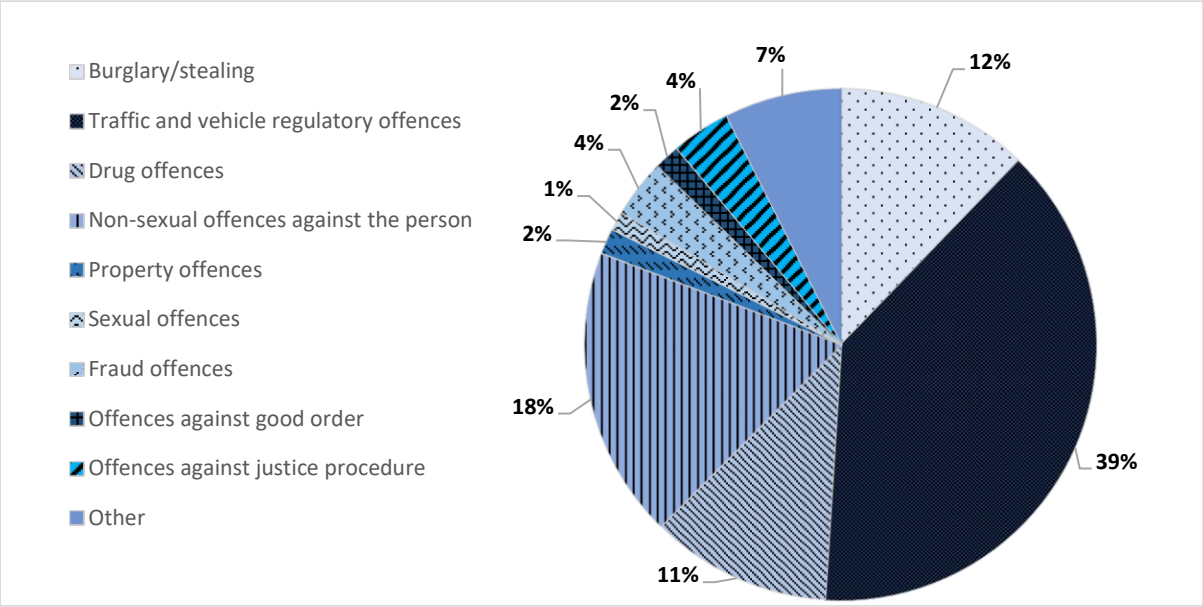
103 *Tasmania v Burk* (COPS, Supreme Court of Tasmania, Brett J, 5 August 2020).

HDOs were imposed was traffic and vehicle regulatory offences (95 cases or 39% of cases), followed by non-sexual offences against the person (45 cases or 18%), and then drug offences (28 cases or 11%). The 10 most common offences for which HDOs were imposed (classified by most serious offence for which an offender was sentenced) were (in decreasing order of frequency):

- drive a motor vehicle while exceeding prescribed alcohol limit
- drive with prescribed illicit drug in blood or oral fluid
- common assault
- driver referred to in s 6(3) or s 6(4) with alcohol in body
- burglary
- cultivate a controlled plant (minor offence)
- selling/supplying controlled drug (minor offence)
- drive whilst disqualified
- drive whilst under the influence of alcohol or a drug
- stealing.

These offences accounted for more than half of all HDOs imposed (60%). Further details are set out in Appendix A.[104]

Figure 3.2: HDOs imposed, proportion of orders by offence category, most serious offence, Magistrates Court, 2019–20[105]



3.3.3 Duration of orders

Data was available for 181 of the 245 HDOs imposed in the Magistrates Court. As noted, the longest operational period for which an HDO can be made is 18 months, and no orders of this length were imposed in the Magistrates Court. The longest duration was 12 months'

[104] See Table A.3.

[105] It is noted that the category of non-sexual offences against the person includes dangerous or negligent acts endangering persons.

home detention (imposed in six cases), the median duration was four months' home detention (imposed in 48 cases) and the minimum duration was one month's home detention (imposed in four cases).

3.4 Breaches of HDOs

An HDO may be breached by an offender failing to follow the conditions of the order and/or by being found guilty of a new offence committed during the operational period. Under the *Sentencing Act* s 42AI, if an offender has breached a condition of an HDO (other than the core condition in relation to offending), the court can confirm the order, vary the order or cancel the order and re-sentence the offender.

If an offender has breached a condition of an HDO where the offender is found guilty of an offence, the court can also confirm the order, vary the order or cancel the order and re-sentence the offender.[106] However, if the offender is found guilty of an offence that is punishable by imprisonment, the court must cancel the order and re-sentence the offender, unless exceptional circumstances exist.[107]

Separate from the provisions that allow an application to be made to vary or cancel an order where a breach has occurred, there is also power for an application to be made for an HDO to be varied or cancelled under the *Sentencing Act* s 42AH. Under this section, the HDO can be varied or cancelled where the circumstances have changed so that the offender is unable to comply with the condition(s), or the offender is no longer willing or able to comply with the order, or it is otherwise appropriate to do so.[108]

3.4.1 Supreme Court

In the Supreme Court, the Council has identified five cases where an application was made to cancel an HDO. In none of these cases was the application made as a result of new offending. In three cases, the offender did not comply with the requirements of the order; in one case, a change in the offender's mental health meant that he was no longer suitable for home detention; and in one case, the offender had complied with the order, but his particular circumstances made continued compliance too difficult. In four of these five cases, the order was cancelled, with a CCO imposed in two cases (combined with a term of imprisonment in one case), a PSS with supervised probation imposed in one case, a FSS with supervised probation imposed in one case and a CCO imposed in the final case. The circumstances and outcomes are set out in more detail in Appendix A.[109]

3.4.2 Magistrates Court

By the end of 2020, an application to breach or cancel the HDO had been initiated in the Magistrates Court in relation to 38 of the 245 HDOs. These applications related to 31 offenders. As noted at [2.4], it was not possible to differentiate between applications to cancel that related to breach of a condition or new offending from the CRIMES database. It was also not possible to determine from court data cases where applications to cancel arose in circumstances where the offender was not at fault (see [3.4.3]). However, as noted below, a manual examination of records held by Community Corrections was conducted to determine the basis for the application to breach or cancel.

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106 *Sentencing Act 1997* (Tas) s 42AJ(4).

107 Ibid ss 42AJ(5)–(6).

108 Ibid s 42H(6).

109 See Table A.4.

Of these 38 applications to breach or cancel HDOs, there were 32 finalised actions (for 27 offenders) by the end of 2020. The recorded outcomes were:

- Application Granted – 22
- HDO Cancelled – 2
- Application Dismissed – 7
- Application Withdrawn – 6.[110]

Of the 22 applications finalised as 'Application Granted', 16 orders were terminated[111] and two were cancelled, while six orders were not terminated. In the cases where the order was not terminated, the successful application resulted in an extension to the length of the order.

3.4.3 Reasons for cancellation and outcomes of cancellation in the Supreme Court and the Magistrates Court

Analysis of the basis for the applications to cancel for both HDOs imposed by the Supreme Court and the Magistrates Court was conducted using records held by Community Corrections. This analysis identified 24 HDOs that had been cancelled by the end of 2020: 21 originally imposed by the Magistrates Court, and three by the Supreme Court. All belong to separate offenders, with no offender having two HDOs cancelled in the period in question.

In relation to six of the cancelled orders, the reasons appeared to be largely outside the offender's control and/or to be non-punitive:[112]

- Three offenders had orders cancelled primarily due to loss of suitable housing.
- Three appeared to have cancellations for compassionate reasons where their conduct had otherwise been satisfactory.

Four cancellations appeared to be primarily related to new offending:

- Two involved convictions for new offending.
- Two involved charges for new offending.

Fourteen cancellations appeared to be primarily related to breaches of conditions:

- Twelve of these included breaches related to drug/alcohol use, such as failed urinalysis tests.
- At least six reports mentioned failures to comply with an offender's weekly activity planner (for example, leaving premises, diverting from approved locations, or failing to attend approved appointments).

A number of the reports also mentioned mental health difficulties related to the order.

In relation to the outcomes for the 24 cancelled HDOs:

- There was no further penalty in three of the 'non-punitive' terminations.

[110] It is noted that some HDOs may have multiple associated applications so the total of the application outcomes is greater than the number of HDOs affected.

[111] In one case, there was an application to cancel an HDO which was granted, but the termination was marked as successful in the Community Corrections records. The HDO in question was varied to give it a completion date equal to the appearance date, with no further penalty.

[112] Additionally, as discussed above, there was one more HDO marked as successful but not cancelled, which appears to have been a similar, non-punitive early completion of the order for compassionate reasons but achieved by varying the order rather than by cancelling it.

- Six offenders were re-sentenced to FSSs. In five cases, a CCO was also required, either as part of an ongoing CCO that was already in place or imposed as part of the re-sentencing.
- Four offenders were re-sentenced to a PSS. In two cases, a CCO was also imposed requiring ongoing supervision by Community Corrections, either as part of a CCO that was already in place or imposed as part of the re-sentencing.
- Eleven offenders were re-sentenced to imprisonment. In four of these cases, CCOs requiring ongoing supervision by Community Corrections were imposed to commence upon release from prison.

3.5 Comparison with suspended sentences

In the Terms of Reference, the Council has been asked to compare HDOs and suspended sentences in terms of the duration of the order for similar offending and to compare the outcomes of any breach application made for offenders serving a suspended sentence for similar offending. As discussed at [2.2], in identifying similar offending, the Council has compared sentence duration for the same offences.[113] Yet, while reasonable consistency in sentencing is a central feature in the administration of justice (requiring like cases to be treated alike and different cases to be treated differently), the Court of Criminal Appeal has repeatedly stressed that the 'consistency that is sought is not "numerical equivalence", but consistency in the application of the relevant legal principles'.[114] This means that numerical comparisons are to be approached with caution given that it is difficult to compare sentence lengths even for the same type of sanction. Further, as the Council has noted, the comparison is problematic due to the very small number of sentences imposed for the offences under consideration and the wide discretion that the court has in sentencing an offender.[115]

In addition, due to the different nature of the orders, there are inherent difficulties in making any meaningful comparisons or observations in relation to the operation of the orders by focussing on their duration. For example, a FSS is a sentence of imprisonment that will not be activated provided the offender is not found guilty of an imprisonable offence during the operational period and otherwise complies with the conditions of the order. Factors that have been identified as being relevant to the severity of the sentence include the length of the operational period (that is, the period in which the offender must comply with the terms of the FSS order), the conditions of the order and/or the use of a combination sentencing order (such as a FSS and a CCO). In making comparisons between the duration of HDOs and PSSs, an offender subject to a PSS must serve a period of the sentence in prison (which is more onerous than an HDO) and is subject to the possibility of serving the unsuspended portion of the sentence for the length of the operational period. Again, the punitive nature of the order may be enhanced using conditions or combined sentencing orders.[116] These factors are not apparent in an examination of the average duration of the orders.

In relation to the examination of the outcome of breach applications, the comparison is made with broad offence categories, given the very small number of breach applications made for

[113] Another option would be to attempt to match similar cases where suspended sentences and HDOs were imposed to compare the duration. However, this would not allow a comparison to be made between the average duration of orders. In addition, this approach was also not used due to the time constraints of the project and the uncertainty in relation to obtaining matched cases.

[114] *Le v Tasmania* [2017] TASCCA 21, [4]–[5] (Wood J).

[115] See [2.2].

[116] See [2.1.2] and [3.1].

the new sentencing orders. The breach cases were obtained from extracts from two Supreme Court databases that were manually screened for relevant cases, as well as searching for breach outcomes in the sentencing comments available online.

3.5.1 Average duration for similar offending

As part of the Terms of Reference, the Council has been asked to compare the average duration of an HDO with suspended sentences for similar offending. As noted, this comparison is problematic due to the small number of offenders sentenced for each offence and the different nature of the sentencing orders under comparison.

In the Supreme Court, there were only two offences where three or more HDOs were imposed in the period 2019–20. Combined, there were 15 HDOs imposed for these two offences. These are very small numbers and any comparison with the duration of suspended sentences does not provide useful information about the relative operation of the two orders. However, as requested by the Terms of Reference, comparing the outcomes for the offences of assault and wounding/cause grievous bodily harm, it is noted that for both offences the average duration of HDOs was:

- longer than the average duration of the imprisonment component of FSSs
- considerably shorter than the average duration of the operational period of FSSs
- shorter than the average duration of the total term of imprisonment and the operational period for PSSs
- shorter than the average duration of the unsuspended portion of PSSs, meaning that time served in prison (subject to any parole considerations) was longer than the average duration of the HDOs.[117]

In the Magistrates Court, a comparison of sentence length was made for 59 HDOs imposed for the three offences which were most common when looking at the most serious offence in the period 2019–20.[118] These offences were drive a motor vehicle while exceeding prescribed alcohol limit, drive with prescribed illicit drug and common assault. Comparing the average duration with FSSs and PSSs, it is noted that the average duration of HDOs was:

- longer than the average duration of the imprisonment component of FSSs
- longer than the average duration of the imprisonment component of PSSs for the driving offences under the *Road Safety (Alcohol and Drugs) Act 1970* (Tas), but shorter than the average duration of imprisonment for assault
- considerably shorter than the average duration of the operational period of FSSs and PSSs.

In terms of the practical consequences of the differences between the durations of FSSs and HDOs, it is not possible to say which sentence was more severe or punitive. This is because, as has been noted, it depends on the conditions attached to the FSS and the HDO, and whether the offender is required to serve any portion of the FSS. For those offenders who received a PSS, the average term of imprisonment required to be served was

[117] For more detail see Appendix A.

[118] A further 21 HDOs were made for these three offences, but did not have sentence length data readily extractable due to a system issue. Orders with 'balance suspended' are excluded as the data on the length of suspension cannot be calculated without knowing the length of time the defendant had served in prison. There were also a small number of FSS/PSS orders with text rather than number data for their operational period and these were excluded from the calculation of operational period, but not other fields.

longer than the average duration of the HDO, and so a more severe penalty. However, it is stressed again that the numbers under consideration are too small to demonstrate a difference in the use of the orders per se, but only reflect the consequences of the penalty for the small number of individual offenders.

3.5.2 Breach outcomes for similar offending

As indicated at [3.4.1], the Council identified five applications in the Supreme Court to cancel HDOs, with four of these applications resulting in the HDO being cancelled.

Only three of these five applications resulted from a breach of the order, and, in these cases, this related to a failure to comply with a condition of the HDO and not new offending. In two cases the order was cancelled and the offender was re-sentenced and in one case the order was confirmed.

Comparing these three cases (grouped into broad offence categories) with the outcome of applications for breach of suspended sentences for offences of the same offence category, it is noted that all but one of these applications for breach of a suspended sentence related to new offending and not the breach of another condition of the order. This means that comparisons in terms of outcomes are difficult to make because of the different nature of the breaches, as well as the very small number of cases involved. However, the data show that for suspended sentences, 68% of applications resulted in the sentence being activated, and in a further 16% of cases, the offender was re-sentenced or the order varied. There were only 16% of cases where it was found that it was unjust to activate the suspended sentence and no further order made.[119]

In the Magistrates Court, in the period 2019–20, there were 31 applications made to breach or cancel an HDO and 387 applications to breach a suspended sentence for the same offence categories. Further details of the offence categories are set out in Appendix A.[120] In relation to the HDOs:

- 22 applications were granted
- 15 HDOs were cancelled and the offender re-sentenced
- five orders were extended
- no order or an order for early termination was made in two cases
- nine applications were withdrawn or dismissed.

In relation to suspended sentences:

- 370 applications were granted
- 209 suspended sentences were activated
- no order was made in two cases
- 17 applications were withdrawn or dismissed.

The utility of this comparison is limited because it was not possible to determine if the applications for breach for both HDOs and suspended sentences were based on new offending, a failure to comply with another condition of the order or for some other reason (so the comparison is not necessarily of a ‘like’ breach). It was also not possible to

[119] See Table A.10.

[120] See Table A.11.

determine the outcome if an offender was found to have breached a suspended sentence and the original sentence was not activated but the offender was re-sentenced, or the original sentence was varied.

3.6 Stakeholder feedback

As part of the review process as set out in the Terms of Reference, the Council sought feedback from relevant stakeholders in relation to a number of matters relating to the operation of the new orders and the phasing out of suspended sentences. In relation to HDOs, these matters were:

- the perceived effectiveness of home detention as a sentencing option among relevant stakeholders
- the need for any legislative amendments to improve the operation of home detention, particularly if suspended sentences are phased out.

Generally, the feedback received from stakeholders was that the HDO is functioning well, and that the expansion in the range of sentencing options available to the court was welcome. TLA expressed the view that HDOs 'provide harsh punishment by placing significant limitations on the freedom of movement of offenders'. The 'high degree of restriction on liberty' was achieved without the 'unnecessarily harsh and unintended consequences of imprisonment' while able to facilitate rehabilitation and 'constructive pursuits that benefit the individual and the community'.

However, some specific concerns were raised by stakeholders.

In the consultation draft, the Council identified two issues in relation to the HDO that may preclude otherwise suitable offenders from accessing the order[121] — technical limitations and issues of fairness and equity.

Technical limitations of monitoring equipment has been a feature of home detention that has limited its use and effectiveness as a sentencing option in other jurisdictions.[122] This is also an issue that has been raised by the Supreme Court in relation to HDOs in Tasmania, where concerns about the reliability of the signal from an electronic monitoring device due to the location of the offender's home have limited the availability of the order for otherwise suitable offenders.[123] Other issues identified have been in relation to offenders who have not been able to provide monitoring authorities with a work schedule in advance.[124] It is noted that in these cases, due to the constraints on the availability of electronic monitoring for otherwise suitable offenders, the court imposed a FSS.

Fairness and equity. Previously, the Council has acknowledged that appropriate resourcing needs to attach to the operation of an HDO scheme to address concerns in relation to barriers for suitability for home detention for those offenders with substance dependency or

[121] Community Corrections advised that a suitability assessment is conducted to determine whether a person's individual circumstances, criminogenic risks and needs make them suitable for a community-based order, including an HDO.

[122] See TSAC, *Phasing Out of Suspended Sentences Report* (n 53) [7.3.4].

[123] *Tasmania v TW* (COPS, Supreme Court of Tasmania, Wood J, 26 February 2021); *Tasmania v Parssey* (COPS, Supreme Court of Tasmania, Blow CJ, 29 July 2020); *Tasmania v Wilmot* (COPS, Supreme Court of Tasmania, Blow CJ, 19 August 2019); *Tasmania v Cashion* (COPS, Supreme Court of Tasmania, Geason J, 5 October 2020). In all these cases, the court imposed a FSS.

[124] *Tasmania v Shearing* (COPS, Supreme Court of Tasmania, Estcourt J, 12 June 2020). The offender was sentenced to a FSS.

mental health issues, homeless offenders or those with unstable housing.[125] Significant issues of fairness arise if home detention is a sentencing order only (or predominately) limited to those offenders with financial means from stable family backgrounds. Anecdotally, concerns have been raised about the accessibility of HDOs for a broader range of offenders.

In line with the issues identified by the Council, feedback from the Office of the DPP was that there were concerns that the HDO depended on an offender having stable housing and also living in an area with the ability to access appropriate technology. Community Corrections wrote that '[h]omelessness in and of itself does not preclude a person from a home detention order, however the nature of the order requires a level of housing stability to meet the legal requirements of the order and ensure conditions can be effectively managed'. This meant that while this could include transitional housing, 'a person experiencing housing instability [was] unlikely to be found suitable for a home detention order'.

Community Corrections confirmed the technical limitations of electronic monitoring, which was reliant on the availability of mobile phone networks. It was noted that currently 8% of homes were assessed as unsuitable due to the inability to recover enough data from the electronic monitoring equipment. Given this level of coverage, Community Corrections' view was that 'monitoring equipment does not represent a significant limitation to home detention order suitability in Tasmania'. Further, it was noted that technological advances in the equipment and system used meant that more homes were being assessed as suitable, and that it was anticipated that there would be a decrease in the homes that were unsuitable on technological grounds.

Community Corrections noted that there was no effective way to monitor an offender without electronic monitoring, as there were insufficient resources to allow this to occur. Its view was that if electronic monitoring was removed as a condition of the order (in cases where electronic monitoring was not available), the nature of the order was fundamentally changed, and it lacked sufficient punitive and deterrent effect to reflect the seriousness of the circumstances where the order was appropriate. In addition, an order without monitoring was considered unlikely to be successful due to compliance issues. Concerns about monitoring and compliance with HDOs in remote areas was also raised by Mr Belpin, police officer, Geeveston Police Station.

In addition to the circumstances outlined by the DPP, the Law Society identified other circumstances where a person was likely to be assessed as unsuitable for an HDO, such as where their work or family arrangements created difficulties with monitoring.[126]

Other situations identified by Community Corrections as giving rise to unsuitability were offenders with mental health issues or intellectual disability that created difficulties because of a lack of capacity to complete an HDO. Concerns were also expressed about the appropriateness of an HDO for offenders who used illicit drugs or had issues with alcohol dependency, given the difficulties with compliance with the conditions of the orders. Additional difficulties were identified by Community Corrections in relation to the suitability of an HDO for offenders who were the primary carer of a child/children. In these circumstances, the requirement of the order limiting the movement of the offender had the effect of placing the children on the order.

[125] See TSAC, *Phasing Out of Suspended Sentences Report* (n 53) [7.3.5].

[126] Community Corrections reported that electronic monitoring under an HDO requires that offenders timetable their activities a week in advance, including times and locations for all employment and other activities. Any activities away from the home address require approval by an authorised officer, and this may include collateral checks. For certain kinds of work, planning a week in advance is not feasible, for instance where a person is called out to various work sites at short notice.

However, Community Corrections indicated that unsuitability assessments based on perceived difficulties with compliance with the strict conditions of an HDO or other issues to do with suitability did not mean that the order was inequitable but 'only means that it is not a sentence that [a] person is likely to be able to comply with at that time'. Community Corrections wrote '[s]ome orders are not a "good fit" for an offender'. Community Corrections also observed that a person who was deemed unsuitable for an HDO 'could still be suitable for a different community-based order'.

As with other stakeholders, TLA also noted the exclusion of certain offenders from HDOs and added that additional resources needed to be allocated to allow the court to use HDOs in a broader range of cases.

The DPP raised concerns that HDOs had, on occasion, been imposed in inappropriate cases due to the seriousness of the offence, in particular for serious violence offences.

Tasmania Police identified an issue about the use of police rather than Community Corrections in undertaking drug and alcohol monitoring for HDOs. This was seen to be beyond the scope of responsibility of Tasmania Police.

Community Corrections raised several issues in relation to pre-sentence reports:

- In conducting a home assessment, there are problems in relation to managing family violence concerns.[127]
- The difficulty in assessing suitability for an HDO when there is no indication provided in the request for a pre-sentence report about the possible duration of the order. The view was expressed that there is a considerable difference in an offender's potential capacity to comply with an order of three months, for example, in comparison to an order of 18 months.
- The difficulty created by a request to provide a dual assessment for both an HDO and a DTO. The assessments look at different factors in terms of suitability, and this created complexity and an unnecessary expenditure of resources in some cases.

A further gap in the legislative framework noted by Community Corrections was in relation to the power of the court to impose a condition that the offender not have contact with persons under a specified age without the presence of a probation officer or other nominated person. Community Corrections suggested that the *Sentencing Act* s 42AE(1) be amended to include an ability for the court to make directions relevant to child related offences, including that the offender must not remain in the presence of a person under a certain age unless a probation officer is present or a person nominated by a probation officer is present. This was suggested to provide additional protection to children in relation to offenders who have convictions for child related offences in circumstances where the offender is sentenced to an HDO and required to live at premises where children reside, as long as the children are not

[127] As noted, an HDO cannot be made if the offender is being sentenced for a family violence offence, a violent offence or a sexual offence and the victim lives at the premises, or if the court considers that there is a significant risk of an offender committing a violent or sexual offence during the operational period: *Sentencing Act 1997* (Tas) s 42AC. However, these restrictions were not considered to be sufficient to address other concerns in relation to the risk of escalating family violence if it is identified as an issue relating to suitability of the premises in the pre-sentence report. If family violence exists, the victim may be reluctant to disclose (or if they disclose this may create a heightened risk of violence) given that this appears in the pre-sentence report and is disclosed to the offender in the usual course. Community Corrections noted that there was provision under the *Sentencing Act 1997* (Tas) s 87(2) to allow a request for a confidential report to be submitted, but indicated that this 'would be deemed highly unusual' and raises issues of procedural fairness. In addition, Community Corrections indicated that the Magistrates Court had identified some operational challenges in such a report being submitted.

also the victims of a sexual or family violence offence included on the HDO. It was noted that this is a condition that can be imposed by the Parole Board.

Community Corrections expressed concerns about the significant and detrimental impacts on an offender's mental health when sentenced to a long period of home detention. Under the HDO scheme, there is also no provision for a supported reintegration into the community (as there is for parole) or for a reduction in the level of restrictions imposed as the order progresses. As noted, the maximum period of the order is 18 months' imprisonment, and this was imposed in 32.5% of HDOs imposed in the Supreme Court. Community Corrections suggested that consideration be given to introduction of a phased transition through the orders. This approach was also suggested by the Council in its previous consideration of replacements for suspended sentences. The Council expressed the view that the legislative framework should be sufficiently flexible for Community Corrections to have a staged approach to manage offenders on home detention that results in them experiencing fewer restrictions on their freedom as they progress through the order.[128]

TLA's view was that the 18 month statutory limit for HDOs unnecessarily limits the availability of the order, and that if suspended sentences are phased out entirely, then longer HDOs could be used to fill the gap.

The Council also asked about any issues that arose from the use of combination orders, in particular the use of an HDO with a CCO. There were no fundamental concerns about the use of combination orders raised in the stakeholder feedback. However, the DPP expressed concerns about the imposition of general conditions by the court that could be modified by probation officers to reduce the punitive effect of the order, so that in reality home detention did not operate very differently for the offender from their 'normal' life.

Community Corrections observed that home detention is not a substitute for imprisonment but a community-based sanction that was 'applied to support people to maintain their connection to employment, family and community'. It was indicated that '[m]anagement of the orders generally is restrictive, however the focus of Community Corrections' engagement with the offender is on supporting rehabilitation and reintegration'. It was indicated that probation officers will approve an offender to engage in limited pro-social and lifestyle activities if appropriate. Nevertheless, the substantial restrictions imposed on people with HDOs meant that it was 'a significant departure from "normal life"' due to the need to plan and gain prior approval for any 'pro social' activities and having their movements tracked'.

Further, Community Corrections noted that there needs to be appropriate resources allocated as the increase in the use of combination orders has led to an increase in resource requirements to manage them. Multiple orders required management by different business units within Community Corrections, and the strict management of HDOs add complexity and 'an increased resource burden when managing community service in particular'.

Community Corrections also raised concerns in relation to timely access to the court to respond to changing circumstances, such as an offender's need to change address or to return to the court for a contravention action, particularly in relation to orders made in the Supreme Court. In relation to change of address, an offender's home detention address is listed as a condition of their order and so a change in accommodation needs to be made through the court. This created difficulties given the need to be able to respond to rapid

[128] TSAC, *Phasing Out of Suspended Sentences Report* (n 53) [7.3.8].

changes in stability and suitability of accommodation and delays that may arise in returning matters before the originating court.[129]

In relation to breaches of conditions, under the current legislative framework, applications to contravene or review an order need to have an initial mention in the originating jurisdiction. This creates a difficulty — particularly where the breach arises as a result of risk to community safety or a significant contravention of the order — if the contravention occurs on the weekend or after hours, as it may not be possible to access a judicial officer with the power to make appropriate orders (particularly if the HDO was made in the Supreme Court). A suggested reform was to allow for an application for breach to be able to have an initial mention before any court in the first instance, to support initial decisions relating to bail or remand under the *Sentencing Act* s 42AI.

A further limitation of the legislative framework for HDOs was the ability to take recovery action where an offender failed to return electronic monitoring equipment. This is paid for by Community Corrections, and there is no formal power that exists to obtain an order for its return.

Tasmania Police also noted the high degree of complexity in relation to the powers of arrest for the different sentencing orders, and the difficulties this presents for operational police officers. Tasmania Police suggested that this was a matter that could be examined to reduce complexity. There is a power for the court to issue a warrant for arrest if an offender fails to appear in court as required by a special condition of an HDO.[130] There is also a power for the court to issue a warrant for arrest for a failure to appear in court in relation to a DTO and a CCO.[131]

Absent a warrant issued by the court, there is no power for police to arrest in relation to a breach of a condition of a DTO. There are also limited powers to arrest for breaches of conditions of a CCO, as this only exists in relation to breach of a condition by attempting to leave the state.[132] In contrast, in relation to HDOs, there are broader arrest powers. Police officers have power to arrest if the police officer believes on reasonable grounds that the offender has breached, is breaching or is about to breach a condition of the order.[133] However, there is no offence of ‘breaching an HDO’ and so the extent that police exercise their arrest powers in these circumstances is difficult to record in a consistent way. Tasmania Police indicated that this is a matter they could potentially provide data in relation to, but it would be resource intensive to extract.

3.7 The Council’s views and recommendations

Based on its research and stakeholder feedback, the Council’s view is that HDOs are a valuable addition to the sentencing options in Tasmania. However, due to the issues identified in relation to availability of the orders for a number of offenders, the Council’s view is that the HDO is likely to be used for a more limited cohort of offenders than currently receive suspended sentences. As suggested by TLA, some of these issues may be able to

[129] It was noted that Community Corrections undertakes a home assessment for addresses nominated by an offender to determine suitability. As such, returning matters where the new address is deemed suitable to court to amend the address on the order has little utility, particularly if the offender is otherwise compliant with the terms of the order. The suggestion was to allow for administrative decisions to be made in the Department.

[130] *Sentencing Act 1997* (Tas) s 42AE(1)(a).

[131] Ibid ss 27G(5), 42AY(1).

[132] Ibid s 42AY(3).

[133] Ibid s 42AL(4).

be addressed by greater resource allocation, however, not all issues related to the availability can be addressed by more resources.

The maximum length of an HDO was an issue raised by stakeholders, with TLA suggesting that an extension of the maximum length of the order from 18 months may allow an HDO in a broader range of cases, and so as an alternative sanction if suspended sentences were phased out. However, concerns were expressed by Community Corrections about the detrimental impact of orders in the vicinity of 18 months on an offender. Given the need for more detailed consideration of the implications of such a reform, the Council's view is that any extension to the maximum length of the HDO would require further stakeholder consultation and makes no recommendation in relation to this reform at this time.

While not relating to legislative changes that would be necessary to improve the operation of the HDO as a replacement for a suspended sentence, the Council was provided with feedback from stakeholders in relation to aspects of the order that affected its operation as a sentencing order more broadly. Accordingly, in relation to the framework of the HDO, the Council suggests further consultation with stakeholders may be beneficial to explore:

- the possible introduction of a staged approach to managing offenders on HDOs that results in such offenders experiencing fewer restrictions on their freedom as they progress through the order
- the provision of a timely means to address changes to the terms of the orders, such as in relation to approved premises, and to allow for applications to be heard quickly in relation to contraventions of the conditions of HDOs made in the Supreme Court
- additional resources that may be required to support the administration of the order.

4 CCOs under Part 5B of the Sentencing Act

CCOs were introduced in Tasmania by amendments to the *Sentencing Act* and were available as a sentencing order in the Magistrates Court and Supreme Court from 14 December 2018.

As part of this review, Terms of Reference 9–16 require the Council to provide advice on the following:

9. How many community correction orders have been made by the court, and for what offences?
10. What is the average duration of a community correction order?
11. With respect to 10, how does this compare to a suspended sentence for similar offending?
12. Have any breaches been committed by offenders while serving a community correction order that have resulted in an application to court to have the order varied or cancelled?
13. If the answer to 12 is yes, what was the outcome(s)?
14. With respect to 13, how does this compare to breaches committed by offenders serving a suspended sentence for similar offending?
15. What has been the perceived effectiveness of community correction orders as a sentencing option among agency stakeholders?
16. Are any legislative amendments recommended that could be made to improve the operation of community correction orders, particularly if suspended sentences are phased out?

This chapter addresses these questions and provides detailed information about the nature of the CCO, including the circumstances in which the order can be made, the use of combination orders, and the conditions that attach to the order. It sets out stakeholder feedback received in the consultation process and the Council's view and recommendations.

4.1 Nature of the order

A CCO is an intermediate community-based sentencing order that is a less severe sanction than imprisonment, a DTO or an HDO. The CCO is intended to provide a flexible order that can be used for a wide range of offending, including where previously a suspended sentence would have been imposed.[134] While it incorporates features of the orders it replaced — CSOs and probation orders — it covers a larger sector of the sentencing

[134] TSAC, *Phasing Out of Suspended Sentences Report* (n 53) [7.6].

continuum than was covered by either of those orders.[135] In the Second Reading Speech, the Minister for Justice stated:

> Community correction orders are likely to be an appropriate sentencing order, either alone or in combination with other orders, for a wide range of offending. These orders are likely to be imposed in a broader range of circumstances than either community service orders or probation orders. Depending on the length of the order and the specific conditions imposed, community correction orders can be a highly punitive sentencing option. Importantly, however, these orders will also help offenders address the factors that led to their criminal behaviour in the first place.[136]

Accordingly, while a less severe sentencing option than an HDO, the CCO also aims to be able to address multiple purposes of sentencing as both a punitive order, but one that also has the capacity to address the rehabilitative needs of the offender and impose appropriate punishment.[137] The severity of the order, including the extent to which it materially infringes on the liberty of an offender, depends on the special conditions that attach to the order, with considerable scope for coercive and restrictive orders to be imposed. This was recognised by Wood J in *King*, where her Honour wrote:

> These orders fulfil a number of sentencing objectives, including deterrence and rehabilitation, and impose significant burdens on the offender: *DPP v Edwards* [2012] VSCA 293, 44 VR 114 at [123] and [242]; *Boulton* at [85]–[98], (noting the Victorian legislative scheme in relation to community corrections orders is broadly similar to the Tasmanian scheme). These orders are intended to be onerous for offenders while allowing the court to have the flexibility to tailor the sentence to address the offender's rehabilitative needs.[138]

The maximum operational period of the order is three years.[139]

4.2 Circumstances in which a CCO can be imposed

As noted, a CCO is an order that is intended to be appropriate for a broad range of offending that could apply when a suspended sentence would otherwise have been considered appropriate,[140] as well as when a probation order or CSO might previously have been imposed.

No offences are legislatively precluded from a CCO.

4.2.1 CCOs combined with other sentencing orders

As previously noted, a CCO can be combined with several other sentencing orders including a sentence of imprisonment (including a PSS or FSS), an HDO, a fine, a rehabilitation program order or a driving disqualification order.[141]

While the CCO can be combined with imprisonment, there are statutory restrictions in relation to the combination sentence. A CCO can only be combined with imprisonment if the period of imprisonment imposed is no more than two years.[142] Further, a court that combines a sentence of imprisonment with a CCO as a sentence for an offence cannot also set a non-parole period in respect of the period of imprisonment (if the court orders that the operational

[135] TSAC, *Phasing Out of Suspended Sentences Report* (n 53) [7.6.1].
[136] *Second Reading Speech* (n 64) 45.
[137] See TSAC, *Phasing Out of Suspended Sentences Report* (n 53) [7.6].
[138] *King* (n 19) [69].
[139] See *Sentencing Act 1997* (Tas) s 42AQ(2).
[140] See ibid s 42AN(2).
[141] See [2.1.4].
[142] *Sentencing Act 1997* (Tas) s 8(1)(a).

period of the CCO is to commence at the end of the sentence of imprisonment).[143] This means for a combined CCO and imprisonment order imposed for a sentence for a single offence, or as a global sentence for multiple offences, the offender will not be eligible for parole. This aligns with the recommendations of the Council that if a combination order of imprisonment and a CCO is imposed, the sentence of imprisonment should be limited to two years,[144] and the court should not be able to impose a non-parole period in relation to imprisonment.[145]

The Council adopted this approach due to concerns about the suitability of the conditions that may be attached to a CCO (made at the time of sentencing) following a long period of imprisonment, given the likely changing needs of an offender which may be better addressed by parole conditions made at the time of release.[146] The Council also observed complexities that arise in relation to differences in the two regimes and concerns in relation to difficulties that would arise with breach of the non-parole period and the commencement and continuity of CCO programs.[147] This approach also reflected current sentencing practice in relation to the use of probation orders following a sentence of imprisonment.[148]

The Court of Criminal Appeal in *Gordon v Tasmania* ('*Gordon*'),[149] made observations regarding these views of the Council and the consequent legislative restrictions. In his judgment, Porter AJ indicated that 'the reduction in the flexibility previously possessed by a sentencing court is not ideal, and may hinder a court's attempts to fashion a sentence in the interests of the community and of the offender.'[150] Previously, there was no limit on the length of the term of imprisonment that could be combined with a probation order or CSO and a court could still make an order for eligibility for parole. Porter AJ observed:

> With sentences of two years or less, a court might take the view that parole eligibility is fully warranted, while at the same time regard a CCO relating to appropriate supervision and rehabilitative intervention as strongly indicated on different or overlapping grounds. With sentences of more than two years, a certainty of supervised structured rehabilitation might be highly desirable. I should note that in this State, parole and CCOs are both managed by the agency of Community Corrections.[151]

Nevertheless, despite the legislative constraints, there have been cases where an offender has been sentenced to more than two years' imprisonment with a non-parole period imposed, and with a CCO imposed on release. In a case involving multiple charges, this outcome has been achieved by imposing separate sentences for different offences rather than a global sentence. In *Bell v Tasmania*,[152] the offender was sentenced to a global sentence of four years' imprisonment for the crimes of assault and wounding with a non-parole period of two and a half years. He was also sentenced to a CCO with a supervision condition for two years after his release from prison for the crime of stealing. In other cases, the offender has been sentenced to a PSS where the total sentence of imprisonment imposed (excluding the suspended portion) was greater than two years and a non-parole

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143 *Sentencing Act 1997* (Tas) s 17(2A). These provisions were based on the recommendations of TSAC, *Phasing Out of Suspended Sentences Report* (n 53) Recommendations 46 and 48.

144 TSAC, *Phasing Out of Suspended Sentences Report* (n 53) Recommendation 47.

145 Ibid Recommendation 48.

146 See ibid [8.1].

147 See ibid.

148 See ibid.

149 [2020] TASCCA 17 ('*Gordon*').

150 Ibid [70] (Porter AJ).

151 Ibid [72].

152 [2019] TASCCA 14.

period was set. In addition, a CCO was imposed to operate from the date of release from prison, which would either be the beginning of the suspended portion of the sentence or the date on which the offender was released on parole.[153]

4.2.2 Conditions of CCOs

The *Sentencing Act* s 42AO sets out the core conditions of a CCO:

- not to commit an offence punishable by imprisonment
- report to probation officer as required
- comply with lawful and reasonable directions of probation officer as required
- not leave or remain outside Tasmania without the permission of the probation officer
- give notice of change of address or employment.

In addition, there are a number of special conditions that a court may attach to a CCO. These are:

- judicial monitoring
- attend educational and other programs as directed
- supervision by probation officer
- complete community service
- undergo assessment and treatment for drug and/or alcohol dependency
- submit to drug testing
- an offender not to consume alcohol
- submit to medical, psychological or psychiatric assessment or treatment
- non-association conditions meaning that the offender must not communicate with a particular person or members of a class of persons
- curfew conditions
- area restriction
- conditions that the court considers appropriate.

The *Sentencing Act* s 42AP(2) limits the discretion of the court when imposing special conditions on an offender, as it mandates that either supervision by a probation officer or community service must be imposed as part of the order.

Several of the conditions of a CCO reflect conditions that could previously have been attached to a probation order or a CSO. Conditions also reflect conditions that can attach to an area restriction order and/or a suspended sentence (or a combination of these orders).[154] There are also new conditions such as judicial monitoring, alcohol exclusion, curfew and non-association.

[153] *Tasmania v Gill* (COPS, Supreme Court of Tasmania, Estcourt J, 24 September 2019); *Tasmania v Murtagh* (COPS, Supreme Court of Tasmania, Estcourt J, 24 September 2019); *Tasmania v JTWR* (COPS, Supreme Court of Tasmania, Geason J, 14 March 2019).

[154] *Sentencing Act 1997* (Tas) ss 24, 70.

The range of conditions available to the sentencing court as part of a CCO was intended to provide a high degree of flexibility and means that the order can fulfil a number of sentencing purposes, including punishment, deterrence and rehabilitation.[155] It also means that the order may be particularly onerous depending on the conditions that are attached to the order, and as noted by Porter AJ in *Gordon*, the special conditions that may be imposed 'range in nature from punitive and disabling to rehabilitative and therapeutic'.[156] In its previous report, the Council also noted that the order should only contain the minimum number of conditions consistent with the proportionality, the purposes of sentences and the purposes of a CCO.[157]

4.3 Use of CCOs in the Supreme Court

4.3.1 Number of orders

There has been an increase in the proportion of offenders sentenced to a CCO in the two years that the order has been available, from 5.4% of offenders sentenced in 2019 to 7.4% in 2020. In the Supreme Court, there were 41 offenders sentenced to a CCO as the most serious sentence imposed for an offence (19 in 2019 and 23 in 2020).[158]

As noted, a statutory requirement of a CCO is that supervision or a CSO are imposed as a special condition of the order.[159] There were 27 cases where a community service condition was imposed, 19 cases where a supervision condition was imposed and two cases where both community service and supervision conditions were imposed.[160]

There were also 83 cases where CCOs were imposed in combination with other sentencing orders. A CCO was combined with a FSS in 46 cases, a PSS in 16 cases and imprisonment in six cases. As noted, there were 14 CCOs combined with an HDO. There was also one CCO combined with a DTO.[161]

In relation to sentences of imprisonment combined with a CCO, as noted, the maximum period of imprisonment that can be combined with a CCO is two years and there is no capacity for the court to make an order in relation to eligibility for parole.[162] The shortest sentence of imprisonment combined with a CCO was 10 months' imprisonment, the longest sentence was 24 months' imprisonment and the median was 16 months' imprisonment.

It would appear that the Supreme Court has accepted the utility of a CCO as an order that provides a punitive sentencing option able to address general and specific deterrence and impose punishment, as well as addressing rehabilitative sentencing objectives.[163] However, it is unclear the extent to which CCOs have been imposed in circumstances where the Court would otherwise have imposed a suspended sentence.

Broadly, the CCO appears to have been used in cases where an individualised approach to sentencing is required due to the particular personal circumstances of the offender (including youth, drug and alcohol issues, impaired mental functioning) and where rehabilitation was

[155] TSAC, *Phasing Out of Suspended Sentences Report* (n 53) [7.6.11].

[156] *Gordon* (n 149) [71].

[157] TSAC, *Phasing Out of Suspended Sentences Report* (n 53) [7.6.11].

[158] There were also two cases where a CCO was imposed for a breach of a CSO, and one case where a CCO was imposed for a summary conviction for assault.

[159] See [4.2.2].

[160] It is noted that in one case only core conditions were imposed.

[161] There is no provision in the *Sentencing Act 1997* (Tas) for a combined DTO and CCO.

[162] See [4.2.1].

[163] *Tasmania v Richardson* (Supreme Court of Tasmania, Porter AJ, 26 October 2020) ('*Richardson*'); *Tasmania v Gray* (Supreme Court of Tasmania, Geason J, 17 September 2020).

identified as a more prominent sentencing factor, even though imprisonment may be the appropriate penalty in other cases.[164] In these cases, the special conditions imposed (treatment, counselling) relate to factors relevant to the underlying causes of offending, and supervision imposed as the legislatively required special condition rather than community service. In other cases, the offender's culpability due to lack of prior offending, remorse, prior good character and/or due to the seriousness of the offence, did not warrant imprisonment.[165] Generally speaking, in these cases, a community service condition was imposed as the legislatively required special condition.

4.3.2 Offences

As noted, the CCO was intended to provide a flexible sentencing option that would be appropriate for a broad range of offending, including cases where a suspended sentence would have been imposed.

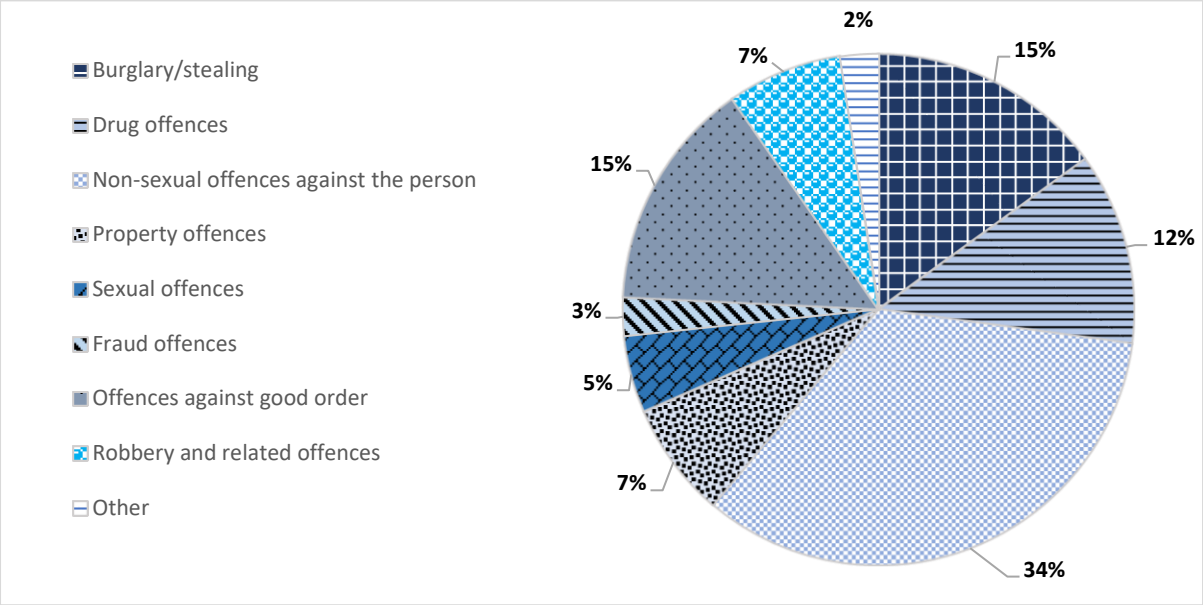
As shown by Figure 4.1, CCOs have been imposed in relation to serious offending. Figure 4.1 sets out the use of CCOs for offences grouped into offence categories (by most serious offence). The most common offence category for which CCOs were imposed was non-sexual offences against the person (14 cases or 34%), followed by burglary/stealing and offences against good order (both six cases or 15%). Assault was the most common offence for which CCOs were imposed (nine cases), followed by trafficking in a controlled substance and perverting the course of justice (both four cases). Full details are set out in Appendix B.[166]

[164] See for example, *Tasmania v Benson* (COPS, Supreme Court of Tasmania, Wood J, 24 September 2019); *Tasmania v Jones* (COPS, Supreme Court of Tasmania, Porter AJ, 30 July 2019); *Tasmania v Boyer* (COPS, Supreme Court of Tasmania, Wood J, 6 February 2019); *Tasmania v Morgan* (COPS, Supreme Court of Tasmania, Brett J, 6 August 2019); *Tasmania v JAR* (COPS, Supreme Court of Tasmania, Porter AJ, 30 May 2019); *Tasmania v Thompson* (COPS, Supreme Court of Tasmania, Geason J, 12 August 2019); *Tasmania v Riley* (COPS, Supreme Court of Tasmania, Brett J, 2 September 2019); *Tasmania v Benjamin* (COPS, Supreme Court of Tasmania, Brett J, 19 May, 24 June 2020); *Tasmania v Downey* (COPS, Supreme Court of Tasmania, Pearce J, 1 April 2021); *Tasmania v McGuire* (COPS, Supreme Court of Tasmania, Geason J, 26 August 2020); *Tasmania v Mountney* (COPS, Supreme Court of Tasmania, Pearce J, 22 June 2020).

[165] See for example, *Tasmania v Barwick* (COPS, Supreme Court of Tasmania, Brett J, 25 March 2019); *Tasmania v Hodgson* (COPS, Supreme Court of Tasmania, Pearce J, 22 March 2019); *Tasmania v Munday* (COPS, Supreme Court of Tasmania, Brett J, 2 July 2019); *Tasmania v McCauley* (COPS, Supreme Court of Tasmania, Estcourt J, 23 March 2021); *Tasmania v Iezzi* (COPS, Supreme Court of Tasmania, Pearce J, 20 March 2020); *Tasmania v Hickey* (COPS, Supreme Court of Tasmania, Brett J, 18 November 2020); *Tasmania v Lohrey* (COPS, Supreme Court of Tasmania, Pearce J, 1 July 2020); *Tasmania v Huskic* (COPS, Supreme Court of Tasmania, Blow CJ, 3 February 2020); *Tasmania v Hayes* (COPS, Supreme Court of Tasmania, Blow CJ, 4 March 2020); *Tasmania v McRae* (COPS, Supreme Court of Tasmania, Brett J, 2 July 2020); *Tasmania v Woolley* (COPS, Supreme Court of Tasmania, Brett J, 2 July 2020); *Tasmania v Clack* (COPS, Supreme Court of Tasmania, Brett J, 2 July 2020); *Tasmania v Traill-Barwick* (COPS, Supreme Court of Tasmania, Pearce J, 21 May 2020), *Tasmania v Cosgrove* (COPS, Supreme Court of Tasmania, Pearce J, 16 December 2020).

[166] See Table B.1.

Figure 4.1: CCOs imposed, proportion of orders by offence category, most serious offence, Supreme Court, 2019–20



4.3.3 Duration of orders

As noted, the longest operational period that can be made for a CCO is three years (36 months), and this was imposed in four of the 41 cases (9.7%). Further, the minimum duration of CCO was an order for six months and the median duration was an order for 18 months in relation to all offenders who received a CCO as the most serious sentence. For more details see Appendix B.[167]

The minimum duration of a CCO for six months was imposed in one case where the offender pleaded guilty to one count of making a false declaration and four summary offences relating to possession of a firearm.[168] In this case, the offender lied to police in relation to firearms in the roof cavity of her property that were placed there by her brother.

The median duration of 18 months was imposed in nine cases. This was imposed in three cases of assault, one case of stalking, one case of trafficking, one case of unlawful possession, one case of being an accessory after the fact to armed robbery, one case of recklessly discharging a firearm and one case of an indecent act with a young person. Some of the conduct was objectively serious and was said to usually require a sentence of imprisonment, however, a CCO was imposed in the circumstances of the particular case. These included the following cases:

- Stalking where the offender was 75 and had serious medical conditions including early onset dementia. In imposing a CCO in this case, Porter AJ stated that '[i]n short, the case calls for a high degree of individualisation and a penalty which would not be appropriate for someone without the defendant's difficulties.'[169]
- Accessory after the fact to armed robbery where the offender agreed to give evidence against the principal offender.[170]

[167] See Table B.2.
[168] *Tasmania v Mace* (COPS, Supreme Court of Tasmania, Porter AJ, 2 July 2019).
[169] *Tasmania v Jones* (COPS, Supreme Court of Tasmania, Porter AJ, 30 July 2019).
[170] *Tasmania v Radin* (COPS, Supreme Court of Tasmania, Pearce J, 14 October 2020).

- Assault where the offender had an acquired brain injury and had taken active steps to gain employment. In this case, Wood J stated that 'he is a young offender who is learning how to manage his difficulties and get on with living a productive and responsible life. I am satisfied that an individualised response to this offending is appropriate and the sentence should give prominence to his rehabilitation'.[171]
- Recklessly discharging a firearm in a siege situation where the offender was, for most parts, the victim of the siege and not a perpetrator.[172]

In other cases, the offender was a youthful offender who had taken steps toward rehabilitation,[173] an offender with a low IQ,[174] or an older offender who was of good character and whose offending was connected with a health condition.[175]

The maximum duration of a CCO for 36 months was imposed on four offenders. Three of these matters involved a charge of dangerous driving, where each offender was driving their own vehicle in close proximity to the others.[176] They were all 18 years old at the time of the offence and driving on a P1 licence. In imposing a sentence of a CCO for 36 months, Brett J stated:

> People who drive dangerously and put themselves and others at risk are usually sent to jail. This occurs even if they are young and lack a criminal record. However, in the case of each of you, when I have regard to your relative lack of prior convictions, your young age and your otherwise good character, together with your obvious remorse, I am satisfied that a sentence of actual imprisonment is not necessary. I think that adequate punishment can be inflicted by requiring you to perform community service and by a lengthy disqualification from driving. Further, in the case of each of you, there will be conviction for this crime on your record, which in itself will have punitive consequences.[177]

In the other case, the offender entered a plea of guilty to two counts of perverting justice in relation to false complaints of family violence committed by her former partner. In sentencing, Estcourt J acknowledged that the crimes would be very serious examples of perverting the course of justice, '[i]f the defendant [had] acted otherwise in her offending than as a result of the compulsion of a psychiatric condition, whether it be PTSD, depression and anxiety with panic attacks, or a delusional disorder'.[178]

4.4 Use of CCOs in the Magistrates Court

4.4.1 Number of orders

In the Magistrates Court, there were 1,047 offenders sentenced to a CCO as the most serious sentence imposed for an offence (four in 2018, 596 in 2019 and 447 in 2020). Nearly 70% of offenders received a supervision condition (40% only supervision, and 27% both supervision and community service) and a third of offenders (33%) received community service only.

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171 *Tasmania v Benson* (COPS, Supreme Court of Tasmania, Wood J, 24 September 2019).

172 *Tasmania v Mountney* (COPS, Supreme Court of Tasmania, Pearce J, 22 June 2020).

173 *Tasmania v Boyer* (COPS, Supreme Court of Tasmania, Wood J, 6 February 2019); *Tasmania v Thompson* (COPS, Supreme Court of Tasmania, Geason J, 12 August 2019); *Tasmania v Lohrey* (COPS, Supreme Court of Tasmania, Pearce J, 1 July 2020).

174 *Tasmania v JAR* (COPS, Supreme Court of Tasmania, Porter AJ, 30 May 2019).

175 *Tasmania v McIntyre* (COPS, Supreme Court of Tasmania, Pearce J, 23 May 2019).

176 *Tasmania v McRae, Woolley and Clack* (COPS, Supreme Court of Tasmania, Brett J, 2 July 2020).

177 Ibid.

178 *Tasmania v Brown* (COPS, Supreme Court of Tasmania, Estcourt J, 3 February 2020).

Overall, there were 2,351 CCOs imposed in the Magistrates Court since the creation of the order to 2020. Over half of defendants who received a CCO had a higher level sentencing order from the same sentencing event (53%). As shown by Table 4.1, a CCO was most commonly combined with a suspended sentence.

Table 4.1: CCOs combined with higher level sentencing orders, Magistrates Court, 2019–20

Sentencing order	Number	% of CCOs
Imprisonment with no suspension	198	9
PSS	217	10
FSS	655	30
HDO	93	4

Of the 2,351 CCOs imposed, over 75% were imposed with supervision conditions (55% supervision only, and 24% with both supervision and community service conditions) and there were 21% of orders that had community service conditions only.[179]

4.4.2 Offences

Figure 4.2 sets out the offences for which a CCO was the most serious sentence imposed by the Magistrates Court, classified by most serious offences and offence categories. The most common offence category for which CCOs were imposed was traffic and vehicle regulatory offences (290 cases or 28%), followed by non-sexual offences against the person (278 cases or 27%) and burglary/stealing (159 cases or 15%). As with the Supreme Court, the most common offence for which a CCO was imposed was assault (226 cases). This was followed by (in decreasing order of seriousness):

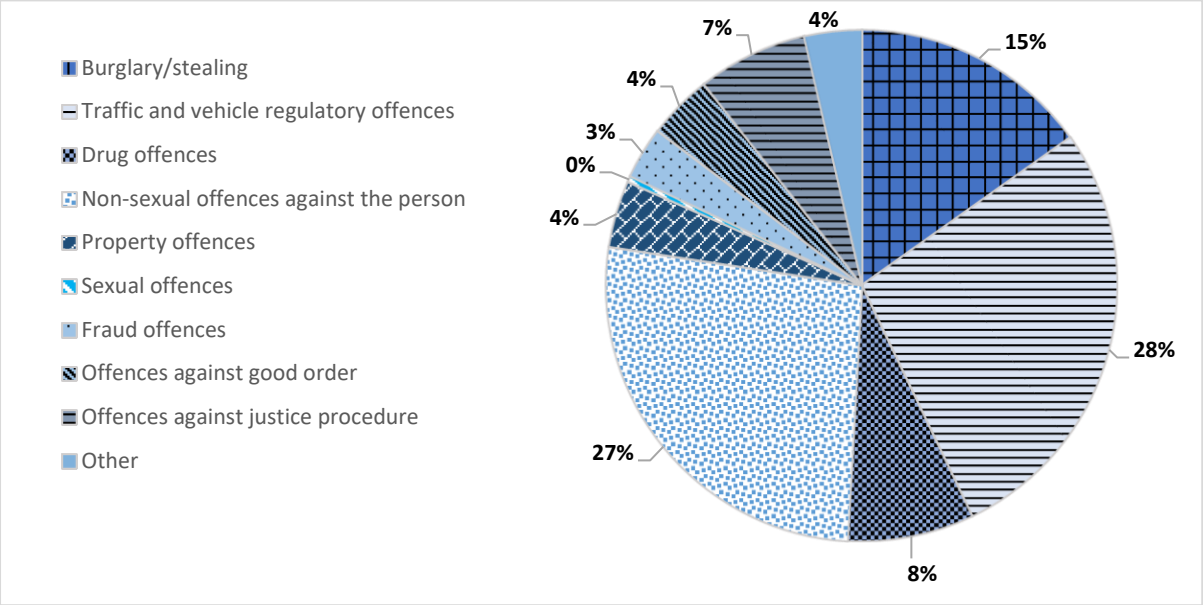
- drive with prescribed illicit drug in blood or oral fluid
- stealing
- drive a motor vehicle while exceeding prescribed alcohol limit
- burglary
- breach of family violence order, police family violence order/interim family violence order
- destroy property
- driver referred to in s 6(3) or s 6(4) with alcohol in body
- drive whilst not the holder of a driver licence
- assault a police officer.

These offences accounted for more than half of all CCOs imposed (66%). Further details are set out in Appendix B.[180]

[179] It is noted that the use of community service as a condition was affected by the COVID-19 pandemic period where community service was not available.

[180] See Table B.3.

Figure 4.2: CCOs imposed, proportion of orders by offence category, most serious offence, Magistrates Court, 2019–20



4.4.3 Duration of orders

As noted, the longest operational period that can be made for a CCO is 36 months (three years), and this was not imposed in the Magistrates Court. For offenders where the CCO was imposed as the most serious sentence,[181] the minimum duration of CCO imposed in the Magistrates Court was an order for four months and the longest duration was 24 months. The median duration was an order for 12 months in relation to all offenders who received a CCO as the most serious sentence. This was imposed for 65% of CCOs.

4.5 Breaches of CCOs

A CCO may be breached by an offender failing to follow the conditions of the order and/or being found guilty of a new offence committed during the operational period. Under the *Sentencing Act* s 42AV, if an offender has breached a condition of a CCO (other than the core condition in relation to offending), the court can confirm the order, vary the order or cancel the order and re-sentence the offender. These options are also available under the *Sentencing Act* s 42AW, if an offender has breached a condition of a CCO where the offender is found guilty of an offence.[182] A breach of a CCO is not a separate offence. An order may also be cancelled or varied under the *Sentencing Act* s 42AU, if there is a change in the offender's circumstances that has rendered the offender unable to comply with any condition, the offender is no longer willing or able to comply with the order, or it is otherwise appropriate to do so.

4.5.1 Supreme Court

In the Supreme Court, the Council has identified four cases where an application has been made to vary or cancel a CCO following the breach of the conditions of a CCO. In all cases, the CCO was part of a combined sentence of a suspended sentence and a CCO. In none of these cases was the application made as a result of new offending.

[181] Data was available for 995 CCOs out of 1,047 CCOs.

[182] *Sentencing Act 1997* (Tas) s 42AW.

In all four cases, the order was cancelled. In three cases, the offender was re-sentenced and in one case, no further order was made, but in relation to a separate application for breach of a suspended sentence, the PSS was activated. The circumstances and outcomes are set out in more detail in Appendix B.[183]

4.5.2 Magistrates Court

In the Magistrates Court, there were 411 CCOs where an application was made to vary or cancel a CCO, of which 324 have been finalised. In relation to these finalisations, outcomes are provided for the 317 which belong to most common ANZSOC categories.[184] Of these 317 applications, 289 were granted and 28 applications were withdrawn or dismissed. There were 41 applications made on the basis of the *Sentencing Act* s 42AU, which relates to change in circumstance, unwillingness to comply or it being otherwise appropriate. There were 276 made on the basis of the *Sentencing Act* 42AV, which relates to breach of a condition and can be used if an offender has breached the order by being found guilty of an offence if an application is not made under s 42AW(1).[185] Accordingly, it was not possible to identify the basis of the application (that is, whether the application was made on the basis of new offending, breach of a condition of the CCO or some other reason). It is also not possible to determine the outcome of the cases where the application was granted.[186]

4.6 Comparison with suspended sentences

As part of the Terms of Reference, the Council has been asked to make a comparison between CCOs and suspended sentences in terms of the duration of the order for similar offending and also to compare the outcomes of any breach application made. As discussed at [2.2], in identifying similar offending, the Council has compared the duration for offences of the same offence type and breach outcomes for applications where the breaches were committed by offenders serving a suspended sentence for the same category of offence.[187] However, as the Council has noted, this comparison is problematic due to the very small number of sentences imposed for the offences under consideration in the Supreme Court and the wide discretion that the court has in sentencing an offender.[188] Due to the different nature of the orders, there are also inherent difficulties in making any meaningful comparisons or observations in relation to the operation of the orders by focussing on their duration.

4.6.1 Average duration for similar offending

Noting the significant limitations of the utility of comparing average duration, the Council has undertaken this analysis in the Supreme Court for the five offences for which three or more CCOs have been made (as the most serious offence) in the period 2019–20: assault, trafficking in a controlled substance, perverting justice, dangerous driving and stealing. The average duration for these offences is compared to suspended sentences imposed for the

[183] See Table B.4.

[184] It is noted that this is a count by order rather than by finalised defendants. See Table B.14 for more details.

[185] See *Sentencing Act 1997* (Tas) s 42AV(6).

[186] This information was not apparent from the database, and the number of orders involved made it too resource intensive and time consuming to cross-check with files held by Community Corrections (as was done with HDOs where there were fewer orders).

[187] Another option would be to attempt to match similar cases where suspended sentences and HDOs were imposed to compare the duration. However, this would not allow a comparison to be made between the average duration of orders. In addition, this approach was also not used due to the time constraints of the project and the uncertainty in relation to obtaining matched cases.

[188] See [2.2], [3.4].

same offences in the same period. In making this comparison, it is noted that for three of the five offences, there were no or few PSSs imposed (perverting justice, dangerous driving and stealing), and so no comparison is made for PSSs given the small number of offences involved.[189]

In relation to all five offences, the average duration of the CCO was longer than the average duration of the sentence of imprisonment for the FSS. However, in making comparisons in relation to the relative severity of the order, it is important to observe that the operational period for the FSS was generally longer or equivalent to the duration of the CCO, and that during the operational period, many offenders may have additional conditions imposed or be subject to a combined CCO.[190] If an offender breaches a FSS during the operational period, the sentence of imprisonment may be activated.[191] There is no unactivated sentence of imprisonment attached to a CCO.

In the Magistrates Court, a comparison of sentence length is made for 908 CCOs imposed for the three offences which were the most common when looking at the most serious offence in the period 2019–20.[192] These offences were common assault, drive with prescribed illicit drug and stealing. Comparing the average duration with FSSs and PSSs, it is noted that the average duration of a CCO was:

- considerably longer than the average duration of the imprisonment component of FSSs and PSSs
- considerably shorter than the average duration of the operational period of FSSs and PSSs.

4.6.2 Breach outcomes for similar offending

As indicated at [4.5.1], the Council identified four applications in the Supreme Court to cancel CCOs, with all of these applications resulting in the CCO being cancelled. All applications were based on the offender failing to comply with a condition and not new offending. In three cases, the offender was re-sentenced (to home detention in one case, a PSS in one case, and the original FSS in one case) and in one case, no additional order was made.

In comparing these four cases (grouped into broad offence categories) with the outcome of applications for breach of suspended sentences for offences of the same offence category, it is noted that all but one of the applications to breach a suspended sentence order related to new offending rather than the breach of another condition of the order. Accordingly, as with HDOs, comparisons in terms of outcomes are difficult to make because of the different nature of the breaches. It is again stressed that there were very few cases involved, making any conclusion or useful comparison unfeasible. However, it is noted that a majority of the suspended sentences are activated as a result of an application to breach the order based on new offending, or if not activated, the offender is re-sentenced. Rarely is no further order made following a breach application for a suspended sentence (14.8% of cases).[193]

189 See Appendix B, Tables B.5–B.9.

190 See [4.2.1], [6.1.3].

191 See discussion at [6.4].

192 A further two CCOs were made for these three offences, but did not have sentence length data readily extractable due to a system issue. Orders with 'balance suspended' are excluded as the data on the length of suspension cannot be calculated without knowing the length of time the defendant had served in prison. There were also a small number of FSS/PSS orders with text rather than number data for their operational period and these were excluded from the calculation of operational period, but not other fields.

193 For more detail, see Appendix B, Table B.13.

In the Magistrates Court, in the period 2019–20, there were 317 applications made to breach or cancel a CCO and 387 applications to breach a suspended sentence for the same offence categories. Further details of the offence categories are set out in Appendix B.[194] In relation to the CCOs:

- 287 applications were granted
- 28 applications were withdrawn or dismissed.

In relation to the suspended sentences:

- 370 applications were granted
- 209 suspended sentences were activated
- no order was made in two cases
- 17 applications were withdrawn or dismissed.

The utility of this comparison is limited because it was not possible to determine if the applications for breach for both CCOs and suspended sentences were based on new offending, a failure to comply with another condition of the order or for some other reason (so the comparison is not necessarily of a 'like' breach). It was not possible to determine the outcome of cases where the application was granted for CCOs. It was also not possible to determine the outcome if an offender was found to have breached a suspended sentence and the original sentence not activated but the offender was re-sentenced, or the original sentence varied.

4.7 Stakeholder feedback

As part of the review process as set out in the Terms of Reference, the Council sought feedback from relevant stakeholders in relation to a number of matters relating to the operation of the new orders and the phasing out of suspended sentences. In relation to CCOs, these matters are:

- What has been the perceived effectiveness of CCOs as a sentencing option among relevant stakeholders?
- Are any legislative amendments recommended that could be made to improve the operation of CCOs, particularly if suspended sentences are phased out?

As with HDOs, generally, the view of stakeholders was that CCOs were functioning well, with the DPP indicating that courts appeared more willing to use a CCO than previous community-based orders, particularly probation. TLA stated that the 'CCO provide[s] a great deal of flexibility to courts to address the sentencing challenge'. Feedback was also received about the utility of the provision for judicial monitoring in the appropriate case. However, as a replacement for suspended sentences, the view was expressed, that the CCO may not be a sufficiently punitive order to address the range of cases in which suspended sentences were imposed.

An additional issue raised in the consultation process, as well as in the comments on passing sentence from the Supreme Court, is the current statutory restriction on parole in cases where a CCO is combined with a sentence of imprisonment, as well as the two-year limit on the term of imprisonment that may be combined with a CCO.

[194] See Table B.14.

The DPP's view was that a CCO would be appropriate and beneficial in cases where the offender was not eligible or did not obtain parole, as well as where the sentence of imprisonment was longer than two years. This would allow for the supervision and support to be put in place on transition from prison to the community. It would also allow support and monitoring to be provided to offenders who do not fall within the scope of the high-risk offender category of serious offences,[195] but may present a risk of reoffending (such as some family violence offenders). The Law Society's view was that there was no reason to limit the term of imprisonment to two years for a combined CCO/imprisonment order or to preclude parole if a CCO is ordered. TLA stated the legislative provision placing restrictions on making a parole order and a CCO was unnecessary.

Feedback received from Community Corrections similarly supported the ability to have a CCO combined with a sentence of imprisonment longer than two years, and to have a CCO and an order for eligibility for parole made. Community Corrections noted that not everyone who is eligible for parole will apply for parole or be successful in their application, and the use of a CCO with supervision conditions would provide a 'back-up' option to provide support to facilitate transition to the community on release from prison. Community Corrections supervise both parole and CCOs and indicated that there were no operational issues that would arise from the supervision of an offender on both orders. However, if an additional number of offenders required supervision following such a legislative change, then this would have resource implications that would need to be addressed.

In discussions with Community Corrections, several issues were noted in relation to the operational framework of CCOs:

- On occasions, an offender may need additional time on a CCO to complete the required number of community service hours. If this is required, an application has to be made to the court to have the order extended. A suggested reform was to allow for an administrative extension of the order to allow for the completion of the hours, with the consent of the offender.[196]
- On occasions, an offender may have completed all the requirements of a CCO, and the only means of bringing an order to an end is to make an application to the court under the *Sentencing Act* s 42AU. This means the matter needs to be returned to court to cancel, or for Community Corrections to maintain the order on an unsupervised list of offenders, given that there are no conditions of their order that would require them to engage with Community Corrections. It was noted that this is a change from the pre-existing situation for CSOs, where the order was finalised when the hours were completed. A suggested reform was to allow for the administrative discharge from an order if the community service is completed prior to the end of the CCO.

4.8 The Council's views and recommendations

Based on its research and stakeholder feedback, the Council's view is that the CCO is a valuable addition to the range of sentencing options in Tasmania. However, stakeholder feedback indicated that CCOs may not be a sufficiently punitive sanction for a range of cases where suspended sentences had previously been imposed. The Council did not

[195] Post imprisonment supervision is created by the *Dangerous Criminals and High Risk Offenders Act 2021* (Tas). Once commenced, this will allow for the Supreme Court to make a high-risk offender order in relation to offenders convicted of specified serious offences where the court is satisfied that the offender poses an unacceptable risk of committing another serious offence unless the order is made: at s 35, sch 1.

[196] Community Corrections noted that this is the position in other jurisdictions.

receive any feedback from stakeholders in relation to legislative changes to CCOs to improve their operation as a replacement for suspended sentences and so does not make any recommendation for legislative change.

Although not related to the issue of phasing out of suspended sentences, as part of the consultation process, the Council was provided with feedback in relation to two aspects of the operation of the CCO as a sentencing order more broadly:

(1) For combined imprisonment/CCOs, removing the restriction on imposing a sentence of imprisonment of more than two years contained in the *Sentencing Act* s 8(1)(a). As recognised by Porter AJ in *Gordon*,[197] this may allow for structured rehabilitation and appropriate supervision where necessary in the circumstances of the case.

(2) Allowing a court to make a parole order if it has imposed a combined imprisonment/CCO.

[197] *Gordon* (n 149).

5 Court Mandated Drug Diversion (CMD) – DTOs under Part 3A of the Sentencing Act

DTOs were introduced in Tasmania in 2007 as an intensive intervention program aimed at addressing the cycle of drugs and crime for offenders with substance abuse issues.[198] The sentencing order was only available in the Magistrates Court until 8 February 2017, when its operation was extended to include sentences imposed in the Supreme Court.

In relation to DTOs, the Council has received the following Terms of Reference 17–25:

17. How many drug treatment orders have been made by the Supreme Court, and for what offences?
18. What is the average duration of a drug treatment order?
19. Should a court be able to extend the term of a drug treatment order, and if so, are there any limitations or conditions that should apply, e.g., a limit on the time for which a drug treatment order can be extended, that a drug treatment order can only be extended to allow for completion of a treatment program?
20. With respect to 18, how does this compare to a suspended sentence for similar offending?
21. Have any breaches been committed by offenders while serving a drug treatment order that have resulted in an application to court to have the order varied or cancelled?
22. If the answer to 21 is yes, what was the outcome(s)?
23. With respect to 22, how does this compare to breaches committed by offenders serving a suspended sentence for similar offending?
24. What has been the perceived effectiveness of the extension to the Supreme Court of drug treatment orders as a sentencing option among agency stakeholders?
25. Are any legislative amendments recommended that could be made to improve the operation of drug treatment orders, particularly if suspended sentences are phased out?

5.1 Nature of the order

A DTO is a type of suspended sentence of imprisonment, where a custodial sentence is imposed but not activated on condition that the offender comply with the conditions of the order. This means that if the offender complies with the order, the offender will not need to

[198] See TSAC, *Phasing Out of Suspended Sentences Report* (n 53) [6.1].

serve the prison sentence. The DTO was intended to provide 'viable pathways for offenders by increasing their access to drug, alcohol, or other welfare services in order to deal with their drug use and break their cycle of contact with the criminal justice system'.[199]

It is one of a number of sentencing orders that allow a court to impose assessment and treatment conditions on an offender relating to drug dependency. Other sentencing orders include imprisonment combined with a CCO on release, a suspended sentence with treatment conditions or combined with a CCO, home detention combined with a CCO, or a CCO. In the structure of the *Sentencing Act* s 7, a DTO is positioned as the penultimate sanction below imprisonment and above a suspended sentence of imprisonment. The DTO is an onerous and rigorous order reserved for serious offending in circumstances where the principles of sentencing require a more severe penalty than a CCO with treatment conditions attached. It may not be a suitable order for more serious offences where imprisonment is the appropriate penalty.[200]

A DTO has two components: (1) a custodial part; and (2) a treatment and supervision component.[201] The court imposes on the offender the sentence of imprisonment it would have imposed were it not making the order, but the offender is not required to serve the custodial component of the order unless it is activated by contravention of the order.[202] In fixing the term of imprisonment, the court must not fix a non-parole period for the sentence of imprisonment. The treatment and supervision component contains core conditions and program conditions (these are discussed at [5.1.2]).

The *Sentencing Act* sets out four explicit purposes of a DTO:

(1) to provide an alternative sanction to imprisonment

(2) through treatment, to facilitate the offender's rehabilitation and reintegration into the community

(3) to reduce the incentive for the offender to resort to criminal activity

(4) to reduce risks to the offender's health and well-being.[203]

The order reflects a problem-solving or therapeutic approach to sentencing where the judicial officer has a role in the ongoing supervision of the offender. There is provision for judicial monitoring over the period of the order and the court may vary the order based on the offender's progress. This may include adding or removing program conditions, varying conditions to adjust the frequency of treatment, the degree of supervision and the type or frequency of vocational, educational, employment or other programs that the offender must attend.[204] The court may also reward an offender for compliance by varying or cancelling the order.[205]

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[199] Department of Justice, Community Corrections, *Court Mandated Diversion: Intention of the CMD Program* (Web Page, 5 May 2015) <http://www.justice.tas.gov.au/communitycorrections/court_mandated_diversion/intent_of_program>.

[200] *Tasmania v Joseph* (2017) 25 Tas R 327, [29]–[32] (Brett J) ('*Joseph*').

[201] *Sentencing Act 1997* (Tas) s 27E.

[202] Ibid s 27F. See further [5.3].

[203] Ibid s 27C.

[204] See ibid s 27J.

[205] Ibid ss 27K, 27L.

5.1.1 Circumstances in which a DTO can be imposed

Under the provisions of the *Sentencing Act*, there are a number of eligibility requirements for the imposition of a DTO:

- It can be made where the court is satisfied on the balance of probabilities that the offender has a demonstrable history of illicit drug use, and that illicit drug use contributed to the commission of the imprisonable offence or offences.[206]
- It is not available in relation to sexual offences or offences involving the infliction of actual bodily harm that was not minor harm.[207] In this context, 'actual bodily harm' includes physical and psychological harm.[208]
- It is only available where the court would have sentenced the offender to actual imprisonment and would not have suspended the sentence, either fully or in part.[209]
- The offender must not be subject to a parole order under the *Corrections Act 1997* (Tas) or another CMD order.[210]

Further, the court must not make the order unless it is appropriate to do so in all the circumstances, the facilities likely to be used for treatment and supervision are reasonably accessible to the offender, and the offender consents to the making of the order and compliance with the order.[211]

In determining that a DTO is appropriate in all the circumstances, a court needs to be satisfied that this order would properly respond to the various sentencing considerations relevant to the circumstances of the particular case. This is a mandatory provision which means that 'unless the court is satisfied that it is in all the circumstances appropriate to make a drug treatment order, it must not do so'.[212] Relevant considerations include the aims or purposes of sentencing, namely, protection of society, general and specific deterrence, retribution and reform.[213] As set out in *Tasmania v Joseph* ('*Joseph*'), by Brett J:

> A drug treatment order is a sentencing option which places emphasis on the rehabilitation of the offender. It is not without punitive effect because it will require, on the part of the offender, onerous application to the program put in place by the order, and carries with it the potential for activation of the custodial component of the order in the event of default. However, it is still an alternative to imprisonment, where imprisonment would otherwise be the outcome. If a drug treatment order is made, the court is making a choice to place emphasis on rehabilitation as the primary sentencing aim in preference to other sentencing objectives such as general deterrence and retribution. It may be argued that general deterrence is given effect by the custodial component of the order, and the onerous requirements of the treatment and supervision part of the order, and, further, that specific deterrence is also achieved by the custodial component of the order. It might also be argued that a person who otherwise meets the criteria for the making of a drug treatment order, with the appropriate commitment and expectation of success of that order, is not an appropriate vehicle for general deterrence. However, the primary focus of the order is rehabilitation, and, as it is a more lenient

[206] Ibid s 27B(1)(b).
[207] Ibid s 27B(1)(a).
[208] *Joseph* (n 200).
[209] *Sentencing Act 1997* (Tas) s 27B(1)(c).
[210] Ibid s 27B(1)(e).
[211] Ibid s 27B(1)(e).
[212] *Joseph* (n 200) [27] (Brett J).
[213] Ibid at [28] (Brett J) quoting the High Court in *Veen v The Queen (No 2)* (1988) 164 CLR 464, 476.

> sentencing order than imprisonment, other punitive aims such as general deterrence are necessarily given less emphasis.[214]

As stated, a DTO places emphasis on rehabilitation and reform of the offender rather than more punitive aims, and so will not be appropriate in some cases having regard to the objective seriousness of the offence.[215]

The focus on rehabilitation has been recognised in the Supreme Court cases where DTOs have been imposed, where this opportunity is seen to be for the benefit of the offender but also the public more generally. The community benefit is the potential long term public protection that arises if the offender is able to address their drug addiction issues, in contrast to the short-term public protection offered by immediate imprisonment.[216] Sentencing judges have also recognised the punitive effect of a DTO given the onerous compliance with the program conditions.[217]

The court must also have received and considered a DTO assessment report.[218] In its submission, CLC (Tas) reported that in the period 2017–18 to 2019–20, 24 out of the 40 (60%) referrals for assessment for a DTO from the Supreme Court were assessed as suitable and a DTO made.

5.1.2 Conditions of DTOs

There are core and program conditions that attach to a DTO. The core conditions provide that an offender must:

- not, in Tasmania or elsewhere, commit another imprisonable offence
- attend the court whenever it directs
- report to a court diversion officer at a specified place within two clear working days after the order is made
- undergo such treatment for the offender's illicit drug use problem as is specified in the order or from time to time as specified by the court
- report to, and accept visits from a case manager or court diversion officers
- give the offender's case manager at least two clear working days' notice before any change of address

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214 *Joseph* (n 200) [29].

215 Ibid [30], [31] (Brett J).

216 See *Richardson* (n 163); *Tasmania v May* (COPS, Supreme Court of Tasmania, Geason J, 8 February 2019) *Tasmania v Ransley* (COPS, Supreme Court of Tasmania, Porter AJ, 13 August 2019) ('*Ransley*'); *Tasmania v Dare* (COPS, Supreme Court of Tasmania, Pearce J, 2 August 2018); *Tasmania v Hordvik* (COPS, Supreme Court of Tasmania, Pearce J, 9 February 2018).

217 *Tasmania v McLaughlin* (COPS, Supreme Court of Tasmania, Porter AJ, 3 July 2019); *Tasmania v Smith* (COPS, Supreme Court of Tasmania, Pearce J, 11 June 2019); *Ransley* (n 216); *Tasmania v Stebbings* (COPS, Supreme Court of Tasmania, Wood J, 10 August 2020); *Tasmania v Baker* (COPS, Supreme Court of Tasmania, Pearce J, 25 February 2020); *Tasmania v Graham* (COPS, Supreme Court of Tasmania, Porter AJ, 14 September 2018); *Tasmania v Dougherty* (COPS, Supreme Court of Tasmania, Porter AJ, 4 November 2020); *Tasmania v Midson* (COPS, Supreme Court of Tasmania, Pearce J, 7 February 2020).

218 *Sentencing Act 1997* (Tas) ss 27D(1), (3)–(4). Matters to be considered in the report assessing an offender's suitability for the order include: (1) the defendant's age, social history and background, history of drug use, medical, psychological and psychiatric history and condition, including details of any treatment for drug or alcohol dependence, educational background, employment history, financial circumstances, special needs; (2) the circumstances of any other offences, known to the court, of which the defendant has been found guilty; (3) the extent of the defendant's compliance with any sentence currently in force; and (4) any other matters relevant as the court may direct.

- not leave Tasmania except with the permission, granted either generally or in a particular case, of the court
- comply with all lawful directions of the court
- comply with all reasonable directions of the offender's case manager and court diversion officers concerning the core conditions and program conditions of the order.[219]

There are additional conditions if the offence is a domestic violence offence, requiring that the offender: must not commit another family violence offence; must comply with any family violence order, interim family violence order, police family violence order or domestic violence order; must attend and undergo assessment for, and treatment under, rehabilitation programs as directed by court diversion officers; if directed to undergo any rehabilitation programs, must attend and satisfactorily complete those programs and comply with the reasonable directions of the persons employed or engaged to conduct them.[220] These conditions apply while the treatment and supervision part of the order is operating.[221]

In addition, the court must add at least one of the following program conditions to the treatment and supervision part of the order:

- submit to drug testing, as specified in the order
- submit to detoxification or other treatment, whether or not residential in nature, as specified in the order
- attend vocational, educational, employment, rehabilitation or other programs specified in the order
- submit to medical, psychiatric or psychological treatment specified in the order
- not associate with persons or classes of persons specified in the order
- reside at such place, and for such period, as is specified in the order
- do or not do anything else that the court considers necessary or appropriate concerning the offender's illicit drug use or the personal factors that the court considers contributed to the offender's criminal behaviour.

The court must not attach more program conditions than it considers necessary to achieve the purposes of the order.[222]

5.1.3 Duration of order

The *Sentencing Act* pt 3A does not specify a limit on the term of imprisonment that may be imposed as part of a DTO. It also does not expressly state the length of time that an offender must comply with the treatment and supervision part of the DTO. However, the interplay of the provisions in pt 3A have been interpreted in a manner that 'suggests that it would, in most circumstances, be inappropriate to make a drug treatment order if the custodial component will exceed two years'.[223]

[219] Ibid s 27G(1).
[220] Ibid s 27G(2).
[221] Ibid s 27G(4).
[222] Ibid s 27H(3).
[223] *Joseph* (n 200) [34]. This has been affirmed in *Bell v Tasmania* [2021] TASCCA 3 [32] (Martin AJ).

There are several provisions under the *Sentencing Act* that allow the court to bring a DTO to an end within a two year period.[224] Further, if the order has not been cancelled under one or other of the provisions providing for cancellation within the two-year period, s 27R(2) provides the court must review the treatment and supervision part of the order to determine whether, notwithstanding any other provision of the Part, it should continue. Section 27R(4) then provides that on the completion of the review, the court must cancel the treatment and supervision part of the order and either make an order activating some or all of the custodial part of the order, or cancel the order and re-sentence the offender (other than by making a CMD order).[225] In *Joseph*, Brett J interpreted this provision to require 'the court to either activate some or all of the custodial part of the order, or resentence the offender in a manner other than the imposition of a sentence of imprisonment. The intention would seem to be to bring the order to an end'.[226]

5.2 Use of DTOs in the Supreme Court

5.2.1 Number of orders

In the Supreme Court, there have been 35 offenders sentenced to a DTO as the most serious sentence imposed for an offence.[227] As shown in Figure 2.1, there has been an increase in the use of DTOs since the order's introduction to the Supreme Court, from four orders in 2017 (1.4% of sentences) to 10 orders in 2020 (3.2% of sentences). However, these are still very small numbers of sentences.

5.2.2 Offences

As recognised, the DTO is an appropriate sentencing order in cases where an offender would be sentenced to imprisonment for a period of up to two years (excluding sexual offences and offences involving the infliction of actual bodily harm that is not minor). This is reflected in the offences shown in Figure 5.1, which shows the use of DTOs by offence category (by most serious offence). Unlike home detention and CCOs, where non-fatal offences against the person accounted for the largest proportion of offenders, the most common offence categories for which a DTO was imposed were drug offences (12 cases or 34%) and burglary/stealing (12 cases or 34%), then non-fatal offences against the person (six cases or 17%). Trafficking in a controlled substance was the most common offence for

[224] See *Sentencing Act 1997* (Tas) s 27L, which provides for a cancellation reward where a court can cancel the order as a reward to the offender where the offender has fully or substantially complied with the conditions of the order, the continuation of the order is no longer necessary to meet the purposes for which it has been made, and the period of imprisonment that the offender would have had to serve if the order had been fully activated at the time of sentencing has expired. Section 27O provides for cancellation of the treatment and supervision part of the order and activation of the custodial component or re-sentence where an offender commits an offence punishable by a term of imprisonment exceeding 12 months. Section 27Q provides that a court may cancel the order if: the offender's circumstances were not accurately presented to the court or the authors of the drug treatment order assessment report; the offender is unable to comply with a condition of the order because his or her circumstances have materially changed since it was made; the offender is no longer willing to comply with the condition of the order; or the continuation of the treatment and supervision part is unlikely to achieve one or more of the purposes for which the order was made.

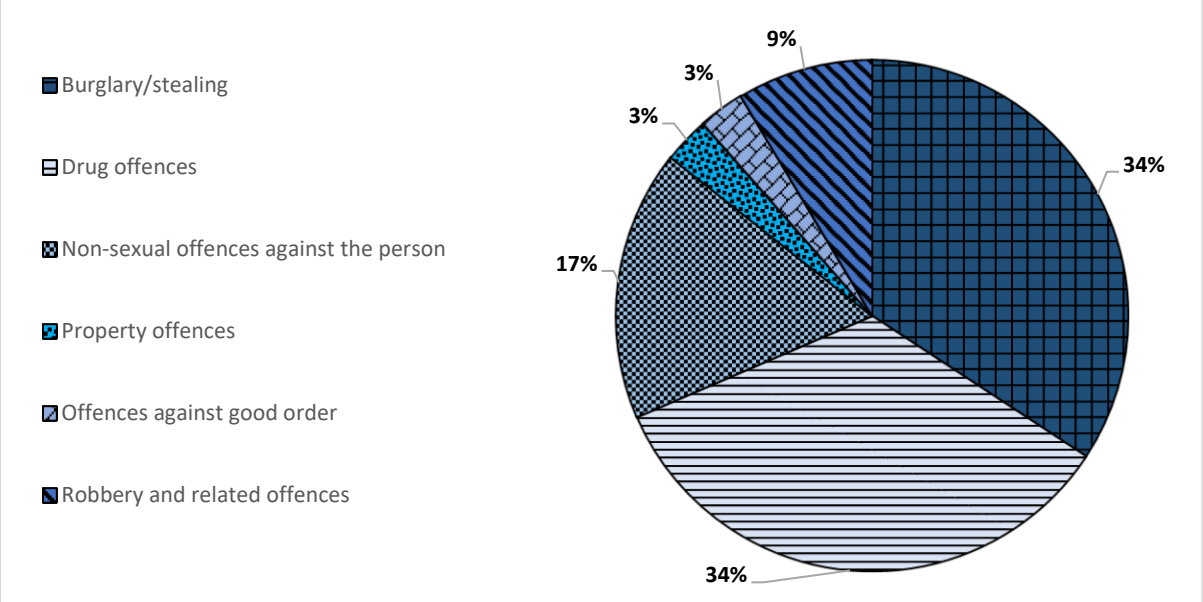
[225] Ibid s 27Q(2), 27R(4).

[226] *Joseph* (n 200) [32]. In its previous consideration of the interpretation of these provisions in the Magistrates Court, the Council observed that their interaction was unclear and there was no universally accepted interpretation, with most magistrates interpreting the provisions to mean that, if an offender has not graduated, they must cancel the order at the second anniversary review. A small number of magistrates have interpreted the provisions to mean that there was power to continue the order and have adopted the approach that the review has not been finalised until the expiration of any extension of the order: see TSAC, *Phasing Out of Suspended Sentences Report* (n 53) [6.1.1].

[227] In one of these cases, a CCO was combined with the DTO: see *Tasmania v Stebbings* (Supreme Court of Tasmania, Wood J, 10 August 2020).

which DTOs were imposed (10 cases), followed by burglary (six cases) and aggravated burglary (five cases).[228]

Figure 5.1: DTOs imposed, proportion of orders by offence category, most serious offence, Supreme Court, 2017–20



5.2.3 Duration of orders

As noted, while there is not a legislatively prescribed limit to the length of the custodial component of a DTO, courts have taken the view that it should not exceed two years' imprisonment other than in exceptional cases. Further, other than the requirement that the court not cancel the DTO as a cancellation reward before the period of imprisonment has expired,[229] the duration of the custodial component does not otherwise determine the length of the time that the offender will be subject to the DTO. A DTO will remain in place until it is cancelled at any time up to the two-year review and, if not already cancelled, on the two-year review. The typical period that an offender is subject to the treatment component of the order is between 16 and 24 months with many graduating in between 16 and 18 months.[230]

The maximum length of the custodial component of the order imposed in the Supreme Court was two years' (24 months') imprisonment. The minimum custodial component was nine months' imprisonment, and the median duration was an order for 18 months' imprisonment.[231]

The minimum custodial component of nine months' imprisonment was imposed in two cases. In one of these cases, the offender entered a plea of guilty to one count of trafficking in a controlled substance (cannabis and methylamphetamine) in circumstances where the offender both used and sold the illicit drugs with a profit of approximately $5,500.[232] In the other case, the offender pleaded guilty to two counts of aggravated burglary, one count of

[228] For more detail, see Appendix C, Table C.1.

[229] *Sentencing Act 1997* (Tas) s 27L(1)(c).

[230] Email from Pauline van Adrichem, Director Community Corrections, Department of Justice to Rebecca Bradfield, 15 July 2021.

[231] For more details, see Appendix C, Table C.2.

[232] *Tasmania v Giles* (COPS, Supreme Court of Tasmania, Geason J, 4 July 2018).

burglary, three counts of stealing, one count of stealing a firearm and one count of unlawfully injuring property, arising out of three separate incidents.[233]

The median custodial component of 18 months' imprisonment was imposed in three cases. One of the cases involved a 24 year old offender with a serious drug problem, who pleaded guilty to dangerous driving and associated summary offences. In sentencing, Brett J noted that the custodial component reflected the seriousness of the criminal conduct which was 'an extremely serious case of dangerous driving'.[234] One offender pleaded guilty to two counts of unlawfully setting fire to motor vehicles, two counts of burglary of motor vehicles and two counts of stealing from those vehicles.[235] The third case involved multiple offences, including trafficking in a controlled substance, dealing with property suspected of being the proceeds of crime and two counts of possessing stolen firearms.[236]

The maximum custodial component of 24 months' imprisonment was imposed in nine cases (25.7% of cases) and was the most frequently imposed period of imprisonment used with DTOs. As noted above, DTOs cannot be cancelled as a cancellation reward until the end of the 24 month period. These orders were imposed for serious examples of offending including drug trafficking (three cases),[237] aggravated burglary (one case),[238] attempted armed robbery (one case),[239] armed robbery (one case),[240] possess a dangerous thing with intent to facilitate crime, possess firearm and obstruct police, which related to a 12-hour siege (one case)[241] and burglary (two cases).[242]

5.3 Breaches of DTOs

Under the *Sentencing Act*, the court has broad powers on breach of a DTO, including requiring that the offender serve all or a portion of the unactivated sentence.

Under the *Sentencing Act* s 27M, if a court is satisfied that an offender has failed to comply with a condition of a DTO, other than by committing an offence punishable by a term of imprisonment exceeding 12 months, the court must take one of the following actions:

- confirm the treatment and supervision part of the DTO
- vary the treatment and supervision part of the DTO
- make an order requiring the offender to perform up to 20 hours of community work under the supervision of the offender's case manager
- order that the custodial part of the DTO is activated for a specified period, of not less than one day and not more than seven days, to be served in prison.[243]

233 *Tasmania v Dougherty* (COPS, Supreme Court of Tasmania, Porter AJ, 4 November 2020).

234 *Tasmania v Lovell* (COPS, Supreme Court of Tasmania, Brett J, 9 December 2020).

235 *Tasmania v Murtagh* (COPS, Supreme Court of Tasmania, Estcourt J, 22 November 2018).

236 *Tasmania v Hume* (COPS, Supreme Court of Tasmania, Pearce J, 9 February 2018).

237 *Tasmania v Gendall* (COPS, Supreme Court of Tasmania, Pearce J, 12 December 2019); *Tasmania v Seabourne* (COPS, Supreme Court of Tasmania, Brett J, 17 June 2019); *Tasmania v Atkinson* (COPS, Supreme Court of Tasmania, Brett J, 6 December 2017).

238 *Tasmania v Cosgrove* (COPS, Supreme Court of Tasmania, Brett J, 24 September 2020).

239 *Ransley* (n 216).

240 *Tasmania v Stone* (COPS, Supreme Court of Tasmania, Brett J, 4 December 2020).

241 *Richardson* (n 163).

242 *Tasmania v House* (COPS, Supreme Court of Tasmania, Brett J, 5 September 2019); *Tasmania v Dillon* (COPS, Supreme Court of Tasmania, Brett J, 4 December 2017).

243 *Sentencing Act 1997* (Tas) s 27M(1).

The offender will not serve this activated portion of the sentence until it exceeds 13 days' imprisonment.[244]

Under the *Sentencing Act* s 27O, if the offender commits an offence punishable by a term of imprisonment exceeding 12 months, the court must:

- take one of the actions under s 27M(1) as though the offender had failed to comply with any other condition of the order (see above); or
- cancel the treatment and supervision part of the order and, after taking into account the extent of the offender's compliance with that part, make an order activating some or all of the custodial part of the DTO; or
- cancel the custodial part of the DTO and, other than by making an order of imprisonment, deal with the offender for each offence in respect of which the DTO was made in any way in which it could deal with the offender had it just found the offender guilty of each such offence.[245]

There is also power to cancel the treatment and supervision component of a DTO and activate some or all of the custodial part of the sentence under the *Sentencing Act* s 27Q if the offender will be unable to comply because their conditions have changed, or they are no longer willing to comply with one or more conditions of the order, or the continuation of the treatment and supervision part is unlikely to achieve one or more of the purposes for which the order was made.

5.3.1 Supreme Court

Since DTOs have been available as a sentencing option in the Supreme Court, the Council identified six cases where an application has been made to cancel the order. There were two cases where the application to cancel was as a result of new offending, three cases where the offender did not comply with the other requirements of the order and one case where the offender was unable to access rehabilitation services due to COVID-19. In all six cases, the order was cancelled with the full custodial component being activated in three of the cases. The circumstances and outcomes are set out in more detail in Appendix C.[246]

5.4 Comparison with suspended sentences

As part of the Terms of Reference, the Council has been asked to make a comparison between DTOs and suspended sentences in terms of the duration of the order for similar offending and also to compare the outcomes of any breach application made. As previously discussed, this comparison is problematic as there are only a few sentences imposed, and it is likely that any differences can be attributed to the particular circumstances of each case (which are not necessarily comparable) rather than providing helpful information about the use of the respective sentencing orders by the court.

In addition, as noted, there are differences between sentencing orders in terms of their operation and their purposes, which limit the utility in making comparison between the average duration of orders. In relation to suspended sentences and DTOs, both orders involve the imposition of a term of imprisonment which is held in abeyance (in full or in part) subject to the offender complying with the terms of the order. However, the circumstances in which DTOs and suspended sentences are likely to be imposed vary considerably, including

[244] Ibid s 27N.

[245] Ibid.

[246] Table C.3.

key differences in the characteristics of the offender who may be considered appropriate for the order.

As noted at [6.1.1], there has been a tendency to use suspended sentences for youthful or first-time offenders, as well as those with pro-social influences such as employment, family connections and good character. In contrast, DTOs are imposed on offenders where the court would not have suspended the sentence and where the offender has a demonstrated history of illicit drug use that has contributed to the commission of the offence(s). Rarely are offenders who receive a DTO first-time offenders.[247] Instead, DTOs may be imposed on offenders who had previously been to prison and/or received and breached a suspended sentence.[248] Courts have recognised the offender's risk of reoffending but have noted that the public interest is better served by a focus on rehabilitation rather than immediate imprisonment in the circumstances of the particular case.[249]

5.4.1 Average duration for similar offending

As with other sentencing orders considered in this report, a comparison of the average duration of a DTO with suspended sentences for similar offending is problematic due to the very small number of offenders sentenced for each offence and the different nature of the sentencing orders. A further limitation is that the time period in which an offender is subject to the treatment component of a DTO is not fixed at sentencing and depends on an offender's success in relation to the treatment component of the order, with the maximum period that the treatment component can take being two years.[250]

Noting the significant limitations of the utility of the comparison, the Council has undertaken this analysis in the Supreme Court for the four offences for which three or more DTOs have been made (as the most serious offence) in the period 2019–20: trafficking, aggravated burglary, burglary and dangerous driving. In relation to the offence of burglary, it is noted that suspended sentences were generally not used, with only one FSS and one PSS imposed, and so no observations are made in relation to this offence. In relation to the other offences (although also offences with small numbers of offenders), the comparison shows that:

- the average duration of the term of imprisonment of a DTO is longer than the imprisonment component of FSSs
- the average duration of the term of imprisonment of a DTO is shorter than the operational period of FSSs and PSSs (with the average operational period exceeding the 24 month maximum of the treatment component of a DTO for some offences)
- the average duration of the term of imprisonment of a DTO is generally similar to the average total term of imprisonment for PSSs

[247] In the Council's analysis of DTOs imposed in the Supreme Court, there were two offenders who received a DTO and did not have prior convictions.

[248] *Richardson* (n 163); *Tasmania v MB* (COPS, Supreme Court of Tasmania, Pearce J, 22 November 2019); *Tasmania v Clarke* (COPS, Supreme Court of Tasmania, Pearce J, 16 April 2019); *Tasmania v SCM* (COPS, Supreme Court of Tasmania, Estcourt J, 22 November 2018); *Tasmania v Costello* (COPS, Supreme Court of Tasmania, Porter AJ, 1 August 2018).

[249] *Tasmania v McLaughlin* (COPS, Supreme Court of Tasmania, Porter AJ, 3 July 2019); *Tasmania v Saunders* (COPS, Supreme Court of Tasmania, Pearce J, 22 February 2018).

[250] See [5.1.3].

- the average duration of the term of imprisonment of a DTO is longer than the unsuspended component of PSSs.[251]

5.4.2 Outcome of breach applications for similar offending

As indicated at [5.3.1], the Council identified six applications to cancel DTOs with five of the applications made as a result of a breach of the order. Of these five, in two cases the breach was new offending and in three cases, it was a failure to comply with conditions of the order.

In three of the five cases, the full custodial component was activated and in two cases it was partially activated. The judge's reasons for the approach taken in these cases showed that the outcome of the application to cancel the order depended on the reason why the application was made, the degree of compliance with the order prior to the application being made, as well as any time served by the offender as sanction days or otherwise in custody.

As with HDOs and CCOs, comparisons in terms of the outcomes of breach applications are difficult to make because of the different nature of the breaches, as well as the small number of cases involved. The court also has different legislative constraints on the exercise of its discretion following a breach of a DTO when compared to a breach of a suspended sentence by new offending. For suspended sentences, if the offender has breached the order by new offending, the court must activate all of the suspended portion of the sentence unless it is unjust.[252] In contrast, for DTOs, the court has the option of activating all or some of the unserved sentence of imprisonment.[253] In relation to suspended sentences, all but one of these applications related to new offending rather than the breach of another condition of the order. The original sentence was activated in 23 of the 32 cases (71.9%) and in four cases, the offender was re-sentenced (12.5%), with no order being made in five cases (15.6%).[254]

5.5 Stakeholder feedback

As part of the review process as set out in the Terms of Reference, the Council sought feedback from relevant stakeholders in relation to a number of matters regarding the operation of the new orders and the phasing out of suspended sentences. In relation to DTOs, these matters are:

- Should a court be able to extend the term of a DTO, and if so, are there any limitations or conditions that should apply, (for example, a limit on the time for which a DTO can be extended, or that a DTO can only be extended to allow for completion of a treatment program)?
- What has been the perceived effectiveness of DTOs as a sentencing option among relevant stakeholders?
- Are any legislative amendments recommended that could be made to improve the operation of DTOs, particularly if suspended sentences are phased out?

Stakeholder feedback generally indicated that the DTO in the Supreme Court is working well. However, there were some suggested reforms that would make the order more accessible to a greater range of offenders.

[251] For more detail see Appendix C, Tables C.4–C.7.
[252] See [6.4].
[253] See [5.3].
[254] See Appendix C, Table C.8.

There was support for the proposal to extend the term of the assessment and treatment component beyond the two-year anniversary review, for a limited period of time. The DPP's view was that, generally, the order should end at two years but agreed that it may be appropriate to allow for a short extension of the order to allow for completion of a treatment program. The Law Society also saw merit in an ability to extend the DTO beyond two years.

It is noted that there are three phases of a DTO (Phase 1: Stabilisation, Phase 2: Consolidation and Phase 3: Reintegration) with each phase taking a minimum of three months. On this basis, Community Corrections also saw merit in having the order able to be extended for a short period of time to allow for graduation from Phase 3. Further, it was considered desirable to have legislative clarity in relation to the approach to be taken to the two-year anniversary review, and the capacity for a minor extension in time would alleviate any discrepancy in approach in the Magistrates Court.[255] Community Corrections proposed that there should be an amendment to allow an adjournment of the second anniversary review for a period of up to three months to allow a person to complete the order.

Tasmania Police noted that there was an implementation issue in relation to the monitoring of conditions of DTOs. While the orders were managed by Community Corrections, Tasmania Police were being requested to visit offenders for curfew checks and drug and alcohol monitoring. This was not a responsibility of Tasmania Police, and was also seen to create uncertainty for offenders who may not understand why police were doing these checks. Community Corrections indicated that police involvement was sought to check curfews and to undertake oral fluid tests for drugs for offenders on DTOs due to issues arising from COVID-19, with offenders not being able to attend routine testing appointments.

Community Corrections also suggested the utility of using electronic monitoring as a component of Phases 1 and 2 of a DTO, in circumstances where an offender had breached a condition of the DTO (other than by new offending). Currently, if an offender breaches a condition of the order (other than new offending), the court may order a sanction day/s (of between one and seven days) to be served in prison. The offender will serve these days when there are 14 sanction days accumulated.[256] The ability to order a period of electronic monitoring was seen to be a useful first step in breach enforcement (before the use of sanction days) as electronic monitoring in the community would allow the offender to still engage with treatment in the community rather than disrupting treatment by being sent to prison.

An additional issue in the legislative framework identified by Community Corrections was the inability to bring an offender back before the court before the next set court date in circumstances where there was breach of a DTO. It was noted that there was no clear avenue for courts to issue warrants or otherwise manage an offender's non-compliance except through a review hearing. Accordingly, it was proposed that there be a power of arrest created in the *Sentencing Act* pt 3A tailored to DTOs based on the power in *Sentencing Act* s 42AL.[257]

Concerns were raised by the Law Society about the availability of places in the DTO program, with limited funded places available and offenders being assessed as not suitable when there were no vacancies. Community Corrections indicated that the expansion of the program to the Supreme Court was accompanied by an increase in available program placements to 120 across the State. The program (as well as the regions individually) had

[255] See TSAC, *Phasing Out of Suspended Sentences Report* (n 53) [6.1.1].

[256] See [5.3].

[257] This provides for a power of arrest in relation to HDOs.

not reached the allocated limit. When this occurs, it is anticipated that Community Corrections will maintain a waitlist of eligible and suitable participants waiting for placements to become available.

An additional issue on which the Council sought feedback was in relation to any changes that needed to be made to the DTO, particularly if suspended sentences were phased out. In its report on *Phasing Out of Suspended Sentences*, the Council considered potential reforms to the DTO to allow it to operate more effectively as a possible replacement for suspended sentences. The Council expressed the view that a DTO was an onerous and rigorous order that should be reserved for serious offending in circumstances where the principles of sentencing require a more severe penalty than a CCO with treatment conditions attached.[258] Further, the Council observed that the current statutory limitation that restricted the order to cases where a sentence of actual imprisonment (without full or part suspension) would be imposed, and also the prohibition of making the order in cases where harm was inflicted that was not minor, limited its utility as a replacement (in appropriate cases) for a suspended sentence.

Accordingly, the Council previously recommended several changes to the *Sentencing Act* including extending the operation of the order to all offences, except for sexual offences, and the removal of the reference in s 27B(c)(ii) to suspended sentences. Instead, the Council recommended the insertion of a provision (akin to the *Sentencing Act 1991* (Vic) s 36(2)) to provide that, without limiting when a DTO may be imposed, it may be an appropriate sentence where, before the ability of the court to impose a suspended sentence was abolished, the court may have imposed a sentence of imprisonment and then suspended that sentence of imprisonment.[259]

In response, the Office of the DPP indicated that it did not support either of these proposals. In relation to extending the availability of a DTO to circumstances where an offender would otherwise receive a suspended sentence, it was observed that:

> A DTO is intended to be a sentence of last resort for recidivist offenders and sits high in the hierarchy of sentencing options. As an actual custodial component attaches to a DTO, if a DTO is ordered in circumstances where a suspended sentence would otherwise be ordered it will mean that offenders may be required to serve custodial terms (such as sanction days) when they otherwise would not be required to, or alternatively, if no custodial term is to attach to a DTO, it would fundamentally change the nature of the order. It would alter it from being a true alternative to imprisonment with significant consequences for breaching its terms, to something more akin to a treatment order that might attach to a CCO.

The Office of the DPP also opposed any change to the requirement that the order could not be made where the harm caused was not minor:

> It is not appropriate for serious violent offenders to be sentenced to a DTO. Complainants in such cases would feel a serious sense of injustice if DTOs were extended to such cases. It could also lead to community outrage. Further, it may be harder to satisfy the requisite causal connection required between drug use and the offending in cases of serious violence, compared to cases of drug-trafficking and dishonesty.

In contrast, TLA supported broad eligibility for DTOs based on its foundation of addressing the underlying cause of offending and its effectiveness in reducing recidivism. TLA considered that there is 'a strong argument that community safety is promoted by the use of,

[258] See TSAC, *Phasing Out of Suspended Sentences Report* (n 53) [6.4].

[259] Ibid Recommendations 8 and 9.

and expansion of, DTOs in Tasmania'. Accordingly, TLA considered that the following limitations on DTOs were unnecessary:

- That there must be a term of imprisonment with none suspended. This was seen to be inconsistent with the rehabilitative focus of the DTO because it excluded those eligible for suspended sentences — cases that warranted a sentence of imprisonment but because of steps taken toward rehabilitation justified a partial or total suspension of imprisonment.
- The custodial length being limited to two years' imprisonment. A maximum term of three years was seen more appropriate to allow it to be used in a wider variety of circumstances, particularly in the Supreme Court.
- That the order is not available if the offence involves the infliction of bodily harm that was not minor. TLA's view was the broad scope of this exclusion, meant that '[m]any offences are excluded from eligibility … despite the infliction of only modest injuries'.
- That there must be a connection between the offending and illicit drug use. This excludes offences linked to the misuse of alcohol or medication prescribed to the person.

Community Corrections supported a reform to the DTO legislation that would expand the list of eligible offences. Its view was that 'court should have the ability to make sentencing orders that are tailored to the needs of the offender and the circumstances of the offence, including by broadening eligibility for drug treatment orders'. However, it was stressed that there would still need to be 'very strong nexus between an offender's illicit substance dependency and their offending'. It was noted that Community Corrections was managing offenders on DTOs who also had convictions for offences of violence.

In its submission, CLC (Tas) also recommended the extension of the DTO as a sentencing option for all drug use including alcohol, pharmaceutical and illicit drugs. An extension to the length of the order to sentences of imprisonment for four years was also recommended by CLC (Tas). This is consistent with the position in the ACT,[260] Victoria[261] and Queensland.[262]

5.6 The Council's views and recommendations

Based on its research and stakeholder feedback, the Council's view is that DTOs are a valuable addition to the sentencing options available in the Supreme Court. However, as noted, the current legislative framework means that, without reform, a DTO cannot operate as a replacement sanction for a suspended sentence as this is expressly precluded by statute. Further, its utility as a replacement for suspended sentences is limited by the restriction that a DTO can only be imposed when the harm caused is minor, as this precludes many offences where suspended sentences are currently imposed.

Additional issues raised in the feedback from TLA and CLC (Tas) that were said to limit the utility of the DTO were: (1) the maximum custodial limit that can be imposed with a DTO (currently set by judicial authority at two years); (2) the need for its extension beyond illicit drugs to prescription drugs and alcohol. In relation to the maximum custodial limit, CLC

[260] *Crimes (Sentencing) Act 2005* (ACT) s 12A(1)(a).

[261] *Sentencing Act 1991* (Vic) s 18Z(1)(d)(ii). This only applies to orders made in the County Court of Victoria.

[262] *Penalties and Sentences Act 1992* (Qld). Magistrates are able to refer offenders to the Drug and Alcohol Court if they are eligible. This means that they reside within the district of the Brisbane Magistrates Court and are sentenced to imprisonment of up to four years (ie, a summary offence or an indictable offence dealt with summarily).

(Tas) recommended a maximum custodial term of four years and TLA suggested a maximum custodial term of three years.

These views align with previous observations of the Council that reform is required for the DTO to be used as an alternative to suspended sentences. However, the Council observes that these reforms are complex and would require more detailed examination and broader consultation than was possible within the scope of this report before any legislative change was made.

As part of the consultation process, while not relating to changes that would be necessary to improve the operation of the DTO as a replacement for suspended sentences, the Council was provided with feedback in relation to other aspects of the order. Based on this feedback, the Council suggests that consideration be given to examining the advantages and disadvantages of the option of allowing for a short extension of a DTO beyond the two-year anniversary to allow for an offender to graduate from the program if the offender is in Phase 3.

6 Phasing out of suspended sentences

Unlike the other orders under consideration in this report, suspended sentences have been a longstanding sentencing option in Tasmania. The power of the Supreme Court to impose a suspended sentence was introduced in 1924, and an amendment in 1963 allowed for the imposition of PSSs.[263] Magistrates were given the power to impose a suspended sentence in 1974.[264] In 2016, the Council observed that Tasmania's use of suspended sentences was higher than in all other Australian jurisdictions.[265] In 2019–20, suspended sentences accounted for 39.1% of sentences imposed in the Supreme Court and 12.3% of sentences imposed in the Magistrates Court. However, as reflected in the Tasmanian Government's commitment to phase out suspended sentences, and the proposed legislative constraints on the use of suspended sentences for the offences listed in Schedule 3 of the *Sentencing Amendment (Phasing Out Of Suspended Sentences) Act 2017* (Tas), suspended sentences have been a contentious sentencing option.[266]

In relation to the phasing out of suspended sentences, Terms of Reference 26–29 request that the Council provide advice on the following:

26. How many and how often are suspended sentence orders made for offences listed in Schedule 3 of the *Sentencing Amendment (Phasing Out Of Suspended Sentences) Act 2017*?
27. With reference to 26, for each offence, has the number of suspended sentence orders made declined since the commencement (in 2014) of the Government's project to phase out suspended sentences?
28. With reference to 26, are any offences listed in Schedule 3 incompatible with either drug treatment, home detention or community correction orders as a substitute sentencing option, in place of a suspended sentence?
29. Any other matters considered relevant.

This chapter addresses these Terms of Reference that relate to the Schedule 3 offences and also provides an overview of suspended sentences and the use of suspended sentences in the Supreme Court and Magistrates Court. It sets out stakeholder feedback received in the consultation process and the Council's view and recommendations.

[263] Warner (n 26) [9.201].

[264] Ibid [9.201].

[265] TSAC, *Phasing out of Suspended Sentences* (Background Paper, August 2015) [3.3.2].

[266] It is noted that suspended sentences have been abolished in Victoria and New South Wales: see Arie Freiberg, 'Suspended Sentences in Australia: Uncertain, Unstable, Unpopular, and Unnecessary?' (2019) 82 *Law and Contemporary Problems* 81, 82.

6.1 Nature of the order

A suspended sentence is a sentence of imprisonment that is not executed at the time when it is imposed by the court. A FSS means that the whole sentence is not activated and the offender is immediately released into the community. A PSS means that the offender spends a specified period of time in prison before being released into the community. In both cases, the suspended period of imprisonment is held in abeyance for a set period during which time the offender must comply with the conditions of the order or risk having to serve the sentence. Two key steps are involved in the imposition of a suspended sentence:

- the imposition of a term of imprisonment, and
- an order that all or part of the term of imprisonment be held in suspense for a set period ('the operational period').[267]

In this way, a suspended sentence has been described as a 'Sword of Damocles hanging over the offender's head' — it contains the threat of future imprisonment if the offender reoffends or otherwise breaches the sanction.[268] Others have described the suspended sentence as a 'butter knife' in acknowledgment of the reality that if an offender does not reoffend, then there is no punishment.[269] However, the punitive effect of a suspended sentence can be enhanced by the conditions attached to the order or the use of a combination sentencing order.[270]

Recent decisions of the Court of Criminal Appeal have articulated the sentencing purposes of a suspended sentence and its utility as a sentencing option. In examining the application of the purposes of sentencing, the Court has acknowledged that considerations of general deterrence, punishment or denunciation may constrain the use of suspended sentences in cases of serious offending, in light of the public perception and the reality of the sentence for an offender in contrast to a sentence of imprisonment.[271] However, the Court has acknowledged its utility, in the appropriate case, to allow for the seriousness of the offence to be identified as well as rehabilitation to be recognised or prioritised. In *RDA v Tasmania*,[272] Geason J observed:

> Suspension of the term of imprisonment, or part of it, was one way to recognise the appellant's rehabilitation. Such course enables the court to impose a head sentence which marks the gravity of the offending and to ameliorate the effect of the sentence to recognise rehabilitation.[273]

As stated by Freiberg, a suspended sentence 'can simultaneously — if not uniquely — combine the denunciatory and the mitigating elements of sentencing, "marking the gravity of the offence while simultaneously acknowledging some extenuating circumstances"'.[274] Similarly, in its submission, TLA observed that suspended sentences 'acknowledge the gravity of the offending by imposing a term of imprisonment. Whole or partial suspension allows for the other factors to be reflected in the sentence and to foster rehabilitation'.

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[267] Sentencing Advisory Council, Victoria ('VSAC'), *Suspended Sentences* (Final Report Part 1, 2006).

[268] Bartels, '"Sword or Feather': The Use and Utility of Suspended Sentences in Tasmania' (n 17), 4.

[269] *R v Brady* (1998) 121 CCC (3d) 504 cited in Lorana Bartels, 'Sword or Butter Knife? A Breach Analysis of Suspended Sentences in Tasmania' (2009) 21 *Current Issues in Criminal Justice* 119, 220.

[270] See [6.1.3], [6.2.1].

[271] See *DPP (Tas) v Vincent* [2020] TASCCA 16 [32], [35] (Martin AJ), quoting *DPP (Tas) v Broadby, Cockshutt and Woolley* [2010] TASCCA 13. See also *King* (n 19) [111] (Estcourt J); *DPP (Tas) v JSP* [2020] TASCCA 3 [49]–[52] (Estcourt J) ('*JSP*').

[272] [2021] TASCCA 4.

[273] [63] (Geason J). See also *King* (n 19) [111] (Estcourt J); *JSP* (n 271) [49]–[52] (Estcourt J).

[274] Freiberg (n 266) 85.

Suspended sentences are 'seen as having an important place in the sentencing hierarchy for first-time offenders or offenders with limited criminal histories, who had committed serious offences but who do not require a program intervention and who had proved themselves to have been rehabilitated'.[275] TLA also observed the utility of suspended sentences in these circumstances. The Law Society also stressed the rehabilitative potential of suspended sentences.

There are no statutory restrictions on the minimum or maximum term of imprisonment that can be suspended. Similarly, there is no statutory limit on the period of time for which a sentence can be suspended (the operational period).

6.1.1 Circumstances in which a suspended sentence can be imposed

In Tasmania, a court may 'record a conviction and order that the offender serve a term of imprisonment that is wholly or partly suspended'.[276] Beyond this, there is very limited statutory guidance as to when a suspended sentence can be imposed. No legislative test is prescribed in the *Sentencing Act*, aside from the restriction that only sentences of imprisonment can be suspended. Currently, there is only one offence-based restriction that would prevent a suspended sentence being imposed (other than in exceptional circumstances) where a person is convicted of an offence committed in relation to a police officer and the police officer suffered serious bodily harm.[277] There are no other restrictions for particular offences or types of offences. However, significant statutory restrictions will exist if the amendments that have been made to the *Sentencing Act* come into force. This reform would restrict the use of suspended sentences for a number of crimes under the *Criminal Code* to 'exceptional circumstances' only.[278]

Case law has set out certain principles that guide the exercise of the court's discretion to impose a suspended sentence. The leading decision is the High Court decision in *Dinsdale v The Queen*,[279] which makes it clear that the court must decide that a sentence of immediate imprisonment is appropriate before it makes a decision about whether to suspend the sentence. In deciding whether to suspend a sentence, the Tasmanian Court of Criminal Appeal has stressed that the 'considerations … cannot be identified by any constant ratio. The factors to be taken into account must invariably be different in the particular circumstances of each particular case'.[280] There is, however, no requirement for 'strong considerations' to justify fully suspending a sentence, as explained in *Director of Public Prosecutions (Tas) v Vincent*:[281]

> It is obvious that in cases of particularly serious offending, the importance of general deterrence, denunciation and punishment might dictate that suspension of a sentence is inappropriate, or justified only if the considerations favouring suspension are particularly strong. However, the authorities do not support the broad proposition that, if the circumstances require a sentence of imprisonment, suspension of the sentence is justified only if there are 'strong considerations' favouring such a course.
>
> Each case must be determined according to its particular circumstances, recognising that a suspended sentence is a 'severe sentence', and a 'more severe sentence than many

[275] VSAC, *Suspended Sentences* (Discussion Paper, 2005) [8.19].

[276] *Sentencing Act 1997* (Tas) s 7(b).

[277] Ibid s 16A.

[278] Ibid s 23A (yet to commence). This is discussed further at [6.5].

[279] (2000) 202 CLR 321.

[280] *King* (n 19) [111] (Estcourt J), quoting *DPP (Tas) v Broadby, Cockshutt and Woolley* [2010] TASCCA 13 (Evans J). See also *McKenna v Tasmania* [2020] TASCCA 7.

[281] [2020] TASCCA 16 (Martin AJ, Blow CJ and Pearce J agreeing).

> members of the public might realise', but also recognising that the utility of a suspended sentence 'is constrained in circumstances which require that the sentencer pays particular attention to considerations such as general deterrence, punishment or denunciation'. In addition, it should not be overlooked that a suspended sentence 'publicly condemns and stigmatises the criminal conduct, marking it as sufficiently serious as to warrant imprisonment, and in some cases lengthy imprisonment.'[282]

In the context of community perception and community benefits, the courts have highlighted that where a suspended sentence is the appropriate sentence, ultimately 'it is the community that benefits' if the offender takes advantage of the opportunity to not reoffend.[283]

Further, as stated above, the Court of Criminal Appeal has indicated that there is a need to take into account the circumstances of the case as 'there are no comprehensive specific criteria which tell a court when a case is one fit for a suspended sentence'.[284] Factors that have been identified in case law as relevant to the decision to suspend a sentence include:

- youth
- first offender
- employment
- drug/alcohol rehabilitation
- good character
- mental health/intellectual disability/family responsibility
- guilty plea
- remorse
- adverse personal circumstances
- supportive relationship
- co-operating/informing
- degree of participation/parity
- risk of reoffending.[285]

It has been noted that '[m]ore than one factor will generally be cited, and it appears to be the intersection of various factors which ultimately determines the decision to suspend a sentence'.[286]

6.1.2 Conditions of suspended sentences

A suspended sentence is subject to a mandatory condition that the offender does not commit another offence punishable by imprisonment during the operational period.[287] In

[282] Ibid at [40] (Martin AJ), quoting *DPP (Acting) v Hawkins* [2015] TASCCA 8, [13] (Blow CJ).

[283] *JSP* (n 271) [49], quoting *Garcie v Lusted* [2014] TASSC 27, [16] (Pearce J).

[284] *King* (n 19) [111] (Estcourt J), quoting *DPP (Tas) v Broadby, Cockshutt and Woolley* [2010] TASCCA 13 (Evans J).

[285] Lorana Bartels, 'To Suspend or Not to Suspend: A Qualitative Analysis of Sentencing Decisions in the Supreme Court of Tasmania' (2009) 28 *University of Tasmania Law Review* 23, 27–8.

[286] Ibid 28.

[287] *Sentencing Act 1997* (Tas) s 24(1).

addition, the *Sentencing Act* s 24(2) provides that the court may impose any one or more of the following conditions:

- that the offender performs community service
- that the offender is subject to the supervision of a probation officer
- that the offender is required to undertake a rehabilitation program
- any other conditions as the court considers necessary or expedient.

Any condition imposed can itself be 'made subject to any condition as the court considers necessary or expedient'.[288] In its previous analysis of suspended sentences imposed in the Supreme Court in 2011, the Council found that a majority of offenders (70%) did not have any additional order imposed. However, there appears to have been a shift in the approach of the Supreme Court, with the Council's recent analysis of FSSs imposed in 2019 and 2020 indicating that 60% of offenders received an additional condition as part of the suspended sentence, or had another sentencing order imposed (in addition to the FSS) as part of the order made by the court.

6.1.3 Suspended sentences combined with other sentencing orders

A court may combine a suspended sentence with other sentencing orders such as a CCO, a fine, a rehabilitation program order or a driving disqualification order.[289] As noted, 46 FSSs and 16 PSSs have been combined with a CCO since its introduction. There were also eight cases identified in 2019 and 2020 where a FSS was combined with a fine.

6.2 Use of suspended sentences in the Supreme Court

6.2.1 Number of orders

In the period 8 February 2017 to 31 December 2020, there were 324 offenders sentenced to a FSS and 189 offenders sentenced to a PSS, as the most serious sentence imposed for an offence (or offences).[290] Over this period, the use of suspended sentences has declined, with PSSs accounting for 18% of sentencing orders imposed in 2017 (from 8 February) and 15.7% of sentencing orders imposed in 2020.[291] In the same period, FSSs accounted for 32% of sentencing orders imposed in 2017 (from 8 February) and 23.4% of sentencing orders imposed in 2020.[292]

A further observation that can be made about the recent use of suspended sentences in the Supreme Court is the increased use of suspended sentences that are combined with probation and/or community service and/or combined with a CCO. In its 2014 analysis of the use of suspended sentences in the Supreme Court, the Council found that, in 2011, 70% of offenders who received a suspended sentence did not receive any additional order. As noted above, in 2019 and 2020, there were 46 FSSs and 16 PSSs that were combined with a CCO. This accounted for 17% of PSSs and 29.1% of FSSs imposed in this period (overall 46.1% of suspended sentences).

[288] Ibid s 24(3).

[289] Ibid s 8(1).

[290] In one of these cases a CCO was combined with the DTO: see *Tasmania v Stebbings* (COPS, Supreme Court of Tasmania, Wood J, 10 August 2020).

[291] See Appendix D, Table D.2.

[292] See Appendix D, Table D.3.

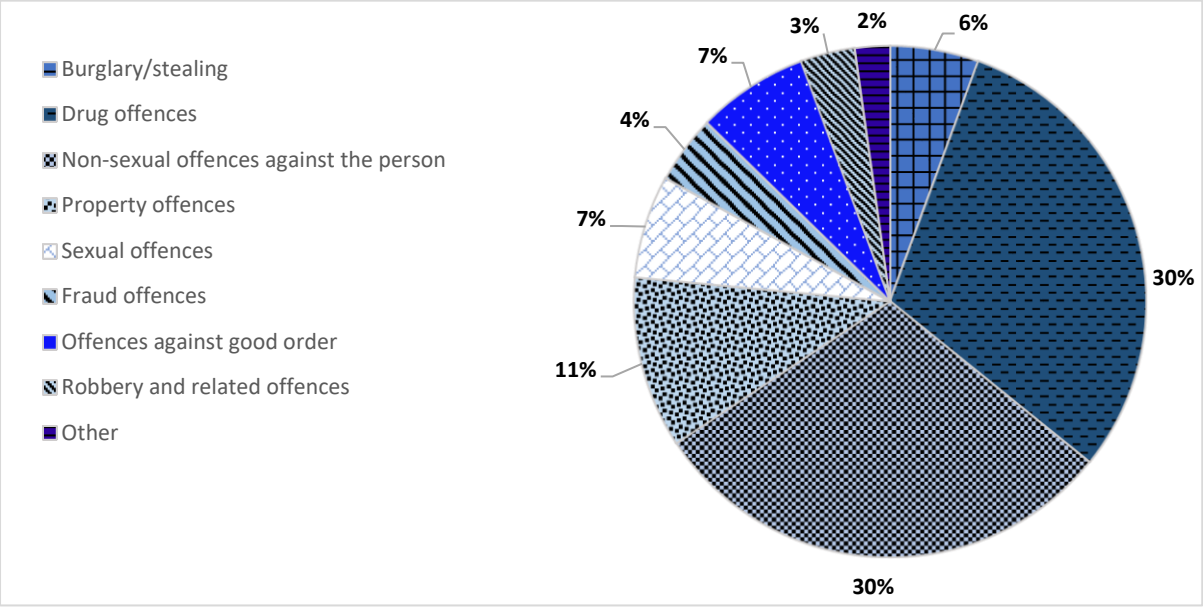
In addition, in 2019 and 2020, there were 40 cases in which additional conditions (either probation and/or community service) were imposed as part of the FSS for an offence(s). There were a further six offenders who received a FSS in relation to some offences and an additional order(s) in relation to other offending. There were only 63 offenders (39.8%) who did not receive any additional order or condition. This appears to suggest that there has been a shift in the way in which suspended sentences are used by the Supreme Court, with additional orders being imposed to increase the immediate punitive effect of a suspended sentence order (so it cannot be said that these offenders 'walked free', which is the negative perception of a suspended sentence),[293] while at the same time relying on the deterrent and rehabilitative effect of a FSS.

6.2.2 Offences

Based on all offences finalised in the Supreme Court between 8 February 2017 and 31 December 2020, Figures 6.1 and 6.2 show the offence category for which FSSs and PSSs were imposed, as the most serious sentence.

In relation to FSSs, the most common offence categories were drug offences (98 cases or 30% of cases) and non-sexual offences against the person (97 cases or 30% of cases), and then sexual offences (35 cases or 11% of cases). Trafficking in a controlled substance or plant was the most common offence for which a FSS was imposed (89 cases), followed by assault (57 cases) and then wounding (20 cases). In contrast with PSSs, FSSs were less commonly imposed for robbery offences or more serious offences against the person, such as unlawful act causing bodily harm. A greater proportion of FSSs were imposed for fraud offences and offences against good order compared to the proportion of PSSs for these offence categories.[294]

Figure 6.1: FSSs, proportion of orders by offence category, most serious offence, Supreme Court, 2017–20



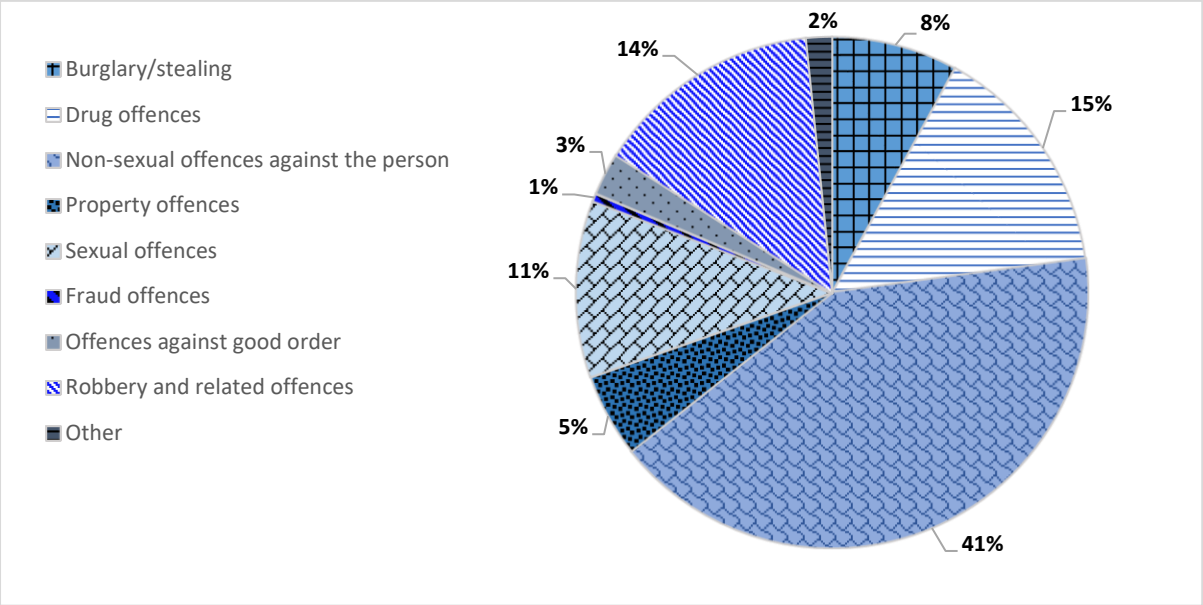
As shown in Figure 6.2, in relation to PSSs, the most common offence category was non-sexual offences against the person (78 cases or 41.5% of cases), followed by drug offences

[293] See *DPP (Tas) v Broadby, Cockshutt and Woolley* [2010] TASCCA 14 [10] (Evans J), referring to TLRI (n 18) [3.3.6].

[294] See further information about use for individual offences in Appendix D, Table D.4.

(28 cases or 14.9% of cases) and robbery offences (27 cases or 14.4% of cases). Assault was the most common offence for which PSSs were imposed (37 cases), followed by trafficking in a controlled substance or plant (27 cases) and then cause grievous bodily harm/wounding (22 cases).[295]

Figure 6.2: PSSs, proportion of orders by offence category, most serious offence, Supreme Court, 2017–20



6.2.3 Duration of orders

In relation to the duration of orders, sentencing details in relation to two periods are provided to allow for a comparison with the operation of DTOs in the Supreme Court (8 February 2017 to 2020) and the operation of CCOs and HDOs (2019–20).[296]

In the period 8 February 2017 to 31 December 2020, for FSSs, the shortest term of imprisonment that was fully suspended was 14 days and the longest term of imprisonment was 60 months (five years) with the median term being eight months' imprisonment (see Table D.6). The operational period for FSSs ranged from 10 months to 120 months (10 years) with a median of 24 months (see Table D.7).[297]

For PSSs, in the period 8 February 2017 to 31 December 2020, the unsuspended portion of the sentence ranged from 2.8 months to 48 months with a median term of imprisonment of eight months, and the suspended portion of the sentence ranged from 0.2 months to 31 months with a median term of 15 months (see Table D.10). The operational period of PSSs ranged from three months to 36 months with a median term of 24 months (see Table D.11).

In the period 2019 to 2020, for FSSs, the shortest term of imprisonment imposed was 14 days' imprisonment and the longest term of imprisonment imposed was 60 months'

[295] See Appendix D, Table D.5 for more detail.

[296] See Appendix A, Tables D.6–D.13.

[297] It is noted that the operational period of 10 years was imposed in a historical sexual assault case with exceptional circumstances. In *Tasmania v O'Neill* (COPS, Supreme Court of Tasmania, 9 September 2020), Blow CJ stated that the offender 'deserves a prison sentence. However, I am unable to send him to prison because he lives in the Australian Capital Territory, suffers from very serious medical conditions that make him unfit to travel to Tasmania, and is never likely to become fit to travel to Tasmania'.

imprisonment (five years) (see Table D.8). The operational period for FSSs ranged from 12 months to 120 months (10 years) with the median being 24 months (see Table D.9).

For PSSs, in the period 2019 to 2020, the unsuspended portion of the sentence ranged from 2.8 months to 48 months with a median term of imprisonment of eight months, and the suspended portion of the sentence ranged from 0.2 months to 31 months with a median term of 16 months (see Table D.12). The operational period of PSSs ranged from 12 months to 36 months with a median term of 24 months (see Table D.13).

6.3 Use of suspended sentences in the Magistrates Court

6.3.1 Number of orders

From 2018 to 2020, there were 3,127 offenders sentenced to a FSS and 798 offenders sentenced to a PSS (of which 174 were balance served sentences). In 2020, FSSs accounted for 9.6% of sentencing orders in the Magistrates Court (by most serious sentence) and PSSs accounted for 2.7% of orders (by most serious sentence).

Further, as with the Supreme Court, in the Magistrates Court, there has been an increased use of suspended sentences combined with supervision and/or community service either as a condition of a suspended sentence or as a combination suspended sentence and CCO. In the Magistrates Court in 2014, 23% of defendants had community service or supervision imposed as part of a PSS, and in 2020, this proportion had risen to 49% of defendants. In relation to FSSs, in 2014, 19% of defendants had community service or supervision imposed as part of a PSS, and in 2020, this proportion had risen to 37% of defendants.

6.3.2 Offences

Figure 6.3 sets out the offence categories for which FSSs were imposed in the Magistrates Court, classified by most serious offence. The most common offence category for which FSSs were imposed was traffic and vehicle regulatory offences (1279 cases or 41% of cases where FSSs were imposed), followed by non-sexual offences against the person (636 cases or 20%) and offences against justice procedures (382 cases or 12%). The 10 most common offences for which FSSs were imposed (classified by most serious offence for which an offender was sentenced) were (in decreasing order of frequency):

- drive with prescribed illicit drug in blood or oral fluid
- common assault
- drive a motor vehicle while exceeding prescribed alcohol limit
- driver referred to in s 6(3) or s 6(4) with alcohol in body
- stealing
- drive whilst disqualified
- drive whilst not the holder of a driver licence
- breach of bail
- burglary
- breach of family violence order, police family violence order/interim family violence order.

These offences accounted for more than half of all FSSs imposed (63%). Further details are set out in Appendix D.[298]

Figure 6.3: FSSs, proportion of orders by offence category, most serious offence, Magistrates Court, 2018–20

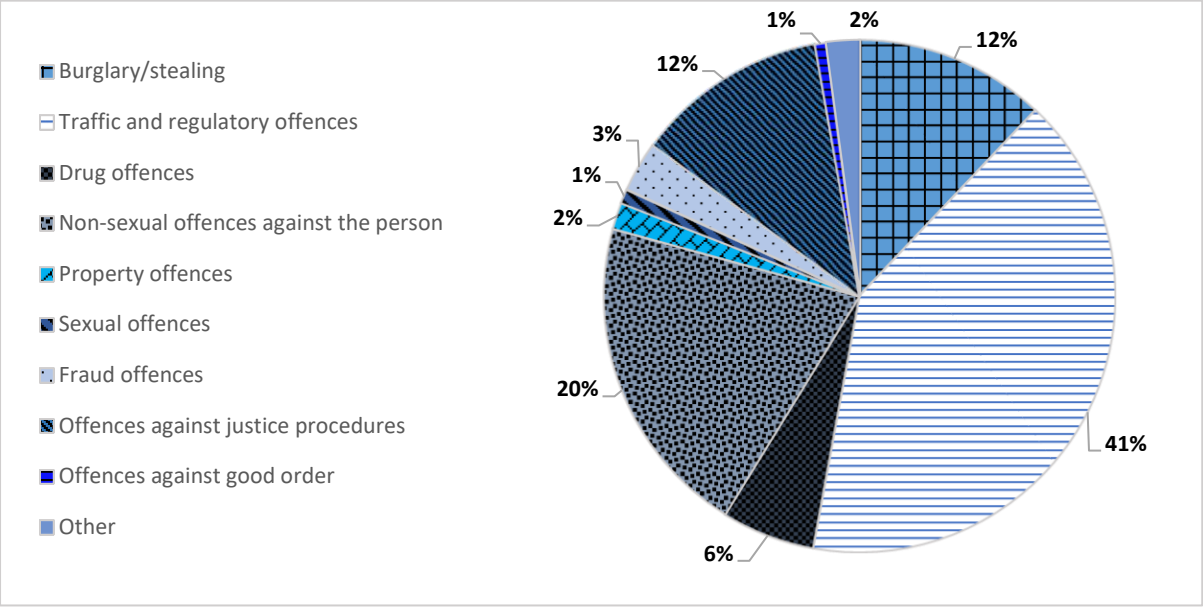


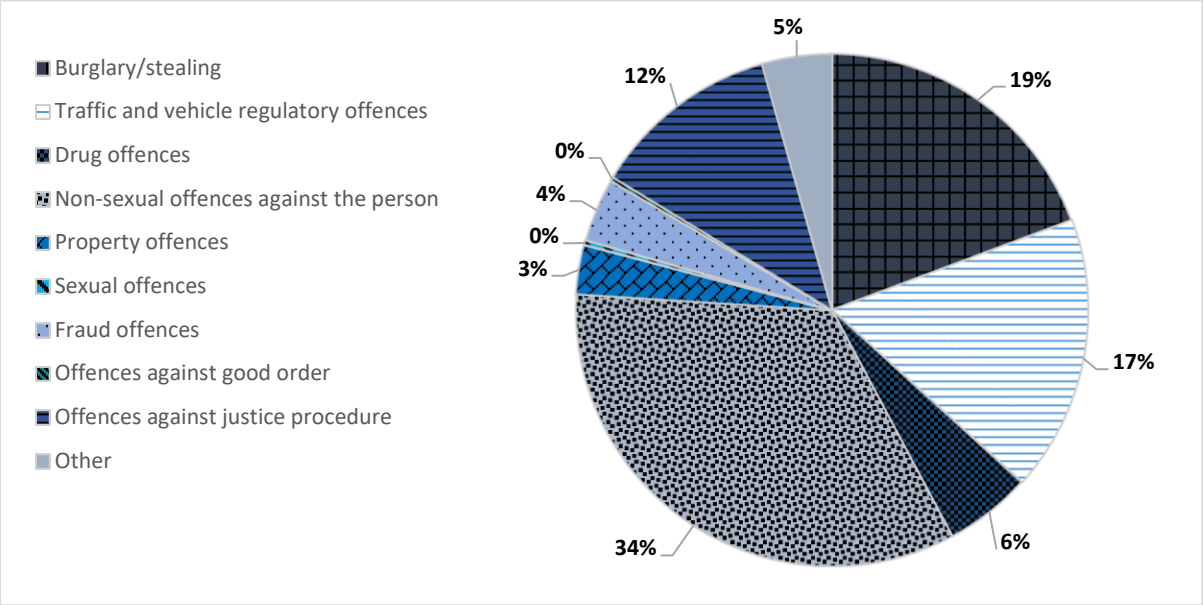
Figure 6.4 sets out the offence categories for which PSSs were imposed in the Magistrates Court, classified by most serious offence. The most common offence categories for which PSSs were imposed were non-sexual offences against the person (270 cases or 34%), burglary and theft related offences (154 cases or 19%) and traffic and vehicle regulatory offences (139 cases or 17%). The 10 most common offences for which PSSs were imposed (classified by most serious offence for which an offender was sentenced) were (in decreasing order of frequency):

- common assault
- drive with prescribed illicit drug in blood or oral fluid
- burglary
- stealing
- aggravated burglary
- breach of bail
- assault a police officer
- driver referred to in s 6(3) or s 6(4) with alcohol in body
- breach of family violence order, police family violence order/interim family violence order
- selling/supplying controlled drug (minor offence).

These offences accounted for more than half of all PSSs imposed (65%). Further details are set out in Appendix D.[299]

[298] See Table D.14.
[299] See Table D.15.

Figure 6.4: PSSs, proportion of orders by offence category, most serious offence, Magistrates Court, 2018–20



6.3.3 Duration of orders

In the period 2018 to 2020, for FSSs, the shortest term of imprisonment imposed was two days' imprisonment and the longest term of imprisonment imposed was 36 months' imprisonment (three years). The median term of imprisonment was four months. The operational period for FSSs ranged from one month to 60 months (five years) with the median being 24 months.

For PSSs,[300] in this period, the total sentence of imprisonment ranged from 14 days to 20 months with a median term of imprisonment of five months, and the suspended portion of the sentence ranged from nine days to 12 months with a median term of three months. The operational period of PSSs ranged from two months to 60 months (five months) with a median term of 24 months.

6.4 Breach of orders

A suspended sentence order is breached if the offender is found guilty of an imprisonable offence or if the offender breaches another condition of the suspended sentence.[301] Different consequences attach depending on the nature of the breach.

New offending. Currently, under the *Sentencing Act* s 27(4B), there is a presumption that the court must activate the sentence of imprisonment that is held in suspense, and order that the offender serve it, if an offender is found guilty of an imprisonable offence. However, under s 27(4B), the court may decline to activate the sentence if it is of the opinion that the activation of the sentence would be unjust. In this case, the court has other sentencing options (partial activation, substituting a new sentence, varying the conditions on which the sentence was suspended, or making no order).

[300] This data relates to sentences coded as PSSs but excludes the orders coded as 'balance suspended' (n = 174) as the length of the total sentence of imprisonment cannot be calculated without knowing the length of time the defendant had served in prison.

[301] *Sentencing Act 1997* (Tas) s 27.

The starting point is whether activation of the sentence would be unjust.[302] In addressing this question, the issue is whether it would be unjust to activate the sentence of imprisonment in its entirety, not whether it would be unjust to activate in part or whole.[303]

If the court does not activate the sentence, the court must state the reasons for its decision.[304]

Breach of another condition. There is no statutorily enshrined presumption of activation if the offender unreasonably breaches a condition of the suspended sentence other than by committing a new offence. In this case, the court may activate all or part of the sentence, impose a substituted sentence, vary the conditions of the suspended sentence or make no order.[305]

Breach applications in the Supreme Court. In the period 2019–20, the Council identified 56 applications for breach of a suspended sentence where the outcome of the application was known,[306] with 55 applications based on new offending and one application for breach of a suspended sentence based on breach of another condition of the order.

In 42 of the 55 cases where the application was based on new offending, the suspended sentence was activated (76.4% of cases). In three cases, the offender was re-sentenced (in one case a DTO was imposed; in one case a PSS was imposed for the breach of the suspended sentence and a DTO imposed in respect of the new offending; and in the final case, an HDO was imposed for the breach of the suspended sentence and the new offending). In one case, the sentence was not activated but an extension to the order was made, and there were nine cases where no further order was made (16.4%). This activation rate can be contrasted with the findings of the Council in 2015 that only 42% of actioned cases were activated in full.[307]

In the case where the offender's breach related to a condition of the order (other than reoffending), the offender was re-sentenced to a CCO.[308]

Breach applications in the Magistrates Court. In the period 2019–20, the Council identified 414 finalised breach applications in the Magistrates Court, with 390 having an 'application granted' finalisation. Of the 390 orders with an application granted, 224 (57%) had an activation of the suspended sentence for that order.[309] It was not possible to determine the outcome in cases where the application was granted and the offender was re-sentenced or the suspended sentence order varied.

Changes to the *Sentencing Act* s 27. Amendments to the *Sentencing Act* s 27 contained in the *Sentencing Amendment (Phasing Out Of Suspended Sentences) Act 2017* (Tas) s 10, which have been passed by Parliament but not commenced, make three key changes to the potential consequences for an offender of breaching a suspended sentence:

(1) If the breach is by offending that is an imprisonable offence, the statutory test for activation is changed by adding a requirement that, in addition to it being unjust to

[302] *Moore v Slater* (2018) 30 Tas R 391, [36] (Brett J); *Parker v Stebbings* (2017) 29 Tas R 252, [33] (Pearce J).

[303] *Allie v Wilkie* [2019] TASSC 27, [35] (Wood J).

[304] *Sentencing Act 1997* (Tas) s 27(4D).

[305] Ibid s 27(4E).

[306] It is noted that there was one case where the outcome was unknown.

[307] TSAC, *Phasing out of Suspended Sentences* (Background Paper, August 2015) 51.

[308] For more information, see Appendix D, Table D.1.

[309] Email from Betty Evans, Data and Policy Analyst, Department of Justice, to Rebecca Bradfield, 29 July 2021.

activate the suspended sentence, there also needs to be exceptional circumstances to justify the variation of the conditions of an order or to make no order.

(2) If the breach is a breach of another condition of the order, there needs to be exceptional circumstances to justify the variation of the conditions of an order or to make no order.

(3) If the court imposes a substituted sentence for either a breach by being found guilty of an imprisonable offence or a breach of another condition, the substitute sentence may not include an order partly or fully suspending a sentence of imprisonment unless there are exceptional circumstances.

6.5 Suspended sentence orders for offences listed in Schedule 3 of the *Sentencing Amendment (Phasing Out Of Suspended Sentences) Act 2017* (Tas)

6.5.1 Overview of offences in Schedule 3

As part of the sentencing reforms contained in the *Sentencing Amendment (Phasing Out Of Suspended Sentences) Act 2017* (Tas), amendments to the *Sentencing Act* would limit the ability of a court to make an order suspending the whole or part of a sentence of imprisonment for specified offences except in exceptional circumstances.[310] All the offences contained in Schedule 3 are currently indictable offences that are heard in the Supreme Court.[311] In introducing the legislation, these offences were described as 'serious violent, sexual and drug offences'.[312]

The offences are set out in the *Sentencing Amendment (Phasing Out Of Suspended Sentences) Act 2017* (Tas) Schedule 3 as an offence or an attempt to commit the following offences contrary to the *Criminal Code*:

- penetrative sexual abuse of child or young person (previously sexual intercourse with a young person under the age of 17 years) (s 124(1))
- persistent sexual abuse of a child or young person (previously maintaining a sexual relationship with a young person under the age of 17 years) (s 125A(1))
- procuring unlawful sexual intercourse with a young person (s 125C(2))
- penetrative sexual abuse of a person with a mental impairment (previously sexual intercourse with a person with a mental impairment) (s 126(1))
- aggravated sexual assault (s 127A(1))
- involving a person under the age of 18 years in the production of child exploitation material (s 130)
- producing child exploitation material (s 130A)
- distributing child exploitation material (s 130B(1))
- incest (s 133(1))

[310] *Sentencing Amendment (Phasing Out Of Suspended Sentences) Act 2017* (Tas) s 8.

[311] It is noted that amendments to the *Misuse of Drugs Act 2001* (Tas) ss 22A and 27AA create summary offences of cultivating a controlled plant for sale and trafficking controlled substance: *Justice Miscellaneous (Court Backlog and related Matters) Act 2020* (Tas) ss 21, 23. These offences are mirror offences of the indictable offences and are heard in the Magistrates Court.

[312] *Second Reading Speech* (n 64) 45.

- murder (s 158(1))
- manslaughter (s 159(2))
- being accessory after the fact to murder (s 161)
- committing an unlawful act intended to cause grievous bodily harm (s 170(1))
- wounding or causing grievous bodily harm (s 172)
- performing female genital mutilation (s 178A(1))
- setting a spring-gun or man-trap (s 179(1))
- rape (s 185(1))
- forcible abduction (s 186(1))
- abduction (s 186(1))
- kidnapping (s 191A)
- armed robbery (s 240(3))
- aggravated armed robbery (s 240(4))
- arson (s 268).

In addition, Schedule 3 contains the following offences in the *Sex Industry Offences Act 2005* (Tas):

- procuring or otherwise causing or permitting a child to provide sexual services in a sexual services business (s 9(1))
- receiving a fee or reward that a person knows &c. is derived, directly or indirectly, from sexual services provided by a child in a sexual services business (s 9(2)).

Schedule 3 also contains additional offences from the *Misuse of Drugs Act*, where the quantity of drugs involved amount to a trafficable quantity. These relevant offences from the *Misuse of Drugs Act* are:

- manufacturing controlled drug for sale (s 6(1))
- cultivating controlled plant for sale (s 7(1))
- possessing thing intended for use in manufacture of controlled substance for sale (s 8)
- possessing thing intended for use in cultivation of controlled plant for sale (s 9)
- manufacturing controlled precursor intended for use in manufacture of controlled drug for sale (ss 10(1)–(2))
- selling controlled precursor for use in manufacture of controlled drug (s 11)
- trafficking in controlled substance (s 12(1))
- procuring child to traffic in controlled substance (s 13(1))
- supplying controlled drug to child (s 14)
- concealing property derived from drug offence (s 16)
- receiving property directly received from drug offence (s 17(1)).

The statutory amendment that would restrict use of suspended sentences for these offences has not yet commenced. This means that, currently, a court can still impose a suspended sentence for these offences.

6.5.2 Overview of use of suspended sentence orders for offences listed in Schedule 3 of the Sentencing Amendment (Phasing Out Of Suspended Sentences) Act 2017 (Tas)

The Terms of Reference ask the Council to provide information about the use of suspended sentences for Schedule 3 offences (how many and how often are suspended orders made for these offences) and the extent to which usage has changed (in particular whether the number of suspended sentence orders made has declined since 2014).

Before examining this issue, the Council noted that the use of suspended sentences for the specified offences contained in Schedule 3 needs to be viewed in the context of broader trends in relation to the use of suspended sentences and sentencing more generally.[313] In Chapter 2, it was noted that in the Supreme Court, there has been an increase in the use of imprisonment from 31.9% of sentences in 2014 to 39.5% of sentences in 2020. In the same period, there has been an overall decline in use of FSSs and PSSs.

It is also noted that in relation to the sentences imposed for a number of the sexual offences set out in Schedule 3, the Council has examined sentencing sexual offences on three previous occasions: *Sex Offences Sentencing: Final Report No 4* (2015), *Mandatory Sentencing for Serious Sex Offences Against Children: Final Report No 7* (2016) and *Sentencing for Serious Sex Offences Against Children: Research Paper 3* (2018). The discussion of the use of suspended sentences for sexual offences should be viewed in the context of the finding that there has been a decided upward trend in sentences imposed under the *Sentencing Act* for serious sexual offences against children in the period 2008–14 to 2015–18.[314]

Based on the Council's analysis of the use of suspended sentences for Schedule 3 offences, an observation that can be made is that many of these offences are not frequently used offences and/or that suspended sentences have not generally been imposed for the offences.[315] Even in relation to offences where suspended sentences have been imposed, there are generally only a relatively small number of offenders and a small number of suspended sentences imposed in each year and so it is difficult to make observations in relation to trends from 2014 to 2020. Random variation is more noticeable when numbers are small, which might affect the appearance and interpretation of trends, which should therefore be interpreted with caution.

Accordingly, given the small number of cases sentenced in each year for many of the offence categories, it was not possible to make firm observations about any trends relating to the decline in the use of suspended sentences for most offences, as it was not possible to determine whether any changes in sentencing were attributable to a change in approach of the court or to the particular circumstances of the cases that were sentenced by the court in any given year. As noted previously, the number of cases are too small to allow for meaningful statistical analysis.

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313 This was acknowledged in VSAC, *Suspended Sentences in Victoria: Monitoring Report* (2010) 19.

314 TSAC, *Sentencing for Serious Sex Offences Against Children* (Research Paper No 3, November 2018) v ('*Sentencing for Serious Sex Offences Against Children Research Paper*').

315 See Appendix D, Table D.16.

Tentative observations are made in relation to a possible decline in the use of suspended sentences for penetrative sexual abuse of a child or young person contrary to the *Criminal Code* s 125A, wounding or causing grievous bodily harm contrary to the *Criminal Code* s 172, aggravated armed robbery contrary to the *Criminal Code* s 240(4), and arson contrary to the *Criminal Code* s 268. However, it is repeated that these observations are only speculative, given the case numbers involved in each year. In relation to the crime of trafficking in a controlled substance contrary to the *Misuse of Drugs Act 2001* (Tas) s 12(1), given the larger number of cases involved, it is possible to more confidently state that there has been an overall decline in the use of suspended sentences, particularly FSSs.

Further, based on the analysis of Schedule 3 offences (noting that the data for drug offences relates to all offences and not only those that would fall within the Schedule 3 restriction to drug offences involving trafficable quantities),[316] there are a number of offences where suspended sentences were used as a sentencing option in nearly half or more of the cases sentenced between 2014 and 2020. These offences are:

- penetrative sexual abuse of a young person (52.9%)
- producing and/or distributing child exploitation material (76.9%)
- wounding or causing grievous bodily harm (46.2%)
- arson (61.6%)
- cultivating a controlled plant for sale (not limited to cases involving trafficable quantities) (86.9%)
- trafficking in a controlled substance (not limited to cases involving trafficable quantities) (68.7%).

Based on the Council's analysis, it is not possible to draw an unqualified conclusion about the overall number of cases where an offender received a suspended sentence in the period 2014 to 2020, but would be unlikely to receive a suspended sentence if the legislation (with Schedule 3 offences) were to come into force. This is because of the limitations identified in relation 'trafficable quantity' and also the qualification in the legislation that suspended sentences can still be used in 'exceptional circumstances'. It is unclear how the requirement for 'exceptional circumstances' would be interpreted by the court. It appears to create a requirement that a suspended sentence can be imposed if it would be 'unjust' not to impose that sentence (for example), which depends on the particular circumstances of each case and factors personal to the offender. For example, in deciding whether it is 'unjust' to activate a suspended sentence, the court considers:

> the nature and circumstances of the original offending; the nature and gravity of the breach offence/s; the breach in light of the penalty for the original offending (whether activation is a disproportionate response to the breach offence, lapse of time between imposition and breach and whether the breach represents a relapse into the way of life or criminal conduct comparable to the offence for which the suspended sentence was imposed), and finally, any progress towards reform (whether the suspended sentence may be having its desired effect and the extent to which there has otherwise been observance of the conditions of the suspended sentence).[317]

[316] It is noted that it was not possible to reliably determine the cases that involved a trafficable quantity from the sentencing comments or sentencing data provided the Supreme Court. This is discussed further at [6.7].

[317] *Allie v Wilkie* [2019] TASSC 27, [39] (Wood J); *Moore v Slater* (2018) 30 Tas R 391, [37] (Brett J).

In contrast, the requirement for 'exceptional circumstances' has been interpreted to suggest that 'the circumstances … must be clearly unusual or quite special or distinctly out of the ordinary'.[318] This focuses on a comparison between how the circumstances of the particular case compare with the usual or ordinary case that the court may consider. However, a tentative observation is that, if the legislation were to come into force, based on the number of suspended sentences imposed between 2014 to 2020 for Schedule 3 offences, potentially up to 461 cases (or 47.7% of sentences imposed for these offences) would be unlikely to receive a suspended sentence and would either end up with a sentence of imprisonment, a DTO or receive a non-custodial order.

6.5.3 Use of suspended sentences for penetrative sexual abuse of a child or young person (formerly sexual intercourse with a young person under the age of 17 years old): Criminal Code s 124(1)

The crime of penetrative sexual abuse of a child or young person (previously sexual intercourse with a young person) involves 'sexual intercourse' with a person under the age of 17.[319] There is an expanded definition of sexual intercourse contained in the *Criminal Code* s 2B which defines sexual intercourse to mean:

- penetration of a person's vagina, genitalia, anus or mouth by a penis
- penetration of a person's vagina, genitalia or anus by a body part other than a penis, or an object held or manipulated by, or attached to the person, or
- the continuation of such penetration.

This definition came into force on 14 July 2017. Prior to this time, the definition of sexual intercourse was limited to penile penetration of the vagina, genitalia, anus or mouth (and the continuation of such intercourse).

In the period 2014 to 2020, there were 34 offenders sentenced for this offence as the most serious offence. There were 27 offenders sentenced for a single count of penetrative sexual abuse of a child or young person and seven offenders sentenced for multiple offences.

As shown by Table 6.1, there were 18 suspended sentences imposed (four PSSs and 14 FSSs). This accounted for 52.9% of the sentences imposed.

Table 6.1: Sentence imposed for penetrative sexual abuse of a child or young person, most serious offence (all counts), 2014–20

	Imprisonment	PSS	FSS	Non-custodial sentence
Number of offenders (n = 34)	13	4	14	3
Proportion %	38.2	11.8	41.2	8.8

This analysis supplements prior research of the Council on sentencing for sexual intercourse with a young person (now called penetrative sexual abuse of a child or young person), and as with the previous analysis, suspended sentences have been used in around 50% of cases. Previously, in the overlapping period of 2015–18, there were 12 cases identified with 33.3% of offenders (four offenders) receiving a sentence of imprisonment, 41.7% (five offenders) receiving a FSS and 8.3% (one offender) receiving a PSS. This can be compared with sentencing for the period 2008–14, where there were 62 cases identified and

[318] *R v Ioannou* [2007] VSCA 277. See discussion in VSAC, *Suspended Sentences in Victoria: Monitoring Report* (2010) 14–15.

[319] *Criminal Code* (n 11) s 124.

suspended sentences were imposed in 33 of those cases: 26 FSSs (41.9%) and seven PSSs (11.3%). There were 19 offenders (30.6% of cases) where imprisonment was imposed.

The Council has previously observed that FSSs tended to involve younger offenders in circumstances where there was not a great disparity in the respective levels of maturity between the offender and the complainant and/or where there was a relationship between the offender and the complainant.[320] Generally, these factors were reflected the use of suspended sentences in the period 2014 to 2020. However, in one case, a FSS was imposed in exceptional circumstances where the sentencing judge stated that the offender 'deserve[d] to be sent to prison'.[321] In this case, the offender had pleaded guilty to seven sexual offences committed when he was a schoolteacher between 1981 and 1990, including one count of penetrative sexual abuse of a child or young person. In sentencing, the judge acknowledged the seriousness of the offender's predatory behaviour and abuse of trust in respect of his students. However, due to significant and complex health needs, he was unable to return to Tasmania and there was no way for the judge to impose an actual term of imprisonment in these circumstances.

An analysis of the sentences imposed for penetrative sexual abuse of a child or young person from 2014–20 by year demonstrates considerable fluctuation in the sentences imposed, including the use of suspended sentences. Due to the small number of cases involved (between one and eight offenders each year), it is not possible to make firm observations about the decline in the use of suspended sentences, given the individual nature of sentencing and the broad range of circumstances that can give rise to the crime.[322] As has been recognised by the Court of Criminal Appeal in *Cleaver v Tasmania*,[323] '[t]he circumstances of each case vary widely. No range is established'.[324]

6.5.4 Use of suspended sentences for persistent sexual abuse of a child or young person (formerly maintaining a sexual relationship with a young person): Criminal Code s 125A

The crime of persistent sexual abuse of a child or young person (previously maintaining a sexual relationship with a young person) is committed if a person commits an unlawful sexual act (penetrative sexual abuse of a child or young person, indecent assault, aggravated sexual assault (now repealed), incest or rape) with a person under the age of 17 on at least three occasions.[325]

In the period 2014 to 2020, there were 71 offenders sentenced for this offence as the most serious offence. There were 51 offenders sentenced for a single count of persistent sexual abuse of a child or young person and 20 offenders sentenced for multiple offences.

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320 TSAC, *Sentencing for Serious Sex Offences Against Children Research Paper* (n 314) [6.1]. It is noted that indictable offences may be remitted to the Magistrates Court for summary trial if it appears to a judge that the punishment of a term of imprisonment not exceeding one year would be adequate for the circumstances of the case: *Criminal Code* (n 11) ss 308(1), (4). In a Practice Direction published by the Chief Justice of the Supreme Court, it is indicated that defence counsel and prosecutors may consider making s 308 applications in cases where a defendant has been charged with sexual intercourse with a young person where the accused is 25 years old or younger and the complainant is at least 15 years old: *Practice Direction No 2 of 2015* (n 45).

321 *Tasmania v O'Neill* (COPS, Supreme Court of Tasmania, Blow CJ, 9 September 2020).

322 See [2.2].

323 [2018] TASCCA 11.

324 Ibid [20] (Pearce J). This was also expressed in *DPP (Tas) v Harington* [2017] TASCCA 4, [20]–[21] (Wood J), [85]–[86] (Pearce J).

325 *Criminal Code* (n 11) s 125A.

As shown by Table 6.2, there were 18 suspended sentences imposed (four partially suspended and 14 wholly suspended). This accounted for 25.3% of the sentences imposed.

Table 6.2: Sentence imposed for persistent sexual abuse of a child or young person, most serious offence (all counts), 2014–20

	Imprisonment	PSS	FSS	Non-custodial sentence
Number of offenders (n = 71)	52	4	14	1
Proportion %	73.2	5.6	19.7	1.4

This analysis supplements prior research of the Council in relation to sentencing for maintaining a sexual relationship with a young person (now called persistent sexual abuse of a child or young person). In the overlapping period of 2015–18, there were 36 cases identified, with 72.2% (26 offenders) receiving a sentence of imprisonment, 19.4% (seven offenders) receiving a FSS and 8.3% (three offenders) receiving a PSS. This was a higher proportion of imprisonment sentences and a reduced use of suspended sentences when compared with sentencing for the period 2008–14, where there were 95 cases identified. Imprisonment was imposed in 63 cases (66.3%) and suspended sentences imposed in 30 cases, with 20 receiving a FSS (21%) and 10 receiving a PSS (10.5%).

In its previous consideration of sentencing for this offence, the Council identified three broad categories of cases as relevant to the sentence imposed:

(1) cases where the offender was in a family relationship

(2) cases where the offender was an adult acquaintance who had connected with the child in another capacity as a trusted adult

(3) cases where the court characterised the offender and the young person as being in a 'consensual' relationship.[326]

The Council observed that imprisonment was the most commonly used sanction for the offence of maintaining for all categories other than those cases that had the hallmarks of a 'consensual relationship'. Generally, this reflects the Council's current analysis, where suspended sentences were imposed in the context of consensual relationships. Additional circumstances where suspended sentences were imposed are as follows:

- two PSSs imposed where there was an older offender but the complainant was close to 17 at the time of the offending
- a FSS in relation to historical sexual offending committed when the offender was a youth
- a FSS in relation to offences committed by a youth.

In relation to the sentences imposed for persistent sexual abuse of a child or young person from 2014–20 by year, there are only a small number of cases sentenced in each year and so it is difficult to make firm observations based on trend data. Bearing in mind this caveat, there may be indications of an overall decline in the use of suspended sentences for the offence of persistent sexual abuse of a child or young person. However, due to the small

[326] TSAC, *Mandatory Sentencing for Serious Sex Offences Against Children* (Final Report No 7, 2016) [5.2.3]; TSAC, *Sex Offence Sentencing* (Final Report, 2015) [3.3.4]. The Council noted that the notion of consent is problematic in the context of a young person, given that (other than rape) absence of consent is not an element of sexual offences involving people under 17 on the basis that they are in need of protection: see *Sentencing for Serious Sex Offences Against Children Research Paper* (n 314) [4.1].

number of cases (between six and 16 cases in a year), it is difficult to assess if this reflects a general reduction in the use of suspended sentences or the particular circumstances of the cases that were dealt with by the court in any particular year. A reduction in the use of suspended sentences would reflect the general increase in sentencing severity for this offence by way of increasing length of sentences of imprisonment imposed and the changing approach of the Court of Criminal Appeal to cases of serious sexual offences involving children.[327]

6.5.5 Use of suspended sentences for aggravated sexual assault: Criminal Code s 127A (repealed on 14 July 2017)

A separate crime of aggravated sexual assault no longer exists in Tasmania and conduct that would have fallen within the offence in *Criminal Code* s 127A is now within the expanded definition of sexual intercourse and constitutes the crime of rape (where absence of consent is an element of the offence), or penetrative sexual abuse of a child or young person (where the offence does not require proof of absence of consent). The crime of aggravated sexual assault was repealed on 14 July 2017.[328] Previously, the crime of aggravated sexual assault involved the penetration of the vagina or anus by any part of the human body, other than a penis, or by penetration by an inanimate object. This offence did not require proof of absence of consent in cases where the alleged victim was under the age of 17.

There were 15 offenders sentenced for the offence of aggravated sexual assault contrary to the *Criminal Code* s 127A as the most serious offence, prior to its repeal. There were five offenders sentenced for a single count of aggravated sexual assault and 10 offenders sentenced for multiple offences.

There were 12 sentences of imprisonment imposed (80%), two PSSs (16.7%) and in one case a conviction was recorded and proceedings were adjourned (8.3%).

Given the small number of cases where an offender was sentenced for aggravated sexual assault as the most serious offence in each year, it is not possible to make any firm observation about trends in the use of suspended sentences from 2014. However, the data suggest that the use of sentences other than immediate imprisonment were rare for this offence. There were no FSSs imposed, only two PSSs imposed (in 2015 and 2017) and one non-custodial sentencing order (in 2016). These data appear to show a greater use of imprisonment (and fewer suspended sentences) than found in the Council's previous examination of sentencing for this offence in the period 2008–14. In this prior analysis, 11 offenders (57.9%) were sentenced to immediate imprisonment, with three receiving a PSS (15.8%) and three receiving a FSS (15.8%).

6.5.6 Use of suspended sentences for producing child exploitation material and distributing child exploitation material: Criminal Code ss 130A, 130B(1)

Child exploitation material (CEM) is material that describes or depicts, in a way that a reasonable person would regard as being, in all the circumstances, offensive, a person who is or who appears to be under the age of 18 years — (a) engaged in sexual activity; (b) in a

[327] See TSAC, *Mandatory Sentencing for Serious Sex Offences Against Children* (n 326) [5.2.3]; TSAC, *Sentencing for Serious Sex Offences Against Children Research Paper* (n 314) [4.1].

[328] Omitted by the *Criminal Code Amendment (Sexual Assault) Act 2017* (Tas) s 4.

sexual context; or (c) as the subject of torture, cruelty or abuse (whether or not in a sexual context).[329]

It is a crime for a person to produce or do anything to facilitate the production of CEM.[330] To produce CEM means to 'make film, print, photograph and record'.[331] It is also a crime to distribute CEM.[332] In determining the seriousness of CEM, relevant to both charging and sentencing, CEM is classified using the Australian National Image Library (ANVIL)/Child Exploitation Tracking System (CETS) scheme. This scheme was adopted in Tasmania in *Director of Public Prosecutions (Tas) v Latham* ('*Latham*').[333]

In *Latham*,[334] the Court of Criminal Appeal set out the factors which bear upon the objective seriousness of the possession and distribution of child pornography including:

- the nature and content of the images, including the age of the children and the gravity of the activity portrayed — in particular, the degree of obvious physical harm or fear or distress in the victim
- the number of images or items of material, as a secondary issue to the type of material
- whether mere possession was for the purposes of further distribution, and whether there would be any profit or benefit from the activity of the offender — actual profit or benefit would aggravate the offence, whilst the absence of such profit or benefit was not mitigatory
- the level of personal interest in the material, as perhaps evidenced by the way in which any collection was organised on a computer
- whether the possession involved a risk of accidental discovery by innocent computer users.[335]

The Court also noted the additional abuse of a child (beyond possession of CEM) that occurs by the distribution of images.[336]

In the period 2014 to 2020, there were 13 offenders sentenced for these offences as the most serious offence. There were no offenders sentenced for a single count of distribution and/or production of CEM and all offenders were sentenced for multiple offences. Of the 13 offenders, 11 offenders were charged with the offence of distribution of CEM and six were charged with production of CEM.

As shown by Table 6.3, there were 10 suspended sentences imposed (seven partially suspended and three wholly suspended). This accounted for 76.9% of the sentences imposed.

329 *Criminal Code* (n 11) s 1A.

330 Ibid s 130A

331 Ibid s 1A.

332 Ibid s 130B(1). The making and distribution of CEM are also offences under the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas): at s 72A (make) and s 73A (distribute).

333 (2009) 19 Tas R 281. For further information, see DPP (Tas), *Prosecution Policy and Guidelines* (2019) ('*DPP Guidelines*') 70.

334 (2009) 19 Tas R 281.

335 Ibid [34] (Porter J).

336 Ibid [35] (Porter J).

Table 6.3: Sentences imposed for the production and/or distribution of CEM, most serious offence (all counts), 2014–20

	Imprisonment	PSS	FSS
Number of offenders (n = 13)	3	7	3
Proportion %	23.1	53.8	23.1

In relation to any change in use of suspended sentences for these offences, over the period 2014 to 2020 there were three or fewer offenders sentenced for this offence each year. Accordingly, it is not possible to make reliable observations in relation to any changes in the use of suspended sentences since the Tasmanian Government's change in policy in relation to suspended sentences in 2014.

6.5.7 Use of suspended sentences for manslaughter: Criminal Code s 159(2)

In the period 2014 to 2020, there were 12 offenders sentenced for manslaughter and 10 offenders were sentenced to a term of imprisonment. Two offenders received a FSS following their plea of guilty to manslaughter on the basis of criminal negligence.[337] In this case, the offenders were caring for the mother of one of the offenders, and she died due to their gross negligence in leaving her to sleep in a shipping container in freezing conditions on one night.

There are too few sentences imposed for this offence to allow the Council to make any observation about any change in the use of suspended sentences since 2014.

6.5.8 Use of suspended sentences for committing an unlawful act intended to cause grievous bodily harm: Criminal Code s 170(1)

The crime of committing an unlawful act intended to cause grievous bodily harm requires a specific intent to cause serious bodily harm, and is generally a more serious offence than the crime of causing grievous bodily harm contained in the *Criminal Code* s 172.[338]

In the period 2014 to 2020, there were 30 offenders sentenced for this offence as the most serious offence. There were 12 offenders sentenced for a single count of unlawful act intended to cause grievous bodily harm and 18 offenders sentenced for multiple offences.

As shown by Table 6.4, there were six suspended sentences imposed (five partially suspended and one wholly suspended). This accounted for 20% of the sentences imposed.

Table 6.4: Sentence imposed for act intended to cause grievous bodily harm, most serious offence (all counts), 2014–20

	Imprisonment	PSS	FSS	HDO (available from 14 Dec 2018)
Number of offenders (n = 30)	23	5	1	1
Proportion %	76.7	16.7	3.3	3.3

Examining the sentences imposed for an act intended to cause grievous bodily harm from 2014 to 2020 by year, there are very few offenders sentenced for this offence each year (with fluctuating numbers between two and eight offenders). It is therefore difficult to make any firm observations in relation to any changes in the use of suspended sentences since the Government's change in policy in relation to suspended sentences in 2014. Since 2014,

[337] See *Tasmania v Anglin* (COPS, Supreme Court of Tasmania, Tennent J, 13 April 2015).

[338] *DPP (Tas) v Blackaby* [2013] TASCCA 4, [16]–[18] (Estcourt J) quoted in *Jay v Tasmania* [2016] TASCCA 12, [11] (Estcourt J). See also *Crisp* (n 56).

there have only been a few sentences other than immediate imprisonment imposed in each year, but given the low numbers of cases involved, each of these cases has a considerable impact on the statistical picture. However, FSSs have been rarely imposed for this offence, and they continue to be used infrequently.

Examining sentencing trends for act intended to cause grievous bodily harm over a longer period of time, it is noted that in the period 2014–20, there has been a reduction in the use of custodial sentences (imprisonment or PSSs) for this offence compared to the period 2008–14, with 90.3% of offenders receiving a custodial sentence (imprisonment or PSSs) compared to 96.6% in the earlier period.[339] In *Crisp*, Blow CJ observed that for most s 170 cases, 'the only appropriate course is to send the offender to prison' with an ordinary penalty in the range of three to seven years'.[340] However, in some cases, it has been recognised that the interests of justice may be served by making another sentencing order, such as a suspended sentence or an HDO.[341] Given the small number of cases involved, it is likely that changes in the use of different sentencing options reflect these individual factors rather than any change in approach by the court.

6.5.9 Use of suspended sentences for wounding [or causing grievous bodily harm]: Criminal Code s 172

The crime of wounding or causing grievous bodily harm contained in the *Criminal Code* s 172 is a less serious offence than the offence in s 170, as it does not require the prosecution to prove that the accused intended to cause a wound or grievous bodily harm — only that the accused foresaw the likelihood of this occurring.

In the period 2014 to 2020, there were 160 offenders sentenced for this offence as the most serious offence. There were 102 offenders sentenced for a single count of wounding or causing grievous bodily harm and 58 offenders sentenced for multiple offences.

As shown by Table 6.5, there were 74 suspended sentences imposed (39 partially suspended and 35 wholly suspended). This accounted for 46.3% of the sentences imposed.

Table 6.5: Sentence imposed for wounding [or causing grievous bodily harm], most serious offence (all counts), 2014–20

	Imprisonment	PSS	FSS	HDO (available from 14 Dec 2018)	Non-custodial sentence
Number of offenders (n = 160)	74	39	35	7	5
Proportion %	46.3	24.4	21.9	4.4	3.1

Previously, the Council examined sentences imposed by the Supreme Court for wounding or causing grievous bodily harm in the period 2008–14, and there would now appear to be a greater use of imprisonment and fewer FSSs imposed. In 2008–14, there were 150 cases with 38.7% of offenders receiving a sentence of imprisonment (23.3% a PSS and 31.3% a FSS). There were 6.7% of offenders who received a non-custodial sentence.[342] It has been accepted by the Court of Criminal Appeal that for offences contrary to the *Criminal Code*

[339] See TSAC, *Supreme Court Sentencing Statistics* <https://www.sentencingcouncil.tas.gov.au/statistics/supremecourt>.

[340] *Crisp* (n 56) [19], [22] (Blow CJ).

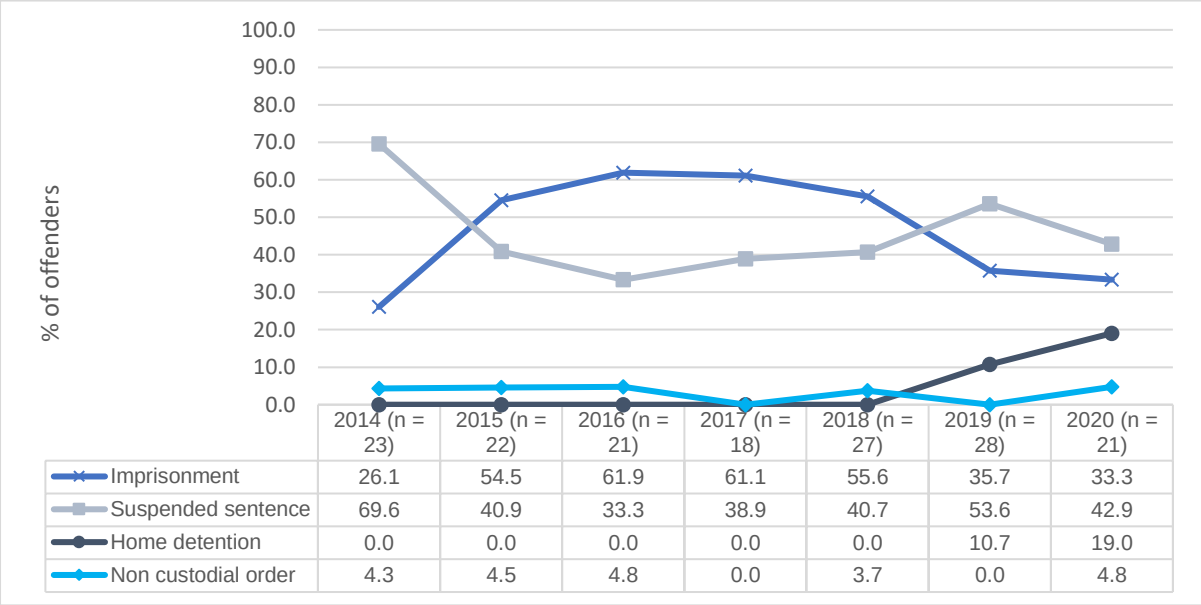
[341] Ibid [22] (Blow CJ); *Tasmania v Davey* (COPS, Supreme Court of Tasmania, Blow CJ, 18 April 2018) (factors relevant to suspending the sentence were youth, remorse and substantial steps at rehabilitation).

[342] TSAC, *Sex Offence Sentencing* (Final Report No 4, 2015) 53.

s 172 ordinarily a sentence of imprisonment would be required.[343] However, a sentence of actual imprisonment was not necessarily required in every case.[344] Factors that would be relevant to the imposition of a suspended sentence would include lesser significance attached to general deterrence in cases of intellectual disability,[345] as well as cases where the court is entitled to give more weight to rehabilitation than to principles of personal and general deterrence.[346]

Figure 6.5 sets out the sentences imposed for wounding or causing grievous bodily harm from 2014 to 2020 by year. Few offenders are sentenced for these offences in each year, but these data suggest that there may have been a general decline in the use of suspended sentences since 2014. However, it is also noted that, over this period, wounding/cause grievous bodily harm was the third largest category of offence where both PSSs and FSSs were imposed. There was only one CCO imposed for this offence. It is noted also that the use of imprisonment increased in the period 2016 to 2018 from the levels in 2014, and then has declined with an apparent take up of with the use of HDOs by the court. As noted at [3.2.2], wounding/cause grievous bodily harm is the most common offence for which HDOs have been made, accounting for 22.5% of HDOs imposed in 2019–20.

Figure 6.5: Sentences imposed for wounding/causing grievous bodily harm, 2014–20 (by year)



	2014 (n = 23)	2015 (n = 22)	2016 (n = 21)	2017 (n = 18)	2018 (n = 27)	2019 (n = 28)	2020 (n = 21)
Imprisonment	26.1	54.5	61.9	61.1	55.6	35.7	33.3
Suspended sentence	69.6	40.9	33.3	38.9	40.7	53.6	42.9
Home detention	0.0	0.0	0.0	0.0	0.0	10.7	19.0
Non custodial order	4.3	4.5	4.8	0.0	3.7	0.0	4.8

6.5.10 Use of suspended sentences for rape: Criminal Code s 185(1)

In Tasmania, rape is sexual intercourse without consent.[347] As discussed at [6.5.5], conduct that would previously have given rise to the offence of aggravated sexual assault has been

[343] *DPP (Tas) v Pearce* (2015) 28 Tas R 1, [13] (Pearce J). See also *DPP (Tas) v Greely* (2019) 29 Tas R 448.

[344] (2015) 28 Tas R 1, [13] (Pearce J).

[345] Ibid [16] (Pearce J).

[346] *DPP (Tas) v Greely* (2019) 29 Tas R 448 [32] (Geason J).

[347] *Criminal Code* (n 11) ss 1, 185. Consent is defined in s 2A as follows:

(1) In the Code, unless the contrary intention appears, 'consent' means free agreement.

(2) Without limiting the meaning of 'free agreement', and without limiting what may constitute 'free agreement' or 'not free agreement', a person does not freely agree to an act if the person —

(a) does not say or do anything to communicate consent; or

(b) agrees or submits because of force, or a reasonable fear of force, to him or her or to another person; or

(c) agrees or submits because of a threat of any kind against him or her or against another person; or

included in the offence of rape since 14 July 2017.[348] Rape also includes the continuation of an act of penetration without consent. In assessing the sentences imposed, it is noted that the definition of sexual intercourse that applied to the accused's conduct (and so whether the conduct amounted to aggravated sexual assault or rape) was dependent on whether it occurred before or after 14 July 2017.

In the period 2014 to 2020, there were 57 offenders sentenced for rape. There were 21 offenders sentenced for a single count of rape and 36 offenders sentenced for multiple offences.

As shown by Table 6.6, there were seven suspended sentences imposed (six partially suspended and one wholly suspended). This accounted for 12.3% of the sentences imposed.

Table 6.6: Sentence imposed for rape, most serious offence (all counts), 2014–20

	Imprisonment	PSS	FSS	HDO (available from 12 Dec 2018)
Number of offenders (n = 57)	49	6	1	1
Proportion %	86	10.5	1.7	1.7

As shown, most offenders sentenced for rape received a sentence of imprisonment. In cases where other sentencing orders were imposed, the circumstances included:

- impaired capacity of offender (three cases where PSSs were imposed)
- the offender was a youth (one case where a wholly suspended sentence was imposed and one case where a PSS was imposed)[349]
- digital penetration (one case where an HDO was imposed in addition to a CCO)
- continuation of intercourse (after consent removed) and youth (one case where a PSS was imposed)
- oral sexual intercourse male on male, older offender who was extremely intoxicated (one case where a PSS was imposed).

Examining the sentences imposed for rape from 2014 to 2020 by year, as noted, conduct that falls within the crime of rape has changed in this period. One case was identified where conduct would previously have been aggravated sexual assault (digital penetration of the vagina) rather than rape.[350] In this case, the offender was sentenced to an HDO.

Based on the sentences imposed, it is difficult to make any observations in relation to any changes in the use of suspended sentences since the Government's change in policy in

(d) agrees or submits because he or she or another person is unlawfully detained; or
(e) agrees or submits because he or she is overborne by the nature or position of another person; or
(f) agrees or submits because of the fraud of the accused; or
(g) is reasonably mistaken about the nature or purpose of the act or the identity of the accused; or
(h) is asleep, unconscious or so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required; or
(i) is unable to understand the nature of the act.

(3) If a person, against whom a crime is alleged to have been committed under chapters XIV or XX, suffers grievous bodily harm as a result of, or in connection with, such a crime, the grievous bodily harm so suffered is evidence of the lack of consent on the part of that person unless the contrary is shown.

348 Ibid s 2B. See [6.5.5].

349 In the case of the PSS, the Crown appeal against sentence was dismissed: see *JSP* (n 271).

350 *Tasmania v MSL* (COPS, Supreme Court of Tasmania, Wood J, 21 December 2020).

relation to suspended sentences in 2014, in particular whether there has been a decline in their use. There are only a small number of offenders sentenced for rape each year, and the number of offenders fluctuates year on year.

Suspended sentences (partially or wholly) were rarely imposed prior to 2014[351] and this remains the case from 2014 to 2020. Since 2014, there have only been one or two sentences other than immediate imprisonment imposed in each year; but given the low numbers of cases involved, each of these cases has a considerable impact on the statistical picture. Further, in cases where a suspended sentence was imposed, the sentencing judge acknowledged that the imposition of a sentence other than immediate imprisonment was unusual, and referred to the specific circumstances of the case that justified imposing a sentence other than one of full-time imprisonment.[352]

6.5.11 Use of suspended sentences for armed robbery: Criminal Code ss 240(3)

Robbery is a crime where a person steals anything and uses or threatens to use violence.[353] It is a crime of violence as well as dishonesty.[354] Armed robbery is a robbery committed by a person armed with a firearm or other dangerous or offensive weapon or instrument.[355]

In the period 2014 to 2020, there were 55 offenders sentenced for armed robbery. There were 42 offenders sentenced for a single count of armed robbery and 13 offenders sentenced for multiple offences.

As shown by Table 6.7, there were 20 suspended sentences imposed (15 partially suspended and five wholly suspended). This accounted for 36.4% of the sentences imposed.

Table 6.7: Sentence imposed for armed robbery, most serious offence (all counts), 2014–20

	Imprisonment	PSS	FSS	DTO (available from 8 Feb 2017)	HDO (available from 12 Dec 2018)	Other non-custodial order
Number of offenders (n = 55)	30	15	5	1	1	3
Proportion %	54.5	27.3	9.1	1.8	1.8	5.5

An analysis of the sentences imposed for armed robbery from 2014 to 2020 by year is limited by the small number of cases sentenced in each year (between three and 12 offenders) and so it is difficult to make firm observations based on trend data. The use of suspended sentences has fluctuated in the period, with there being no change in the proportion of sentences that were suspended in 2014 and 2020. The Court of Criminal Appeal has stressed that armed robbery is a 'very serious crime'[356] and one that would

[351] See TSAC, *Sex Offence Sentencing* (n 342) [3.3.1].

[352] *Tasmania v SGH* (COPS, Supreme Court of Tasmania, Wood J, 9 July 2016); *Tasmania v QMT* (COPS, Supreme Court of Tasmania, Wood J, 11 May 2015); *Tasmania v NWH* (COPS, Supreme Court of Tasmania, Wood J, 19 September 2016); *JSP* (n 271); *Tasmania v DW* (COPS, Supreme Court of Tasmania, Brett J, 30 October 2019); *Tasmania v JPW* (COPS, Supreme Court of Tasmania, Wood J, 21 April 2020); *Tasmania v JJCH* (COPS, Supreme Court of Tasmania, Geason J, 29 June 2018).

[353] *Criminal Code* (n 11) s 240(1).

[354] See *Burns v Tasmania* [2018] TASCCA 18, [6] (Wood J).

[355] *Criminal Code* (n 11) s 240(3).

[356] See *Burns v Tasmania* (n 354) [36] (Geason J); *Streets v Tasmania* [2016] TASCCA 13; *Armstrong v Tasmania* [2017] TASCCA 18.

ordinarily attract a sentence of immediate imprisonment.[357] However, as has been recognised by the Court of Criminal Appeal, it is an offence that may be committed in a broad range of circumstances and the seriousness of the crime 'turns on the facts of the individual case and the nature of the particular crime that was committed'.[358] Accordingly, the circumstances of individual cases are likely to account for any changes in sentencing year by year, rather than any change in approach to the view held by the court as to the seriousness of the offence or the use of suspended sentences as a sentencing option for this offence.

Examining sentencing trends for armed robbery over a longer period of time, it is noted that in the period 2014–20, there has not been a considerable change in the use of custodial sentences (imprisonment or PSSs) for armed robbery compared to the period 2008–14, with 81.8% of offenders receiving a custodial sentence (imprisonment or PSSs) compared to 82.1% in the earlier period.[359]

6.5.12 Use of suspended sentences for aggravated armed robbery: Criminal Code s 240(4)

Aggravated robbery is a robbery where a person is in the company of another person(s) at the time or causes bodily harm to any person at the time of committing the robbery.[360] An aggravated armed robbery is aggravated robbery committed when the person is armed with a firearm or other dangerous or offensive weapon or instrument.[361]

In the period 2014 to 2020, there were 77 offenders sentenced for aggravated armed robbery. There were 40 offenders sentenced for a single count of aggravated armed robbery and 37 offenders sentenced for multiple offences.

As shown by Table 6.8, there were 22 suspended sentences imposed (20 partially suspended and two wholly suspended). This accounted for 28.6% of the sentences imposed.

Table 6.8: Sentence imposed for aggravated armed robbery, most serious offence (all counts), 2014–20

	Imprisonment	PSS	FSS	DTO (available from 8 Feb 2017)	HDO (available from 12 Dec 2018)	Other non-custodial order
Number of offenders (n = 77)	55	20	2	1	1	0
Proportion %	68.8	26	2.6	1.3	1.3	0

In examining the sentences imposed for aggravated armed robbery from 2014 to 2020 by year, there are only a small number of cases sentenced in each year and so it is difficult to make firm observations based on trend data. The use of suspended sentences has fluctuated in the period, with 80% of sentences imposed in 2017 being suspended sentences (all PSSs) in contrast to 2018 when 16.7% of sentences were suspended

[357] *Armstrong v Tasmania* [2017] TASCCA 18 [8] (Estcourt J) quoting *Bartle v Tasmania* [2016] TASCCA [22] (Brett J); *Streets v Tasmania* (n 356) [8].

[358] *Burns v Tasmania* (n 354) [8] (Wood J).

[359] See TSAC, *Supreme Court Sentencing Statistics* (n 339).

[360] *Criminal Code* (n 11) s 240(2).

[361] Ibid s 240(4).

sentences (again all PSSs). However, the numbers sentenced each year are too small (between seven and 16 offenders) to make any meaningful analysis.

The Court of Criminal Appeal has applied similar principles to sentencing for aggravated armed robbery as it has applied to armed robbery and has 'repeatedly emphasised the seriousness of the crime of aggravated armed robbery' and the likely penalty being immediate imprisonment.[362] However, there are differences in the use of suspended sentences by the Supreme Court for these offences. There were fewer suspended sentences imposed overall for aggravated armed robbery, and the suspended sentences tended to be PSSs rather than FSSs. In the seven-year period, there were only two FSSs, which were acknowledged by the sentencing judges to be exceptional sentences for the offence:

- In one case, the offender was 17 years old at the time of the offence and had been threatened with violence by her then partner if she did not participate in the crime. At that time, she was addicted to illicit drugs whereas by the time of her sentencing, five years later, she was able to demonstrate successful rehabilitation.[363]
- In the other case, the offender had a significant intellectual impairment and was taken advantage of by his co-offenders.[364]

In both cases, additional orders were imposed: a CSO (in the first case) and a probation order (in the second case).

Examining sentencing trends for aggravated armed robbery over a longer period of time, it is noted that in the period 2014–20, there has been an increase in the use of custodial sentences (imprisonment or PSSs) for aggravated armed robbery compared to the period 2008–14, with 94.8% of offenders receiving custodial sentences (imprisonment or PSSs) compared to 73.1% in the earlier period.[365]

6.5.13 Use of suspended sentences for arson: Criminal Code s 268

Arson is the offence of unlawfully setting fire to any building or structure, to any stack or heap of cultivated vegetable produce, timber or mineral or vegetable fuel, or to any mine, or ship or vessel.[366]

There were 73 offenders sentenced for arson contrary to the *Criminal Code* s 268 as the most serious offence. There were 45 offenders sentenced for a single count of arson and 28 offenders sentenced for multiple offences.

As shown by Table 6.9, there were 45 suspended sentences imposed (19 partially suspended and 26 wholly suspended). This accounted for 61.6% of the sentences imposed in the period 2014 to 2020.

[362] *Streets v Tasmania* (n 356) [12] (Pearce J).

[363] *Tasmania v SAT,* 26 March 2019 (Pearce J).

[364] *Tasmania v Streets*, 17 February 2016 (Blow CJ).

[365] See TSAC, *Supreme Court Sentencing Statistics* (n 339).

[366] *Criminal Code* (n 11) s 268. It is noted that there are also offences of setting fire to any vegetation (s 268A) and unlawfully setting fire to property (s 269), which applies to unlawfully setting fire to property not comprised in s 268 (arson) or s 268A (setting fire to vegetation).

Table 6.9: Sentence imposed for arson, most serious offence (all counts), 2014–20

	Imprisonment	PSS	FSS	HDO (available from 14 Dec 2018)	Other non-custodial order
Number of offenders (n = 73)	21	19	26	1	6
Proportion %	28.8	26	35.6	1.4	8.2

Examining sentences imposed for arson from 1 January 2014 to 31 December 2020 by year, there are again low numbers each year (between seven and 13 offenders) and the sentences imposed have fluctuated. A tentative observation is that there appears to be an increase in the use of imprisonment and non-custodial sentences as sentencing options, and a decline in the use of suspended sentences. Since 2014, there has been a decline in the use of FSSs from 50% of sentences imposed in that year to 2020, when 14.3% of sentences were FSSs. However, it is not possible to draw firm conclusions about sentencing trends, as there are too few cases of arson sentenced each year to determine changes in sentencing approach as opposed to the influence of the particular factors in individual cases.

Examining sentencing trends for arson over a longer period of time, it is noted that in the period 2014–20, there has not been a considerable change in the use of custodial sentences (imprisonment or PSSs) compared to the period 2008–14, with 55.4% of offenders receiving a custodial sentence (imprisonment or PSSs) in the current analysis compared to 56.2% in the earlier period.[367] This reflects the fact that courts have accepted that arson is a serious crime that has the potential for widespread damage and destruction, warranting the imposition of a sentence of imprisonment, but that mitigatory factors include that an offender has reduced cognitive capacity, mental illness or emotional stress, as well as the youth of an offender.[368]

6.5.14 Use of suspended sentences for trafficking in a controlled substance: Misuse of Drugs Act s 12(1)

It is a crime to traffic in a controlled substance (controlled drugs, plants or precursors) contrary to the *Misuse of Drugs Act* s 12(1). Trafficking is defined to mean:

- selling
- preparing for supply with the intention of selling or belief that another person intends to sell it
- transporting the substances with the intention of selling or belief that another person intends to sell it
- guarding or concealing a substance with the intention of selling or belief that another person intends to sell it
- possessing a substance with the intention of selling it
- importing the substance into Tasmania with the intention of selling or belief that another person intends to sell it.[369]

[367] See TSAC, *Supreme Court Sentencing Statistics* (n 339). See also TSAC, *Arson and Deliberately Lit Fires* (Final Report No 1, 2012).

[368] Warner (n 26) [12.403]; *Sclater v Tasmania* [2015] TASCCA 26. See for example, *Tasmania v Treloar* (COPS, Supreme Court of Tasmania, Brett J, 16 October 2020); *Tasmania v Odgers* (COPS, Supreme Court of Tasmania, Brett J, 5 July 2019); *Tasmania v Lyon* (COPS, Supreme Court of Tasmania, Brett J, 7 August 2019).

[369] *Misuse of Drugs Act 2001* (Tas) s 3.

There is a broad definition of sale that includes bartering or exchange.[370] Accordingly, given this broad meaning of 'traffic', 'there are many ways in which a person may be guilty of the crime and a diversity of circumstances in which the crime is committed'.[371]

Schedule 3 refers to offences where there is a 'trafficable quantity'. However, it was not possible to reliably determine the trafficking cases that involved a trafficable quantity, and so all cases where an offender was sentenced for this offence are included in this analysis. This is important to keep in mind when considering the use of suspended sentences for this offence.

There were 310 offenders sentenced in the Supreme Court for trafficking in a controlled substance contrary to the *Misuse of Drugs Act* s 12(1) as the most serious offence.[372] There were 184 offenders sentenced for a single count of trafficking in a controlled substance and 126 offenders sentenced for multiple offences.

As shown by Table 6.10, there were 213 suspended sentences imposed (52 partially suspended and 161 wholly suspended). This accounted for 68.7% of the sentences imposed in the period 2014 to 2020.

Table 6.10: Sentence imposed for trafficking in a controlled substance, most serious offence (all counts), 2014–20

	Imprisonment	PSS	FSS	DTO (available from 8 Feb 2017)	HDO (available from 14 Dec 2018)	Other non-custodial order	Fine
Number of offenders (n = 310)	73	52	161	9	5	8	2
Proportion %	23.5	16.8	51.9	2.9	1.6	2.6	0.6

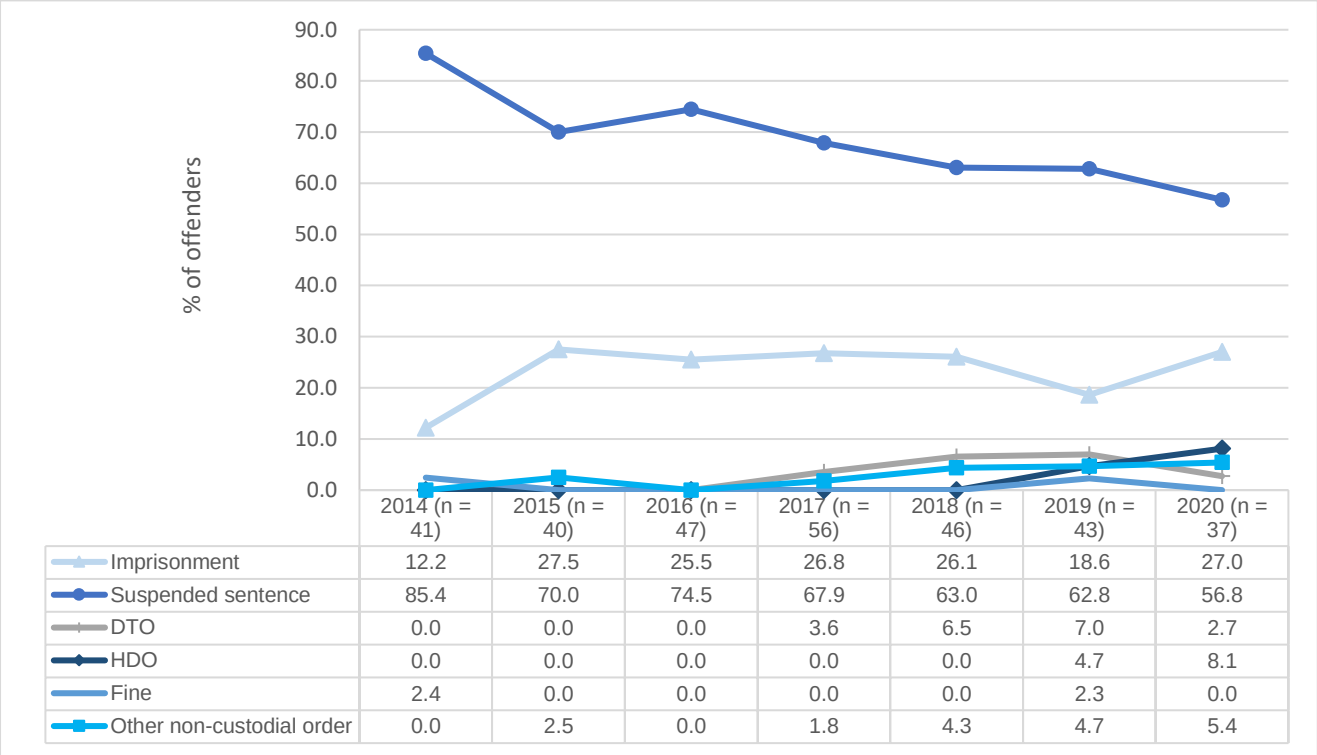
Figure 6.6 sets out the sentences imposed for trafficking in a controlled substance from 1 January 2014 to 31 December 2020, by year. This is the largest category of offenders sentenced for any of the offences under consideration in this chapter, with annual case numbers ranging from 37 to 56. An examination of the sentences imposed since 2014 would suggest that there has been an overall decline in the use of suspended sentences for the offence of trafficking, with 85.4% of sentences being suspended sentences in 2014 (14.6% PSSs and 70.7% FSSs) to 27% of sentences in 2020 (18.9% PSSs and 37.8% FSSs). There has been an increase in this period in the use of imprisonment (12.2% to 27%) and also use of the new sentencing orders of DTO and HDOs in the Supreme Court.

[370] Ibid.

[371] *Tasmania v Le* [2017] TASCCA 21, [3] (Wood J); *Stebbins v Tasmania* [2016] TASCCA 6, [98]–[99] (Pearce J).

[372] It is noted that indictable offences may be remitted to the Magistrates Court for summary trial if it appears to a judge that the punishment of a term of imprisonment not exceeding one year would be adequate for the circumstances of the case: *Criminal Code* (n 11) s 308(1), (4). In a Practice Direction published by the Chief Justice of the Supreme Court, it is indicated that defence counsel and prosecutors may consider making s 308 applications in cases where a defendant has been charged with trafficking involving cannabis concerning 50 plants or fewer: *Practice Direction No 2 of 2015* (n 45).

Figure 6.6: Sentences imposed for trafficking in a controlled substance, 1 January 2014 to 31 December 2020 (by year)



	2014 (n = 41)	2015 (n = 40)	2016 (n = 47)	2017 (n = 56)	2018 (n = 46)	2019 (n = 43)	2020 (n = 37)
Imprisonment	12.2	27.5	25.5	26.8	26.1	18.6	27.0
Suspended sentence	85.4	70.0	74.5	67.9	63.0	62.8	56.8
DTO	0.0	0.0	0.0	3.6	6.5	7.0	2.7
HDO	0.0	0.0	0.0	0.0	0.0	4.7	8.1
Fine	2.4	0.0	0.0	0.0	0.0	2.3	0.0
Other non-custodial order	0.0	2.5	0.0	1.8	4.3	4.7	5.4

It is noted that in the period 2014–20, the use of custodial sentences (imprisonment or PSSs) has increased from the period 2008–14, with 40.3% of offenders receiving a custodial sentence (imprisonment or PSSs) in the period 2014–20 compared to 33% in the earlier period.[373] An upward trend in sentencing is also evident in the views expressed by the Court of Criminal Appeal that 'sentences for serious cases of trafficking have been increasing as a proportionate response to an escalation in the level of criminal activity and as a response to the increased prevalence in trafficking. Such circumstances are resulting in the giving of greater weight to general deterrence and denunciation'.[374]

6.5.15 Use of suspended sentences for manufacturing controlled drug for sale: Misuse of Drugs Act s 6(1)

There were three cases identified where an offender was sentenced for manufacturing a controlled drug or substance for sale. In one case, the offender received a FSS.[375] In the other cases, one offender received a probation order and one received an adjourned undertaking.[376] It was not possible to reliably determine the cases that involved a trafficable quantity from the sentencing comments or sentencing data provided by the Supreme Court and so all cases where an offender was sentenced for this offence are included.[377]

[373] See TSAC, *Supreme Court Sentencing Statistics* (n 339).

[374] *DPP (Tas) v Kobelke* [2020] TASCCA 10, [2] (Wood J). See also *Upston v Tasmania* [2018] TASCCA 4, [22] (Porter AJ).

[375] *Tasmania v Walsh* (COPS, Supreme Court of Tasmania, Blow CJ, 4 May 2015).

[376] *Tasmania v Braslin* (COPS, Supreme Court of Tasmania, Brett J, 15 December 2016) (probation); *Tasmania v Hall* (COPS, Supreme Court of Tasmania, Brett J, 15 December 2016) (adjourned undertaking).

[377] See discussion at [6.7].

6.5.16 Use of suspended sentences for cultivating controlled plant for sale: Misuse of Drugs Act s 7(1)

It is a crime to cultivate a controlled plant with the intention of selling it or its products, or in the belief that another person intends to sell the plant or its products contrary to the *Misuse of Drugs Act*. Cultivate includes planting, grafting, dividing or transplanting, nurturing, tending or growing, guarding or concealing a plant and harvesting.[378]

In the period 2014 to 2020, there were 23 offenders sentenced in the Supreme Court for cultivating a controlled plant for sale.[379] There were 12 offenders sentenced for a single count of cultivating a controlled plant for sale and 11 offenders sentenced for multiple offences. Again, it was not possible to reliably determine the cases that involved a trafficable quantity and so all cases where an offender was sentenced for this offence are included.

As shown by Table 6.11, there were 20 suspended sentences imposed (three partially suspended and 17 wholly suspended). This accounted for 86.9% of the sentences imposed.

Table 6.11: Sentence imposed for cultivating controlled plant for sale, most serious offence (all counts), 2014–20

	Imprisonment	PSS	FSS	DTO (available from 8 Feb 2017)	Fine
Number of offenders (n = 23)	1	3	17	1	1
Proportion %	4.3	13	73.9	4.3	4.3

This is an offence for which suspended sentences, in particular FSSs, are the main sentencing option used. While there are only a small number of offenders sentenced for this offence each year, reliance on suspended sentences does not appear to have changed as a result of the change in government policy.

Examining sentencing trends for cultivating a controlled plant for sale over a longer period, it is noted that in the period 2014–20, the use of custodial sentences (imprisonment or PSSs) has remained fairly constant from the period 2008–14, with 17.3% of offenders receiving a custodial sentence (imprisonment or PSSs) in the period 2014–20 compared to 16.5% in the earlier period.[380]

6.5.17 Use of suspended sentences for manufacturing controlled precursor intended for use in manufacture of controlled drug for sale: Misuse of Drugs Act ss 10(1)–(2)

There was one case identified where the offender was sentenced to a FSS for manufacturing a controlled precursor intended for use in the manufacture of a controlled drug for sale, contrary to the *Misuse of Drugs Act* s 10(1).[381]

[378] *Misuse of Drugs Act 2001* (Tas) s 3(1).

[379] It is noted that indictable offences may be remitted to the Magistrates Court for summary trial if it appears to a judge that the punishment of a term of imprisonment not exceeding one year would be adequate for the circumstances of the case: *Criminal Code* (n 11) ss 308(1), (4). In a Practice Direction published by the Chief Justice of the Supreme Court, it is indicated that defence counsel and prosecutors may consider making s 308 applications in cases where a defendant has been charged with cultivating involving cannabis concerning 50 plants or fewer: *Practice Direction No 2 of 2015* (n 45).

[380] See TSAC, *Supreme Court Sentencing Statistics* (n 339).

[381] *Tasmania v Franklin* (COPS, Supreme Court of Tasmania, Tennent J, 5 November 2015). It is noted that it was not possible to reliably determine the cases that involved a trafficable quantity from the sentencing comments or sentencing data provided by the Supreme Court.

6.5.18 Use of suspended sentences for supplying controlled drug to child: Misuse of Drugs Act s 14

There was one case identified where an offender was sentenced for supplying a controlled drug to a child, contrary to the *Misuse of Drugs Act* s 14, as the most serious offence. The offender was sentenced to a FSS.[382]

6.5.19 Schedule 3 offences where there were no cases identified where the offence was the most serious offence

In relation to 17 Schedule 3 offences there were no cases identified where the offence was the most serious offence for which the offender was sentenced, or no cases identified at all:

- procuring unlawful sexual intercourse with young person: *Criminal Code* s 124C(1)[383]
- penetrative sexual abuse of a person with a mental impairment (formerly sexual intercourse with a person with a mental impairment): *Criminal Code* s 126(1)
- involving a person under the age of 18 years in the production of CEM: *Criminal Code* s 130[384]
- performing female genital mutilation: *Criminal Code* s 178A(1)
- setting a spring-gun [or man-trap]: *Criminal Code* s 179(1)
- forcible abduction: *Criminal Code* s 186(1)[385]
- abduction: *Criminal Code* s 186(2)
- abduction of a child: *Criminal Code* s 191(1)[386]
- kidnapping: *Criminal Code* s 191A
- procuring or otherwise causing or permitting a child to provide sexual services in a sexual services business: *Sex Industry Offences Act 2005* (Tas) s 9(1)

[382] *Tasmania v Austen* (COPS, Supreme Court of Tasmania, Brett J, 9 September 2016). There were three other cases where a global sentence was imposed for offences including supplying a controlled drug to a child where this was not the most serious offence. In two cases, the most serious offence was maintaining a sexual relationship with a young person, and in the other case, the most serious offence was sexual intercourse with a young person. In all three cases, the offender was sentenced to imprisonment. It was not possible to reliably determine the cases that involved a trafficable quantity from the sentencing comments or sentencing data provided the Supreme Court, and so all cases where an offender was sentenced for this offence are included.

[383] It is noted that there was one case identified where an offender was sentenced for the crime of procuring unlawful sexual intercourse with a young person. This was not the most serious offence and the offender was also sentenced for a count of maintaining a sexual relationship with a young person. A FSS was imposed. However, there were particular circumstances in relation to the age of the offender, the offender's mental capacity and the 'consensual' relationship between the offender and the complainant: *Tasmania v JGM* (COPS, Supreme Court of Tasmania, Estcourt J, 6 February 2019).

[384] There were two cases where an offender received a global sentence for maintaining a sexual relationship and producing CEM, and in both cases a sentence of imprisonment was imposed. In one case, the offender received a global sentence for aggravated sexual assault and producing CEM and a sentence of imprisonment was imposed.

[385] There was one case where this offence was not the most serious offence for which the offender was sentenced. He was also sentenced for 10 other offences including two counts of rape, four counts of aggravated sexual assault and one count of producing CEM. A sentence of imprisonment was imposed: *Tasmania v Reid* (COPS, Supreme Court of Tasmania, Estcourt J, 5 September 2016).

[386] It is noted that there was an offender sentenced to a term of imprisonment for abduction of a young person under the age of 17 contrary to the *Criminal Code* (n 11) s 189. A global sentence was imposed for other offences that included maintaining a sexual relationship with a young person.

- receiving a fee or reward that a person knows &c. is derived, directly or indirectly, from sexual services provided by a child in a sexual services business: *Sex Industry Offences Act 2005* (Tas) s 9(2)
- possessing thing intended for use in manufacture of controlled substance for sale: *Misuse of Drugs Act* s 8
- possessing thing intended for use in cultivation of controlled plant for sale: *Misuse of Drugs Act* s 9
- selling controlled precursor for use in manufacture of controlled drug: *Misuse of Drugs Act* s 11
- procuring child to traffic in controlled substance: *Misuse of Drugs Act* s 13(1)
- concealing property derived from drug offence: *Misuse of Drugs Act* s 16
- receiving property directly received from drug offence: *Misuse of Drugs Act* s 17(1).

6.5.20 Schedule 3 offences where suspended sentences were not imposed since 2014

There were three Schedule 3 offences where suspended sentences were not imposed:

- incest: *Criminal Code* s 133(1)[387]
- murder: *Criminal Code* s 158[388]
- being an accessory after the fact to murder: *Criminal Code* s 161.[389]

6.6 Stakeholder feedback

As part of the review process as set out in the Terms of Reference, the Council sought feedback from relevant stakeholders in relation to a number of matters relating to the operation of the new orders and the phasing out of suspended sentences. In particular, in relation to suspended sentences:

- Are any offences listed in Schedule 3 incompatible with either DTOs, HDOs or CCOs as a substitute sentencing option, in place of a suspended sentence?

The DPP expressed the view that for the circumstances of some offences, including for offences in Schedule 3, a suspended sentence was the appropriate sentence, and accordingly, that it would create injustice to remove or limit the use of suspended sentences. Given the broad statutory definitions of the crimes contained in Schedule 3, a wide scope of conduct was captured by the elements of the offences. This meant that the particular circumstances of an offence and an offender's culpability may differ considerably, and this meant that sentencing discretion was essential to ensure an appropriate sentence was imposed.[390] This was also the view of the Law Society.

[387] There were two offenders sentenced for incest. One offender was sentenced to a term of imprisonment and one received a community based order (probation and community service).

[388] There were 26 offenders sentenced for murder and all offenders were sentenced to a term of imprisonment.

[389] There were four offenders sentenced for being an accessory after the fact to murder contrary to the *Criminal Code* (n 11) s 161 and all offenders were sentenced to a term of imprisonment.

[390] An example provided by the DPP was in relation to the circumstances in which the offence of penetrative sexual abuse of a child or young person contrary to s 124(1) can be committed, ranging from predatory behaviour to a close in age 'relationship' situation (see discussion at [6.5.3]). In addition, although not usually appropriate, the DPP indicated that even for other serious offences like manslaughter, there may be circumstances where a suspended sentence was the only appropriate sentence to be able to reflect the sanctity of human life, as well as the reduced culpability of the offender.

Similarly, TLA highlighted the myriad of factors that need to be considered in sentencing, and strongly supported the 'courts having a range of tools to support that difficult task'. TLA observed the important role of suspended sentences in allowing the courts to recognise the range of circumstances in which offenders may commit crimes and to allow for the imposition of an appropriate sentence that promoted community safety.[391]

The DPP expressed concern that if suspended sentences were restricted for Schedule 3 offences, it would remove an important tier in the sentencing hierarchy and limit the ability of the court to impose a just sentence. Given that HDOs and DTOs were not appropriate for a number of offenders, the other remaining sentencing options were imprisonment or a CCO. If a suspended sentence was the appropriate sentence in the circumstances of the case, then it would be unjust to impose imprisonment (a harsher sentence) or to impose an unduly lenient sanction by the imposition of a CCO.

TLA's submission highlighted the potential for an increase in imprisonment as a sanction given that once imprisonment is deemed to be the appropriate penalty, it is difficult to justify imposing a more lenient penalty. Suggested solutions were to increase the maximum operational or custodial length of HDOs, DTOs and CCOs to make them more suitable sentencing options for serious matters, including Schedule 3 offences.

Community Corrections indicated that it currently works with people subject to all of the Schedule 3 offences on community-based orders, including parole. However, if offenders who had previously received a suspended sentence were to receive a community-based order for a Schedule 3 offence, it was noted that:

- the management of a community-based order is significantly more resource intensive than a suspended sentence and so any change would require resourcing to match the anticipated demand
- there are limited community-based programs and supports in a range of criminogenic areas, particularly in more remote locations across the state. This particularly applied to sex offender interventions, but also for interventions for family violence, anger management, those with counselling and psychological needs and those addressing illicit and licit substance abuse issues or other health conditions. An increase in the number of community-based orders would require additional resourcing for these programs to manage the increase in demand.[392]

As noted, stakeholders recognised the limitations of DTOs and HDOs to address the range of offences contained in Schedule 3. In relation to DTOs, the DPP indicated that there are a number of offences contained in Schedule 3 that were incompatible with the imposition of a DTO given that the harm caused is not minor. This was also the concern of TLA given that the majority of Schedule 3 offences were offences where bodily harm was inflicted or comprised crimes of sexual violence. In relation to HDOs, as discussed at [3.6], for a number of offenders due to issues of housing stability or location, drug and alcohol use, mental health concerns and factors relating to co-residents, they would be assessed as

[391] For example, a first-time offender (particularly a young offender) who commits a serious crime but has engaged positively in rehabilitation and expressed remorse. TLA highlighted the function of suspended sentences in keeping protective relationships in intact (such as employment, family relationships or treatment for substance abuse or poor mental health), providing a substantial incentive to avoid future offending and to foster rehabilitation while allowing for the most severe penalty to be imposed if this fails.

[392] It is noted that community-based orders are less expensive than imprisonment, see John Walker and Lorana Bartels, *Exploring the Costs of Alternatives to Suspended Sentences in Tasmania* (2015); Anthony Morgan, *How much does prison really cost? Comparing the costs of imprisonment with community corrections* (Research Report No 5, Australian Institute of Criminology, 2018).

unsuitable for an HDO, but in these circumstances a suspended sentence may be the appropriate sentence. The DPP also agreed that the use of trafficable quantity in Schedule 3 in relation to drug offences was not an appropriate indicia of offence seriousness.

More generally, the Law Society also observed that a suspended sentence could no longer be said to be a sentence of no consequence, given the activation rate on breach of suspended sentences and the use of conditions or combined sentencing orders.

6.7 The Council's view and conclusions

Based on the feedback received and the Council's research, the Council's view is that it is not appropriate to limit or remove the ability of courts to impose suspended sentences for Schedule 3 offences at this time.

As indicated, for many offences, there are too few sentences imposed to make any observations about trends in sentencing. Further, as noted by stakeholders, the offences potentially capture a broad range of conduct, and it is important for the court to retain the discretion to impose a sentence that reflects the circumstances of the case and the culpability of the offender. In this context, the Council identified that for some offences nearly half or more of the sentences imposed in the period 2014 to 2020 were suspended sentences.[393] As shown by the Council's consideration of the sentencing approach to Schedule 3 offences, suspended sentences are typically used to recognise the factors that mitigate an offender's culpability for otherwise serious offending. It remains uncertain as to whether the 'exceptional circumstances' proviso would provide scope for the court to avoid the imposition of an unjust sentence, if it was not able to impose a suspended sentence.[394] If suspended sentences are restricted, as observed by the DPP, injustice is likely to arise by the court imposing an unduly harsh or unduly lenient sentence.

The Council shares the concerns expressed by stakeholders in relation to the limitation on the use of suspended sentences for the drug offences contained in Schedule 3 (including trafficking) where there is a trafficable quantity. 'Trafficable quantity' refers to a specified amount of a controlled drug, plant or precursor as set out in the *Misuse of Drugs Act*.[395] The purpose of 'trafficable quantity' under the *Misuse of Drugs Act* is to assist with establishing criminal responsibility for a limited number of serious drug offences. If an accused is found in possession of a 'trafficable quantity', then it is easier for the Crown (prosecution) to prove that the accused had the necessary mental state of mind for the offences of manufacturing a controlled drug for sale (s 6), cultivating a controlled plant for sale (s 7), and trafficking (s 12). This is because the required state of mind is presumed to exist in these circumstances, unless the accused, on the balance of probabilities, proves otherwise.[396] Possession of a trafficable quantity then relates to establishing criminal responsibility and is not (of itself) an indication of the seriousness of the offending.[397]

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393 See [6.5.2].

394 See [6.5.2].

395 *Misuse of Drugs Act 2001* (Tas) s 3A, sch 1. For example, a trafficable quantity of methylamphetamine is 20 packages (in individual packages) or 25g (in any other form) or for cannabis 20 plants (as individual plants) or 20 packages (in individual packages) or 1kg.

396 See J Blackwood et al, *Tasmanian Criminal Law: Text and Cases* (University of Tasmania Law Press, 4th ed, 2015) 820–21. See also *DPP Guidelines* (n 333) for information on charging practices where an accused is found in possession of a trafficable quantity.

397 This is clear because amendments to the *Misuse of Drugs Act 2001* (Tas) ss 22A and 27AA (commenced on 1 July 2021) create mirror summary offences of cultivating a controlled plant for sale and trafficking controlled substance. These offences are less serious mirror offences of the indictable equivalent offences and are heard

The Council shares the concern that it is inappropriate to use 'trafficable quantity' as the criteria to determine serious drug offences to generally preclude the use of suspended sentences. While possession by an accused of a trafficable quantity is relevant to the determination of seriousness — both as a matter of the appropriate charge and also the exercise of the sentencing discretion — trafficable quantity alone (or of itself) is not an indicia of offence seriousness. The DPP, *Prosecution Policy and Guidelines* (2019) provide the following guidance in relation to the possession of a trafficable quantity for the purposes of charging for an indictable or summary offence:

> As Parliament has made this specific enactment, generally where a person is found to be in possession of in excess of the trafficable quantity, he or she should be charged with the indictable offence even where there is no other evidence of an intention to sell. Of course, prosecutors are to bear in mind there must be a reasonable prospect of conviction. Thus, any actual positive evidence of a lack of intention to sell should be considered.
>
> ….
>
> Parliament has provided that where a person sells a controlled drug, he or she can be charged with either the indictable crime or the summary offence. Where it is alleged that a person has sold more than the trafficable quantity of a particular drug on any one occasion then the preferred charge should be trafficking. Further, where the sale is less than the trafficable quantity but there is evidence of numerous sales, the charge should also be trafficking.
>
> The charge of selling a controlled drug or plant should only be preferred where there is a small number of sales of an amount under the trafficable quantity where it could not be said to be a commercial operation.[398]

For the purposes of sentencing, while the value and quantity of the drug involved are relevant factors to be taken into account, it is the existence of a commercial operation and its scale that are factors increasing the seriousness of the offence rather than the possession of a trafficable quantity of a drug.[399] This was expressly acknowledged by the Court of Criminal Appeal in *Tasmania v Le*,[400] where Wood J observed that '[i]t is a flawed approach to argue that the gravity of a drug offence is to be assessed chiefly by reference to the weight of the drug involved'.[401]

Other relevant sentencing factors include motive (commercial or a user supporting a drug habit), role of the accused and the amount of profit received from the drugs, the prevalence of the drug in the community, the harm caused by the drug and the value of the drug.[402]

As noted by the DPP, there are also several offences contained in Schedule 3 that are incompatible with the imposition of other sentencing options. In relation to a DTO, these include offences against the person where the harm caused is not minor. These would include the sexual offences and violent offences set out in Schedule 3. In addition, DTOs are not an alternative sanction to a suspended sentence because of the legislative direction that a DTO cannot be imposed if the court would have suspended the sentence in whole or in part. As noted at [5.5] and [5.6], this would need to be changed to allow the court to impose

in the Magistrates Court. Both rely on the presumption created by the possession of a trafficable quantity of a controlled substance. There are also summary offences that apply where there is not an intention to sell (see ss 21–25) as well as a summary offence of selling a controlled plant or plant product (ss 26–27).

398 *DPP Guidelines* (n 333) 74–5.

399 See *Billinghurst v Tasmania* [2018] TASCCA 16.

400 [2017] TASCCA 21.

401 Ibid [3] (Wood J).

402 *DPP Guidelines* (n 333) 74.

a DTO where it would have suspended the sentence and this reform was not supported by stakeholders due to the nature of the DTO.

There are also offences where an HDO would not be allowed given that 'relevant circumstances' may exist in relation to an offender, such as where the offender is sentenced for a family violence offence, a violent offence or a sexual offence, and the victim lives on the premises or the court is of the opinion that there is a significant risk that the offender may commit a violent offence or a sexual offence.

Accordingly, the Council's view is that Schedule 3 should not be commenced at this time. As noted, it is too early and there are too few cases to fully assess the operation of the new orders. There is also the need to take account of the implications of the COVID-19 pandemic on sentencing practice. Further, the Council's view is that the specification of offence categories in Schedule 3 are not able to accommodate the broad circumstances of offending and removing suspended sentences (even with the exceptional circumstances proviso) is likely to result in injustice.

APPENDIX A: SUPPLEMENTARY INFORMATION FOR HDOS

Table A.1: HDOs imposed as most serious sentence, offence category by most serious offence, Supreme Court, 2019–20

Offence category	Offence name	Number of HDOs made	% of HDOs
Burglary/stealing	Aggravated burglary	1	
	Burglary	2	
	Total	**3**	**7.5**
Robbery	Aggravated armed robbery	1	
	Armed robbery	1	
	Total	**2**	**5**
Drug offences	Trafficking in a controlled substance	5	
	Cultivating a controlled plant	2	
	Total	**7**	**17.5**
Non-sexual offences against the person	Assault	6	
	Act intended to cause bodily harm	1	
	Cause grievous bodily harm/ Wounding	9	
	Dangerous driving	1	
	Total	**17**	**42.5**
Property offences	Arson	1	
	Total	**1**	**2.5**
Sexual offences	Rape[403]	1	
	Indecency	1	
	Possession of child exploitation material (CEM)	2	
	Total	**4**	**10**
Fraud offences	Computer-related fraud	2	

[403] This was a case where the conduct involved penetrating the complainant's vagina to a slight degree with one finger: *Tasmania v MSL* (COPS, Supreme Court of Tasmania, Wood J, 21 December 2020). It was accepted that the penetration was reckless as to whether the complainant was consenting rather than intentional penetration without consent. Her Honour observed that: '[r]ape is a very serious crime and would usually attract an immediate and lengthy term of imprisonment. … It is a serious crime but not such a grave example that a term of imprisonment is the only option regardless of the circumstances of the offender and his prospects of reform. … After careful consideration and given the options now available to sentencing courts, I am satisfied that the defendant can appropriately be sentenced to a sanction other than immediate imprisonment. I am satisfied that a home detention order coupled with a community correction order is a just sentence in this particular case'. The operational period of the HDO was 18 months and the order was combined with a CCO for a period of 18 months.

Offence category	Offence name	Number of HDOs made	% of HDOs
	Dishonestly acquiring a financial advantage	1	
	Total	**3**	**7.5**
Offences against good order	Perverting justice	1	
	Total	**1**	**2.5**
Other	Stealing firearms	2	
	Total	**2**	**5**

Table A.2: HDO sentences, duration, most serious offence, Supreme Court, 2019–20

Counts for which sentence imposed	Minimum (months)	Maximum (months)	Median[404] (months)	Average[405] (months)	Number
Single	3	18	12	11.3	26
Multiple	4	18	16.5	13.8	14
All	3	18	12	12.5	40

Table A.3: HDOs imposed, 10 most serious offences, Magistrates Court, 2019–20

Offence	Number of HDOs made	Proportion of HDOs %
Drive a motor vehicle while exceeding prescribed alcohol limit	34	13.9
Drive with prescribed illicit drug in blood or oral fluid	24	9.8
Common assault	22	9
Driver referred to in s 6(3) or s 6(4) with alcohol in body	15	6.1
Burglary	11	4.5
Cultivate a controlled plant (minor offence)	9	3.7
Selling/Supplying controlled drug (minor offence)	8	3.3
Drive whilst disqualified	8	3.3
Drive whilst under the influence of alcohol or a drug	8	3.3
Stealing	8	3.3

Table A.4: Applications to cancel HDOs and outcomes, Supreme Court, 2019 – 30 June 2021

Case	Original offence	Reasons for application	Outcome of application
Tasmania v Cunningham (20 June 2020)	Assault	Breached condition by using illicit drugs	Cancelled and re-sentenced to 5 months' imprisonment with 3 months suspended for a period of 18 months with an order for 18 month supervised probation. Original sentence 12 months' home detention.

[404] The median is the middle value in a set of values. It is the statistical midpoint where half of the values are below the median and half of the values are above the median.

[405] The average or mean is the most common value in a set of values.

Case	Original offence	Reasons for application	Outcome of application
Tasmania v Curbishley (18 February 2021)	Aggravated armed robbery	Not comply with urine testing and restrictions on movement	Cancelled and 4 months' imprisonment fully suspended for 18 months with an order for 18 months' supervised probation. Original sentence 12 months' home detention.
Tasmania v Robaard (30 November 2020)	Wounding	Mental health deterioration	Cancelled HDO and CCO and re-sentenced to a new 24 month CCO with additional condition in relation to psychological or psychiatric assessment or treatment and a 5-month sentence of imprisonment. Original sentence 6 months' HDO and a 10 months' CCO.
Tasmania v Jones (2 December 2020)	Trafficking	Urine sample showed illicit drugs	Confirmed HDO. Original sentence 18 months' HDO. There had been an overall satisfactory level of compliance for 17 months.
Tasmania v Domarecky (16 December 2020)	Assault	Exemplary compliance for 6 months but too difficult to continue to comply with the order	Cancelled and substituted CCO with supervision for 4 months. Original sentence 8 months' HDO.

Table A.5: Duration of HDOs, comparison with suspended sentences, assault, Supreme Court, 2019–20

	No of orders	Range (months)	Average (months)	Median (months)
HDO	6	7–18	10.6	9.5
FSS	29	Imprisonment: 3–21 Operational period: 12–36	Imprisonment: 7.8 Operational period: 21.9	Imprisonment: 9 Operational period: 24
PSS	45	Total imprisonment: 5–36 Suspended portion: 3–18 Operational period:12–36	Total imprisonment:19.4 Suspended portion: 9.6 Operational period: 24.5	Total imprisonment:18 Suspended portion: 9 Operational period: 24

Table A.6: Duration of HDOs, comparison with suspended sentences, wounding/cause grievous bodily harm, Supreme Court, 2019–20

	No of orders	Range (months)	Average (months)	Median (months)
HDO	9	3–18	14.8	18
FSS	13	Imprisonment: 4–15 Operational period: 12–36	Imprisonment: 8.8 Operational period: 20.8	Imprisonment: 9 Operational period: 24
PSS	11	Total imprisonment: 12–36 Suspended portion: 6–15 Operational period: 12–36	Total imprisonment: 23.8 Suspended portion: 9.2 Operational period: 21	Total imprisonment: 24 Suspended portion: 9 Operational period: 24

Table A.7: Duration of HDOs, comparison with suspended sentences, drive a motor vehicle while exceeding the prescribed alcohol limit, Magistrates Court, 2019–20[406]

	No of orders	Range (months)	Average (months)	Median (months)
HDO	26	1–12	5.2	5
FSS	209	Imprisonment: 0.7–12 Operational period: 6–48	Imprisonment: 2.7 Operational period: 26	Imprisonment: 2 Operational period: 24
PSS	23	Imprisonment: 1.8–9 Suspended portion: 1–6 Operational period: 24–48	Imprisonment: 4.3 Suspended portion: 2.7 Operational period: 31	Imprisonment: 4 Suspended portion: 3 Operational period: 24

Table A.8: Duration of HDOs, comparison with suspended sentences, drive with prescribed illicit drug in blood or oral fluid, Magistrates Court, 2019–20[407]

	No of orders	Range (months)	Average (months)	Median (months)
HDO	17	2–10	5.2	4
FSS	495	Imprisonment: 0.1–9 Operational period: 6–48	Imprisonment: 2.3 Operational period: 21	Imprisonment: 2 Operational period: 24
PSS	46	Imprisonment: 1.4–12 Suspended portion: 1–6 Operational period: 12–36	Imprisonment: 4.5 Suspended portion: 2.6 Operational period: 27	Imprisonment: 4 Suspended portion: 2 Operational period: 24

Table A.9: Duration of HDOs, comparison with suspended sentences, common assault, Magistrates Court, 2019–20[408]

	No of orders	Range (months)	Average (months)	Median (months)
HDO	16	2–8	4.6	4
FSS	384	Imprisonment: 0.5–24 Operational period: 1–60	Imprisonment: 2.5 Operational period: 21	Imprisonment: 2 Operational period: 24
PSS	125	Imprisonment: 0.9–18 Suspended portion: 0.3–10 Operational period: 12–36	Imprisonment: 5.5 Suspended portion: 2.8 Operational period: 23	Imprisonment: 5 Suspended portion: 3 Operational period: 24

[406] This excludes the sentence length for PSSs that were recorded as balance suspended because it was not possible to calculate the suspension period from the database.

[407] This excludes the sentence length for PSSs that were recorded as balance suspended because it was not possible to calculate the suspension period from the database.

[408] This excludes the sentence length for PSSs that were recorded as balance suspended because it was not possible to calculate the suspension period from the database.

Table A.10: Outcome of breach applications, HDOs and suspended sentences, Supreme Court, 2019–20

	HDOs (no of applications)	Outcome	Suspended sentences (no of applications)	Outcome
Non-sexual offences against the person	1 (Assault)	Cancelled and re-sentenced	16	Activated – 10 Substitute sentence/vary – 2 (includes 1 breach of condition) No order – 4
Robbery and related offences	1 (Robbery)	Cancelled and re-sentenced	2	Activated – 2
Drug offences	1 (Trafficking)	Confirmed order	7	Activated – 5 Substitute sentence – 2

Table A.11: Outcome of breach applications, HDOs and suspended sentences, Magistrates Court, 2019–20

ANZSOC division – original sentence	Applications to breach or cancel HDO	Outcomes	Suspended sentences with application to breach finalised	Outcomes
14: Traffic and vehicle regulatory offences	10 s 42AI Breach – 9 s 42AH/2 Cancel –1	Application Granted – 7 Cancelled and re-sentenced – 5 Order extended – 2 Application Withdrawn/Dismissed – 3	96	Application Granted – 91 Suspended Sentence activated – 35 No Order – 1 Application Withdrawn/Dismissed – 5
10: Illicit drug offences	5 s 42AI Breach – 3 s 42AH/1 Cancel – 1 s 42AH/2 Cancel – 1	Application Granted – 5 Cancelled and re-sentenced – 4 Order extended – 1	27	Application Granted – 26 Suspended Sentence activated – 9 Application Withdrawn/Dismissed – 1
04: Dangerous or negligent acts endangering persons	4 s 42AI Breach – 2 s 42AH/2 Cancel – 2	Application Granted – 3 Cancelled and re-sentenced – 1 Order extended – 1 No order/early termination – 1 Application Withdrawn/Dismissed – 1	6	Application Granted – 5 Suspended Sentence activated – 3 Application Withdrawn/Dismissed – 1
09: Fraud, deception and related offences	4 s 42AI Breach – 2 s 42AH/2 Cancel – 2	Application Granted – 2 Cancelled and re-sentenced – 1 Order extended – 1 Application Withdrawn/Dismissed – 2	18	Application Granted – 17 Suspended Sentence activated – 10 Application Withdrawn/Dismissed – 1
02: Acts intended to cause injury	3 s 42AI Breach – 1 s 42AH/2 Cancel – 2	Application Granted – 1 No order/early termination – 1 Application Withdrawn/Dismissed – 2	93	Application Granted – 90 Suspended Sentence activated – 57 No Order – 1 Application Withdrawn/Dismissed – 3
07: Burglary, break and enter	1 s 42AI Breach – 1	Application Withdrawn/Dismissed – 1	39	Application Granted – 35 Suspended Sentence activated – 21 Application Withdrawn/Dismissed – 4

08: Theft and related offences	1 s 42AI Breach – 1	Application Granted – 1 Cancelled and re-sentenced – 1	40	Application Granted – 40 Suspended Sentence activated – 26
11: Prohibited and regulated weapons offences	1 s 42AH/2 Cancel – 1	Application Granted – 1 Cancelled and re-sentenced – 1	11	Application Granted – 9 Suspended Sentence activated – 6 Application Withdrawn/Dismissed – 2
13: Public order offences	1 s 42AH/2 Cancel – 1	Application Granted – 1 Cancelled and re-sentenced – 1	3	Application Granted – 3 Suspended Sentence activated – 1
15: Offences against justice procedures	1 s 42AI Breach – 1	Application Granted – 1 Cancelled and re-sentenced – 1	54	Application Granted – 54 Suspended Sentence activated – 41
Total	**31** **s 42AI Breach – 20** **s 42AH/2 Cancel – 10** **s 42AH/1 Cancel – 1**	**Application Granted – 22** **Cancelled and re-sentenced – 15** **Order extended – 5** **No order/early termination – 2** **Application Withdrawn/Dismissed – 9**	**387**	**Application Granted – 370** **Suspended Sentence activated – 209** **No Order – 2** **Application Withdrawn/Dismissed – 17**

APPENDIX B: SUPPLEMENTARY INFORMATION FOR CCOS

Table B.1: CCOs imposed as most serious sentence, offence category by most serious offence, Supreme Court, 2019–20

Offence category	Offence name	Number of CCOs made	% of CCOs
Burglary/stealing	Aggravated burglary	2	
	Stealing	3	
	Unlawful possession	1	
	Total	**6**	**14.6**
Robbery	Accessory after the fact	2	
	Robbery	1	
	Total	**3**	**7.3**
Drug offences	Trafficking in a controlled substance	4	
	Possess a controlled drug (with conduct of importing)	1	
	Total	**5**	**12.2**
Non-sexual offences against the person	Assault	9	
	Stalking	1	
	Wounding	1	
	Dangerous driving	3	
	Total	**14**	**34.1**
Property offences	Arson	2	
	Injury to property	1	
	Total	**3**	**7.3**
Sexual offences	Indecent act with young person	1	
	Access and possess CEM	1	
	Total	**2**	**4.9**
Fraud offences	Obtain a financial advantage	1	
	Total	**1**	**2.4**
Offences against good order	Perverting justice	4	
	False declaration	2	
	Total	**6**	**14.6**
Other	Recklessly discharging firearm	1	
	Total	**1**	**2.4**

Table B.2: CCO sentences, duration, most serious sentence, Supreme Court, 2019–20

Counts for which sentence imposed	Minimum (months)	Maximum (months)	Median (months)	Average (months)	Number
Single	8	36	21	19.4	28
Multiple	6	36	12	17.1	13
All	6	36	18	20.5	41

Table B.3: CCOs imposed, offence category by most serious offence, Magistrates Court, 2019–20

Offence	Number of CCOs made	Proportion of CCOs
Common assault	226	21.6
Drive with prescribed illicit drug in blood or oral fluid	114	10.9
Stealing	84	8
Drive a motor vehicle while exceeding prescribed alcohol limit	57	5.4
Burglary	41	3.9
Breach of family violence order/police family violence order/interim family violence order	37	3.5
Destroy property	37	3.5
Driver referred to in s 6(3) or s 6(4) with alcohol in body	34	3.2
Drive whilst not the holder of a driver licence	33	3.2
Assault a police officer	24	2.3

Table B.4: Applications to cancel CCOs and outcomes, Supreme Court, 2019 – 30 June 2021.

Case	Original offence	Reasons for application	Outcome of application
Tasmania v King (30 June 2020)	Trafficking	Breach of conditions of CCO (also subject to a FSS)	Cancelled CCO and FSS and imposed PSS.
JM (23 November 2020)	Maintain sexual relationship with a young person	Breach of condition of CCO (also subject to a FSS)	Cancelled CCO and no order made. Subsequently FSS was activated as a result of separate breach application.
Tasmania v Lee (3 October 2019)	Aggravated armed robbery	Breach of condition of CCO (also subject to a FSS)	Cancelled both orders and re-sentenced to home detention.
Tasmania v Hunt (31 July 2020)	Assault	Breach of condition of CCO (also subject to a FSS)	Cancelled both orders and re-sentenced to original FSS.

Table B.5: Duration of CCOs, comparison with suspended sentences, assault, Supreme Court, 2019–20

	No of orders	Range (months)	Average (months)	Median (months)
CCO	9	9–30	19.7	18
FSS	29	Imprisonment: 3–21 Operational period: 12–36	Imprisonment: 7.8 Operational period: 21.9	Imprisonment: 9 Operational period: 24
PSS	45	Total imprisonment: 5–36 Suspended portion: 3–18 Operational period:12–36	Total imprisonment:19.4 Suspended portion: 9.6 Operational period: 24.5	Total imprisonment:18 Suspended portion: 9 Operational period: 24

Table B.6: Duration of CCOs, comparison with suspended sentences, trafficking, Supreme Court, 2019–20

	No of orders	Range (months)	Average (months)	Median (months)
CCO	4	12–24	19.5	21
FSS	37	Imprisonment: 1–18 Operational period: 18–36	Imprisonment: 8.2 Operational period: 22.5	Imprisonment: 8 Operational period: 24
PSS	9	Total imprisonment: 9–48 Suspended portion: 6–24 Operational period: 12–36	Total imprisonment: 21.2 Suspended portion: 9.9 Operational period: 22	Total imprisonment:12 Suspended portion: 7 Operational period: 24

Table B.7: Duration of CCOs, comparison with suspended sentences, Supreme Court, 2019–20

	No of orders	Range (months)	Average (months)	Median (months)
CCO	4	9–36	21	19.5
FSS	4	Imprisonment: 3–21 Operational period: 12–18	Imprisonment: 9.75 Operational period: 15	Imprisonment: 15 Operational period: 15
PSS	2	Total imprisonment: 18 Suspended portion: 3 and 17 Operational period: 18	Total imprisonment: n/a Suspended portion: n/a Operational period: n/a	Total imprisonment: n/a Suspended portion: n/a Operational period: n/a

Table B.8: Duration of CCOs, comparison with suspended sentences, stealing, Supreme Court, 2019–20

	No of orders	Range (months)	Average (months)	Median (months)
CCO	3	12–24	16	12
FSS	6	Imprisonment: 2–18 Operational period: 18–26	Imprisonment: 10.3 Operational period: 26	Imprisonment: 11 Operational period: 24
PSS	0	n/a	n/a	n/a

Table B.9: Duration of CCOs, comparison with suspended sentences, dangerous driving, Supreme Court 2019–20

	No of orders	Range (months)	Average (months)	Median (months)
CCO	3	36	36	36
FSS	6	Imprisonment: 8–22 Operational period: 18–36	Imprisonment: 14.5 Operational period: 29	Imprisonment: 13.5 Operational period: 30
PSS	2	Total imprisonment: 18–21 Suspended portion:12–14 Operational period: 18–24	Total imprisonment: n/a Suspended portion: n/a Operational period: n/a	Total imprisonment: n/a Suspended portion: n/a Operational period: n/a

Table B.10: Duration of CCOs, comparison with suspended sentences, common assault, Magistrates Court, 2019–20[409]

	No of orders	Range (months)	Average (months)	Median (months)
CCO	488	6–30	13.1	12
FSS	384	Imprisonment: 0.5–24 Operational period: 1–60	Imprisonment: 2.5 Operational period: 21	Imprisonment: 2 Operational period: 24
PSS	125	Imprisonment: 0.9–18 Suspended portion: 0.3–10 Operational period: 12–36	Imprisonment: 5.5 Suspended portion: 2.8 Operational period: 23	Imprisonment: 5 Suspended portion: 3 Operational period: 24

Table B.11: Duration of CCOs, comparison with suspended sentences, drive with prescribed illicit drug in blood or oral fluid, Magistrates Court, 2019–20[410]

	No of orders	Range (months)	Average (months)	Median (months)
CCO	270	6–30	12.4	12
FSS	495	Imprisonment: 0.1–9 Operational period: 6–48	Imprisonment: 2.3 Operational period: 21	Imprisonment: 2 Operational period: 24
PSS	46	Imprisonment: 1.4–12 Suspended portion: 1–6 Operational period: 12–36	Imprisonment: 4.5 Suspended portion: 2.6 Operational period: 27	Imprisonment: 4 Suspended portion: 2 Operational period: 24

Table B.12: Duration of CCOs, comparison with suspended sentences, stealing, Magistrates Court, 2019–20[411]

	No of orders	Range (months)	Average (months)	Median (months)
CCO	150	6–24	12.6	12
FSS	176	Imprisonment: 0.1–12 Operational period: 6–48	Imprisonment: 1.9 Operational period: 20	Imprisonment: 1.4 Operational period: 24
PSS	35	Imprisonment: 0.9–10 Suspended portion: 0.5–6 Operational period: 6–36	Imprisonment: 5.2 Suspended portion: 2.8 Operational period: 22	Imprisonment: 5.5 Suspended portion: 3 Operational period: 24

[409] This excludes the sentence length for PSSs that were recorded as balance suspended because it was not possible to calculate the suspension period from the database.

[410] This excludes the sentence length for PSSs that were recorded as balance suspended because it was not possible to calculate the suspension period from the database.

[411] This excludes the sentence length for PSSs that were recorded as balance suspended because it was not possible to calculate the suspension period from the database.

Table B.13: Outcome of breach applications, CCOs and suspended sentences, Supreme Court, 2019 – 30 June 2021

	CCOs (number of applications)	**Outcome**	**Suspended sentences (number of applications)**	**Outcome**
Non-sexual offences against the person (Assault)	1	Cancelled and re-sentenced	16	Activated – 10 Substitute sentence/vary – 2 (includes 1 breach of condition) No order – 4
Robbery and related offences (Aggravated armed robbery)	1	Cancelled and re-sentenced	2	Activated – 2
Drug offences (Trafficking)	1	Cancelled and re-sentenced	7	Activated – 5 Substitute sentence – 2
Sexual offences (Maintain sexual relationship with a young person)	1	Cancelled and no further order (note that separate breach of FSS and re-sentenced to PSS)	2	Activated – 2

Table B.14: Outcome of breach applications, CCOs and suspended sentences, Magistrates Court, 2019–20

ANZSOC division – original sentence	No of CCOs with application to breach or cancel finalised	Outcomes	No of Suspended Sentences with Application to breach or cancel finalised	Outcomes
14: Traffic and vehicle regulatory offences	79 s 42AU Cancel – 8 s 42AV Breach – 71	Application Granted – 72 Application Withdrawn/Dismissed – 7	96	Application Granted – 91 Suspended Sentence activated – 35 No Order – 1 Application Withdrawn/Dismissed – 5
02: Acts intended to cause injury	97 s 42AU Cancel – 15 s 42AV Breach – 82	Application Granted – 92 Application Withdrawn/Dismissed – 5	93	Application Granted – 90 Suspended Sentence activated – 57 No Order – 1 Application Withdrawn/Dismissed – 3
08: Theft and related offences	31 s 42AU Cancel – 3 s 42AV Breach – 28	Application Granted – 28 Application Withdrawn/Dismissed – 3	40	Application Granted – 40 Suspended Sentence activated – 26
10: Illicit drug offences	18 s 42AU Cancel – 1 s 42AV Breach – 17	Application Granted – 16 Application Withdrawn/Dismissed – 2	27	Application Granted – 26 Suspended Sentence activated – 9 Application Withdrawn/Dismissed – 1
15: Offences against justice procedures	30 s 42AU Cancel – 6 s 42AV Breach – 24	Application Granted – 26 Application Withdrawn/Dismissed – 4	54	Application Granted – 54 Suspended Sentence activated – 41
07: Burglary, break and enter	22 s 42AV Breach – 22	Application Granted – 18 Application Withdrawn/Dismissed – 4	39	Application Granted – 35 Suspended Sentence activated – 21 Application Withdrawn/Dismissed – 4
12: Property damage	6 s 42AU Cancel – 2 s 42AV Breach – 4	Application Granted – 5 Application Withdrawn/Dismissed – 1	3	Application Granted – 3 Suspended Sentence activated – 1

13: Public order offences	6 s 42AU Cancel – 3 s 42AV Breach – 3	Application Granted – 5 Application Withdrawn/Dismissed – 1	3	Application Granted – 3 Suspended Sentence activated – 1
09: Fraud, deception and related offences	17 s 42AU Cancel – 1 s 42AV Breach – 16	Application Granted – 16 Application Withdrawn/Dismissed – 1	18	Application Granted – 17 Suspended Sentence activated – 10 Application Withdrawn/Dismissed – 1
11: Prohibited and regulated weapons offences	11 s 42AU Cancel – 2 s 42AV Breach – 9	Application Granted – 11	11	Application Granted – 9 Suspended Sentence activated – 6 Application Withdrawn/Dismissed – 2
Total	**317** **s 42AU Cancel – 41** **s 42AV Breach – 276**	**Application Granted – 289** **Application Withdrawn/Dismissed – 28**	**387**	**Application Granted – 370** **Suspended Sentence activated – 209** **No Order – 2** **Application Withdrawn/Dismissed – 17**

The table is based on 2,346 CCOs issued to end of 2020; of which 411 have a matching breach order initiated; of which 324 have been finalised; of which 317 belong to the most common ANZSOC groups.

APPENDIX C: SUPPLEMENTARY INFORMATION FOR DTOS

Table C.1: DTOs imposed as most serious sentence, offence category by most serious offence, Supreme Court, 2017–20

Offence category	Offence name	Number of DTOs made	% of DTOs
Burglary/stealing	Aggravated burglary	5	
	Burglary	6	
	Being found prepared	1	
	Total	**12**	**34.3**
Robbery	Aggravated armed robbery	1	
	Armed robbery	1	
	Robbery	1	
	Total	**3**	**8.6**
Drug offences	Trafficking in a controlled substance	10	
	Cultivating a controlled plant	1	
	Administering a controlled drug to a child	1	
	Total	**12**	**34.3**
Non-sexual offences against the person	Assault	1	
	Aggravated assault	2	
	Dangerous driving	3	
	Total	**6**	**17.1**
Property offences	Setting fire to property	1	
	Total	**1**	**2.9**
Offences against good order	Possession of dangerous article	1	
	Total	**1**	**2.9**

Table C.2: DTO sentences, duration, custodial component, Supreme Court, 2017–20

Counts for which sentence imposed	Minimum (months)	Maximum (months)	Median (months)	Average (months)	Number
Single	9	24	13	15.9	14
Multiple	9	24	18	18.2	21
All	9	24	18	17.3	35

Table C.3: Applications to cancel DTOs and outcomes, Supreme Court, 2018 – 30 June 2021

Case	Original offence	Custodial component	Reasons for application	Outcome of application
Tasmania v Clarke (6 September 2019)	Found prepared for commission of a crime	14 months	Committed new offences	Cancelled and 14 months activated with eligibility for parole.
Tasmania v McLaughlin (19 March 2020)	Trafficking in a controlled substance	12 months	Not comply with urine testing	Cancelled and 12 months activated with eligibility for parole.
Tasmania v Murtagh (22 July 2020)	Unlawfully setting fire to a motor vehicle, burglary of a motor vehicle and stealing	18 months	Not able to enter residential rehabilitation due to COVID restrictions	Cancelled and sentenced to 6 months' imprisonment wholly suspended. This took into account sanction days, time on remand, time in residential rehabilitation and efforts to rehabilitate and deferred sentence in Magistrates Court.
Tasmania v Ransley (21 May 2020)	Attempted aggravated robbery	24 months	Committed new offences	Cancelled and activated 24 months with eligibility for parole.
Tasmania v Stone (15 June 2021)	Armed robbery	24 months	Not comply or engage with order and so continuation unlikely to achieve purpose	Cancelled and activated 21 months with parole eligibility. This took into account sanction days and time in custody.
Tasmania v Cartledge (2 June 2021)	Dangerous driving	20 months	Not comply with treatment component and so continuation unlikely to achieve purpose	Cancelled and activate 14 months with eligibility for parole. This took into account sanction days, time in residential rehabilitation and effort to overcome drug addiction.

Table C.4: Duration of orders, trafficking, Supreme Court, 2017–20

	No of orders	Range (months)	Average (months)	Median (months)
DTO	10	9–24	16.5	15
FSS	89	Imprisonment: 1- 18 Operational period: 12–36	Imprisonment: 8 Operational period: 23.1	Imprisonment: 8 Operational period: 24
PSS	27	Total imprisonment: 6–48 Suspended portion: 3–24 Operational period: 3–36	Total imprisonment: 15.1 Suspended portion: 8.7 Operational period: 21.8	Total imprisonment:12 Suspended portion: 7 Operational period: 24

Table C.5: Duration of orders, dangerous driving, Supreme Court, 2017–20

	No of orders	Range (months)	Average (months)	Median (months)
DTO	3	12–20	16.7	18
FSS	8	Imprisonment: 6–22 Operational period: 18–36	Imprisonment: 12.1 Operational period: 27	Imprisonment: 13.5 Operational period: 30
PSS	6	Total imprisonment: 6–22 Suspended portion: 3–14 Operational period: 18–24	Total imprisonment: 17.5 Suspended portion: 10.3 Operational period: 22	Total imprisonment: 19 Suspended portion: 12 Operational period: 24

Table C.6: Duration of orders, aggravated burglary, Supreme Court, 2017–20

	No of orders	Range (months)	Average (months)	Median (months)
DTO	5	9–24	16.2	15
FSS	5	Imprisonment: 4–12 Operational period: 18–36	Imprisonment: 9.2 Operational period: 22.8	Imprisonment: 9 Operational period: 18
PSS	5	Total imprisonment: 9–18 Suspended portion: 4–14 Operational period: 10–36	Total imprisonment: 12.8 Suspended portion: 6.6 Operational period: 26.4	Total imprisonment:12 Suspended portion: 5 Operational period: 24

Table C.7: Duration of orders, burglary, Supreme Court, 2017–20

	No of orders	Range (months)	Average (months)	Median (months)
DTO	6	14–24	19.7	20.5
FSS	1	Imprisonment: 6 Operational period: 36	n/a	n/a
PSS	1	Total imprisonment: 18 Suspended portion: 6 Operational period: 24	n/a	n/a

Table C.8: Outcome of breach applications, DTOs and suspended sentences, 2019 – 30 June 2021

Offence category	DTOs (no of applications)	Outcome	Suspended sentences (no of applications)	Outcome
Burglary and stealing (Found prepared for commission of crime)	1	Cancelled and full custodial period activated	7	Activated – 6 No order – 1
Drug offences (Trafficking)	1	Cancelled and full custodial period activated	7	Activated – 5 Substitute sentence – 2
Robbery and like offences (Aggravated robbery and armed robbery)	2	1 - Cancelled and full custodial period activated 1 - Cancelled and partial custodial period activated	2	Activated – 2

Offence category	**DTOs (no of applications)**	**Outcome**	**Suspended sentences (no of applications)**	**Outcome**
Non-sexual offences against the person (Dangerous driving)	1	Cancelled and partial custodial period activated	16	Activated – 10 Substitute sentence/vary order – 2 (includes one breach of conditions) No order – 4

APPENDIX D: SUPPLEMENTARY FOR INFORMATION FOR SUSPENDED SENTENCES

Table D.1: Offences where suspended sentences were imposed and breach applications made, Supreme Court, 2019 – 30 June 2021[412]

Offence category	No of applications	Outcome
Drug offences	7	Activated – 5 Substitute sentence – 2
Property offences	3	Activated – 3
Robbery	2	Activated – 2
Burglary and stealing	7	Activated – 6 No order – 1
Driving offences	2	Activated – 2
Non-sexual offences against the person	16	Activated – 10 Substitute sentence/vary – 2 (includes 1 breach of condition) No order – 4
Offences against justice procedures	3	Activated – 1 No order – 2
Sexual offences	3	Activated – 3
Summary offences (unspecified)	7	Activated – 5 No order – 2
Unknown	6	Activated – 5 Re-sentence – 1

Table D.2: PSSs, Supreme Court, 8 February 2017 – 2020

Year	Number	Proportion of sentences %
2017 (from 8 February)	49	18
2018	46	15.1
2019	45	12.7
2020	49	15.7

[412] This excludes two cases where the outcome was unknown.

Table D.3: FSSs, Supreme Court, 28 February 2017 – 2020

Year	Number	Proportion of sentences
2017 (from 8 February)	86	32
2018	80	26.3
2019	85	24
2020	73	23.4

Table D.4: FSSs, offence category by most serious offence, Supreme Court, 2017–20

Offence category	Offence name	Number of FSS made	% of FSSs
Burglary/stealing	Aggravated burglary	5	
	Burglary	2	
	Being found in possession	1	
	Receiving stolen property	1	
	Stealing	7	
	Stealing firearm	1	
	Misappropriation	1	
	Total	**18**	**5.6**
Robbery/extortion	Aggravated armed robbery	1	
	Aggravated robbery	1	
	Armed robbery	3	
	Demanding property with menaces	1	
	Robbery	3	
	Blackmail	2	
	Total	**11**	**3.4**
Drug offences	Trafficking in a controlled substance/plant	89	
	Cultivating a controlled plant	9	
	Total	**98**	**30.2**
Non-sexual offences against the person	Assault	57	
	Aggravated assault	7	
	Cause grievous bodily harm/Wounding	20	
	Assault a police officer	4	
	Act intended to cause bodily harm	1	
	Dangerous driving	8	
	Total	**97**	**29.9**
Sexual offences	Access/possess CEM	9	
	Produce CEM	1	
	Rape	1	
	Penetrative sexual abuse of a child (unlawful sexual intercourse)	11	
	Persistent sexual abuse of a child (maintain sexual relationship)	5	
	Indecent assault	4	
	Communicating with intent/grooming with intent	4	
	Total	**35**	**10.8**

Offence category	Offence name	Number of FSS made	% of FSSs
Property offences	Arson (including attempt)	10	
	Setting fire to property	9	
	Causing fire with intent to injury person or property	1	
	Injury/damage to property	1	
	Total	**21**	**6.5**
Offences against good order	Making false threats of danger	2	
	Perverting justice	14	
	False declaration	4	
	Armed in public	3	
	Total	**23**	**7.1**
Fraud offences	Dishonestly acquiring a financial advantage	5	
	Computer related fraud	1	
	Unauthorised access to computer	1	
	Dealing with proceeds of crime	3	
	Fraud	4	
	Total	**14**	**4.3**
Other	Trafficking in firearms	2	
	Possess a firearm	2	
	Recklessly discharge a firearm	2	
	Failure to report a killing	1	
	Total	**7**	**2.2**

Table D.5: PSSs, offence category by most serious offence, Supreme Court, 2017–20

Offence category	Offence name	Number of PSS made	% of PSSs
Burglary/ stealing	Aggravated burglary	5	
	Burglary	1	
	Being found in possession	2	
	Receiving stolen property	2	
	Stealing	5	
	Total	**15**	**8**
Robbery	Aggravated armed robbery (including attempt)	13	
	Armed robbery	8	
	Accessory after the fact aggravated armed robbery	1	
	Aggravated carjacking	2	
	Carjacking	1	
	Robbery	2	
	Total	**27**	**14.4**
Drug offences	Trafficking in a controlled substance	27	
	Administering a controlled drug to a child	1	
	Total	**28**	**14.9**

Offence category	Offence name	Number of PSS made	% of PSSs
Non-sexual offences against the person	Assault	37	
	Aggravated assault	4	
	Cause grievous bodily harm/Wounding	22	
	Assault a police officer	2	
	Assault a pregnant woman	1	
	Act intended to cause bodily harm	3	
	Ill-treating a child	1	
	Stalking	2	
	Dangerous driving causing grievous bodily harm	1	
	Dangerous driving	5	
	Total	**78**	**41.5**
Sexual offences	Access/possess CEM	9	
	Produce CEM	1	
	Rape	3	
	Penetrative sexual abuse of a child	2	
	Persistent sexual abuse of a child (maintain sexual relationship)	1	
	Aggravated sexual assault	1	
	Indecent assault	2	
	Communicating with intent	2	
	Total	**21**	**11.2**
Property offences	Arson (including attempt)	9	
	Injury to property	1	
	Total	**10**	**5.3**
Offences against justice	Interfering with witness	1	
	Perverting justice	4	
	Total	5	**2.7**
Fraud offences	Dishonestly acquiring a financial advantage	1	
	Total	**1**	**0.5**
Other	Trafficking in firearms	**1**	
	Total	**1**	**1.6**

Table D.6: FSSs, custodial component, Supreme Court, 2017–20

Counts for which sentence imposed	Minimum (months)	Maximum (months)	Median (months)	Number
Single	0.5 (14 days)	36	8	235
Multiple	2	60	9	89
All	0.5 (14 days)	60	8	324

Table D.7: FSSs, operational period, Supreme Court, 2017–20

Counts for which sentence imposed	Minimum (months)	Maximum (months)	Median (months)	Number
Single	10	48	24	235
Multiple	12	120	24	89
All	10	120	24	324

Table D.8: FSSs, custodial component, Supreme Court, 2019–20

Counts for which sentence imposed	Minimum (months)	Maximum (months)	Median (months)	Number
Single	0.5 (14 days)	27	8	98
Multiple	2	60	9	60
All	0.5 (14 days)	60	9	158

Table D.9: FSSs, operational period, Supreme Court, 2019–20

Counts for which sentence imposed	Minimum (months)	Maximum (months)	Median (months)	Number
Single	12	36	18	98
Multiple	12	120	24	60
All	12	120	24	158

Table D.10: PSSs, custodial component, Supreme Court, 2017–20 (n = 188)

	Minimum (months)	Maximum (months)	Median (months)
Suspended portion	0.2	31	15
Unsuspended portion	2.8	48	7.75

Table D.11: PSSs, operational period, Supreme Court, 2017–20 (n = 188)

Minimum (months)	Maximum (months)	Median (months)[413]
3	36	24

Table D.12: PSSs, custodial component, Supreme Court, 2019–20 (n = 94)

	Minimum (months)	Maximum (months)	Median (months)
Suspended portion	0.2	31	16
Unsuspended portion	2.8	48	8

Table D.13: PSSs, operational period, Supreme Court, 2019–20 (n = 94)

Minimum (months)	Maximum (months)	Median (months)
12	36	24

[413] It is noted in one case the operational period was not specified in the comments on passing sentence.

Table D.14: FSSs imposed, 10 most serious offences, Magistrates Court, 2018–20

Offence	Number of FSSs made	Proportion of FSSs
Drive with prescribed illicit drug in blood or oral fluid	495	15.8
Common assault	384	12.3
Drive a motor vehicle while exceeding prescribed alcohol limit	209	6.7
Driver referred to in s 6(3) or s 6(4) with alcohol in body	204	5.6
Stealing	176	5.6
Drive whilst disqualified	125	4
Drive whilst not the holder of a driver licence	120	3.8
Breach of bail	90	2.9
Burglary	90	2.9
Breach of family violence order, police family violence order or interim family violence order	84	2.7

Table D.15: PSSs imposed, 10 most serious offences, Magistrates Court, 2018–20

Offence	Number of PSSs made	Proportion of PSSs %
Common assault	177	22.2
Drive with prescribed illicit drug in blood or oral fluid	59	7.4
Burglary	53	6.6
Stealing	49	6.1
Aggravated burglary	35	4.4
Breach of bail	34	4.3
Assault a police officer	30	3.8
Driver referred to in s 6(3) or s 6(4) with alcohol in body	30	3.8
Breach of family violence order, police family violence order or interim family violence order	30	3.8
Selling/supplying controlled drug (minor offence)	24	3

Table D.16: Suspended sentences imposed for Schedule 3 offences, most serious offence, 1 January 2014 to 31 December 2020

Offence	Number of cases	Number of suspended sentences	Proportion %
Penetrative sexual abuse of child or young person	34	18	52.9
Persistent sexual abuse of a child or young person	71	18	25.3
Procuring unlawful sexual intercourse with young person	0	n/a	n/a
Penetrative sexual abuse of a person with a mental impairment	0	n/a	n/a

Offence	Number of cases	Number of suspended sentences	Proportion %
Aggravated sexual assault (to 14 July 2017)[414]	15	2	13.3
Involving a person under the age of 18 years in the production of CEM	0	n/a	n/a
Producing and/or distributing CEM	13	10	76.9
Incest	2	1	50
Murder	26	0	0
Manslaughter	12	2	16.7
Being accessory after the fact to murder	4	0	0
Committing an unlawful act intended to cause grievous bodily harm	30	6	20
Wounding [or causing grievous bodily harm]	160	74	46.2
Performing female genital mutilation	0	n/a	n/a
Setting a spring-gun [or man-trap]	0	n/a	n/a
Rape	57	7	12.3
Forcible abduction	0	n/a	n/a
Abduction	0	n/a	n/a
Abduction of a child	0	n/a	n/a
Kidnapping	0	n/a	n/a
Armed robbery	55	20	36.4
Aggravated armed robbery	77	22	28.6
Arson	73	45	61.6
Procuring or otherwise causing or permitting a child to provide sexual services in a sexual services business	0	n/a	n/a
Receiving a fee or reward that a person knows &c. is derived, directly or indirectly, from sexual services provided by a child in a sexual services business	0	n/a	n/a
Manufacturing controlled drug for sale	3	1	33.3
Cultivating controlled plant for sale	23	20	86.9
Possessing thing intended for use in manufacture of controlled substance for sale	0	n/a	n/a
Possessing thing intended for use in cultivation of controlled plant for sale	0	n/a	n/a
Manufacturing controlled precursor intended for use in manufacture of controlled drug for sale	1	1	100
Selling controlled precursor for use in manufacture of controlled drug	0	n/a	n/a
Trafficking in controlled substance	310	213	68.7
Procuring child to traffic in controlled substance	0	n/a	n/a
Supplying controlled drug to child	1	1	100
Concealing property derived from drug offence	0	n/a	n/a
Receiving property directly received from drug offence	0	n/a	n/a

[414] This offence was repealed in 2017 from 14 July 2017 by the *Criminal Code Amendment (Sexual Assault) Act 2017* (Tas). Conduct that amounted to aggravated sexual assault is not included in the offence of rape.

APPENDIX E: SUITABILITY AND ELIGIBILITY FOR HOME DETENTION

In preparing a report on an offender's eligibility and suitability for an HDO, probation officers consider the suitability of the proposed residence by:

- undertaking a firearms licence check and identifying if any regulated weapon is stored at the property
- visiting the proposed residence to determine whether the environment will support effective compliance and case management
- assessing the residence for its suitability for use of the designated home monitoring test device
- interviewing co-residents (where consent is required under the *Sentencing Act*) to ensure that each resident actively consents to the residence being the designated premises, as well as to a national criminal history check to be conducted for the co-resident
- conducting a collateral check to ensure access to all relevant information in relation to any child protection matters
- conducting a collateral check to ensure access to all relevant information about housing and tenancy
- conducting a collateral check to identify risks contained in intelligence held by Tasmania Police
- conducting a check in the FVMS for family violence issues between the offender and a co-resident.[415]

In assessing an offender's suitability, a probation officer must give serious consideration to an offender's risks and their ability to comply with the conditions of an HDO, including:

- non-compliance with previous community-based orders
- unwillingness or inability to comply (demonstrated or assessed) with strict conditions of an HDO
- intellectual disability such as capacity to understand the order or the conditions
- the offender's motivation
- any significant mental health issues
- low capacity (demonstrated or assessed) to comply with order

[415] Department of Justice, Community Corrections, *Eligibility and Assessment for a Home Detention Order* (nd), 1–4.

- any significant physical health issues that would require regular and unplanned hospitalisation
- proximity to the victim
- current drug and alcohol use if offender assessed as being unable or unwilling to remain drug and alcohol free
- education and employment, including whether the nature of the employment means that the offender would not be suitable for electronic monitoring.[416]

Other assessments are required where the offender is a sex offender, or the offender presents as a suitable candidate to participate in a program conducted by Community Corrections.[417]

[416] Ibid 5–6.

[417] Ibid 6.