



## Trends in the use of s 12 suspended sentences

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### Introduction

A decision to impose a suspended sentence of imprisonment is not a straightforward exercise. The sentencer must first be satisfied that no penalty other than imprisonment is appropriate, set the term of the sentence without regard to the manner it is to be served, and then consider whether any alternative to full-time imprisonment is available given the term set and the circumstances of the case.<sup>1</sup> This paper discusses trends in the utilisation of suspended sentences.

Suspended sentences under s 12 of the *Crimes (Sentencing Procedure) Act 1999* were introduced as a sentencing option in New South Wales on 3 April 2000. This type of sanction is available for offences prosecuted under State law and where the court imposes a sentence of imprisonment on an offender not exceeding two years. For a discussion of the law and practice relating to suspended sentences in New South Wales, see Part I of *Sentencing Trends & Issues No 29*, published by the Judicial Commission of New South Wales.<sup>2</sup>

This paper addresses the following questions:

- How often are s 12 suspended sentences used in the Local Court and higher courts of New South Wales?
- Has the use of s 12 suspended sentences increased over time?
- What is the average term of a s 12 suspended sentence?

- Which offences are disproportionately more likely to be given a s 12 suspended sentence?
- Has the availability of s 12 suspended sentences had an impact on the use of both custodial and non-custodial sentences?
- What factors contribute to the likelihood of a s 12 suspended sentence being imposed?

### Factors that contribute to the use of s 12 suspended sentences

In sentencing offenders, and particularly sentencing offenders who commit serious offences, courts must take into account a large range of considerations. These include both the objective facts of the case and subjective features. Numerical data were available for some of these factors, such as the age of the offender, record of prior offending and previous terms of imprisonment, final bail status, number of counts of the principal offence and statutory maximum penalties for offences.

Other possibly more pertinent factors that result in the use of a s 12 suspended sentence, however, were either not available or not available in a form that could be numerically tested. These include whether the offender had good prospects of rehabilitation;<sup>3</sup> whether any significant period of pre-sentence custody had been served; the degree to which the offender

1 *R v Zamagias* [2002] NSWCCA 17 at [25]–[28].

2 G Brignell and P Poletti, "Suspended Sentences in New South Wales" (2003) 29 *Sentencing Trends & Issues*, Judicial Commission of New South Wales. Part II of the publication presented a statistical analysis of suspended sentences to 31 December 2002, which addressed a number of questions about the use of suspended sentences. These included, how often suspended sentences were imposed, the offences that attracted the greatest number of suspended sentences, the most common length of a suspended sentence and the impact of the availability of suspended sentences on the use of other sentencing options.

3 Including whether a deferred sentence under s 11 of the *Crimes (Sentencing Procedure) Act 1999* had been imposed on the offender.

had assisted (or undertaken to assist) authorities; the medical and mental health of the offender; the probable effects of imprisonment (hardship) on the offender or on family members and third parties (for example, loss of employment); the inappropriateness of alternative penalties (for example, availability and suitability of home detention, periodic detention and community service orders); and any other extraordinary subjective features.

There were other limitations to the available data. For example, while it was known that a guilty plea was entered, the timing of the plea was not known. Similarly, the role or degree of culpability of the offender in the commission of the offence was also not known. Any conclusions drawn must therefore be viewed in the light of these limitations.

### Impact of legal changes on the use of s 12 suspended sentences

The use of s 12 suspended sentences has been affected by changes to the law and through the application of guidelines affecting sentencing practice. For example, the introduction of standard non-parole periods for certain offences, and more recently, the establishment of a guideline judgment governing the sentencing of high range drink drivers, might have had an effect on the rates and terms of imprisonment imposed by the courts. Since s 12 suspended sentences are initially imposed as a term of imprisonment, such legislative changes may impact on their use.

### Standard non-parole periods

The *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* introduced standard non-parole periods for certain offences<sup>4</sup> that were committed on or after 1 February 2003. In *R v Way*,<sup>5</sup> the Court of Criminal Appeal considered

the impact of the new legislation on sentencing patterns. The court held that the implementation of standard non-parole periods may “result in some change in the established sentencing pattern for these offences, or at least some of them, with an overall increase in the non-parole periods and terms of the sentences.”<sup>6</sup> As a result of the new legislation, “it may be that for some offences the sentencing pattern will move upwards, while for others it will not.”<sup>7</sup> As standard non-parole periods, however, tend to apply to the more serious categories of offences, it is unlikely that they will affect the use of s 12 suspended sentences to any significant extent.

### Guideline judgments

Guideline judgments of the Court of Criminal Appeal are also relevant and may have a significant impact on sentencing patterns. On 8 September 2004, the Court of Criminal Appeal handed down a guideline judgment for sentencing high range prescribed concentration of alcohol (PCA) offences.<sup>8</sup> The guideline describes the appropriateness (or inappropriateness) of various penalty options in relation to certain objective facts of the case.<sup>9</sup> Again, the impact of the guideline judgment on the use of s 12 suspended sentences needs to be tested, especially given the prevalence of high range PCA offences.

### METHOD

To meet the aims outlined in the Introduction, Local Court and higher court<sup>10</sup> data spanning almost five years from 3 April 2000 to 30 September 2004 were chosen for the study.<sup>11</sup> The study was limited to the use of s 12 suspended sentences under the *Crimes (Sentencing Procedure) Act 1999* and therefore offences under Commonwealth legislation were excluded.<sup>12</sup>

4 See the Table in Pt 4, Div 1A of the *Crimes (Sentencing Procedure) Act 1999*.

5 (2004) 60 NSWLR 168.

6 Ibid at [54].

7 Ibid at [142].

8 *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* (2004) A Crim R 546.

9 Ibid at [146].

10 “Higher courts” refers to both the Supreme and District Courts of New South Wales.

11 The timeframe covers the period from the time s 12 suspended sentences were introduced and include the latest available data at the time of writing.

12 In relation to Commonwealth offences, s 20(1)(b) of the *Crimes Act 1914* (Cth) provides for the conditional release of an offender either forthwith or after part of the sentence has been served in custody. While conditional release orders are suspended sentences, they were excluded from this study for several reasons. For example, the State and federal jurisdictions vary in relation to the maximum period for which a sentence can be suspended. Federally, the term of the good behaviour bond is not restricted to the term of sentence and the ramifications of a breach during the suspension period differ. It is not known to what extent, if any, the inflexibility of the system in New South Wales may affect the rate of use of suspended sentences.

Further to this, given the legislation stipulates that s 12 suspended sentences should only be imposed when a sentence of imprisonment is an option, the data excluded offences where a sentence of imprisonment was not an option (that is, where the statutory maximum penalty was not imprisonment).

The analysis employed first instance sentencing data contained on JIRS.<sup>13</sup> As such, the data were based on the principal offence — that is, the offence attracting the most severe penalty when more than one penalty was imposed on an offender at the same time. In relation to higher court data, it also takes into account decisions made by the Court of Criminal Appeal in the instances where the court quashed or varied a sentence.<sup>14</sup>

Finally, partially suspended sentences, where part of the sentence is served in custody, were recorded as full-time custodial penalties rather than as suspended sentences.<sup>15</sup>

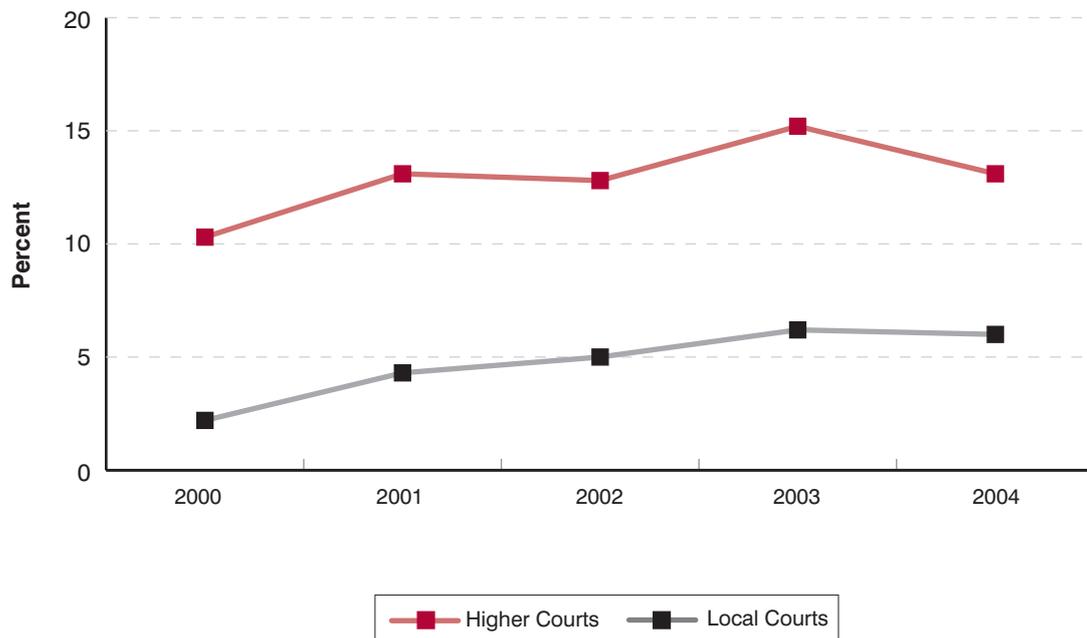
## RESULTS<sup>16</sup>

### The use of suspended sentences

In the period from 3 April 2000 to 30 September 2004 there were 17,374 instances where a s 12 suspended sentence was imposed in the Local Court and 1,517 instances in the higher courts. The majority of s 12 suspended sentences were handed down in the Local Court, however, they were proportionately more frequently handed down in the higher courts (13.0% compared with 4.7% in the Local Court). This difference may be explained by the fact that offences that appear before the higher courts are more likely to attract a custodial sentence.

Figure 1 shows the trend in the use of s 12 suspended sentences as a sentencing option in the Local Court and higher courts of New South Wales. It shows that there was an increase in the use of this penalty over the five-year period in both

Figure 1: Trends in the use of s 12 suspended sentences in the Local Court and higher courts (3 April 2000–30 September 2004)



13 The Judicial Information Research System (JIRS) maintained by the Judicial Commission of New South Wales.

14 If a conviction appeal resulted in an acquittal or a new trial, the record was removed from the data. All sentence appeals that were remitted to the lower court for re-sentencing were also excluded from the data. New penalties from successful sentence appeals (severity and inadequacy) replaced the first instance penalties.

15 Since 8 July 2003, it is no longer possible to partially suspend a sentence for a State-based (NSW) offence.

16 The chi-square statistic was utilised in all bivariate and discriminant analyses conducted for the study. All results presented in this section were significant at  $p < 0.01$ .

jurisdictions. This increase, however, was not a dramatic one in either jurisdiction.

### Local Court

The proportion of s 12 suspended sentences handed down in the Local Court increased from 2.2% of all penalties in 2000 to 6.2% in 2003, falling slightly to 6.0% in 2004.

The median term of a suspended sentence was nine months and the most common term was 12 months (27.8%), followed by six months (24.0%). Supervision by the Probation and Parole Service (PPS) was a condition of the bond in just over a half (53.7%) of all s 12 suspended sentences. Yearly comparisons found little variation in the median term of sentence (ranging from seven months in 2000 to nine months in each subsequent year), and whether the sentence required supervision by the PPS (ranging from 48.3% to 56.1%).

### Higher courts

As Figure 1 shows, the use of s 12 suspended sentences in the higher courts fluctuated between 10.3% of all penalties in 2000 and 13.1% in 2004, peaking at 15.2% in 2003.

The median term of a suspended sentence was 18 months and the most common term was 24 months (44.6%). Terms of 18 months (21.4%) and 12 months (18.5%) were also commonly imposed. Around two-thirds (67.8%) of s 12 suspended sentences required supervision by the PPS. Yearly comparisons found little variation in the median term of sentence (ranging from 18 to 21 months), and whether the sentence required supervision by the PPS (ranging from 58.7% to 71.7%).

### Offences that received a disproportionately high number of s 12 suspended sentences

This section describes offences defined according to legislation and offences defined according to the Australian Standard Offence Classification (ASOC). Reference to ASOC was made because the legislation did not sufficiently differentiate between offence types for the purposes of this study.

### Offences defined according to legislation

Tables 1 and 2 list the top 20 offences that received a disproportionately high number of s 12 suspended sentences in the Local Court and higher courts respectively. That is, these are the offences that were proportionately more likely to be given s 12 suspended sentences; they are not to be mistaken for offences for which s 12 was most commonly imposed.<sup>17</sup> Only offence categories that contained a minimum of 20 cases spanning the five years have been reported.

#### Local Court

The top 20 offences accounted for only 6.8% of all offences that were given a s 12 suspended sentence and only 1.8% of all offences sentenced in this jurisdiction. (There were many more offences in the Local Court that disproportionately received s 12 suspended sentences than what is shown in Table 1.)

Offences most likely to disproportionately receive s 12 suspended sentences were, in order, the possession of precursors for the manufacture or production of prohibited drugs (31.8%); the use or possession of weapons to resist arrest, etc. (27.3%); and three sexual assault offences — aggravated indecent assault (23.9%), an act of indecency with or towards a person under the age of 16 years (23.3%), and aggravated indecent assault with a person under the age of ten years (21.3%).

#### Higher courts

In the higher courts, the top 20 offences for which s 12 suspended sentences were disproportionately imposed accounted for almost one-third (32.5%) of all offences given s 12 suspended sentences. These offences, however, only account for 18.2% of all offences sentenced in this jurisdiction.

The offences most likely to disproportionately receive s 12 suspended sentences were, in order, indecent assault (36.4%);<sup>18</sup> offences related to cultivating prohibited plants (29.8% where the scheduled amount was a commercial quantity and 28.3% where the scheduled amount was less than the commercial quantity); and the offence of receiving or disposing of property where the principal is guilty of a minor indictable offence (27.3%).

17 The latter information is available in Brignell and Poletti, op cit n 2, p 10.

18 This offence refers specifically to indecent assault under s 61E(1) of the *Crimes Act 1900* that was repealed on 16/3/91. It does not refer to any sexual offences that could be broadly categorised as indecent assault, however, several indecent assault offences proscribed under different sections of the *Crimes Act 1900* also appear in the table.

**Table 1: Top 20 offences in the Local Court disproportionately more likely to receive a s 12 suspended sentence (3 April 2000–30 September 2004)**

Offence	Legislation	s 12 suspended sentence		
		N	n	%
possess precursors for manufacture or production of prohibited drugs	<i>Drug Misuse and Trafficking Act 1985, s 24A</i>	44	14	31.8
use or possess weapon to resist arrest, etc	<i>Crimes Act 1900, s 33B(1)</i>	128	35	27.3
aggravated indecent assault	<i>Crimes Act 1900, s 61M(1)</i>	297	71	23.9
act of indecency with/towards child < 16	<i>Crimes Act 1900, s 61N(1)</i>	60	14	23.3
aggravated indecent assault with child < 10	<i>Crimes Act 1900, s 61M(2)</i>	61	13	21.3
knowingly take part/supply drug — < commercial quantity	<i>Drug Misuse and Trafficking Act 1985, s 25(1)</i>	2,709	501	18.5
malicious wounding or inflict grievous bodily harm	<i>Crimes Act 1900, s 35(1)</i>	1,333	234	17.6
enter or remain on property w/i to commit indictable offence	<i>Crimes Act 1900, s 114(1)</i>	452	77	17.0
cause danger with firearm or speargun	<i>Crimes Act 1900, s 93G(1)</i>	186	29	15.6
causing grievous bodily harm	<i>Crimes Act 1900, s 54</i>	26	4	15.4
false accusation, etc	<i>Crimes Act 1900, s 314</i>	46	7	15.2
hinder investigation, etc	<i>Crimes Act 1900, s 315(1)</i>	66	10	15.2
enter dwelling-house w/i to commit serious indictable offence	<i>Crimes Act 1900, s 111(1)</i>	53	8	15.1
dishonestly destroy or damage property by fire/explosives	<i>Crimes Act 1900, s 197(b)</i>	20	3	15.0
indecent assault	<i>Crimes Act 1900, s 61L</i>	423	63	14.9
allow premises to be used as drug premises — 1st offence	<i>Police Powers (Drug Premises) Act 2001, s 13</i>	34	5	14.7
sexual intercourse with child 10–16	<i>Crimes Act 1900, s 66C(1)*old*</i>	28	4	14.3
demand property w/i to steal	<i>Crimes Act 1900, s 99(1)</i>	239	34	14.2
introduce or supply syringes in place of detention	<i>Summary Offences Act 1988, s 27C(1)</i>	111	15	13.5
dangerous driving occasioning grievous bodily harm	<i>Crimes Act 1900, s 52A(3)</i>	262	35	13.4
<b>ALL OFFENCES</b>		<b>370,936</b>	<b>17,374</b>	<b>4.7</b>

**Table 2: Top 20 offences in the higher courts disproportionately more likely to receive a s 12 suspended sentence (3 April 2000–30 September 2004)**

Offence	Legislation	s 12 suspended sentence		
		N	n	%
indecent assault	<i>Crimes Act 1900, s 61E(1)*rep*</i>	33	12	36.4
knowingly take part/cultivate plant — commercial quantity	<i>Drug Misuse and Trafficking Act 1985, s 23(2)(a)</i>	47	14	29.8
knowingly take part/cultivate prohibited plant — < commercial quantity	<i>Drug Misuse and Trafficking Act 1985, s 23(1)(a)</i>	46	13	28.3
receiving, etc — minor indictable offence	<i>Crimes Act 1900, s 189</i>	22	6	27.3
steal motor vehicle	<i>Crimes Act 1900, s 154AA</i>	28	7	25.0
attempt to pervert the course of justice	<i>Crimes Act 1900, s 319</i>	57	14	24.6
indecent assault of female < 16	<i>Crimes Act 1900, s 76*rep*</i>	37	9	24.3
knowingly take part/supply drug — < commercial quantity	<i>Drug Misuse and Trafficking Act 1985, s 25(1)</i>	1,251	292	23.3
aggravated enter dwelling-house w/i to commit serious indictable offence	<i>Crimes Act 1900, s 111(2)</i>	45	10	22.2
enter or remain on property w/i to commit indictable offence	<i>Crimes Act 1900, s 114(1)(d)</i>	59	13	22.0
accessory after the fact to robbery — armed or in company	<i>Crimes Act 1900, s 97(1) &amp; s 347</i>	50	11	22.0
aggravated indecent assault	<i>Crimes Act 1900, s 61M(1)</i>	102	22	21.6
larceny by clerks or servants	<i>Crimes Act 1900, s 156</i>	33	7	21.2
cause danger with firearm or speargun	<i>Crimes Act 1900, s 93G(1)</i>	43	9	20.9
indecent assault on male	<i>Crimes Act 1900, s 81*rep*</i>	24	5	20.8
accessory after the fact to robbery/steal from the person	<i>Crimes Act 1900, s 94 &amp; s 347</i>	24	5	20.8
malicious wounding or inflict grievous bodily harm — in company	<i>Crimes Act 1900, s 35(2)</i>	20	4	20.0
aggravated indecent assault with child < 10	<i>Crimes Act 1900, s 61M(2)</i>	50	10	20.0
steal in dwelling	<i>Crimes Act 1900, s 148</i>	20	4	20.0
receive, etc, stolen property	<i>Crimes Act 1900, s 188</i>	131	26	19.8
<b>ALL OFFENCES</b>		<b>11,679</b>	<b>1,517</b>	<b>13.0</b>

**Offences defined according to ASOC<sup>19</sup>**

Figures 2 and 3 show the proportion of s 12 suspended sentences imposed in the Local Court and higher courts respectively, for each of the 16 major ASOC categories of offences.<sup>20</sup>

**Local Court**

In the Local Court, ten of the 16 major offence categories attracted a disproportionate use of s 12 suspended sentences. Excluding abduction and related offences where the number of cases was

19 Figures described at the ASOC subdivision level are not shown in any graph or table in this document.

20 Offences were grouped into the 16 broad categories of offences set out in the Australian Standard Offence Classification (ASOC), 1997, Australian Bureau of Statistics (Catalogue No 1234.0).

Figure 2: Proportion of s 12 suspended sentences imposed in the Local Court for each ASOC category of offence (3 April 2000–30 September 2004)

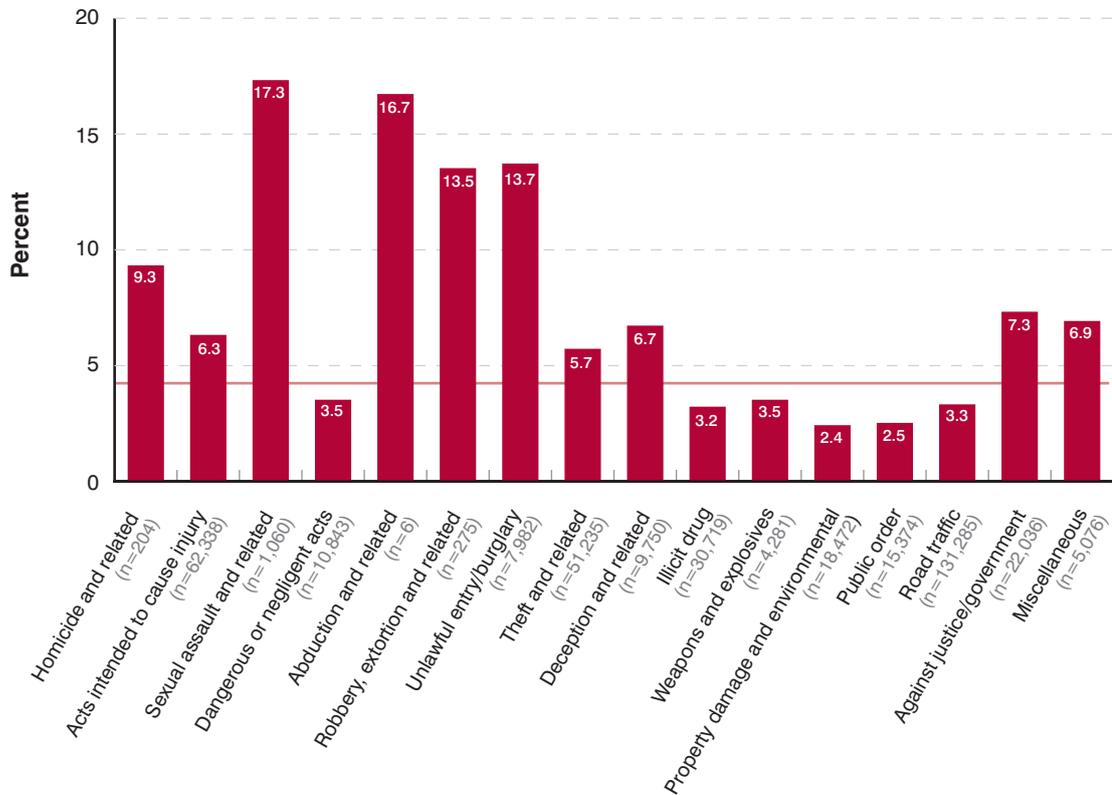
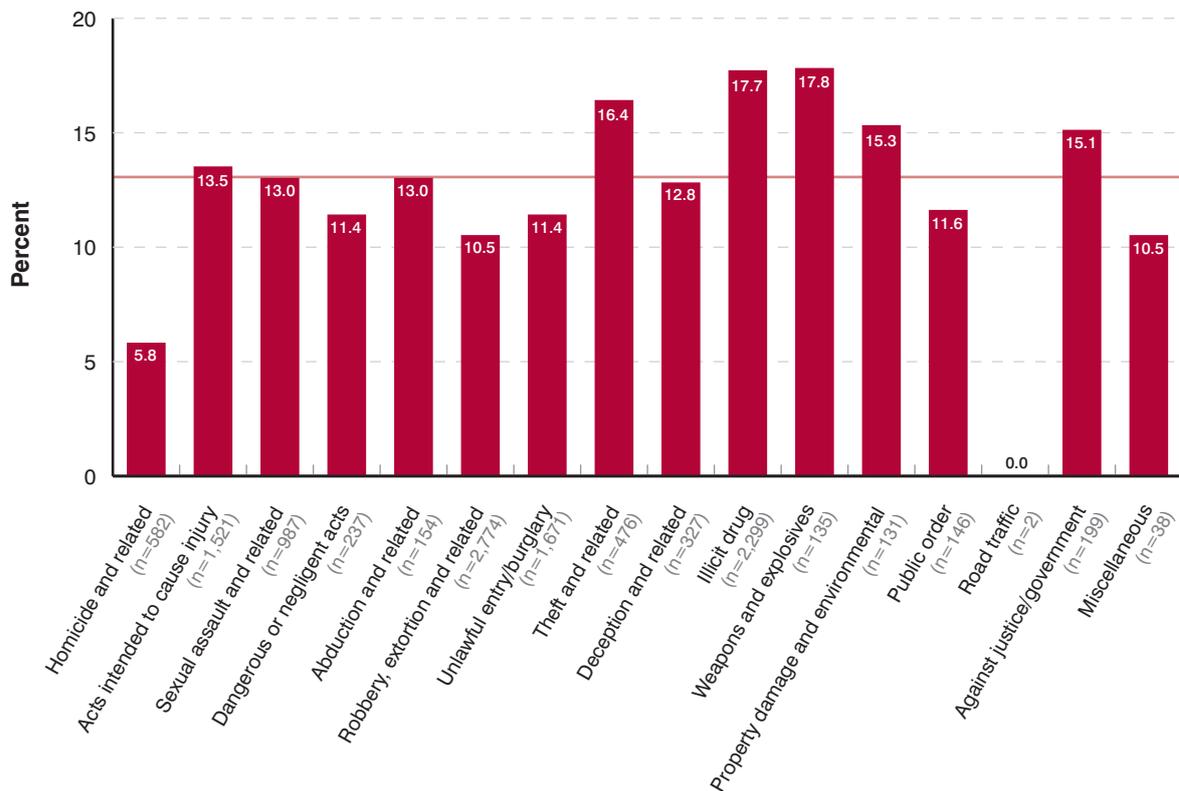


Figure 3: Proportion of s 12 suspended sentences imposed in the higher courts for each ASOC category of offence (3 April 2000–30 September 2004)



too small to draw any firm conclusions, there were three major offence categories that stood out from the others. They were, in order, sexual assault and related offences (17.3%); unlawful entry with intent/burglary and break and enter offences (13.7%); and robbery, extortion and related offences (13.5%).

When offences defined at the ASOC subdivision levels were considered, however, it was found that dealing or trafficking in illicit drugs attracted a disproportionately high use of s 12 suspended sentences in the Local Court (18.2%).

### Higher courts

In the higher courts, five major offence categories attracted a disproportionate use of s 12 suspended sentences. They were, in order, offences involving weapons and explosives (17.8%); illicit drug offences (17.7%); theft and related offences (16.4%); offences involving property damage and environmental pollution (15.3%);<sup>21</sup> and offences against justice procedures, government security and government operations (15.1%).

Amongst offences involving weapons and explosives, s 12 suspended sentences were more likely to be imposed if the offence involved regulated (19.8%), rather than prohibited (0%) weapons or explosives. Further, unlawful possession (23.1%) and misuse (20.8%) of regulated weapons or explosives were more likely to attract a suspended sentence than dealing or trafficking regulated weapons or explosives offences (6.3%).

Amongst illicit drug offences, s 12 suspended sentences were more likely to be imposed for offences involving the cultivation of illicit drugs (25.7%). The dealing or trafficking of illicit drugs (17.5%) and manufacture of illicit drugs (17.5%) were more likely to attract a suspended sentence than the possession and/or use of illicit drugs (10.8%). Further, the scheduled amount of drug involved in the offence was an important factor relating to the use of s 12 suspended sentences. For example, with offences involving the manufacture of illicit drugs, the likelihood of receiving a suspended sentence decreased as the scheduled amount of drug increased (19.0% when the scheduled amount was less than a commercial quantity compared to 11.1% when the scheduled amount was

a commercial quantity and 0% when the scheduled amount was a large commercial quantity). The same pattern was found when the offence was dealing or trafficking illicit drugs (20.1% when the scheduled amount was less than a commercial quantity<sup>22</sup> compared to 4.9% when the scheduled amount was a commercial quantity and 0.9% when the scheduled amount was a large commercial quantity). As for offences concerning the cultivation of prohibited plants, similar rates of s 12 suspended sentences were imposed when the scheduled amount of the plant was less than a commercial quantity (28.3%) or a commercial quantity (29.8%). However, the rate fell to ten per cent when the offence involved a large commercial quantity.

Differences in the use of s 12 suspended sentences were also evident within the major category of theft and related offences. Receiving or handling the proceeds of a crime was the offence most likely to receive a suspended sentence (19.3%), followed by motor vehicle theft and related offences (16.9%) and theft involving something other than a motor vehicle (14.2%). Further, suspended sentences were more likely to be imposed if the offence involved the theft of a motor vehicle (21.7%) than offences involving the illegal use of a motor vehicle (8.0%). Where the theft was unrelated to a motor vehicle, then the theft of a person not involving force (16.7%) rather than other kinds of theft (11.8%) were more likely to attract a suspended sentence.

Amongst offences against justice procedures,<sup>23</sup> s 12 suspended sentences were more likely to be imposed if the offence involved subverting the course of justice (21.4%) or concealing a serious indictable offence (19.4%)<sup>24</sup> than for a breach of a justice order (1.5%).<sup>25</sup>

ASOC does not distinguish between sexual assault offences where the offence involved indecent assault rather than sexual intercourse/penetration or an act of indecency. When this breakdown was obtained with reference to legislative definitions of offences, it was found that s 12 suspended sentences were more likely to be imposed if the offence involved indecent assault (21.4%) or an act of indecency (18.2%) rather than sexual intercourse/penetration (8.6%).

21 In the higher courts, there were no cases of environmental pollution. All cases involved property damage.

22 Ongoing supply of prohibited drugs prosecuted under s 25A of the *Drug Misuse and Trafficking Act 1985* has been included with the offence dealing or trafficking in less than a commercial quantity of illicit drug. When these cases of ongoing supply were excluded from the analysis, the proportion of s 12 suspended sentences imposed when the scheduled amount of drug was less than a commercial quantity, increased to 23.1%.

23 In the higher courts, there were no cases of offences against government security or against government operations. All cases involved offences against justice procedures.

24 Under s 316(1) of the *Crimes Act 1900*.

25 The most common breach of justice order was escape custody. During the study period, no s 12 suspended sentence was handed down for such an offence.

**Impact of standard non-parole periods (SNPP)**

In order to determine what impact the SNPP legislation had on the use of s 12 suspended sentences, sentencing data prior to the introduction of the legislation were compared to sentencing data subsequent to the legislation's introduction. In general, there was little difference in the use of s 12 suspended sentences before (7.7%) and after (7.3%) the introduction of the legislation.<sup>26</sup>

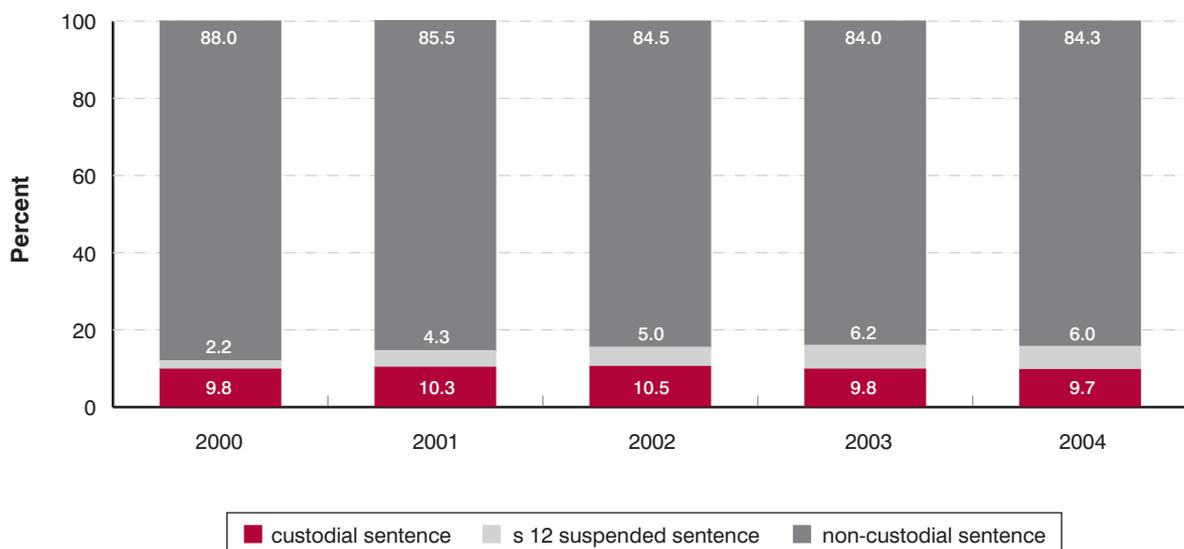
However, there was a noticeable reduction in the imposition of s 12 suspended sentences with respect to three categories of SNPP offences that had previously attracted a relatively high proportion of such a penalty. In the case of aggravated indecent assault,<sup>27</sup> the use of suspended sentences fell from 21.9% to 16.7% after the legislation was introduced. In the cases of aggravated indecent assault with a child under ten<sup>28</sup> and unauthorised possession or use of firearms,<sup>29</sup> the proportion of suspended sentences

fell from 22.2% to nil in both cases. Although the number of cases dealt with after the introduction of SNPP was small (six, five and four cases respectively), nevertheless the use of this penalty dropped.

**Impact of the high range PCA guideline judgement**

A similar comparison was made in relation to sentencing data before and after the introduction of a guideline judgment pertaining to high range PCA. A comparison of the penalties imposed in the Local Court before and after the introduction of the guideline judgment reveals a significant increase in the use of s 12 suspended sentences for high range PCA offences — 2.8% before the introduction of the guideline compared to 7.6% after its introduction. The Judicial Commission is currently undertaking a more comprehensive study of the impact of the guideline judgment on sentencing drink drivers in New South Wales.

**Figure 4: The proportionate use of penalties in the Local Court for each year of the study**



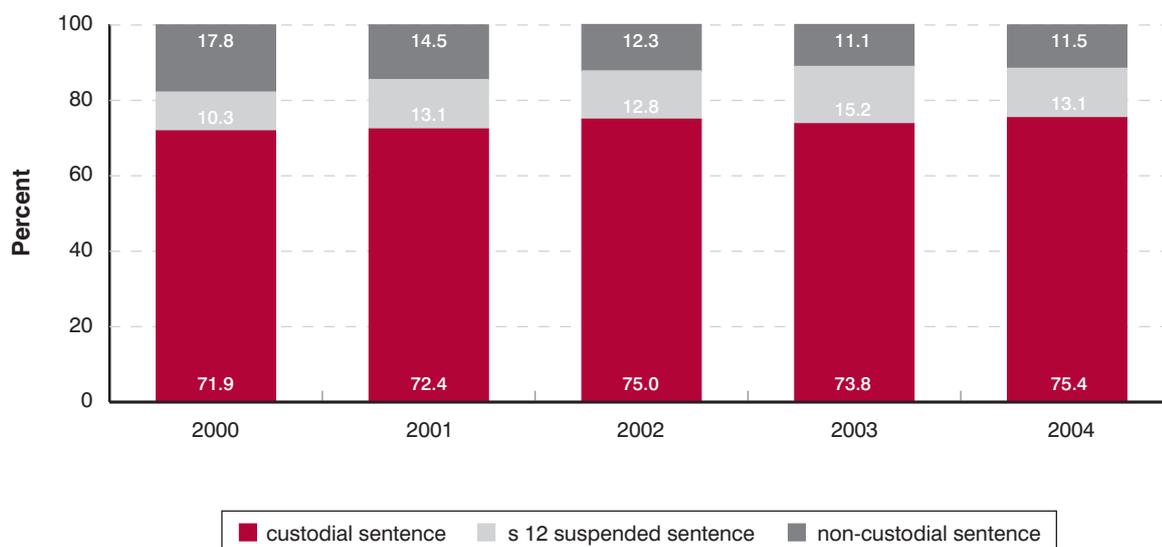
26 There were 191 cases sentenced in the higher courts during the period covered by the study and since the introduction of the standard non-parole period legislation.

27 Under s 61M(1) of the *Crimes Act 1900*.

28 Under s 61M(2) of the *Crimes Act 1900*.

29 Under s 7(1) of the *Firearms Act 1996*.

Figure 5: The proportionate use of penalties in the higher courts for each year of the study



### Impact of s 12 on the use of custodial and non-custodial sentences<sup>30</sup>

Figures 4 and 5 show the patterns of sentences in the Local Court and higher courts, respectively, since the introduction of s 12 suspended sentences. Penalties have been grouped into non-custodial sentences (or penalties less severe than a s 12 suspended sentence),<sup>31</sup> s 12 suspended sentences,<sup>32</sup> and custodial sentences (or penalties more severe than a s 12 suspended sentence).<sup>33</sup>

#### Local Court

As mentioned earlier, the use of s 12 suspended sentences in the Local Court increased from 2.2% of all penalties in 2000 to 6.2% in 2003, falling slightly to 6.0% in 2004. The use of non-custodial sentences fell from 88.0% in 2000 to 84.0% in 2003, increasing slightly to 84.3% in 2004. Falls in the use of fines and community service orders accounted for most of the reduction in the use of non-custodial penalties. At the same time, there was a slight increase in the use of custodial penalties — from 9.8% in 2000 to 10.5% in 2002, falling to 9.7% in 2004. In particular, the

use of full-time custody increased while the use of periodic detention fell from 2001 onwards.

#### Higher courts

As mentioned earlier, the use of s 12 suspended sentences fluctuated between 10.3% of all penalties in 2000 and 13.1% in 2004, peaking at 15.2% in 2003. The use of non-custodial sentences fell from 17.8% in 2000 to 11.1% in 2003, rising slightly to 11.5% in 2004. Falls in the use of s 9 bonds and community service orders accounted for most of the reduction in the use of non-custodial penalties. At the same time, there was an increase in the use of custodial penalties from 71.9% in 2000 to 75.4% in 2004. In particular, the use of full-time custody increased each year except in 2003. The use of periodic detention fell from 2002 onwards and the use of home detention fell marginally.

### Factors that contribute to the decision to impose a suspended sentence

As mentioned in the Introduction, there are many other factors that could also contribute to the

30 Some of the figures described in this section are not shown in any graph or table in this document.

31 These include s 10 dismissals and good behaviour bonds and s 9 bonds under the *Crimes (Sentencing Procedure) Act 1999*, rise of the court, fines and community service orders under s 8 of that Act.

32 Under s 12 of the *Crimes (Sentencing Procedure) Act 1999*.

33 These include periodic detention, home detention and full-time custody.

decision to impose a s 12 suspended sentence other than the offence itself. Only the following factors were available in numeric form.

**Local Court:**

- the statutory maximum prison sentence for the offence
- the offence group in which the principal offence fell
- the number of counts of the principal offence
- whether the offender had a prior criminal record
- the offender’s plea
- gender of the offender
- the offender’s age
- the offender’s indigenous status
- whether bail was granted by the court (where relevant)
- the year in which the offender was sentenced
- the geographic location of the court, and
- whether the offender had legal representation.

**Higher courts**

- the statutory maximum prison sentence for the offence
- the offence group in which the principal offence fell
- the number of counts of the principal offence

- whether any Form 1 matters were taken into account
- whether the offender had a prior criminal record and additionally was previously imprisoned
- the offender’s plea
- gender of the offender
- the offender’s age
- the offender’s indigenous status
- whether bail was granted by the court
- the year in which the offender was sentenced, and
- the geographic location of the court.

While many of the factors in each jurisdiction correlated at the  $p < 0.05$  level, the correlation coefficients were low, thereby indicating that it was unlikely that any two factors were measuring the same construct.

**Comparing the use of s 12, custodial and non-custodial penalties**

In both jurisdictions, bivariate analysis indicated that when s 12 suspended sentences are compared to custodial and non-custodial sentences, all the factors were found to have a statistically significant relationship with the penalty imposed. The exception was the number of counts of the principal offence in the higher courts. This factor was not found to be statistically significantly related to the type of

**Table 3: Relationship between penalty type (3 groups) and other factors in the Local Court (3 April 2000–30 September 2004)**

FACTOR <sup>(a)</sup>			non-custodial sentence	s 12 suspended sentence	custodial sentence
	N	%	%	%	%
<b>Statutory maximum penalty</b>					
3 months	9,852	2.7	3.1	0.1	0.2
6 months	27,901	7.5	7.1	10.5	9.6
12 months	135,027	36.4	38.9	23.4	21.4
18 months	6,366	1.7	1.9	0.7	0.4
24 months	190,252	51.3	48.7	64.7	67.3
36 months	1,532	0.4	0.3	0.6	1.0
<b>Offence type</b>					
against the person	74,726	20.1	19.7	26.0	21.2
property/fraud	68,967	18.6	15.9	26.8	37.7
drug	30,719	8.3	8.8	5.6	4.8
other	196,524	53.0	55.6	41.6	36.3
<b>Counts of the principal offence</b>					
one count	357,025	96.2	96.4	91.5	97.4
more than one count	13,911	3.8	3.6	8.5	2.6

Table 3 – continued

FACTOR <sup>(a)</sup>			non-custodial sentence	s 12 suspended sentence	custodial sentence
	N	%	%	%	%
<b>Priors</b>					
no priors	126,262	34.7	39.6	9.9	5.3
priors	237,221	65.3	60.4	90.1	94.7
<b>Plea</b>					
guilty	290,380	78.3	77.5	84.0	82.4
not guilty	20,305	5.5	5.2	7.5	6.8
no plea entered	60,196	16.2	17.3	8.5	10.8
<b>Gender</b>					
female	63,952	17.3	18.2	15.4	9.7
male	306,646	82.7	81.8	84.6	90.3
<b>Age</b>					
less than 18 years	2,154	0.6	0.7	0.1	0.1
18–20 years	56,329	15.2	15.8	11.2	12.3
21–25 years	80,116	21.6	21.4	20.7	24.2
26–30 years	66,866	18.1	17.5	20.0	22.0
31–40 years	96,088	26.0	25.3	30.6	29.5
41–50 years	46,727	12.6	13.0	13.1	9.6
more than 50 years	21,951	5.9	6.4	4.3	2.4
<b>Indigenous status</b>					
no	278,411	89.7	91.2	83.1	81.4
yes	31,870	10.3	8.8	16.9	18.6
<b>Final bail status</b>					
bail not an issue	230,695	62.3	69.4	29.1	16.8
on bail	108,221	29.2	28.0	57.5	26.1
bail refused	31,620	8.5	2.5	13.4	57.2
<b>Year sentenced</b>					
2000	75,170	20.3	20.9	9.5	19.8
2001	79,764	21.5	21.6	19.5	22.0
2002	78,456	21.2	20.9	22.8	22.1
2003	77,196	20.8	20.5	27.5	20.4
2004	60,350	16.3	16.1	20.7	15.7
<b>Court location</b>					
Sydney	200,533	54.1	54.4	45.7	54.9
Newcastle and Wollongong	40,811	11.0	10.8	10.6	12.7
Rural NSW	129,405	34.9	34.7	43.7	32.3
<b>Legal Representation</b>					
yes	234,230	63.2	58.3	88.9	92.9
no	136,396	36.8	41.7	11.1	7.1
<b>OVERALL</b>	<b>370,936</b>		<b>316,307</b>	<b>17,374</b>	<b>37,255</b>

a Using the Chi-square statistic, all factors were found to have had a statistically significant relationship with the penalty at the  $p < 0.01$  level (unless indicated by NS).

Table 4: Relationship between penalty type (3 groups) and other factors in the higher courts (3 April 2000–30 September 2004)

FACTOR <sup>(a)</sup>			non-custodial sentence	s 12 suspended sentence	custodial sentence
	N	%	%	%	%
<b>Statutory maximum penalty</b>					
5 years or less	1,215	10.5	32.9	11.6	6.2
> 5 years and ≤ 10 years	2,493	21.4	26.4	27.7	19.4
> 10 years and ≤ 15 years	3,350	28.8	29.9	35.9	27.4
> 15 years and ≤ 20 years	3,501	30.1	9.6	22.1	35.2
> 20 years	1,067	9.2	1.2	2.7	11.8
<b>Offence type</b>					
against the person	6,255	53.6	44.0	46.5	56.5
property/fraud	2,474	21.2	21.5	20.4	21.3
drug	2,299	19.7	21.4	26.8	18.1
other	651	5.6	13.0	6.3	4.1
<b>Counts of the principal offence<sup>NS</sup></b>					
one count	10,333	88.5	88.6	88.3	88.5
more than one count	1,346	11.5	11.4	11.7	11.5
<b>Form 1 matters</b>					
no	7,779	66.6	79.8	70.1	63.6
yes	3,900	33.4	20.2	29.9	36.4
<b>Priors/previously imprisoned</b>					
no priors	3,529	30.5	44.8	40.7	26.2
not prev imp but has priors	3,831	33.2	39.6	41.6	30.5
prev imp but for different offence type	1,458	12.6	7.6	7.7	14.4
prev imp for same offence type	2,737	23.7	8.1	10.0	28.9
<b>Plea</b>					
guilty	10,389	89.3	93.5	92.7	88.0
not guilty	1,241	10.7	6.5	7.3	12.0
<b>Gender</b>					
female	1,117	9.6	15.1	16.7	7.3
male	10,562	90.4	84.9	83.3	92.7
<b>Age</b>					
less than 18 years	293	2.5	2.8	2.4	2.5
18–20 years	2,312	19.8	24.4	24.2	18.2
21–25 years	2,665	22.9	23.0	21.6	23.1
26–30 years	2,123	18.2	14.1	17.0	19.2
31–40 years	2,660	22.8	22.2	20.5	23.3
41–50 years	1,152	9.9	8.8	9.5	10.2
more than 50 years	453	3.9	4.8	4.8	3.6

Table 4 – continued

FACTOR(a)			non-custodial sentence	s 12 suspended sentence	custodial sentence
	N	%	%	%	%
<b>Indigenous status</b>					
no	9,395	87.7	89.3	90.5	86.9
yes	1,323	12.3	10.7	9.5	13.1
<b>Final bail status</b>					
bail dispensed with	336	2.9	7.4	4.2	1.9
bail granted	5,613	48.3	84.0	86.5	35.2
bail refused	5,662	48.8	8.7	9.3	62.9
<b>Year sentenced</b>					
2000	2,070	17.7	23.6	14.0	17.3
2001	2,521	21.6	23.5	21.8	21.2
2002	2,657	22.8	20.9	22.3	23.2
2003	2,625	22.5	18.7	26.2	22.5
2004	1,806	15.5	13.3	15.6	15.8
<b>Court location</b>					
Sydney	7,853	67.2	59.3	62.6	69.5
Newcastle and Wollongong	1,162	9.9	10.2	10.0	9.9
Rural NSW	2,664	22.8	30.5	27.4	20.6
<b>OVERALL</b>	<b>11,679</b>		<b>1,558</b>	<b>1,517</b>	<b>8,604</b>

a Using the Chi-square statistic, all factors were found to have had a statistically significant relationship with the penalty at the  $p < 0.01$  level (unless indicated by NS).

penalty. Tables 3 and 4 set out the relationship between each factor and the three penalty types in the Local Court and higher courts, respectively.

### Comparing the use of s 12 to imprisonment of up to 24 months

The bivariate analysis mentioned above seemed to show clear trends between each individual factor and the three categories of penalties. However, discriminant analysis<sup>34</sup> indicated that when all the factors were considered together, the variation in the imposition of the three penalty types was accounted

for either by the imposition of custodial or non-custodial sentences, and not by the imposition of s 12 suspended sentences. This is unsurprising given that the limitations of the s 12 suspended sentence are not shared by most other penalties. Such a suspended sentence is best compared to a sentence of up to 24 months' imprisonment. This penalty type was considered to be comparable because in the first stage of determining the sentence, the judicial officer makes a decision to impose a term of imprisonment for up to 24 months. In the second stage, the judicial officer decides whether or not to then suspend the sentence.

34 The analysis uses Chi-squared Automatic Interaction Detector (CHAID), which is a method that uses the chi-squared statistic to identify optimal splits (G Kass, "An exploratory technique for investigating large quantities of categorical data" (1980) 29 *Applied Statistics* 119). The output from discriminant analysis conducted for the study has not been reproduced in this paper because of its size.

When s 12 suspended sentences were compared to sentences of up to 24 months' imprisonment, the use of s 12 suspended sentences was found to account for a significant amount of the variation in the imposition of sentences.

Bivariate analysis indicated that when the imposition of a s 12 suspended sentence is compared to the imposition of up to 24 months' imprisonment in the Local Court, all the factors continue to have a statistically significant relationship with the penalty imposed. In the higher courts, all factors were found to have a statistically significant relationship with the penalty imposed, except the number of counts of the principal offence, the court location, the plea entered and whether any Form 1 matters were taken into account.

### Local Court

The relationship between each factor and the two penalty types in the Local Court are shown in Table 5. Our analysis reveals that the following were more likely to have received a s 12 suspended sentence in the Local Court than their respective counterparts:

- offences with a statutory maximum penalty of 12 or 18 months' imprisonment
- offences against the person, drug offences or offences found in the miscellaneous category "other"

- offenders with multiple counts of the principal offence
- offenders with no prior criminal record
- offenders who entered a plea
- female offenders
- offenders aged over 30 years
- non-indigenous offenders
- offenders granted bail or where bail was not an issue
- offenders sentenced in the period 2002 to 2004
- offenders sentenced in rural New South Wales, and
- offenders without legal representation.

### Higher courts

The relationship between each factor and the two penalty types in the higher courts is shown in Table 6. Our analysis revealed that the following were more likely to have received a s 12 suspended sentence in the higher courts than their respective counterparts:

- offences with a statutory maximum penalty greater than 15 years
- offences against the person and drug offences
- offenders with no prior criminal record or offenders who had never been imprisoned
- female offenders
- offenders younger than 21 years or offenders older than 50 years
- non-indigenous offenders

**Table 5: Relationship between penalty type (2 groups) and other factors in the Local Court (3 April 2000–30 September 2004)**

FACTOR (a)			s 12 suspended sentence	prison term up to 2 years
	N	%	%	%
<b>Statutory maximum penalty</b>				
3 months	105	0.2	0.1	0.3
6 months	5049	10.5	10.5	10.4
12 months	10,855	22.5	23.4	22.0
18 months	223	0.5	0.7	0.3
24 months	31,699	65.6	64.7	66.1
36 months	382	0.8	0.6	0.9
<b>Offence type</b>				
against the person	11,157	23.1	26.0	21.5
property/fraud	17,126	35.4	26.8	40.3
drug	2,506	5.2	5.6	5.0
other	17,524	36.3	41.6	33.3
<b>Counts of the principal offence</b>				
one count	45,982	95.2	91.5	97.2
more than one count	2,331	4.8	8.5	2.8

Table 5 – continued

FACTOR <sup>(a)</sup>			s 12 suspended sentence	prison term up to 2 years
	N	%	%	%
<b>Priors</b>				
no priors	3,088	6.5	9.9	4.6
priors	44,721	93.5	90.1	95.4
<b>Plea</b>				
guilty	39,927	82.7	84.0	81.9
not guilty	3,473	7.2	7.5	7.0
no plea entered	4,904	10.2	8.5	11.1
<b>Gender</b>				
female	5,746	11.9	15.4	9.9
male	42,563	88.1	84.6	90.1
<b>Age</b>				
less than 18 years	43	0.1	0.1	0.1
18–20 years	5,699	11.8	11.2	12.1
21–25 years	11,043	22.9	20.7	24.1
26–30 years	10,415	21.6	20.0	22.5
31–40 years	14,545	30.1	30.6	29.8
41–50 years	5,077	10.5	13.1	9.1
more than 50 years	1,463	3.0	4.3	2.3
<b>Indigenous status</b>				
no	34,944	80.5	83.1	79.1
yes	8,443	19.5	16.9	20.9
<b>Final bail status</b>				
bail not an issue	9,111	18.9	29.1	13.1
on bail	16,375	33.9	57.5	20.7
bail refused	22,814	47.2	13.4	66.2
<b>Year sentenced</b>				
2000	7,653	15.8	9.5	19.4
2001	10,075	20.9	19.5	21.6
2002	10,763	22.3	22.8	22.0
2003	11,192	23.2	27.5	20.7
2004	8,630	17.9	20.7	16.3
<b>Court location</b>				
Sydney	23,856	49.4	45.7	51.4
Newcastle and Wollongong	5,859	12.1	10.6	13.0
Rural NSW	1,8598	38.5	43.7	35.6
<b>Legal Representation</b>				
yes	44,589	92.3	88.9	94.2
no	3723	7.7	11.1	5.8
<b>OVERALL</b>	<b>48,313</b>		<b>17,374</b>	<b>30,939</b>

a Using the Chi-square statistic, all factors were found to have had a statistically significant relationship with the penalty at the  $p < 0.01$  level (unless indicated by NS).

Table 6: Relationship between penalty type (2 groups) and other factors in the higher courts (3 April 2000–30 September 2004)

FACTOR <sup>(a)</sup>			s 12 suspended sentence	prison term up to 2 years
	N	%	%	%
<b>Statutory maximum penalty</b>				
5 years or less	494	14.3	11.6	16.3
> 5 years and ≤ 10 years	961	27.8	27.7	27.8
> 10 years and ≤ 15 years	1,294	37.4	35.9	38.5
> 15 years and ≤ 20 years	649	18.7	22.1	16.2
> 20 years	65	1.9	2.7	1.2
<b>Offence type</b>				
against the person	1,515	43.4	46.5	41.0
property/fraud	864	24.8	20.4	28.1
drug	842	24.1	26.8	22.1
other	267	7.7	6.3	8.7
<b>Counts of the principal offence<sup>NS</sup></b>				
one count	3,114	89.3	88.3	90.0
more than one count	374	10.7	11.7	10.0
<b>Form 1 matters<sup>NS</sup></b>				
no	2,407	69.0	70.1	68.2
yes	1,081	31.0	29.9	31.8
<b>Priors/previously imprisoned</b>				
no priors	998	28.9	40.7	19.7
not prev imp but has priors	1,211	35.0	41.6	29.9
prev imp but for different type	455	13.2	7.7	17.4
prev imp for same type	795	23.0	10.0	33.0
<b>Plea<sup>NS</sup></b>				
guilty	3,202	91.9	92.7	91.3
not guilty	281	8.1	7.3	8.7
<b>Gender</b>				
female	436	12.5	16.7	9.3
male	3,052	100.0	83.3	90.7
<b>Age</b>				
less than 18 years	65	1.9	2.4	1.5
18–20 years	682	19.6	24.2	16.1
21–25 years	786	22.6	21.6	23.4
26–30 years	669	19.2	17.0	21.0
31–40 years	802	23.1	20.5	25.0
41–50 years	340	9.8	9.5	10.0
more than 50 years	133	3.8	4.8	3.0

Table 6– continued

FACTOR <sup>(a)</sup>			s 12 suspended sentence	prison term up to 2 years
	N	%	%	%
<b>Indigenous status</b>				
no	2,811	87.4	90.5	85.0
yes	405	12.6	9.5	15.0
<b>Final bail status</b>				
bail dispensed with	117	3.4	4.2	2.8
bail granted	2,054	59.3	86.5	38.3
bail refused	1,295	37.4	9.3	58.9
<b>Year of offence</b>				
2000	617	17.7	14.0	20.5
2001	723	20.7	21.8	19.9
2002	789	22.6	22.3	22.8
2003	841	24.1	26.2	22.5
2004	518	14.9	15.6	14.3
<b>Court location<sup>NS</sup></b>				
Sydney	2,201	63.1	62.6	63.5
Newcastle and Wollongong	367	10.5	10.0	10.9
Rural NSW	920	26.4	27.4	25.6
<b>OVERALL</b>	<b>3,488</b>		<b>1,517</b>	<b>1,971</b>

a Using the Chi-square statistic, all factors were found to have had a statistically significant relationship with the penalty at the  $p < 0.01$  level (unless indicated by NS).

- offenders granted bail or where bail was dispensed with, and
- offenders sentenced in 2001, 2003 or 2004.

## The salient factor<sup>35</sup>

### Local Court

Despite the statistically significant relationship between each of the factors mentioned above and the penalty, discriminant analysis indicated that when all the factors were considered together, bail was found to be most closely related to the type of penalty imposed. Offenders for whom bail was refused were more likely to have received a sentence of imprisonment than a s 12 suspended sentence (89.1% of these offenders were imprisoned). Offenders for whom bail was granted or not an issue were more likely to have received a s 12 suspended sentence than a sentence of imprisonment (60.1% of offenders

on bail and 55.1% of offenders not on bail received a suspended sentence).

Amongst those offenders whose bail was refused, the number of counts of the principal offence was the best indicator of the penalty. Offenders with a single count of the principle offence were more likely to receive a sentence of imprisonment than offenders with multiple counts of the principal offence (90.7% compared with 61.5%).

Amongst offenders for whom bail was granted or not an issue, the year in which they were dealt with was the best indicator of penalty type. Amongst offenders on bail, offenders sentenced in 2000 were more likely to have received a sentence of imprisonment than a s 12 suspended sentence (64.6% of these offenders were imprisoned). Offenders sentenced in 2001, 2002 or 2003/2004 were more likely to have received a s 12 suspended sentence than a sentence of imprisonment (58.1%,

35 Some of the figures described in this section are not shown in any graph or table in this document.

63.9% and 69.8% respectively received a suspended sentence). Amongst offenders for whom bail was not an issue, offenders sentenced in 2000 or 2001 were more likely to have received a sentence of imprisonment than a s 12 suspended sentence (64.4% and 50.1% respectively were imprisoned), and offenders sentenced in 2002, 2003 and 2004 were more likely to have received a s 12 suspended sentence than imprisonment (55.8%, 64.3% and 68.8%, respectively received a suspended sentence).

### Higher courts

Similarly, discriminant analysis of higher court data indicated that bail was the best predictor of whether the offender was given a s 12 suspended sentence or a prison sentence. Offenders for whom bail was refused were more likely to have received a sentence of imprisonment than a s 12 suspended sentence (89.2% of these offenders were imprisoned). Offenders for whom bail was granted or dispensed with were more likely to have received a s 12 suspended sentence than a sentence of imprisonment (63.4% of offenders on bail and 54.0% of offenders not on bail received a suspended sentence).

Amongst offenders whose bail was refused, their prior criminal record was the best predictor of penalty type. Offenders who had previously been imprisoned were more likely than offenders who had no prior convictions, or had never previously been imprisoned, to have received a sentence of imprisonment (91.7% compared with 84.7%).

Amongst offenders who had been granted bail, prior criminal record was also the best predictor of penalty type. Offenders who had previously been imprisoned were more likely to have received a sentence of imprisonment than a s 12 suspended sentence (51.7% were imprisoned). Offenders who had no prior convictions, or had prior convictions but had never previously been imprisoned, were more likely to have received a s 12 suspended sentence than a sentence of imprisonment (70.7% of offenders with no prior convictions and 64.2% of offenders who had prior convictions but had never previously been imprisoned received a suspended sentence).

Amongst offenders whose bail was dispensed with, there were no factors that further distinguished between the penalties.

For both the Local Court and the higher courts, the discriminant analysis has not been exhaustively described — only the main findings have been

reported. What is noteworthy about this analysis is that it reveals that many of the factors shown to be statistically significant to the penalty type in the bivariate analysis ceased to have a high level of associative importance when all the factors were considered together.

We employed categorical regression<sup>36</sup> to determine whether the relationship between each of the factors and the penalty continued to be statistically significant when all the other factors were held constant. The output from the regression analyses is presented in the Appendix.

### Local Court

In the Local Court, categorical regression indicated that there was a statistically significant relationship between each factor and the penalty type (that is, whether a s 12 suspended sentence was imposed or imprisonment) when all other factors were held constant. This was also true of the demographic factors such as indigenous status and gender. The patterns followed those reported in Table 5. However, it was the bail status that largely accounted for whether or not a s 12 suspended sentence was imposed, such that offenders either on bail or when bail was not an issue were more likely to receive a s 12 suspended sentence than offenders whose bail was refused. Bail accounted for 81% of the variance in the use of s 12 suspended sentences. It must be remembered, however, that bail status was only considered with other factors also available in numeric form. The year in which the offender was sentenced accounted for 7% of the variance, such that offenders dealt with in 2002 to 2004 were more likely to have received a s 12 suspended sentence than offenders sentenced earlier. The number of counts of the principal offence accounted for 5% of the variance, such that offenders who had multiple counts of the principal offence were more likely to receive a s 12 suspended sentence than imprisonment. Each of the other factors accounted for less than 3% of the variance.

### Higher courts

In the higher courts, categorical regression indicated that there was a statistically significant relationship between many of the factors analysed and the penalty type when all other factors were held constant. These were the statutory maximum penalty; prior criminal record; plea; gender; age; final bail status; and the

<sup>36</sup> This uses SPSS optimal scaling procedures to convert nominal variables into numeric data so that linear relationships could be established between each factor and the penalty while controlling for other factors. These procedures and their SPSS implementation were developed by the Data Theory Scaling System Group (DTSS), consisting of members of the department of Education and Psychology, Faculty of Social and Behavioural Sciences, Leiden University.

year sentenced. The patterns followed those reported in Table 6. The factors found not to be statistically significantly related to the penalty type were offence type; number of counts of the principal offence; whether Form 1 matters were taken into account; court location; and indigenous status.

Final bail status accounted for most (79%) of the variance in the use of s 12 suspended sentences, such that offenders who were granted bail or where bail was dispensed with, were more likely to have received a s 12 suspended sentence than offenders whose bail was refused. The offender's prior criminal record accounted for 13% of the variance, such that offenders with no prior record or who had not previously been imprisoned were more likely to have received a s 12 suspended sentence than offenders who had previously been imprisoned. Each of the other factors accounted for less than 3% of the variance.

Of course, in both the Local Court and the higher courts, none of these factors fully accounted for the use of s 12 suspended sentences. Clearly, other factors not available for numerical analysis accounted for the use of s 12 suspended sentences in both jurisdictions. In fact, the factors analysed for this paper only account for 30% of the decision to impose a s 12 suspended sentence in the Local Court and 31% of the decision in the higher courts.

## SUMMARY AND CONCLUSION

This paper found that over the last five years, suspended sentences continued to be minimally utilised — in 4.7% of cases in the Local Court and 13.0% of cases in the higher courts overall. While the use of s 12 suspended sentences increased over this period, this increase was small.

Some offences were found to have disproportionately attracted s 12 suspended sentences. The most notable of these offences in the Local Court was possessing precursors for the manufacture or production of prohibited drugs. In the higher courts, the most notable of these offences was indecent assault.

Bivariate analysis revealed that other factors also had a statistically significant relationship with the type of penalty imposed, including the final bail status, whether the offender had previously offended, the statutory maximum prison sentence for the offence, the offender's age, gender and indigenous status. This continued to be true even after sentences were grouped into non-custodial sentences, s 12 suspended sentences and custodial sentences.

When all factors were considered together, however, the variation in the imposition of penalties

was found to have been largely explained by the imposition of custodial or non-custodial sentences and much less so by the imposition of s 12 suspended sentences. That is, these variations largely resulted from a decrease or increase in the use of custodial or non-custodial sentences, and much less so to a decrease or increase in the use of s 12 suspended sentences specifically.

When the use of a s 12 suspended sentence was compared to the use of a similar penalty — that is, up to 24 months' imprisonment — only then was it found that its use accounted for variations in the imposition of a penalty. To this end, it was found that the following were more likely than their respective counterparts to have attracted a s 12 suspended sentence in the Local Court: female offenders; offenders without legal representation; offences with a statutory maximum penalty of 12 or 18 months' imprisonment; offenders granted bail or where bail was not an issue; offenders who entered a plea; offenders with no prior criminal record; non-indigenous offenders; offenders with multiple counts of the principal offence; offenders sentenced in the period 2002 to 2004; offenders aged over 30 years; offenders sentenced in rural New South Wales; offences against the person; drug offences; or offences found in the miscellaneous category "other". In the higher courts, the following were more likely to have attracted a s 12 suspended sentence than their respective counterparts: female offenders; offenders younger than 21 years or offenders older than 50 years; offences with statutory maximum penalties greater than 15 years; offenders with no prior criminal record or offenders who had never been imprisoned; where bail was granted or dispensed with; non-indigenous offenders; offenders sentenced in 2001, 2003 or 2004; offences against the person; and drug offences.

Some of these factors were more important than others. In both jurisdictions, final bail status seemed much more likely to have accounted for the decision to impose a s 12 suspended sentence than any other factor available in numeric form. This is perhaps unsurprising given that bail status reflects the court's initial assessment of the offender and the offence, including the risk of re-offending. Similar considerations may arise during the sentencing process.

Nonetheless, even bail did not account for a large part of the decision to impose a s 12 suspended sentence. In the Local Court, all the factors analysed for this paper only accounted for 30% of the decision; in the higher courts, only 31% of the decision.

Nonetheless, even factors that seemed to exert much less of an influence on the decision to

impose a suspended sentence in the Local Court were found to have had a statistically significant relationship with the penalty when all other factors were held constant. This was true of most, but not all, factors available for analysis in the higher courts.

What can be taken from this paper is that a multitude of factors accounts for the decision to impose a s 12 suspended sentence, more so than the offence itself. The results seem to point to factors currently not available in numeric form exerting a greater influence on the decision than even the plea, bail status and the offender's prior criminal record. For example, the court might give a large consideration to the subjective features of the offence, such as the offender's ability and willingness to rehabilitate, and hardship factors. The inappropriateness or lack of availability of other penalties might also impact greatly on the sentencing decision.

Of course, in trying to delineate the relative influence of each factor that could contribute to the determination of a sentence, the words of McHugh J in *Markarian v The Queen*<sup>37</sup> need to be borne in mind; sentence determination is a distinctly non-numeric process that cannot easily be captured in statistical form. His Honour, inter alia, said:

"A sentence can only be the product of human judgment, based on all the facts of the case, the judge's experience, the data derived from comparable sentences and the guidelines and principles authoritatively laid down in statutes and authoritative judgments ... [S]entencing is not an exercise in linear reasoning because the result of each step in the process is not the logical foundation for the next step in the process ... The circumstances of criminal cases are so various that they cannot be the subject of mathematical equations."

## APPENDIX

The Appendix contains the output from the categorical regression analyses conducted using both Local Court and higher court data.

Table 7 (Local Court) and Table 9 (higher courts) show the standardised regression coefficients from the categorical analyses. These values are divided by their corresponding standard errors, yielding an *F* test for each variable.

It must be borne in mind that regression coefficients cannot fully describe the impact of a factor or the relationships between the factors. Alternative statistics must be used in conjunction with the standardised coefficients to fully explore factor effects.

Table 8 and Table 10 show the correlation, tolerance and importance values for each factor in the Local Court and higher courts respectively. The tolerance values for

each factor in each jurisdiction are very high. This indicates that multi-collinearity was not present in either jurisdiction.

Pratt's measure of relative importance<sup>38</sup> has been used to interpret the contribution of each factor to the regression. When the importance value for a factor is large compared to other importance values, this indicates that the factor is crucial to the regression. Further to this, the presence of suppressor variables is signalled by a low importance value for a factor that nonetheless shares a coefficient value similar in size to the important factors. A suppressor variable conceals a relationship between variables. In the Local and higher courts, no factor had a high beta value as well as a low importance value, thereby indicating there were no factors that were acting as suppressor variables in either jurisdiction.

37 [2005] HCA 25 at [52].

38 J W Pratt "Dividing the indivisible: Using simple symmetry to partition variance explained" in T Pukkila and S Puntanen (eds), *Proceedings of the Second International Conference in Statistics, 1987*, University of Tampere.

**Table 7: Local Court — standardised regression coefficients for all factors in the Local Court**

	Standardised co-efficients				
	Beta	Std Error	df	F	Sig
statutory maximum penalty	0.033	0.004	5	67.253	0.000
offence type	0.049	0.004	3	135.308	0.000
counts of the principal offence	0.106	0.004	1	679.294	0.000
prior criminal record	0.039	0.004	1	91.066	0.000
plea	0.031	0.004	2	60.179	0.000
gender	0.064	0.004	1	241.361	0.000
age group	0.020	0.004	6	24.681	0.000
indigenous status	0.029	0.004	1	48.462	0.000
final bail status	0.481	0.004	2	13,104.841	0.000
year of sentence	0.145	0.004	4	12,63.210	0.000
court location	0.018	0.004	2	1,8.546	0.000
legal representation	0.032	0.004	1	60.374	0.000

**Table 8: Correlation, tolerance and importance values for each factor in the Local Court**

	Correlations				Tolerance	
	Zero-Order	Partial	Part		After Transformation	Before Transformation
statutory maximum penalty	0.017	0.040	0.033	0.002	0.995	0.989
offence type	0.129	0.056	0.047	0.021	0.922	0.959
counts or the principal offence	0.130	0.125	0.105	0.045	0.980	0.983
prior criminal record	0.100	0.046	0.038	0.013	0.976	0.979
plea	0.002	0.037	0.031	0.000	0.993	0.984
gender	0.077	0.075	0.063	0.016	0.968	0.985
age group	0.067	0.024	0.020	0.004	0.985	0.969
indigenous status	0.047	0.034	0.028	0.005	0.907	0.887
final bail status	0.512	0.484	0.461	0.811	0.918	0.925
year of sentence	0.144	0.169	0.143	0.069	0.979	0.989
court location	0.071	0.021	0.017	0.004	0.904	0.882
legal representation	0.094	0.038	0.031	0.010	0.966	0.965

**Table 9: Higher courts — standardised regression coefficients for all factors in the higher courts**

	Importance Standardised co-efficients				
	Beta	Std Error	df	F	Sig
statutory maximum penalty	0.035	0.015	4	5.396	0.000
offence type	0.025	0.016	3	2.454	0.061
counts of the principal offence	0.001	0.015	1	0.003	0.959
Form 1 matters	0.011	0.015	1	0.565	0.452
prior criminal record	0.121	0.017	3	48.139	0.000
plea	0.089	0.015	1	34.243	0.000
gender	0.069	0.015	1	20.905	0.000
age group	0.068	0.015	6	19.870	0.000
indigenous status	0.008	0.015	1	0.252	0.615
final bail status	0.470	0.017	2	765.371	0.000
year of sentence	0.063	0.015	4	17.884	0.000
court location	0.013	0.015	1	0.745	0.388

**Table 10: Correlation, tolerance and importance values for each factor in the higher courts**

	Correlations			Importance	Tolerance	
	Zero-Order	Partial	Part		After Transformation	Before Transformation
statutory maximum penalty	0.095	0.0422	0.034	0.011	0.963	0.925
offence type	-0.090	0.028	0.023	-0.007	0.885	0.945
counts or the principal offence	0.021	0.001	0.001	0.000	0.979	0.985
Form 1 matters	0.028	0.013	0.011	0.001	0.960	0.940
prior criminal record	0.346	0.123	0.103	0.134	0.723	0.744
plea	0.037	0.104	0.087	0.011	0.951	0.985
gender	0.109	0.082	0.068	0.024	0.973	0.971
age group	0.101	0.080	0.066	0.022	0.936	0.902
indigenous status	0.080	0.009	0.007	0.002	0.923	0.913
final bail status	0.522	0.444	0.411	0.785	0.765	0.762
year of sentence	0.087	0.075	0.063	0.017	0.991	0.985
court location	0.008	0.015	0.013	0.000	0.942	0.944

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