

INQUIRY INTO DOMESTIC VIOLENCE TRENDS AND ISSUES IN NSW

Organisation: NSW Chief Magistrate

Date received: 16/09/2011

16 September 2011

The Director
Standing Committee on Social Issues
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Director

Submission - Inquiry into domestic violence trends in NSW

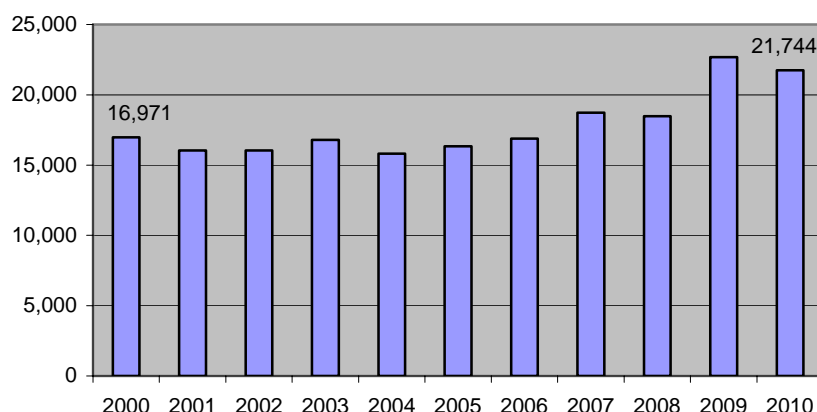
I am writing on behalf of the Chief Magistrate in response to your invitation to make a submission in relation to the above inquiry.

Prior to addressing the Committee's terms of reference, I wish to provide some brief background information in relation to the Local Court's experience in dealing with proceedings involving alleged domestic violence.

The foremost observation is that such proceedings come before the Local Court on a daily basis. The Court presently sits in more than 135 locations across the State and in every region a significant portion of its workload comprises the determination of applications for apprehended domestic violence orders (ADVOs). Many matters also involve related criminal proceedings for a domestic violence offence.

Frequency of proceedings relating to domestic violence

The following graph, which sets out the number of final ADVOs made by the Court per calendar year,¹ illustrates a general upward trend over the past decade:



¹ Source: Court Statistics Unit data, Local Court Annual Reviews 2000-2010. Note it is difficult to assess the extent to which the significant increase seen in 2009 is due to the transition to the new JusticeLink case management system. Some increase may also be due to the commencement of the *Crimes (Domestic and Personal Violence) Act 2007* in March 2008, which introduced a requirement in s 39 that the Court *must* make a final order where a person is convicted of a domestic violence offence.

I am not aware of any available data that quantifies the frequency with which criminal proceedings before the Court relate to allegations of domestic violence, but such matters arise frequently and are a component of many magistrates' everyday work.

Several thousand proceedings for breaches of ADVOs come before the Court every year. Sentencing statistics compiled by the Judicial Commission of NSW, which record matters in which the defendant has been found or pleaded guilty, indicate a total of 9,044 defendants were sentenced for a breach of an ADVO between March 2008 and March 2011.² This data does not record proceedings in which a defendant is found not guilty, or charges are withdrawn for whatever reason, including the frequently encountered situation of a complainant being unwilling to give evidence.

Local Court procedure in proceedings relating to domestic violence

A flow chart setting out the progress of an application for an ADVO through the Local Court, whether with or without associated criminal proceedings, is provided in Appendix 1. The flow chart does not encapsulate every possibility at each stage of proceedings, but is designed to provide an overview to assist the Committee's understanding of how matters involving allegations of domestic violence may progress through the Court.

The Local Court has procedures in place to prioritise the hearing of proceedings for domestic violence offences, with such matters to be listed for hearing within 3 months of the charge being laid. By comparison, the general time standards applying to summary criminal trials in the Local Court are for 95% to be finalised within 6 months and 100% within 12 months. These procedures were first introduced under Practice Note 1 of 2006 at Campbelltown and Wagga Wagga, where the Domestic Violence Intervention Court Model (DVICM) operates, and were later expanded to all other Local Court locations under Practice Note 3 of 2008.

The Committee's terms of reference

Turning now to the Committee's terms of reference, I have the following comments:

1. Strategies to reduce breaches and improve compliance with AVOs

a. The use of GPS bracelets

I understand that GPS technology has been adopted as an offender management strategy in a number of countries, including in the US where several states have passed laws to enable the electronic monitoring of domestic violence offenders. It is ultimately a matter for the Parliament whether to pursue the use of this technology in New South Wales; however, certain policy and operational issues would need to be addressed. These include:

- The policy objective for using the technology. The stated aims in adopting GPS monitoring of domestic violence offenders may influence the stage at which or the individuals upon whom the technology is used. For example, objectives might include:
 - To prevent escalation of domestic violence amongst those with no prior history of committing domestic violence.
 - To limit recidivism amongst offenders who have breached an ADVO or committed a domestic violence offence. A note of caution in this respect appears appropriate,

² Source: Judicial Information Research System (JIRS), as at July 2011

given the reported US experience that whilst rates of re-offending fell amongst offenders for the duration of the GPS monitoring, offending often recommenced after the GPS monitoring concluded if not supported by other strategies.³

- To provide complainants with an additional level of protection or assurance. The US experience again suggests a need for caution in this respect, insofar as an 'illusion of safety' may potentially be created by the use of the technology.
 - To provide an alternative to full time custody in dealing with domestic violence offenders. This might require a mechanism by which the Court could order that an offender be subject to monitoring in lieu of full time custody similar to the intensive correction order, a current sentencing option under Part 5 of the *Crimes (Sentencing Procedure) Act* 1999 that enables offenders to be subject to a form of electronic monitoring as a condition of the order.⁴
 - To assist the criminal justice process. For example, as noted above proceedings involving allegations of domestic violence have typically been affected by comparatively high rates of withdrawals or dismissals due to a lack of evidence where a complainant becomes unwilling to testify. Evidence provided by GPS monitoring may provide an additional level of evidence in some proceedings where this occurs, such as proceedings for breach of an ADVO where the breach alleged relates to accessing prohibited premises.
- The stage of proceedings at which the GPS technology would be used. I understand that various models operating in the US utilise the technology at differing stages of the criminal justice process.⁵ Should the technology be adopted in NSW, it would similarly need to be determined whether an order for GPS monitoring should be available:
 - Upon the making of an ADVO. It should be noted that the determination of these application proceedings is to the civil standard of proof, that is, on the balance of probabilities. In making an ADVO, the Court is not finding that the defendant has committed a crime. Indeed, in many cases ADVOs are made by consent on a without admissions basis.
 - Following an alleged breach of an ADVO and/or the commission of a domestic violence offence, as a condition of bail.
 - Upon conviction for a breach of an ADVO and/or the commission of a domestic violence offence, whether as an alternative to a sentence of full-time imprisonment or in conjunction with a non-custodial sentence.
 - As a condition of probation or parole.

³ See J Szep, 'GPS grows as a crime-fighting tool in U.S', Reuters, 14/5/08. Available via <http://www.reuters.com/resources/archive/us/20080514.html> (accessed 19/8/11)

⁴ Subject to a suitability assessment and other eligibility criteria, a domestic violence offender may be eligible to serve a sentence of imprisonment by way of an intensive correction order. Another alternative to full time imprisonment in which electronic monitoring may be utilised as a condition of the order is home detention under Part 6 of the *Crimes (Sentencing Procedure) Act* 1999. However, under s 76 a home detention order is not available in relation to various offences, including "a domestic violence offence against any person with whom it is likely the offender would reside, or continue or resume a relationship, if a home detention order were made".

⁵ See A Vandercort-Clark, 'Laws seek to better track domestic abusers, protect victims', Council of State Governments, September 2008. Available via <http://www.csg.org/knowledgecenter/docs/pubsafety/Stateline-DVArticle4.pdf> (accessed 19/8/11). In addition to the jurisdictions mentioned in this article, Massachusetts legislation further provides for the use of GPS monitoring after conviction as an alternative to incarceration and a condition of parole where a defendant has been found in violation of an abuse prevention order.

At a practical level, at any stage it would seem necessary to obtain an assessment of whether an individual would be suitable for GPS monitoring prior to making an order.

It is difficult to comment further without any details of what model might be proposed.

b. Whether existing penalties for domestic violence are adequate

It is unclear whether views are sought as to whether the maximum penalties prescribed at law for offences committed in a domestic context are adequate, or whether the sentences being imposed in the courts are considered adequate. The former is a matter for Parliament, in respect of which I do not propose to comment. The latter requires an understanding of the context in which the courts operate. In this regard it should be noted:

- The *Crimes (Sentencing Procedure) Act* 1999 sets out the range of custodial and non-custodial sentencing alternatives generally available to the courts. Section 5 enshrines the principle that a sentence of imprisonment is only to be imposed in circumstances where the court “*is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate*”.⁶
- In the Local Court, jurisdictional limits apply in addition to the maximum penalty prescribed at law for a given offence. If a domestic violence offence that is a Table offence is prosecuted in the Local Court the maximum sentence that may be imposed is two years imprisonment.⁷
- Particular considerations often operate when sentencing for domestic violence offences or breaches of ADVOs that bear upon the assessment of what penalty is suitable in any given matter. The punishment of the offender may have an adverse impact upon the victim or any children of a relationship, particularly in circumstances where there is an ongoing relationship. This might include financial hardship due to the imposition of a fine, emotional, relational and financial hardship due to the imposition of a custodial sentence, or more generally the risk of reprisal against a victim by an offender who regards the punishment as being the ‘fault’ of the victim.

A criminal proceeding for an offence committed in a domestic context may also involve a charge of a breach of an ADVO. I will deal with each separately, as the *Crimes (Domestic and Personal Violence) Act* 2007 (‘the Act’) contains specific additional provisions when sentencing for a breach of an ADVO.

i. *Domestic violence offences*

In NSW there is no specific offence of “domestic violence”. Instead, a “domestic violence offence” is defined in s 11 of the Act to mean a “personal violence offence” committed in the context of a domestic relationship. “Personal violence offence” is defined in s 4 to mean certain specified offences. This approach means that the maximum penalty available for an offence occurring in a domestic context will vary depending on the offence charged – for instance, domestic violence offences under the Act range from common assault (punishable by up to two years imprisonment) to murder (punishable by imprisonment for life).

When sentencing an offender for a domestic violence offence, various considerations are taken into account by the judicial officer in forming an assessment of the objective gravity of

⁶ Where an offender is being sentenced in respect of a breach of an AVO, this principle is qualified by s 14 of the *Crimes (Domestic and Personal Violence) Act* 2007. See below.

⁷ *Criminal Procedure Act* 1986, ss 267 & 268. A Table offence is an indictable offence listed in Sch 1 of the *Criminal Procedure Act* 1986 that may be heard summarily in the Local Court unless an election is made by the prosecution or in some cases the defence to proceed on indictment in the District Court.

the offending conduct. Case law has consistently articulated the need for general deterrence and denunciation, particularly in circumstances where multiple offences have been committed over a period of time. Judgments from the Court of Criminal Appeal since at least 1994⁸ have repeatedly emphasised this point. In addition, various specific aggravating factors in s 21A of the *Crimes (Sentencing Procedure) Act* 1999 are applied by the courts when relevant to offences committed in a domestic context. These include:

- The offence involved the actual or threatened use of violence;
- The offender has a record of previous convictions (particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences);
- The injury, emotional harm, loss or damage caused by the offence was substantial;
- The offender abused a position of trust or authority in relation to the victim;
- The victim was vulnerable, for example, because the victim was very young or very old or had a disability.
- The offence was committed in the presence of a child under 18 years of age; and
- The offence was committed in the home of the victim or any other person.

ii. Breaches of ADVOs

When a domestic violence offence is committed where an existing ADVO is in place, the Local Court will typically also be required to deal with the breach of that order. Under s 14 of the Act, contravention of an AVO is an offence punishable by a maximum of two years imprisonment or a fine of 50 penalty units (\$5,500). As noted above, on average the Court handles several thousand ADVO breach proceedings per year, compared with only a few hundred proceedings for breach of an apprehended personal violence order (APVO).

Section 14 also requires that where a person is found guilty of a breach of an AVO that involved violence, he or she must be sentenced to a period of imprisonment unless the Court orders otherwise and gives its reasons for doing so.⁹ As noted above, there are various considerations that will apply to that decision. However, sentencing statistics¹⁰ indicate an offender is twice as likely to receive a custodial sentence for a breach of an ADVO than for a breach of an APVO, and less likely to be dealt with pursuant to s 10 (dismissal with or without a good behaviour bond) or s 10A (conviction recorded without further penalty) of the *Crimes (Sentencing Procedure) Act* 1999. More details of recorded sentences are set out in Appendix 2.

2. Early intervention strategies

By virtue of its function, the Local Court only becomes involved in matters at a point at which it is alleged that domestic violence has already occurred, giving rise to application proceedings for an ADVO and/or criminal proceedings. Accordingly, I am not in a position to comment in relation to early intervention strategies that would take place prior to, and one would hope aim to prevent, any court involvement.

⁸ See *R v Glen* (Court of Criminal Appeal, Simpson J, 19/12/1994, BC9403423). For a useful summary of the Court of Criminal Appeal's approach towards perpetrators of family violence, see *R v Hamid* [2006] NSWCCA 302 at [68]-[75], [86], [88] per Johnson J (Hunt AJA and Latham J agreeing).

⁹ *Crimes (Domestic and Personal Violence) Act* 2007, ss 14(4),(6)

¹⁰ Source: Judicial Information Research System (JIRS), as at July 2011

3. The increase in women being proceeded against by police for domestic violence related assault

Despite apparent growth in the overall numbers of domestic violence related proceedings before the Court, in my observation there does not appear to have been an increase in the proportion of female defendants. Overall, it seems clear that the recognition in section 9(3)(b) of the Act “*that domestic violence is predominantly perpetrated by men against women and children*” continues to be reflected in the reality of the proceedings coming before the Court.

This observation is supported by research conducted by the Bureau of Crime Statistics and Research, which indicates significant overall growth in the number of both male and female domestic assault offenders¹¹ but a continuing trend in which the large majority of domestic assault offences are committed by males.

One piece of research from 2010 indicates that the number of female domestic violence offenders rose from 941 in 1999/2000 to 2,552 in 2008/09. However, a rise in male domestic violence offenders from 9,696 to 13,523 was recorded for the same years.¹²

Another recent research report indicates that in 2010, 82.1 percent of domestic assault offenders were male and 17.9 percent were female.¹³ This amounts to a slight decrease in the proportion of domestic violence offenders who are female since 2004, when a reported 80.4 percent of such offenders were male and 19.6 percent were female.¹⁴

4. Other issues

I do not have any further issues that I wish to raise.

Thank you for the opportunity to make a submission to this inquiry. Please do not hesitate to contact the Chief Magistrate’s Office on (02) should I be able to provide any further assistance.

Yours sincerely,

Jane Mottley
Deputy Chief Magistrate

¹¹ Note a distinction should be drawn between ‘offenders’ who have been found guilty of or pleaded guilty to an offence, and those who are appearing as defendants before a court.

¹² J Holmes, ‘Female offending: has there been an increase?’, Crime and Justice Statistics Bureau Brief, Issues paper no. 46, April 2010 at 4 (Table 2)

¹³ K Grech & M Burgess, ‘Trends and patterns in domestic violence assaults: 2001 to 2010’, *Crime and Justice Statistics Bureau Brief*, Issues paper no. 61 (May 2011) at 7 (Table 6)

¹⁴ J People, ‘Trends and patterns in domestic violence assaults’, *Crime and Justice Statistics Bureau Brief*, No 89 (October 2005) at 6 (Figure 5)

APPENDIX 1

Local Court procedure

A flow chart illustrating the procedure generally followed in the Local Court in relation to an application for an apprehended domestic violence order (ADVO), whether with or without associated criminal proceedings for a domestic violence offence, is set out on the following page.

It should be noted that the process illustrated in the flowchart represents the progress of a relatively simple matter that assumes:

- That the applicant continues to seek the order at all stages. Matters may be withdrawn; and
- No variation or revocation of orders is sought or made by the court. The court may vary or revoke an order upon application by either party (subject to some restrictions) or where satisfied that it is proper in all the circumstances to do so.

The following abbreviations appear in the flow chart:

Adj - adjournment

App – application

AVO – Apprehended Violence Order

CAN – Court Attendance Notice

Crimes (D & PV) Act – *Crimes (Domestic and Personal Violence) Act 2007 (NSW)*

D – defendant

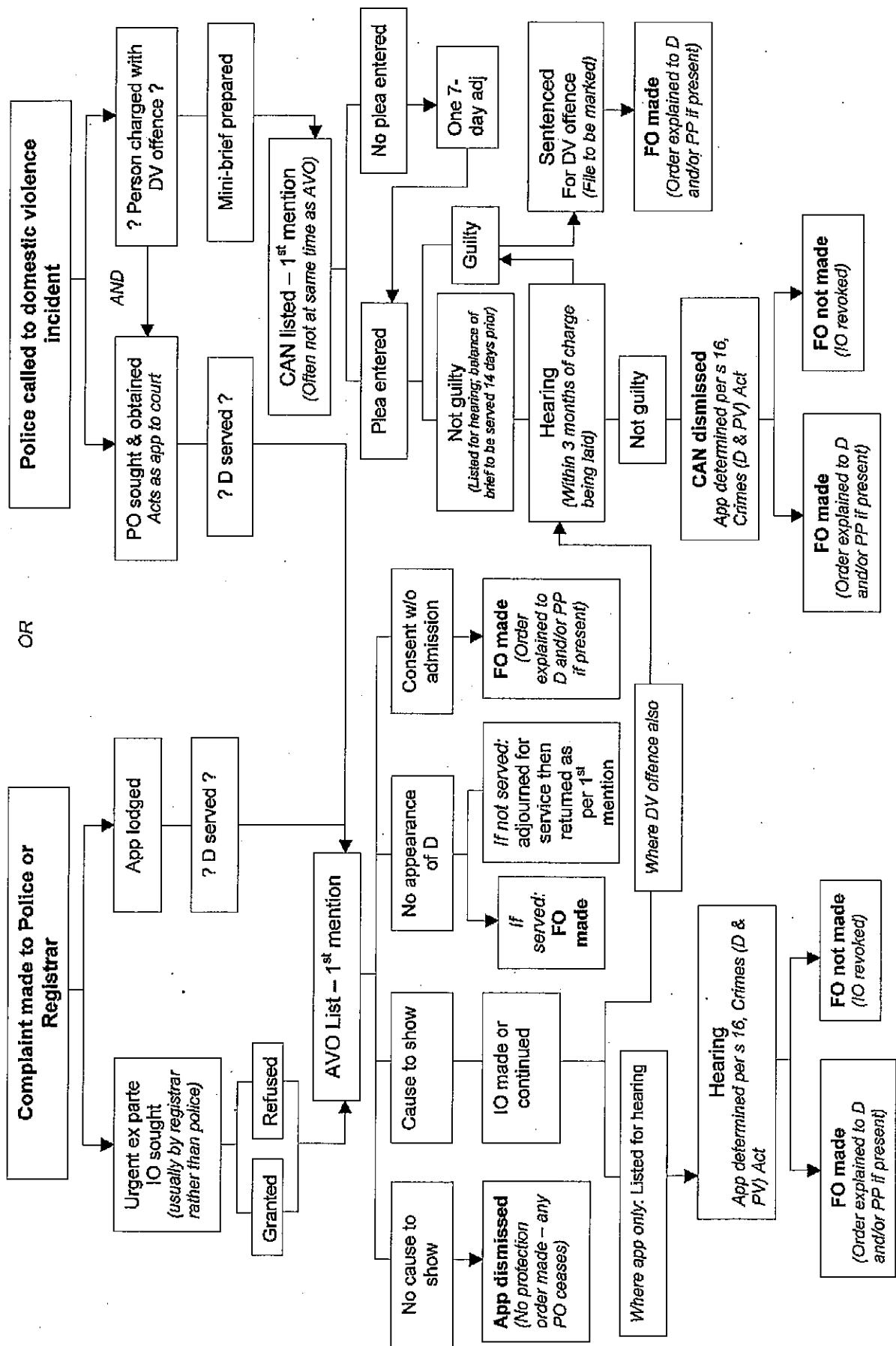
DV offence – Domestic violence offence, defined pursuant to s 11 of the Act as a “personal violence offence committed by a person against another person with whom the person who commits the offence has or has had a domestic relationship”. A personal violence offence is defined in section 4 by reference to a range of specified offences.

FO – Final order, made pursuant to Part 10 of the Act

IO – Interim order, made pursuant to Part 6 of the Act

PO – Provisional order, made pursuant to Part 7 of the Act

PP – Protected person



APPENDIX 2

Recorded Sentences for Breaches of AVOs

In the period March 2008 to March 2011:

- Of 9,044 recorded sentences for breach of an ADVO:
 - 2,451 offenders (27 percent) received a sentence of imprisonment, of which 1,510 (17 percent) were sentenced to full-time imprisonment and 874 (10 percent) received a suspended sentence either with or without supervision. 51 percent of sentences of full-time imprisonment were for a period of 6 months or less, and 89 percent were for 12 months or less.
 - 3,166 offenders (35 percent) were placed on a good behaviour bond pursuant to s 9 of the *Crimes (Sentencing Procedure) Act* 1999, either with or without supervision (14 percent and 21 percent respectively). Bonds without supervision ranged in duration from between 1 and 3 months to two instances of 5 years, with 73 percent being for a period of 12 months or less and 99 percent being for a period of 24 months or less. Bonds with supervision ranged in duration from between 3 and 6 months to four instances of 5 years, with 54 percent being for a period of 12 months or less and 96 percent being for a period of 24 months or less.
 - 1,618 offenders (18 percent) received a fine. Fines ranged in amount from \$50 to \$3,000, with 83 percent of fines being for \$500 or less.
 - 1,405 offenders (16 percent) were dealt with pursuant to s 10 or 10A of the *Crimes (Sentencing Procedure) Act* 1999. In 383 instances (4 percent), charges were dismissed pursuant to s 10(1)(a). In a further 653 cases (7 percent), charges were dismissed pursuant to s 10(1)(b), that is, subject to a good behaviour bond. In the remaining 369 cases (4 percent), a conviction was recorded but no further penalty imposed pursuant to s 10A.
- Of 814 recorded sentences for breach of an APVO:
 - 112 (14 percent) offenders received a sentence of imprisonment, of which 69 (8 percent) were sentenced to full-time imprisonment and 36 (4 percent) received a suspended sentence, either with or without supervision. A sizeable minority of 29 percent of sentences of full-time imprisonment were for a period of 1 month or less. 65 percent of sentences were for 6 months or less, and 94 percent of sentences were for 12 months or less.
 - 278 offenders (34 percent) were placed on a section 9 good behaviour bond, either with or without conditions (9 percent and 26 percent respectively). Bonds without supervision ranged in duration from between 3 and 6 months up to 36 months, with 73 percent being for a period of 12 months or less and 96 percent being for a period of 24 months or less. Bonds with supervision ranged in duration from between 6 and 9 months up to two instances of 36 months. 70 percent were for a period of 18 months or less and 96 percent were for a period of 24 months or less.

- 225 offenders (28 percent) received a fine. Fines ranged in amount from \$50 to \$1,000, with 85 percent being for \$500 or less.
- 172 offenders (21 percent) were dealt with pursuant to s 10 or 10A of the *Crimes (Sentencing Procedure) Act* 1999. In 41 instances (5 percent), charges were dismissed pursuant to section 10(1)(a). In 96 cases (12 percent), charges were dismissed subject to a good behaviour bond pursuant to section 10(1)(b). In 35 cases (4 percent), a conviction was recorded but no further penalty was imposed pursuant to section 10A.
- A further 148 cases involving sentencing for a breach of an AVO were recorded which did not specify whether the breach related to an ADVO or APVO.
- Penalties imposed may be compared as follows:

