NEW SOUTH WALES

THE CHIEF MAGISTRATE OF THE LOCAL COURT

21 December 2015

The Hon James Wood AO QC
Chairperson
New South Wales Sentencing Council
GPO Box 31
Sydney NSW 2001

Dear Chairperson

Submission - review of Intensive Correction Orders

I am writing on behalf of the Local Court of NSW in response to the call for submissions to the above review, which seeks to address whether any of the statutory provisions governing Intensive Correction Orders (ICOs) should be amended.

At the broader level, I remain of the view expressed to the NSW Law Reform Commission's recent *Sentencing* reference that a single alternative custodial option in which the features of home detention and ICOs are merged is preferable. The Court would welcome the introduction of the new Community Detention Order recommended by the LRC in its report. In large part, this is due to operational issues that have weakened the Court's confidence in ICOs as an effective sentencing option.

For instance, restrictive aspects such as curfews, electronic monitoring and/or unannounced home visits that were initially highlighted as being core components seem to be infrequently utilised in practice. In the first few years following the introduction of ICOs, a range of practical limitations restricted the availability of orders, including difficulties and inconsistencies in the suitability assessments being conducted, and limited work or accommodation options for offenders. Though the frequency with which such issues are encountered appears to have reduced, magistrates continue to raise concerns. One ongoing issue is the reported regularity with which offenders with ongoing unresolved mental health issues or drug dependencies are assessed as being unsuitable for an ICO.

However, assuming for the present that both ICOs and home detention are to be retained as discrete sentencing options, I note the Council's current review is concerned with the statutory scheme governing ICOs rather than operational aspects. Accordingly, my observations are confined to the following legislative issues.

Inconsistencies with features of and procedures for ordering home detention

Inconsistencies in the statutory provisions governing the features and processes involved in making an ICO or home detention order have been well ventilated in recent years but have yet to be resolved. In its Report 139 *Sentencing*, the LRC made a

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number of recommendations concerned with better aligning the processes required by the *Crimes (Sentencing Procedure) Act 1999* for making an order for a sentence to be served by way of intensive correction or home detention, should those two options be retained. Relevantly, they include rationalisation of:

- The categories of offences for which an offender is excluded from eligibility for each alternative custodial option: There appears to be no clear basis for the current lists of offences, nor the differences between them;[1] for example, assault occasioning actual bodily harm is an excluded offence for the purpose of eligibility for home detention, but not for an ICO. The LRC observed in its report that the list of ineligible offences for ICOs appears to have simply been carried over from the former provisions relating to periodic detention, and recommended a shortened common list of excluded offences.[2]

- The maximum length available for orders: A home detention order has a maximum length of 18 months (s 6(1)) whereas an ICO may be made for up to two years (s 7(1)), despite the former being placed higher in the hierarchy of custodial options. The LRC recommended both orders have a maximum length when made in the Local Court of 2 years for a single offence, or 3 years for multiple orders; and further, that in both instances the Court should fix a non-parole period (which is not presently required in the case of an ICO).[3]

- The time of fixing sentence: When referring an offender for an ICO suitability assessment, the Court does not first impose a sentence of imprisonment but is to be satisfied that no other sentence is appropriate and the sentence is likely to be 2 years or less (s 69). In the case of home detention, the sentence is fixed prior to the referral for a suitability assessment (s 80). The approach in the case of ICOs is difficult to reconcile with the process described in *R v Zamagias* [2002] NSWCCA 17 of first determining a sentence of imprisonment is required, then fixing the term, and lastly determining the manner in which it will be served. This is highlighted by the requirement in s 67(5) that the court is to give reasons if departing from a favourable assessment report and not imposing an ICO; the provision supposes that, upon referring an offender for assessment, the ordinary course in the event of a favourable report will be for the court to continue on the path of imposing an ICO, notwithstanding that the term of the sentence is yet to be fixed. The LRC recommended that a single suitability assessment for both home detention and an ICO be undertaken after the term of the sentence has been fixed.[4]

I agree with the LRC's recommendations for addressing the above issues.

Extension of the term of an ICO

I raised the following issue in the context of the Council's 2012 review, which I will reiterate briefly as it remains unresolved.

Section 86 of the *Crimes (Administration of Sentences) Act* enables the sentencing court to extend an ICO upon the application of the Commissioner of Corrective Services. This may occur in instances where the Commissioner has granted permission for an offender not to comply with a work or reporting requirement of an ICO and directed the offender to complete

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[1] See s 76 (offences for which home detention is not available) and Part 5, Div 2 (offences in respect of which an ICO is not available)
[2] NSW Law Reform Commission, Report 139 *Sentencing* (July 2013), Rec 9.2 at 207
[3] Above note 2, Rec 9.3 at 209; Rec 9.4 at 212
[4] Above note 2, Rec 9.5 at 214

other work, activities or programs instead. Subsection (6) provides that a single extension of up to 6 months' duration can be made.

Applications for extensions have been relatively infrequent, influenced perhaps by greater operational flexibility in the activities (such as education and training programs) that may be undertaken as 'work' in fulfillment of the mandatory 32 work hours per month. However, the legislation leaves open the possibility of situations in which, if an extension to an ICO is sought, the total length of the sentence served would exceed the Local Court's jurisdictional limit of two years for a single offence.

When raised with the Department of Justice and Attorney General (as it was then) following the introduction of ICOs, the Court was advised that it must have been the intention of the Parliament to override existing legislative provisions in respect of the Court's jurisdictional limits. It is unclear whether that is the case; indeed, section 86(7) provides that if an ICO is extended, the term of the sentence to which the order relates is extended by the same period, leaving the provision vulnerable to argument that an extension should not be granted where to do so would be inconsistent with the clear legislative expression elsewhere of the Court's sentencing limits.

It would be desirable for section 86 to be amended to expressly address the interaction between the power to extend an ICO and thus the term of a sentence by up to six months, with the Local Court's jurisdictional sentencing limits. Alternatively, other options may be to:

- Transfer the power to extend an ICO to the State Parole Authority, given its function of determining applications for revocation of ICOs and home detention orders.
- Remove the power to extend an ICO altogether, noting that there is no power for a sentencing court to extend a home detention order, which may similarly involve a work component.[5]
- Amend the nature of the extension process. For instance, the court was not involved in the extension process that previously existed for sentences served by way of periodic detention; rather, the sentence was automatically extended by the period for which the offender failed to report or was late in reporting, subject to the granting of an exemption by the Commissioner.[6]

Assuming it is thought desirable to retain an extension process in some capacity, comments in the Second Reading speech on the *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Bill 2010* indicate a preference for the sentencing court (or at least, a body other than the Commissioner) to be the decision maker. The then Attorney General indicated that following consultation, the power was to be conferred on the sentencing court rather than the Commissioner, as had been initially proposed; and further, that such a power was intended to strengthen the role of the sentencing court. [7]

Accumulation of multiple orders

I include the following issue for the Council's information, noting that my office has taken steps to bring it to the attention of the Strategy & Policy branch of the Department of Justice for resolution at the next available opportunity.

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[5] When not otherwise employed, a home detainee must undertake community service work, of not more than 20 hours a week, as directed by a supervisor: cl 190(s), Crimes (Administration of Sentences) Regulation 2014

[6] See ss 89, 90, *Crimes (Administration of Sentences) Act 1999* as at 30 September 2010

[7] The Hon John Hatzistergos, Legislative Council, 22 June 2010

Section 71 of the *Crimes (Sentencing Procedure) Act 1999*, dealing with the commencement date for a sentence to be served by ICO, was recently amended by the *Courts and Other Justice Portfolio Legislation Amendment Act 2015*. The existing section had accommodated the making of multiple wholly or partly consecutive ICOs. Subsection (2) provided that restrictions on the commencement date of an ICO, namely to the date it is imposed or no later than 21 days thereafter, did not apply in such instances. However, the amending legislation removed the section in its entirety and replaced it with a provision that states: "An intensive correction order commences on the date on which it is made."

Comments on the amendment in the Attorney General's Second Reading speech referred to Community Corrections no longer requiring a period of up to 21 days to establish the operational requirements for an order, as well as instances where an offender may reoffend or lose motivation to comply with the requirements of an ICO, but did not explain the basis for removing subsection (2).[8]

As a result, it is unclear whether the courts presently have the power to impose cumulative ICOs (subject to the limitation upon total length in s 68). Section 47, which encompasses ICOs by virtue of s 5(5), arguably still permits such a course. It provides:

> **47 Commencement of sentence**
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> (1) A sentence of imprisonment commences:
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> (a) subject to section 71 ***and*** to any direction under subsection (2), on the day on which the sentence is imposed...
>
> ...
>
> (2) A court may direct that a sentence of imprisonment:
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> ...
>
> (b) commences on a day occurring after the day on which the sentence is imposed, but only if the sentence is to be served consecutively (or partly concurrently and partly consecutively) with some other sentence of imprisonment.

However, that provision lacks clarity given s 71 now only provides that an ICO commences on the date it is made. Obviously, a sentence cannot be subject to a requirement that it both commence on the day it is imposed *"and"* a later date.

Strategy & Policy has indicated the omission of s 71(2) was inadvertent. An amendment to make clear that the courts retain the power to impose multiple cumulative ICOs is anticipated in a miscellaneous courts bill in early 2016.

Thank you for the opportunity to provide a submission. Should the Council wish to discuss these issues with me further, please do not hesitate to contact my office.

Yours sincerely,

Judge Graeme Henson
Chief Magistrate

[8] Ms Gabrielle Upton, Legislative Assembly, 20 October 2015