



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our Ref: RBGMM1295919(7115)

Direct Line: 9926 0216

8 September 2009

The Hon. James Wood AO QC  
Chairperson  
The NSW Sentencing Council  
GPO Box 6  
SYDNEY 2001

Dear Mr Wood,

**Re: The use of non-conviction orders and good behaviour bonds**

Thank you for inviting the Law Society to comment on the review of the use of non-conviction orders and good behaviour bonds.

The Law Society's Criminal Law Committee (Committee) makes the following comments for your consideration.

**1. An analysis of the primary types or categories of offences in which non-conviction orders and bonds are utilised significantly or disproportionately when compared with other sanctions.**

Bonds and non-conviction orders are used significantly, but not disproportionately, in relation to other available penalties. The Committee is of the view that the legislation is being used as intended.

As the Judicial Commission has observed, ("Common Offences in the NSW Local Court: 2007" (2008) 37 *Sentencing Trends and Issues*, Judicial Commission of New South Wales, p18) the overall distribution of penalty types has remained extremely stable since 2002:

- Of the 20 most common proven statutory offences in 2007, fines continue to account for almost half of the penalties imposed (48.2%) and represent the most common penalty in the Local Courts by a considerable margin.
- Good behaviour bonds under s 9 accounted for 18.0% of all sentences.
- Dismissals and discharges without conviction under s 10 accounted for 16.7% of all sentences. Of this 16.7%, 6.2% were dismissed unconditionally, and 10.5% of offenders were conditionally discharged on a good behaviour bond.

While there has been an increase in the use of s 9 good behaviour bonds compared to 2002 (from 14.5% of to 18.0%), there has been a decrease in the use of s 10 to unconditionally dismiss the charge (from 7.4% to 6.2%). Although the percentage

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increases are small they account for a large number of individual cases before the Local Court.

Attached and marked "A" is a table showing the distribution of penalties imposed for the 20 most common proven statutory offences in the NSW Local Court in 2007. Bonds and non-conviction orders are used over a wide category of offences and in reasonable proportion when compared to other sanctions. For instance, as a combined percentage s 10 dismissals, s 10 bonds and s 9 bonds accounted for 26.9% of penalties for the offence of possess prohibited drug. However, 66.8% of offenders received a fine for the same offence.

#### s 10 dismissals and s 10 bonds

It is vital that Magistrates have the discretion to dismiss a charge or to impose a bond without proceeding to conviction. This discretion allows the Court to have regard to the offender's subjective circumstances and ensure a just result in each case.

In 2007 the three most common offences dealt with by a s10 dismissal were drive unregistered vehicle (18.6%), offensive conduct (17.6%), and negligent driving (16.4%). However, it cannot be said that s 10 was used disproportionately for these offences when the imposition of a fine accounts for 78.2%, 65.8% and 78.9% of penalties respectively.

The CCA issued its guideline judgment on sentencing for high range PCA offences in September 2004. The November 2008 Bureau of Crime Statistics and Research (BOCSAR) Bulletin *'The impact of the high range PCA guideline judgment on sentencing for PCA offences in NSW'* reported the following findings:

- High range PCA offences – 71% fall in the use of s10, from 9.3% to 2.7%.
- Mid-range PCA offences – a 30% fall in the use of s10, from 25.5% of cases to 17.9% of cases.
- Low-range PCA offences – a non significant decline in the use of s10, a very slight decline in the standard deviation between courts in the use of s10.

A s 10 bond constituted 32.5% of penalties imposed for low-range PCA. The Committee does not consider that this was an over-utilisation of s 10. Fines remain the most common penalty for low range PCA, imposed in 58.9% of cases. Further, low range PCA attracts an automatic disqualification from holding a driver licence of 6 months and a minimum disqualification period of 3 months (s 188(2)(a) *Road Transport (General) Act 2005*). If the legislature is going to constrain judicial discretion by imposing mandatory periods of disqualification s 10 will be used to avoid the statutory consequences of a conviction.

The Crown has the right of appeal, and the Committee suggests that the number of appeals compared to the number of s 10s imposed suggests that is utilised appropriately. The Committee also notes that is common for Magistrates to ask the prosecution its view regarding the use of s 10.

#### Section 9 bonds

The three most common offences dealt with by a s 9 bond were assault occasioning actual bodily harm, (44.6%), common assault (40.8%) and assault with intent on certain officers (35.4%). For all three offences there has been an increase in offenders

receiving a s 9 bond since 2002, and a correlative decrease in the less serious penalty of a fine.

**2. The extent to which there is consistency among NSW Local Courts in the use of non-conviction orders and bonds in respect of different offence types and categories of offenders.**

Attached and marked "B" is data supplied by BOCSAR showing the number of bonds and non-conviction orders imposed by individual Local Courts in NSW in 2007. Whether differences between Courts can be explained by variations within cases could be addressed by further research by BOCSAR.

PCA Offences

The BOCSAR report shows that following the guideline judgment the disparity between courts located inside and outside of Sydney for high range PCA offences has been substantially lessened. The guideline judgment had some incidental effect on reducing the disparity between individual courts in the use of s 10 non-conviction orders for mid range PCA offences, but there was no reduction in the disparity between Sydney and non-Sydney courts.

There was a very small change in the gap between Sydney and non-Sydney courts in the use of s 10 in low-range PCA matters, however the variation remains marked.

The existence of mandatory disqualification periods and the lack of viable alternative transport in country and regional areas, may explain the disparity between the use of s 10s in low-range PCA matters between Sydney and non-Sydney Courts.

Availability of supervised bonds

Supervised bonds are not available in some rural and remote areas due to a lack of Probation and Parole staff to provide supervision. The Legislative Council Standing Committee on Law and Justice recommended in its 2006 report '*Community based sentencing options for rural and remote areas and disadvantaged populations*', that the Department of Corrective Services:

- identify the areas of New South Wales where supervised bonds are unavailable due to a lack of Probation and Parole Service resources.
- take steps to extend supervision, or a modified form of supervision, to all areas of New South Wales.
- work with government and non-government agencies to extend the availability of appropriate and accessible programs to meet offenders' needs in rural and remote areas. In particular, consideration should be given to programs addressing domestic violence, drug and alcohol and driving related offending behaviour.
- work with both government and non-government agencies in the disability services field to identify and develop ways to improve support services to assist offenders with an intellectual disability or a mental illness to comply with the conditions of supervised bonds.

The Committee supports these recommendations aimed at increasing the availability of supervised bonds in rural and remote areas, and for disadvantaged offenders.

The availability of programs to address domestic violence, substance and alcohol abuse, anger management, driving offences and general life skills, are essential because without adequate programs the rehabilitative purpose of the supervised bond is minimal.

**3. An examination of the use across offence categories of non-convictions orders and bonds, the nature of conditions imposed and their enforcement.**

Enforcement of bond conditions

In the last ten years it has been the Committee's experience that the frequency with which breaches of bonds are enforced has increased and the conditions attached to a bond are more stringent.

In *DPP V Cooke* [2007] CA 2, the Court emphasised that in the ordinary case the consequence of a breach of bond would be that the bond would be revoked. The Court held that the subjective circumstances of the offender at the time of the proceedings for breach will not be relevant. The proceedings in *Cooke* related to a breach of a s12 bond. However, the flow on effect of *Cooke* has been that Magistrates are more diligent in dealing with breaches of s 9 and s 10 bonds.

Breaches of bonds are regarded seriously by the courts. Where satisfied that an offender appearing before it has failed to comply with the conditions of a s 9 good behaviour bond, the court under s 98 *Crimes (Sentencing Procedure) Act 1999* may:

- decide to take no action;
- vary the conditions of the bond;
- impose further conditions on the bond; or
- revoke the bond.

If a court revokes a good behaviour bond made under s 9, the court may re-sentence the offender for the original offence: s 99(1)(a) *Crimes (Sentencing Procedure) Act 1999*.

Revocation of a s 10 bond can result in the court convicting and sentencing the offender for the original offence (s 99(1)(b)).

Conditions imposed

Bonds may be supervised or unsupervised. The range of conditions that may attach to a bond are in theory unlimited and can be tailored to suit the offender. A main advantage of bonds is the flexibility they offer as a sentencing option as well as their deterrent and rehabilitative value.

The flexibility of bonds allows the court to order a range of conditions to address offending behaviour by providing supervision, and conditions such as counselling and treatment programs.

**4. The identification, and relative frequency, of the reasons behind sentencing decisions by Magistrates in relation to non-conviction orders and bonds.**

In deciding whether to make an order under s10, the Court is to have regard to the following factors pursuant to s 10(3):

- (a) the person's character, antecedents, age, health and mental condition,
- (b) the trivial nature of the offence,

- (c) the extenuating circumstances in which the offence was committed,
- (d) any other matter that the court thinks proper to consider.

The Court considers whether the offender is suitable for a non-conviction order or a good behaviour bond in accordance with the *Crimes (Sentencing Procedure) Act 1999* and taking into account all the relevant information before the Court.

The Committee considers that non-conviction orders and bonds are very useful sentencing options for young people, disadvantaged people, people with an intellectual disability and people with mental health problems.

Bonds recognise the seriousness of the offence while providing the offender with the opportunity, by good behaviour, to avoid the consequences. The flexibility of a bond allows the courts to order a range of conditions to address offending behaviour. Bonds meet the deterrent and rehabilitative purposes of sentencing while allowing the offender to remain in the community.

Section 10s are more likely to be used when there is an inappropriate fetter on judicial discretion such as mandatory licence disqualification periods imposed by legislation. For the offences of driving whilst suspended and driving whilst unlicensed, s 10 dismissals and s 10 bonds accounted for 28.4% and 14.2% of penalties respectively. Magistrates have no choice but to convict the offender and impose the mandatory disqualification periods or apply s 10. A lengthy disqualification can have crippling effects, both in terms of an offender's employment and personal responsibilities. Mandatory disqualification periods allow insufficient flexibility to achieve a just outcome, and it is often in the interests of justice to deal with a matter under s 10.

Below is a typical case study provided by a practitioner who works with homeless and disadvantaged young people. The case study highlights the importance of s 10s when judicial discretion is constrained and mandatory periods of disqualification.

*Ben is 21 and grew up in an unstable household with frequent changes of address. At one stage, during Ben's teens, his entire family was homeless. During this period, Ben spent some time in temporary foster care, some time staying with his Grandmother, and lots of time travelling from one place to the other. Most of the time he could not afford to buy a ticket, and he accrued several hundred dollars worth of fines.*

*Ben's education, and in turn his employment prospects, were badly affected by his homelessness. At 21, after short periods of unskilled and low-paid work, he is still struggling to find a secure job.*

*At 17, Ben would have liked to get his learner's licence, but the RTA told him he couldn't get a licence until he had sorted out his unpaid fines. Even if he had been able to get his Ls, Ben had no-one in his family to teach him to drive, and no means of paying for driving lessons.*

*At 17, Ben was convicted and fined for unlicensed driving. Although he was a juvenile, he appeared in an adult court because it was a traffic offence. He was not legally represented (because he was told that Legal Aid does not usually act for defendants in traffic matters) and had no real opportunity to explain his circumstances to the Magistrate. Nor did the Magistrate explain to him what might happen if he was caught driving unlicensed again.*

*At 20, Ben was still without a licence and without much hope of getting one. He borrowed a car to go out looking for work, and was charged with a second offence of unlicensed driving: an offence that carries a mandatory disqualification period of 3 years.*

*Ben is now legally represented, is sorting out his fines, and is about to go for his Ls. The Magistrate has adjourned his case and has indicated that, if Ben comes back to court with his licence, he may be prepared to impose a section 10 bond so Ben can keep his licence and improve his employment prospects.*

**5. What is the extent of compliance with conditions imposed on bonds and the rates of re-offending following the imposition of non-conviction orders and bonds?**

The successful completion and revocation rates for good behaviour bonds pursuant to s 9 and a conditional discharge bond pursuant to s 10 as an annual average for 2003 – 2004 inclusive was as follows: 88.9% completed successfully, 11.1% revoked (“Successful Completion Rates for Supervised Sentencing Options” (2005) 33 *Sentencing Trends and Issues*, Judicial Commission of New South Wales, p.5).

These figures demonstrate that compliance with the terms of the bond is relatively successful.

**6. Whether further limitations should be imposed on the ability of Magistrates to impose non-conviction orders and bonds?**

The Committee is completely opposed to further limitations on the discretion of Magistrates to impose non-conviction orders and bonds. The Committee is not aware of any evidence that would justify doing so.

**7. Whether offences for which there is a high rate of non-conviction orders and bonds can be adequately addressed within the existing sentencing regime or if other sentencing alternatives are necessary or appropriate.**

The Committee is strongly of the view that the Court’s use of non-conviction orders and bonds is appropriate. The Committee does not consider that offences for which there is a high rate of non-conviction orders and bonds require to be addressed differently, whether within the existing sentencing regime or otherwise.

**8. Any other relevant matter.**

It is not clear from the terms of reference whether the review includes the Children’s Court. The Committee assumes the review does not apply to the Children’s Court, however if this is not correct please notify the Committee.

The Committee does not support a guideline judgment for the use of s10s or for low range PCA.

Yours sincerely,



Joseph Catanzariti  
President

"A"

**Distribution of penalty types for the most common statutory offences in the NSW Local Court in 2007**

Rank	Offence description	s 10 Dism	s 10 Bond	s 10A	ROC	Fine	s 9 Bond	CSO	s 12 Susp	PD	HD	Prison
1	Mid-range PCA	1.5	15.9	0.2	0.0	63.7	12.8	3.1	1.3	0.5	0.2	0.9
2	Common assault	4.7	17.5	0.6	0.1	19.7	40.8	3.4	5.4	0.7	0.0	7.2
3	Low-range PCA	6.8	32.5	0.5	0.0	58.9	1.3	0.1	No term of imprisonment available			
4	Drive whilst disqualified	0.7	3.5	0.2	0.0†	20.1	19.7	18.4	15.0	4.6	1.5	16.3
5	Larceny	7.2	12.1	0.8	0.2	39.8	20.2	2.2	4.8	0.6	0.1	11.9
6	Possess prohibited drug	5.5	9.8	1.6	0.3	66.8	11.6	0.5	1.2	0.1	0.0†	2.5
7	Drive whilst suspended	8.9	19.5	0.4	0.0	58.1	9.9	1.9	0.9	0.1	0.0†	0.3
8	Maliciously destroy/damage property	7.1	13.6	1.1	0.4	39.6	27.5	2.9	2.5	0.4	0.0	4.9
9	Never licensed person drive on road	7.2	5.5	0.8	0.0	77.3	6.8	1.2	0.7	0.2	0.0†	0.3
10	Assault occasioning actual bodily harm	1.2	8.3	0.2	0.1	11.2	44.6	7.5	10.4	2.1	0.0	14.5
11	High-range PCA	0.1	2.6	0.1	0.0†	40.4	28.0	11.6	9.1	2.1	0.8	5.2
12	Drive without being licensed	10.9	3.3	1.3	0.0	81.2	2.7	0.2	No term of imprisonment available			
13	Knowingly contravene AVO	4.5	6.3	1.8	0.8	20.6	33.5	4.3	10.3	1.4	0.0†	16.4
14	Offensive conduct	17.6	8.1	1.5	0.0†	65.8	5.7	0.5	0.0	0.0	0.0	0.9
15	Assault with intent on certain officers	2.3	7.9	0.2	0.2	30.8	35.4	5.9	6.6	0.8	0.1	9.7
16	Drive unregistered vehicle	18.6	0.5	2.4	0.0	78.2	0.1	0.0	No term of imprisonment available			
17	Negligent driving (not causing death or GBH)	16.4	2.8	1.0	0.0	78.9	0.7	0.0†	No term of imprisonment available			
18	Offensive language	11.0	5.6	1.6	0.1	81.1	0.4	0.2	No term of imprisonment available			
19	Goods in custody	2.4	6.4	0.7	0.3	38.9	23.7	3.2	5.7	0.6	0.1	18.0
20	Drive recklessly/furiously or dangerous speed/manner	0.3	3.0	0.2	0.0	47.9	21.2	10.3	5.2	2.1	0.4	9.5
	All remaining offences	7.4	6.4	1.0	0.2	46.5	17.0	4.8	5.6	1.0	0.3	9.8
	Total	6.2	10.5	0.8	0.1	48.2	18.0	4.2	4.4	0.9	0.2	6.5
	Total number of cases	6765	11580	882	148	52965	19752	4593	4864	958	231	7194

"B"

NSW Local Courts Statistics 2007

Number of persons found guilty\* in NSW Local Courts during 2007 and receiving selected penalties as their principle penalty, by Local Court

Court	Local Courts				Total principal penalty
	Bond with supervision	Bond without supervision	Bond with no conviction	No conviction recorded	
Albion Park	2	15	14	3	135
Albury	154	73	132	29	1340
Armidale	129	33	57	13	530
Ballina	16	64	41	26	564
Balmain	22	89	56	12	718
Balranald	5	10	15	11	92
Bankstown	215	312	408	332	3916
Batemans Bay	24	60	64	24	476
Bathurst	32	66	87	54	827
Bega	25	45	55	16	415
Bellingen	7	6	5	8	110
Belmont	30	126	151	110	958
Bidura Children's	0	0	0	1	1
Blacktown	295	284	391	275	3203
Blayney	0	4	8	2	59
Boggabilla	14	34	29	5	160
Bombala	1	3	2	2	18
Bourke	21	13	7	9	204
Bowral	0	0	0	0	0
Braidwood	0	0	0	0	0
Brewarrina	15	11	2	9	122
Broadmeadow Children's	0	0	0	0	0
Broken Hill	45	69	49	66	636
Burwood	261	505	499	311	4093
Byron Bay	17	79	137	47	830
Camden	31	104	124	15	617
Campbelltown	228	701	416	149	3380
Casino	51	62	46	17	542
Central	52	62	11	10	1197
Cessnock	79	99	67	67	728
Cobar	12	10	30	22	138
Cobham Children's	0	0	0	0	0
Coffs Harbour	74	74	85	88	1255
Condobolin	19	11	25	5	125
Cooma	8	7	58	41	272
Coonabarabran	7	10	10	7	140
Coonamble	6	21	10	7	142
Cootamundra	27	13	19	14	276
Corowa	14	3	7	3	90
Cowra	33	15	24	19	393
Crookwell	4	9	5	2	27
Deniliquin	5	40	26	8	304
Downing Centre	414	779	701	646	7447
Dubbo	144	60	44	10	850
Dunedoo	0	2	0	0	21
Dungog	1	5	3	1	31



East Maitland	0	0	0	0	0
Eden	5	16	10	6	83
Fairfield	39	54	72	18	674
Finley	14	8	26	3	204
Forbes	30	34	36	18	209
Forster	11	79	49	7	588
Gilgandra	17	12	18	8	102
Glen Innes	49	12	15	4	171
Gloucester	12	6	6	5	61
Gosford	205	191	307	131	2600
Goulburn	71	115	74	228	1552
Grafton	21	97	26	18	604
Grenfell	6	2	3	4	65
Griffith	24	101	100	13	912
Gulgong	2	9	8	1	63
Gundagai	11	10	11	1	113
Gunnedah	18	39	23	11	268
Hay	6	13	10	4	189
Hillston	4	5	4	1	37
Holbrook	4	3	7	2	64
Hornsby	118	116	218	118	1842
Inverell	35	78	97	20	465
Junee	9	6	2	1	76
Katoomba	32	40	56	1	289
Kempsey	114	23	42	10	831
Kiama	4	9	21	8	103
Kogarah	3	158	77	14	965
Kurri Kurri	19	33	20	26	219
Kyogle	20	15	10	3	120
Lake Cargelligo	4	15	5	3	62
Leeton	18	33	15	7	287
Lidcombe Children's	0	0	0	0	0
Lightning Ridge	13	15	16	6	102
Lismore	141	185	80	38	1333
Lithgow	35	48	47	2	380
Liverpool	135	732	384	183	4561
Lockhart	0	0	0	0	1
Lord Howe Island	0	0	0	0	0
Macksville	27	20	20	17	286
Macleay	11	45	25	13	293
Maitland	49	217	79	27	1276
Manilla	0	0	0	0	0
Manly	66	326	238	185	2218
Milton	11	19	27	5	357
Moama	1	9	10	6	110
Moree	35	125	86	18	641
Moruya	8	27	26	9	188
Moss Vale	20	71	55	39	630
Moulamein	0	1	0	1	4
Mount Druitt	151	350	180	82	2299
Mudgee	11	30	32	12	269
Mullumbimby	4	26	33	3	161
Mungindi	2	7	6	0	35
Murrurundi	0	0	0	0	0
Murwillumbah	12	36	31	13	257
Muswellbrook	38	33	46	7	373

Narooma	10	13	23	10	151
Narrabri	18	34	21	15	237
Narrandera	5	21	16	5	205
Narromine	11	22	21	9	112
Newcastle	148	390	463	385	3637
Newtown	57	263	260	68	1510
North Sydney	30	108	130	51	786
Nowra	50	67	75	26	1252
Nyngan	9	10	13	9	87
Oberon	2	3	10	3	49
Orange	179	100	116	47	904
Parkes	29	38	63	32	286
Parramatta	150	441	448	251	4267
Parramatta Children's	0	0	0	0	0
Peak Hill	3	7	7	5	36
Penrith	168	378	206	62	2730
Picton	3	34	21	6	259
Port Kembla	41	63	48	37	550
Port Macquarie	135	32	77	20	1267
Queanbeyan	26	90	189	73	1013
Quirindi	4	6	9	33	136
Raymond Terrace	112	179	104	96	1062
Redfern	0	0	0	0	0
Richmond	0	0	0	0	0
Ryde	58	138	215	51	1126
Rylstone	0	4	7	2	42
Scone	8	14	12	15	187
Singleton	20	57	24	5	368
St	0	0	0	0	0
Sutherland	134	498	419	372	4008
Tamworth	61	105	102	84	1104
Taree	31	151	55	17	1044
Temora	10	5	9	6	104
Tenterfield	37	7	12	5	117
Toronto	103	182	196	66	1401
Tumbarumba	2	1	5	0	23
Tumut	31	12	28	11	275
Tweed Heads	37	214	197	85	1391
Wagga Wagga	132	187	227	95	1707
Walcha	13	2	7	6	48
Walgett	32	62	28	28	316
Wallsend	0	0	0	0	0
Warialda	2	6	6	2	24
Warren	4	18	19	7	92
Wauchope	17	3	6	0	66
Waverley	79	491	484	149	2766
Wee Waa	6	16	4	11	84
Wellington	34	14	31	13	170
Wentworth	25	34	27	31	311
West Wyalong	12	5	17	16	137
Wilcannia	15	20	2	3	88
Windsor	38	136	141	89	855
Wollongong	224	405	267	257	3802
Woy Woy	37	61	50	56	568
Wyong	98	472	202	220	2447
Yass	25	21	29	13	222

Young	38	17	22	8	341
<b>Total</b>	<b>6787</b>	<b>13299</b>	<b>11879</b>	<b>6822</b>	<b>112744</b>

\* The penalty counts in the data are based on principal offence data. Where a person has been found guilty of more than one offence, only the most serious penalty is counted in the data.

Source: NSW Bureau of Crime Statistics and Research  
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*Please retain this reference number for future correspondence*