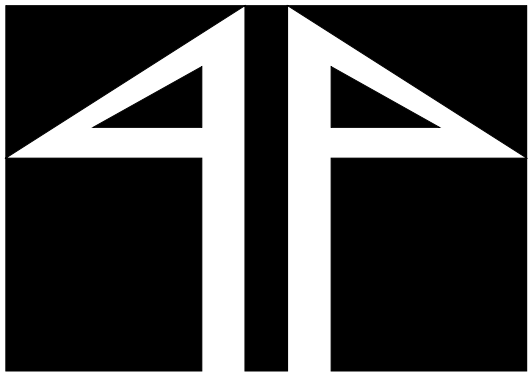
PROBATION AND PAROLE OFFICERS' ASSOCIATION OF NEW SOUTH WALES



SUBMISSION TO THE NEW SOUTH WALES LAW REFORM COMMISSION

STATUTORY REVIEW OF INTENSIVE CORRECTIONS ORDERS

December 2015

1. Overview

1.1 Purpose of the order

The Intensive Correction Order (ICO) was introduced both as a means of replacing periodic detention and providing intensive community-based rehabilitation for recidivist offenders.

In practice, the Association does not consider that this has been the case. The majority of offenders who receive ICOs are at a lower risk of re-offending and do not have rehabilitative needs that require intensive intervention.

In line with the best practice principles contained in the Risk-Needs-Responsivity model, providing intervention to these offenders is of limited value and may even be counterproductive. Although high risk/needs offenders are also frequently referred for assessment by the courts, they are often unable to comply with the demands of the mandatory 32 hours per month community service work component of the order. Consequently, many of these offenders are assessed as unsuitable.

1.2 Net-widening

In the view of the Association, given their limited histories and less serious offences, many ICO offenders would have been unlikely to have gone into custody prior to the introduction of ICOs. This is supported by a 2013 BOCSAR review which found that around 40% of offenders assessed as unsuitable for ICOs subsequently received suspended sentences. Although technically a suspended sentence is a sentence of imprisonment, the practical effect of such an order is a good behaviour bond.

As noted above, offenders who are assessed as unsuitable for ICOs are predominately more prolific high risk offenders, who would be more likely to receive a custodial sentence compared to the lower risk and more stable offenders who are found suitable. The Association is of the view that this figure is, therefore, a significant underestimate of the proportion of offenders who would otherwise not have received full-time custody, were ICOs not available. Additionally, a decline in the number of offenders who have been receiving Community Service Orders corresponds to the growth in ICOs. This suggests that, at least in part, the ICO has caused net-widening to replace lesser penalties. The profile of offenders receiving Community Service Orders is very similar to those receiving ICOs.

1.3 Lack of flexibility

The main reason for the problems experienced by ICOs is the lack of flexibility, particularly with regard to the work component. Structuring work conditions at 32 hours per month, as opposed to a total of hours for the overall sentence (as with Community Service Orders), and making community work a mandatory condition are particularly problematic. These heavily influence the type of offender who is found suitable for the order, as well as making the order more difficult to administer for Community Corrections staff. Whilst technically there are a number of ways in the legislation to circumvent the need to work, for example, exemption from work, these generally require Commissioner approval and it would appear contrary to the intent of the legislation and *Truth in Sentencing* principles to exercise that authority routinely.

2. Overall stance on Intensive Correction Orders (ICOs).

The Association supports the abolition of ICOs, in favour of the new Community Detention Order / Community Corrections Order model proposed by the Law Reform Commission's 2013 report on sentencing. The key advantage of the new order is that it simplifies the sentencing structure and provides for greater flexibility and transparency.

From an offender management perspective, the intervention needs of an offender are independent to the type of order. An offender who has a drug problem will require the same treatment whether on a Section 9 bond, Section 12, ICO, or home detention. Indeed, in practice, offenders on these orders may often be referred to the same programs. The new structure makes this clearer and allows for the conditions to be tailored to fit the needs of the offender, rather than trying to fit the offender to the order.

Should ICOs be retained, or until such time as the new orders are able to be introduced, the Association considers that several changes are required to ICO administration.

3. If ICOs are to continue then the following aspects of the order need to be amended.

3.1 Flexibility regarding supervision

As many ICO offenders are low risk, ongoing intensive supervision is of little benefit. In practice, whilst low levels of supervision are given to these offenders, they pose an ongoing burden to caseloads. Consequently, low risk ICO offenders compete for resources with other higher risk and more serious offenders.

For other orders, such as good behaviour bonds, the ability to terminate or suspend supervision, where it is no longer considered necessary, provides a valuable mechanism for managing workload and adhering to Risk-Needs-Responsivity principles. The Association is of the view that supervision conditions should be clear that CSNSW has the ability to cease the supervision component of the order when deemed necessary. This is consistent with the Law Reform Commission recommendations on supervision conditions for Community Corrections / Community Detention Orders.

3.2 Removal or suspension of mandatory work

Removing the community service work as a mandatory condition would open the order up to a larger number of higher risk/ needs offenders, who are currently assessed as unsuitable.

In principle, lower risk offenders would generally be subject to work conditions whilst management of higher risk offenders would omit work and instead be focused on intervention to address offending behaviour. Imposition of the work condition should only be possible following assessment of suitability by a Community Corrections Officer. If assessed as unsuitable for work, this would still allow an ICO to be imposed on a high risk offender, but without any requirement for the offender to undertake community service work.

It also makes practical sense to be able to suspend work while a person is undertaking intensive treatment, such as in-patient detoxification, residential rehabilitation, undertaking hospitalisation, recovering from injuries, or some other form of intensive treatment.

3.3 Provide alternative activities to satisfy work

If the work component were to remain a mandatory part of the ICO, the Association is of the opinion that an alternative mechanism for satisfying this condition should be available.

Offenders not eligible for the work component could instead complete a weekly intervention for the duration of their order or until such a time as they are able to work. This intervention could include day programs, groups or educational/work-ready programs in order to satisfy the work component of the order.

3.4 Flexibility regarding work hours

Allowing hours to be undertaken in a manner other than 32 hours per month would make administering the order more flexible and efficient. Currently, it is not possible for an offender to work extra hours to complete the order faster (as it is with CSO) or for hours to be held over if the offender is unable to work for a short period (again, as with CSO). This is especially significant for regional areas which have limited work availability and also for offenders with consistently high work commitments and needing to complete community service work in blocks of a week or so.

The Association is of the view that the total hours should be calculated for the order, in a manner similar to CSO, and the offender then able to work them as specified in a work agreement.

If this approach is taken, the provisions should reflect a maximum (ie rather than a minimum) rate of no more than 28 hours per month, with the court able to order a lesser amount if appropriate. This reflects an average 7 hour work day per week. For example, an offender sentenced to a 6 month order could have at most 168 hours imposed (ie 6 times 28).

A maximum is preferable to a minimum, since the only work available may be at a volunteer agency that can only provide, for example, 6 hours work per week. It is considered preferable to have the ability to impose a lesser amount of hours than have the offender deemed unsuitable for an ICO due to lack of available work. The assessing Community Corrections Officer would be able to advise of any limits on work availability at time of sentence. For example, if the offender were assessed as suitable to work 6 hours per week then the maximum work a court could impose for a 6 month order would be 144 hours (ie 6 times 24 hours per month).

Note that the court would have the option to sentence an offender to a lesser number of hours at its discretion, provided it did not exceed the maximum rate.

3.5 Drug and alcohol use

Requiring strict abstinence from drugs and alcohol is an unrealistic goal for offenders who have substance dependency issues. Relapse is commonplace, but should provide an opportunity to intervene and assist the offender to learn from their mistakes, rather than being a breach of an order. Reframing drug and alcohol conditions as requiring the offender to follow all reasonable directions in relation to engaging in intervention to address their substance abuse is considered preferable to a strict compliance approach. This is consistent with the 2015 recommendations of the Law Reform Commission with respect to parole conditions.

3.6 Conditions generally

The approach described in the Law Reform Commission report on parole is supported by the Association for application to ICOs. That is, framing supervision conditions within the context of following reasonable directions with regard to accommodation, programs, and drug use. This is considered more reflective of operational reality and gives Community Corrections Officers the flexibility needed to work with offenders to change behaviour.

3.7 Revocation and alteration of the order

Under the current ICO legislation, there is no capacity to revoke or alter the order in circumstances where the offender is unable to comply through no fault of their own (for example, due to injury). Under the CSO legislation, the sentencing court is able to revoke and resentence the offender in such cases. The Association considers that having such a mechanism available for the work component and/or the whole order would be beneficial. Currently, the only way to resolve these cases is to either revoke the order and return the offender to custody or to exempt the offender from work.

4. Sentencing process

4.1 Process for sentencing to imprisonment

The Association is of the view that the current process for sentencing an offender to an ICO lacks any integrity with regard to the purpose of the ICO as a diversionary order. Although the court has to form an intent to imprison the offender and to reject the available community-based penalty options before imposing an ICO, the Association believes that, in practice, the ICO results in more net-widening than diversion. This is reflected in the issues noted above, including the volume of offenders receiving suspended sentences, a corresponding drop in Community Service Orders, as well as the low risk and often less serious offences for which ICOs are imposed.

The option of sentencing the offender to custody prior to requesting assessment (as with home detention) was recommended by the Law Reform Commission. However, the Association notes that such a proposal has both strengths and weaknesses. For instance, the Association does not believe that this will necessarily have the desired effect of making the ICO a more meaningful diversionary order. While home detention is a form of custody, ICOs are clearly not, yet the breach of either order invokes the same consequences – custody, review, confirmation or re-instatement.

Additionally, the current home detention legislation still permits a suspended sentence to be imposed and, in some cases, this occurs even where the offender is assessed as suitable. However, the Association concurs that this is an important and necessary provision to review its sentencing intention in the light of the assessment and other submissions. Particularly, to retain the power to suspend the sentence of imprisonment, should the offender be assessed as unsuitable for home detention (and ICO) through no fault of his/her own and/or where it is in the interests of justice to do so. Thus it makes considerable sense to consider suspended sentences, ICOs and home detention within a class of alternatives to imprisonment.

The Association believes that programs such as suspended sentences, home detention and ICOs should be meaningful alternatives to custody but have largely become expansions of community

orders. For example, BOCSAR papers in 2014 and 2010 both indicate that suspended sentences have done more to increase imprisonment and net-widen than to divert offenders from custody. The Association is of the view that the ICO has failed in a similar manner.

The Association does not consider there to be a simple solution to this issue, and is only noting it for consideration.

4.2 Reduced exclusion of particular offences

The Association opposes any blanket exclusions by offence type. It proposes that the nature of the offence for which the offender is being sentenced, and any prior convictions, should be taken into account as part of the suitability assessment and by the court at sentence.

4.3 Delegations and responsibilities

Many of the functions of the ICO are specified as the responsibility of the Commissioner within the legislation. This does not occur in practice, and provides a misleading perception of the seriousness of the order, as compared to other similar orders such as parole.

Although CSNSW Commissioner delegates most of these functions, other community-based orders and parole do not have the same ongoing references to the Commissioner. For example, the legislated conditions of parole require the offender to seek permission from the local manager to travel interstate. For ICOs the relevant authority is the Commissioner. In other cases the Commissioner's authority is assigned to trivial matters. For example, under section 85(6) of the CAS act, the Commissioner is required to determine the phone number an offender must call if they are unable to work. This is a matter routinely dealt with by administrative staff and will vary from office to office.

The Association is of the view that the legislation should be amended to remove references to the Commissioner, except where appropriate to the nature of the function. The legislation should reflect the fact that most decisions regarding offender management are made at the local office level.