THE LAW SOCIETY OF NEW SOUTH WALES
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Criminal Law Committee

Submission to the New South Wales Sentencing Council

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Review of Intensive Correction Orders

New South Wales Sentencing Council
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The NSW Young Lawyers Criminal Law Committee (Committee) makes the following submission in response to the NSW Sentencing Council's call for preliminary submissions on its review of intensive correction orders pursuant to the *Crimes (Sentencing and Procedure) Act 1999* (NSW).

NSW Young Lawyers

NSW Young Lawyers is a division of the Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Committee is responsible for the development and support of members of NSW Young Lawyers who practice in, or are interested in, criminal law. The Committee takes a keen interest in providing comment and feedback on criminal law and the structures that support it, and consider the provision of submissions to be an important contribution to the community. The Committee is drawn from prosecution, defence (both private and public), police, the courts and other areas of practice that intersect with criminal law.

The Committee is grateful for the opportunity to make this submission to the NSW Sentencing Council.

Introduction

The Committee considers that Intensive Correction Orders (ICOs) continue to be a useful, but under-utilised, sentencing option that balances the protective, rehabilitative and punitive purposes of sentencing. Accordingly we propose a number of reforms to improve the efficacy and utility of ICOs.

The Committee's submission to the review can be broadly broken down into four areas. First, the Committee supports further consideration of the 2013 proposal by the NSW Law Reform Commission (NSWLRC) concerning the introduction of a Community Detention Order (CDO).

If a CDO is ultimately not introduced, the Committee suggests that changes to the suitability requirements for ICOs be considered in order to make more offenders eligible for the orders. We further propose changes to the conditions attached to ICOs so as to

increase the flexibility of the orders and improve rehabilitative outcomes. Finally we propose consideration be made to amending the breach and revocation process to improve ICO completion rates.

Community Detention Orders

As noted above, the Committee recommends reconsideration of the proposal by the NSWLRC for the introduction of a new CDO. This sentencing option streamlines and simplifies the current process and would give judges an appropriate degree of flexibility when sentencing offenders. Furthermore, the Victorian experience suggests that a consolidation of this kind increases the propensity of Courts to make these kinds of orders,[1] decreasing the number of offenders in full time custody. Such an increase would be in line with the general intent of ICOs of proportionately punishing offenders while reducing recidivism through intensive supervision and tailored rehabilitative mechanisms. It would also represent significant cost savings.

As an alternative to the NSWLRC's proposal, the Committee suggests that a CDO regime be adopted that combines ICOs and home detention, but that the suspended sentence should remain as a sentencing option.[2] A single CDO encompassing ICOs and home detention would be an improvement in sentencing options by combining two sentences that in practice frequently have substantial overlap. It would also allow the courts to retain a sentencing hierarchy with the CDO being considered a more serious penalty than the suspended sentence.

While the Committee supports the introduction of a streamlined approach, a number of members have expressed concern this may have the effect of narrowing sentencing options. Accordingly, the Committee submits that if the CDO is pursued, appropriate mechanisms should be introduced to ensure that where an offender is not suitable for certain conditions, such as work and intervention requirements, they would still be suitable for a CDO that does not have those conditions attached. The CDO regime should prioritise sentencing options other than full time custody rather than operate so as to exclude offenders from serving custodial sentences in the community.

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[1] ICOs represented just 2% of sentences imposed by the Magistrates' Court in Victoria in 2010-11 (1604 offenders), CCOs represented 9.7% of sentences in 2014-5 (9192 offenders) see https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-statistics/sentencing-outcomes-magistrates-court.

[2] *Crimes (Sentencing Procedure) Act 1999* (NSW), s 12

Finally, even if the CDO option is ultimately not pursued, the Committee sees great merit in exploring an inter-agency model, led by Corrective Services NSW (CSNSW), for the administration of community detention. Such a model would allow for cooperative provision of appropriate programs for offenders serving their sentence in the community.

Excluded offences

With regard to offences which render an offender ineligible for an ICO, the Committee reiterates the position it advanced in its submissions to the NSWLRC's sentencing review on excluded offences in which we observed:

> [T]he spectrum of offending behaviour that can satisfy the definition of [offences excluded under the *Crimes (Sentencing Procedure) Act 1999* (NSW) (Sentencing Act) s 66] is vast, and there is scope for its amendment. There might be cases that fall at the very bottom of the range for an offence under Division 10 of Part 3 of the *Crimes Act 1900* for which an ICO is an appropriate sentence.

In addition to revising the Sentencing Act, s 66(2) to preclude only the most serious offences under Division 10 Part 3 from being eligible for an ICO, the Committee agrees with the NSWLRC's view that a limited number of very serious offences, such as murder, should be specifically excluded. In particular the Committee strongly endorses the explicit exclusion of the availability of an ICO for domestic violence offences committed against a likely co-resident of the offender.

ICO Suitability Assessments

The suitability assessment process is central to the imposition of an ICO. The current suitability assessment process tends to consider offenders with substance dependency issues, cognitive impairment, mental illness or physical disability unsuitable for an ICO.[3] In particular, these factors tend to disproportionately affect Aboriginal and Torres Strait Islander offenders.[4] The Committee submits that the review consider amendments to increase the number of offenders found suitable for the orders, particularly to ensure that suitability assessments do not screen out the offenders who would most benefit from an

[3] The Shopfront Youth Legal Centre, *Submission SE28,* 3; NSW Bar Association, *Submission SE27*; Public Interest Advocacy Centre, *Submission SE29*, 8.
[4] Aboriginal Community Justice Group, Mt Druitt and Aboriginal Legal Service, *Consultation SEC19*.

ICO. We propose that the review inquire into the following changes to improve the assessment process and increase the number of offenders suitable for ICOs.

Single suitability assessment for ICOs and Home Detention

If the CDO proposal is not pursued, the current process for assessing suitability for a non-full time custodial sentence may be made more efficient by combining the suitability assessment process for home detention and ICOs.

Under the current arrangements, before referring an offender for an ICO suitability assessment, the court must be satisfied that no other penalty than imprisonment is appropriate and that a period of imprisonment of no more than two years is *likely*.[5] However, a period of imprisonment is not set prior to the assessment. This can be contrasted with assessments for home detention, which occur *after* the imposition of a specific period of imprisonment.[6] The separate assessments exist because of the statutory requirements of the respective sentencing options. In this respect, the NSWLRC notes that "[t]he rationale for this difference in procedure is not clear."[7]

Combining assessments has the benefit of allowing the court to order an ICO where the offender is unsuitable for home detention. At present, an offender may be found to be unsuitable for an ICO but still be suitable for home detention (or a suspended sentence). However, an offender who is found to be unsuitable for home detention cannot then be assessed for an ICO. Thus where the court does not refer the offender for an ICO assessment, they may be precluded from an appropriate sentencing option. By combining the suitability assessments, the Court retains greater flexibly in considering sentencing options.

Streamlining assessments could be achieved by either bringing the home detention assessment forward or by moving ICO assessments back. However, the Committee observes that the practice of ordering an assessment report *prior* to determining the period of imprisonment is inconsistent with the existing practice for other custodial sentences. The Committee's view is that the current ICO legislative framework should more clearly follow the statement in *R v Zamagias* [2002] NSWCCA 17 at [26], which provides that the length of a period of imprisonment must be fixed without regard to the fashion in which it is to be served.

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[5] *Sentencing Act,* s 69
[6] *Sentencing Act,* s 80
[7] NSWLRC, *Sentencing*, Report No 139 (2013) at [9.65]

It is important to note that the Committee have some concerns in this regard. Home detention orders and ICOs are inherently different penalties and should be considered and ordered accordingly. Adopting a single suitability assessment risks reducing sentencing options, as a rejection from one order could in practice result in a rejection from both, without independent consideration of the appropriateness for the two distinctive sentence format options.

In light of these concerns, any streamlining of the suitability assessment must make it abundantly clear that the assessor and the Court consider *both* sentencing options. Moreover, any changes in this respect must also account for the different lengths of sentence which are excluded from the respective sentencing options. That is, at present for an offender to be eligible for home detention, they must have been sentenced to 18 months or less, whereas the sentence must be less than two years to be eligible to be served by way of intensive correction in the community.

Review of Suitability Assessments

An underlying concern with the current suitability assessment framework is the availability of review. While the CSNSW officer responsible for a suitability assessment may be cross-examined on their report in a sentencing hearing, and such examination may impugn the report such that the court may order a further assessment, this process does not provide an adequate mechanism for appeal or review of the officer's opinion.

While CSNSW officers are in a position of practical advantage in assessing many of the prescribed matters, the nature of the assessment as a pre-condition to the exercise of judicial power in ordering, or not ordering, an ICO, calls for the availability of some form of appeal or review of the assessment.

Accordingly, the Committee proposes that the review inquire into an appropriate review mechanism for the suitability assessment process.

In this respect, the Committee submits reasons for (non)suitability must continue to be clearly provided in the CSNSW report. First, such reasons give any appeal court a record of the reasons informing the ultimate sentencing decision under review. Second, they may be relevant to the sentencing judge's assessment of the appropriateness of other alternatives to full time custody such as home detention. Third, reasons need to give an offender an understanding of the substantive bases of the decision whether or not to impose an ICO.

Community service work component of ICOs

The community service work requirement is evidently the single largest obstacle to suitability for ICOs. In light of this, the Committee recommends that this component be made more flexible in order to increase the utility and efficacy of ICOs.

The significant focus of the suitability assessment is the capacity to undertake community service. The current format offered by CSNSW means that offenders with certain disabilities and other factors unconnected with their offending are rendered unsuitable and excluded from serving their sentence by way of an ICO. It should be noted that while a more flexible community service requirement may ameliorate this, there will still be offenders who are unable to fulfil the conditions. In such cases, the suitability assessment process should direct the Court to consider other alternatives to full time custody such as home detention.

Delaying commencement of community service work requirement

At present the Court does *not* have the ability to suspend the commencement of the work requirement.[8] The Commissioner can, on application of the offender, grant permission for the offender to not comply with a work requirement for health reasons, compassionate grounds or any other reason the Commissioner thinks fit.[9]

The Committee recommends that the ICO regime be amended to expressly grant the Court, when making an order, or the Commissioner, on application of the offender, the power to temporarily stay the community service requirement to enable the offender to participate in detoxification programs. This would mean that offenders with these particular needs would not be unsuitable for ICOs solely on these grounds.

Detoxification programs are short term and when combined with extensive drug and alcohol counselling that can be a condition of an ICO, enhance the prospects of rehabilitation.[10] Providing for a temporary stay of the operation of the work component of an ICO would permit offenders to engage in meaningful activities towards rehabilitation, without breaching their ICO conditions.

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[8] *Sentencing Act,* s 71*, Crimes (Administration of Sentences) Act 1999,* s 81(2) and *Crimes (Administration of Sentences) Regulation 2014* (NSW) reg 186

[9] *Crimes (Administration of Sentences) Act 1999,* s 85

[10] Hall and Lucke, "Legally coerced treatment for drug using offenders: ethical and policy issues" (2010) *BOCSAR Contemporary Issues in Crime and Justice* 144, 3

Increased flexibility for the community service work requirement

The Committee endorses the NSWLRC's proposal of broadening the community service work condition to enable a wider group of offenders to participate while also maintaining the objectives of rehabilitation and punishment of an offender.[11]

For example, the mandatory community service condition could be varied to permit a variety of other approved activities such as vocational education and training or literacy and numeracy programs. If these options do not fulfil the total number of hours required by the order, the balance could be made up by community service work hours. This would have the benefit of giving an offender productive options while retaining the punitive effect of the order. Furthermore, in order to fully engage the offender, an onus could be put on them to present such options to their CSNSW officer for approval, and failing other such options being undertaken, the fall-back requirement of community service hours would need to be fulfilled.

Consideration should also be had to varying the nature of community service work to include more intensely supervised community service activities such as supervised individual or small group activities. This would allow for offenders with mental health issues, physical disabilities or cognitive impairments which inhibit their capacity to meet the requirements of existing community service activities, to safely complete community service hours without exposing themselves or the community to risk. While this may impose a resource burden on CSNSW, it is a positive measure which promotes equal access to community-based sentences. Furthermore, the increased resource burden would be offset by the associated savings of fewer offenders entering full time custody.[12]

It has also been recommended in submissions to the NSWLRC's sentencing report that the Court have the power to select the minimum amount of hours an offender is to complete each month.[13] The Committee submits that this proposal has merit, as it would afford the flexibility required to allow ICOs to be tailored to match the capacity of a wider group of offenders, who may be unable to fulfil the current minimum requirements, but who would be adequately punished and deterred (having regard to the nature and circumstances of the individual offenders) by a reduced requirement.

The Committee respectfully disagrees with the suggestion that has been made to the NSWLRC's review that this barrier could be reduced by making community service hours

[11] NSWLRC, *Sentencing*, Report No 139 (2013), [9.81]
[12] NSWLRC, *Sentencing*, Report No 139 (2013), [9.16]
[13] The Shopfront Youth Legal Centre, *Submission SE28*, 3.

an optional, as opposed to mandatory, condition.[14] It is essential that ICOs remain a genuine sentencing option for serious offences. The order must be seen to adequately punish an offender. The order requires significant community service hours as a punitive element to the sentence. Without this the rehabilitative and punitive functions of the sentence would be undermined.

Residential conditions

By their nature, the mandatory conditions that in effect require stable and supervised housing immediately exclude from ICO suitability offenders who are homeless, have unstable housing or are required to travel extensively for employment purposes.[15] Noting the requirement that CSNSW make all reasonable efforts to find housing, it recommended that the review inquire into mechanisms that reduce this barrier.

Breach and revocation of ICOs

In relation to breaches and revocations of ICOs, the Committee raises the following issues for review. In light of the dearth of information concerning breaches of ICOs, the Committee proposes that the review inquire into the adequacy of the notice given to offenders who are suspected to have breached the ICO, those offenders' rights to be heard, and the flexibility of the State Parole Authority (SPA) to deal with breaches.

Breach for failure to fulfil the work requirement of an ICO

As noted above, an offender is to undertake a minimum of 32 hours of community service work per month, as directed by a supervisor from time to time. In addition to being problematic at the assessment stage, this requirement is also relevant to breaches and revocations of ICOs. The most common reason that an ICO is revoked is a failure to comply with the community service requirement.[16]

The punitive effect of the work requirement is important and in the Committee's view should be retained. However, the benefits to the offender and the community that arise from an ICO are not contingent on the offender completing community service. There is evidence to suggest that intensive supervision coupled with rehabilitation is what has an

[14] NSWLRC, *Sentencing*, Report No 139 (2013), [9.76]
[15] *Crimes (Administration of Sentences) Regulation 2014* (NSW) reg 186(c), (f) and (h)
[16] Cloran, "Intensive Correction Orders – three years on" (2013) 25(8) *JOB* 65

effect on recidivism and is therefore where the emphasis should lie.[17] If that is the case, it would seem counterproductive to have a significant number of ICOs revoked on the basis of non-compliance with the community service requirement.

By adopting measures that increase the flexibility of the work requirement, the problems relating to failure to fulfil work requirements may be avoided. The position can be further improved by adopting mechanisms that give the CSNSW greater flexibility in dealing with failure to fulfil work requirements. For example, the *Crimes (Administration of Sentences) Act 1999* (NSW) s 86 could be expanded so as to deal not only with situations where the Commissioner has granted permission to not comply with a work requirement but also where the work requirement has not been met.

Whether the Court should be able to set a non-parole period when sentencing an offender to an ICO

The ability for a Court to set a non-parole period when sentencing for an ICO was suggested by the NSWLRC in 2013, as part of a suggestion that the maximum length of an ICO be extended to three years.

The Committee is of the view that the Court should have the ability to set a non-parole period because of the role that the lack of a non-parole period plays in revoked ICOs. Upon revocation of an ICO, the offender is immediately imprisoned. Within a month the SPA will consider whether to reinstate the ICO, to instead impose a period of home detention, or to order that the offender serve the remainder of the sentence in prison.

If the offender is ordered to serve the remainder of their sentence in prison, there is no provision for setting a parole period. This has the effect that offenders who have been initially assessed as persons who would benefit from a period of supervision and rehabilitation in the community will be released from prison without undergoing a subsequent period on parole.

Further, by introducing a non-parole period to ICOs, the SPA could potentially be given greater flexibility for dealing with parole breaches after the expiry of the non-parole period. Where an offender subject to an ICO breaches a parole condition, the SPA could be given

[17] See the literature review discussed in Ringland and Weatherburn, *"The impact of intensive correction orders on re-offending"* (2013) NSW BOCSAR Crime and Justice Bulletin 176

the power to re-instate the full operation of the ICO, rather than commit the offender to full-time custody or home detention.

The Committee is therefore of the view that the ability of the sentencing court and/or the SPA to set a period of parole should be considered.

Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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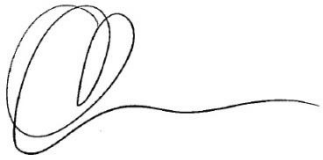

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