NSW GOVERNMENT Justice
Sentencing Council

# Intensive correction orders: Statutory review

Report
September 2016

**NSW Sentencing Council**

September 2016

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ISBN 978-1-922254-16-0

ISSN 1835-5234

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# Terms of reference

Section 73A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides:

> **73A Review of ICO provisions**
>
> (1) The Sentencing Council is to conduct a review of the provisions of this Part and Part 3 of the Crimes (Administration of Sentences) Act 1999 and of any regulations made for the purposes of those provisions in order to ascertain whether any of those provisions (or any other provisions of any other Act or regulations) should be amended.
>
> (2) The review is to be undertaken as soon as possible after the period of 5 years from the commencement of this section and a report on the outcome of the review is to be provided to the Minister and to the Minister administering Part 3 of the Crimes (Administration of Sentences) Act 1999 within 12 months after the end of that 5 years.
>
> (3) The Minister is to cause a copy of the report to be tabled in each House of Parliament as soon as practicable after the report is received by the Minister.

Section 73A was inserted into the *Crimes (Sentencing Procedure) Act 1999* (NSW) by the *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010* (NSW) and commenced on 1 October 2010.

# Contributors

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## Acknowledgements

We acknowledge with gratitude the assistance of:

- the NSW Bureau of Crime Statistics and Research
- Corrective Services NSW, and
- the NSW State Parole Authority.

# Executive summary

## Background

0.1 This report is a review of the intensive correction order (ICO) provisions contained in Part 5 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and Part 3 of the *Crimes (Administration of Sentences) Act 1999* (NSW). It was required by s 73A of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

0.2 Since the provisions commenced on 1 October 2010, the NSW Law Reform Commission (LRC) has carried out a review of sentencing law in NSW and made recommendations, in Report 139 (2013), to replace or amend the ICO provisions. The Government is considering these recommendations.

0.3 In the same period, the NSW Bureau of Crime Statistics and Research has also published three studies that relate to ICOs.

0.4 We called for preliminary submissions on this review in November 2015 and received 13 submissions.

## Use of ICOs

0.5 A court that has sentenced an offender to imprisonment for up to 2 years may order that the sentence be served under an ICO.

0.6 Since 2011, there has been moderate growth each year in the number of offenders sentenced to an ICO. In 2015:

- 1695 offenders were sentenced to ICOs, and
- 1.1% of all NSW offenders were sentenced to an ICO for their principal offence.

0.7 As a proportion of penalties imposed, ICOs are imposed most frequently in major cities and least frequently in very remote regions.

## Advantages of ICOs

0.8 ICOs were introduced at the same time that periodic detention was abolished and sought to address some of the shortcomings of periodic detention as a penalty, in particular the lack of availability of periodic detention in all regions of the State and the fact that detainees were not effectively case managed or rehabilitated.

0.9 The LRC identified that the ICO has important advantages in terms of reducing reoffending, reducing costs, and keeping offenders out of prison. Submissions to this review also generally supported ICOs as a community-based alternative to custodial sentences.

0.10 We agree with the LRC's support for the aims of ICOs.

## Problems with ICOs

0.11 The LRC found that ICOs were underused and not targeted to those offenders who might benefit most. In particular:

- there have been difficulties in making ICOs available across the State
- a large proportion of those who have received ICOs have been low risk offenders needing little in the way of intervention
- those for whom an intervention is appropriate have been excluded, and
- there was dissatisfaction about the unnecessary delay arising from the need for separate suitability assessments to be made for ICOs and home detention.

0.12 The LRC identified the mandatory community service work requirement as the "key barrier to ICO suitability" for offenders who have a cognitive impairment, mental illness, substance dependency, homelessness or unstable housing.

0.13 Submissions to this review generally agreed that ICOs were underused and not appropriately targeted.

0.14 We agree with the LRC's assessment of the problems with ICOs that need to be addressed, including their limited availability. This is borne out by the statistics and trends identified in Chapter 2.

## The Law Reform Commission's recommendations

0.15 The LRC's preferred option was for suspended sentences, home detention orders and ICOs to be replaced with a new community detention order (CDO). (para [3.38]-[3.41])

0.16 However, in the interim, in order to increase the number of offenders who could be sentenced to an ICO, the LRC recommended amendments to the existing ICO provisions that aimed to:

- reduce the number of offences that exclude an offender from an ICO (para [3.22]-[3.24])
- extend the maximum period of an ICO to 3 years (and permit setting a non-parole period for an ICO) (para [3.26]-[3.27])
- require the court to set the head sentence for the term of imprisonment first, before requesting a single suitability assessment for an ICO or home detention or both (para [3.29]-[3.30]), and
- enlarge the scope of the activities that can satisfy the community service work component of an ICO, including engaging in literacy and numeracy courses, and work-ready, educational or other programs and, where appropriate, deferring commencement of the work to complete a residential drug or alcohol treatment program. (para [3.32]-[3.35])

0.17 A number of submissions to this review expressly supported each of these recommendations. On the other hand, one submission expressly opposed altering

the community service work component. No other submissions expressly opposed any of the LRC's other recommendations.

## Our view

0.18 The Government is considering the LRC's recommendations. Any resulting implementation will inevitably involve some departure from the precise terms of the LRC's recommendations. We, therefore, see no need at this stage to put forward further recommendations to amend the existing provisions.

# 1. Background

**In brief**

Intensive correction orders (ICOs) were introduced as a sentencing option in 2010. This is a statutory review of the ICO provisions. The NSW Law Reform Commission recommended changes to the ICO provisions in 2013.



## Source of this review

1.1 Intensive correction orders (ICOs) were introduced as a sentencing option in October 2010 by the *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010* (NSW).

1.2 The provisions were inserted in Part 5 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and included a review clause:

> The Sentencing Council is to conduct a review of the provisions of this Part and Part 3 of the Crimes (Administration of Sentences) Act 1999 and of any regulations made for the purposes of those provisions in order to ascertain whether any of those provisions (or any other provisions of any other Act or regulations) should be amended.[1]

1.3 The review clause requires that we review Part 5 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and Part 3 of the *Crimes (Administration of Sentences) Act 1999* (NSW), but not the provisions relating to revocation and reinstatement under Part 7 of the *Crimes (Administration of Sentences) Act 1999* (NSW).

## Reviews since enactment

### NSW Law Reform Commission

1.4 The NSW Law Reform Commission (LRC) delivered a report on sentencing laws in NSW to the Attorney General in July 2013 in response to terms of reference received on 21 September 2011.[2] The report included a review of ICOs.

1. *Crimes (Sentencing Procedure) 1999* (NSW) s 73A(1) inserted by *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010* (NSW) sch 1[16].
2. NSW Law Reform Commission, *Sentencing*, Report 139 (2013).

1.5 The Sentencing Council participated in the review and assisted the LRC.

1.6 The Government is considering the LRC's recommendations, including those that would impact on ICOs.

### NSW Bureau of Crime Statistics and Research

1.7 Since 2010, the NSW Bureau of Crime Statistics and Research (BOCSAR) has published three studies that relate to ICOs:

- **The impact of intensive correction orders on re-offending - Crime and Justice Bulletin No 176.** This study examined the rate of re-offending by comparing offenders sentenced to an ICO relative to those who received periodic detention and suspended sentences with supervision. It found some evidence to suggest that ICOs are more effective than periodic detention and suspended sentences in terms of re-offending rates. However, the study did emphasise that future evaluations should include more detailed offender, treatment and program information to understand better the differences between comparison groups.[3]

- **Sentencing outcomes for those assessed for intensive correction order suitability - Bureau Brief No 86.** This study examined the sentencing outcomes for those assessed for ICO suitability, with a focus on understanding the penalties imposed on offenders deemed unsuitable. It found that, in line with ICOs being introduced as an alternative to full time imprisonment, 86% of offenders assessed for an ICO and who are not deemed suitable are sentenced to imprisonment or an alternative form of imprisonment.[4]

- **Intensive correction orders vs other penalties: offender profiles – Crime and Justice Bulletin No 163.** This study examined the profile of offenders sentenced to ICOs and compared these to offenders who had received other penalties. The study found that the profiles of offenders who received ICOs were very similar to the profiles of offenders who had previously received periodic detention. This suggests that between 1 October 2010 and 30 September 2011 ICOs were being used as a substitute sentence for periodic detention.[5]

## Our process

1.8 We called for preliminary submissions on the review in November 2015. The call for submissions drew attention to the terms of reference, the recommendations of the LRC and the BOCSAR studies.

1.9 We received 13 submissions, listed in Appendix A.

3. C Ringland and D Weatherburn, *The impact of intensive corrections orders on re-offending*, Crime and Justice Bulletin No 176 (NSW Bureau of Crime Statistics and Research, 2013).
4. C Ringland, *Sentencing outcomes for those assessed for intensive correction order suitability*, Bureau Brief No 86 (NSW Bureau of Crime Statistics and Research, 2013).
5. C Ringland, *Intensive correction orders vs other penalties: offender profiles*, Crime and Justice Bulletin No 163 (NSW Bureau of Crime Statistics and Research, 2012).

## This report

1.10 There are two parts to this report. The first part describes the provisions under review and the available data in relation to the implementation and operation of the provisions. The second part summarises the LRC's recommendations and the responses to those recommendations in the submissions we received.

1.11 We make no recommendations in light of the Government's ongoing consideration of the LRC's recommendations.

# 2. The existing provisions

**In brief**

A court that has sentenced an offender to imprisonment for up to 2 years may order that the sentence be served under an intensive correction order (ICO). Since 2011 there has been moderate growth each year in the number of offenders sentenced to an ICO. In 2015, 1695 offenders were sentenced to ICOs. In 2015, 1.1% of all NSW offenders were sentenced to an ICO for their principal offence. As a proportion of penalties imposed, ICOs are imposed most frequently in major cities and least frequently in very remote regions.



## Origins

2.1 The intensive correction order (ICO) was introduced as a sentencing option in October 2010 on the advice of the NSW Sentencing Council.[1] Periodic detention was abolished at the same time.[2] The ICO was not intended to replace periodic detention, but was designed to address some of its shortcomings, which included:

- periodic detention was not available throughout the State because of resource limitations, particularly in rural and regional areas
- the periodic detention facilities were underused, and

1. NSW Sentencing Council, *Review of Periodic Detention*, Report (2007).
2. *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010* (NSW).

- periodic detainees were not effectively case managed or rehabilitated.[3]

## Overview of the order

2.2 A court that has sentenced a person 18 years or older to imprisonment for up to 2 years may order that the sentence be served by way of intensive correction in the community.[4] The court must impose certain mandatory conditions on an ICO, including residential conditions, alcohol and drug testing, community service, unannounced home visits and curfews.[5] The court can also impose additional conditions.[6]

2.3 Currently, the court cannot set a non-parole period as part of an ICO.[7] This limitation was introduced on the basis that the purpose of an ICO was to ensure supervision and participation in a rehabilitative program or programs for the full term of the order, so that the "rehabilitative focus of the order is maintained from beginning to end".[8] If an ICO is breached, SPA may revoke the order and commit the offender to either full-time custody or home detention for the remainder of the term.[9] The offender must spend at least one month in custody before SPA can consider reinstating the ICO.[10]

2.4 Initially, it was unclear whether, as a matter of statutory interpretation, offenders who did not present with rehabilitation needs were eligible to serve a term of imprisonment by way of an ICO.[11] However, the Court of Criminal Appeal has since confirmed that the ICO is not restricted to any particular class of offender.[12]

## Exclusions

2.5 A court may not impose an ICO for a "prescribed sexual offence" – this includes offences against children under 16 years of age and offences that include sexual intercourse.[13] These exclusions were directly carried over from the exclusions that previously applied to periodic detention,[14] against our 2007 recommendation.[15]

2.6 There are no other statutory exclusions.

3. NSW, *Parliamentary Debates*, Legislative Assembly, 10 June 2010, 24232; NSW Sentencing Council, *Review of Periodic Detention*, Report (2007) x, Part 8.
4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7(1).
5. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 187.
6. *Crimes (Administration of Sentences) Act 1999* (NSW) s 81(3).
7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7(2).
8. NSW Sentencing Council, *Review of Periodic Detention*, Report (2007) 159; NSW, *Parliamentary Debates*, Legislative Council, 22 June 2010, 24426.
9. *Crimes (Administration of Sentences) Act 1999* (NSW) s 163, s 165A.
10. *Crimes (Administration of Sentences) Act 1999* (NSW) s 165.
11. *R v Boughen* [2012] NSWCCA 17; 215 A Crim R 476; *Whelan v R* [2012] NSWCCA 147.
12. *R v Pogson* [2012] NSWCCA 225.
13. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 66(1).
14. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 65B (as at 30 September 2010).
15. NSW Sentencing Council, *Review of Periodic Detention*, Report (2007) 157.

## Suitability for an ICO

2.7 A court cannot impose an ICO unless it is satisfied that:

- the offender is 18 years of age or older
- the offender is a suitable person to serve the sentence in that manner
- it is appropriate in all the circumstances for the sentence to be served by way of an ICO, and
- the offender has signed an undertaking to comply with the ICO's obligations.[16]

2.8 The court must have regard to an assessment report in deciding whether to impose an ICO.[17]

## Suitability assessment reports

### The court's role

2.9 Currently, a court can only consider an ICO if it decides that no sentence other than imprisonment is appropriate in the circumstances and it is contemplating a sentence of imprisonment of two years or less. The court must then refer the offender to the Commissioner for Corrective Services for an ICO suitability assessment, before actually imposing the term of imprisonment.[18] The referral for assessment precludes the court from seeking a home detention assessment until it has determined not to impose an ICO.[19]

2.10 Consequently, Corrective Services NSW must complete the suitability assessment without knowing the likely term of the ICO. If the offender is found suitable, the court then sets the term of imprisonment to be served by way of an ICO.

2.11 A court may only make an ICO if the suitability assessment states that the offender is suitable.[20]

2.12 The court can refuse to order an ICO notwithstanding a favourable assessment but must give reasons for doing so.[21]

2.13 If an offender is found unsuitable for home detention, he or she cannot then be assessed for an ICO, because the provision requires an ICO assessment to be carried out before a term of imprisonment is imposed.[22]

16. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(1).
17. Prepared under *Crimes (Sentencing Procedure) Act 1999* (NSW) s 70.
18. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 69, s 70.
19. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 80(1A).
20. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(4).
21. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(5), s 78(7).
22. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 69.

## Content of a report

2.14 A suitability assessment report covers factors including the offender's age, criminal history, accommodation, physical and mental health, drug and alcohol dependency, any risks associated with managing the offender in the community, such as the likelihood that the offender will commit a domestic violence offence,[23] and the availability of community service work and resources to supervise the offender.[24] The report can also suggest additional conditions that would be appropriate for the court to impose.[25]

## Outcome of assessments

2.15 Table 2.1 shows the outcome of assessments for ICO suitability. In 2015, the courts requested 2608 ICO assessments and of this number, 2541 offenders were assessed. Of those offenders assessed:

- 1672 (65.8%) were assessed as 'suitable'
- 831 (32.7%) were assessed as 'unsuitable', and
- 38 (1.5%) were included in the 'other' or 'unknown' category.[26]

2.16 The data in Table 2.1 indicate that the percentage of offenders assessed as 'suitable' for an ICO has steadily increased each year since October 2010. The greatest increase was from 2014–2015 when the percentage of offenders found suitable for an ICO increased by 5%.

### Table 2.1: Outcomes for offenders assessed for ICO suitability

| Assessment Outcome | 2010 - 2012 | | 2013 | | 2014 | | 2015 | |
|---|---|---|---|---|---|---|---|---|
| | Number | % | Number | % | Number | % | Number | % |
| Suitable | 1725 | 56.7% | 1190 | 58.4% | 1507 | 60.8% | 1672 | 65.8% |
| Unsuitable | 1284 | 42.2% | 799 | 39.2% | 942 | 38.0% | 831 | 32.7% |
| Other/ Unknown | 34 | 1.1% | 50 | 2.5% | 28 | 1.1% | 38 | 1.5% |
| Total | 3043 | 100% | 2039 | 100% | 2477 | 100% | 2541 | 100% |

*Source: Corrective Services NSW, 2016.*[27]

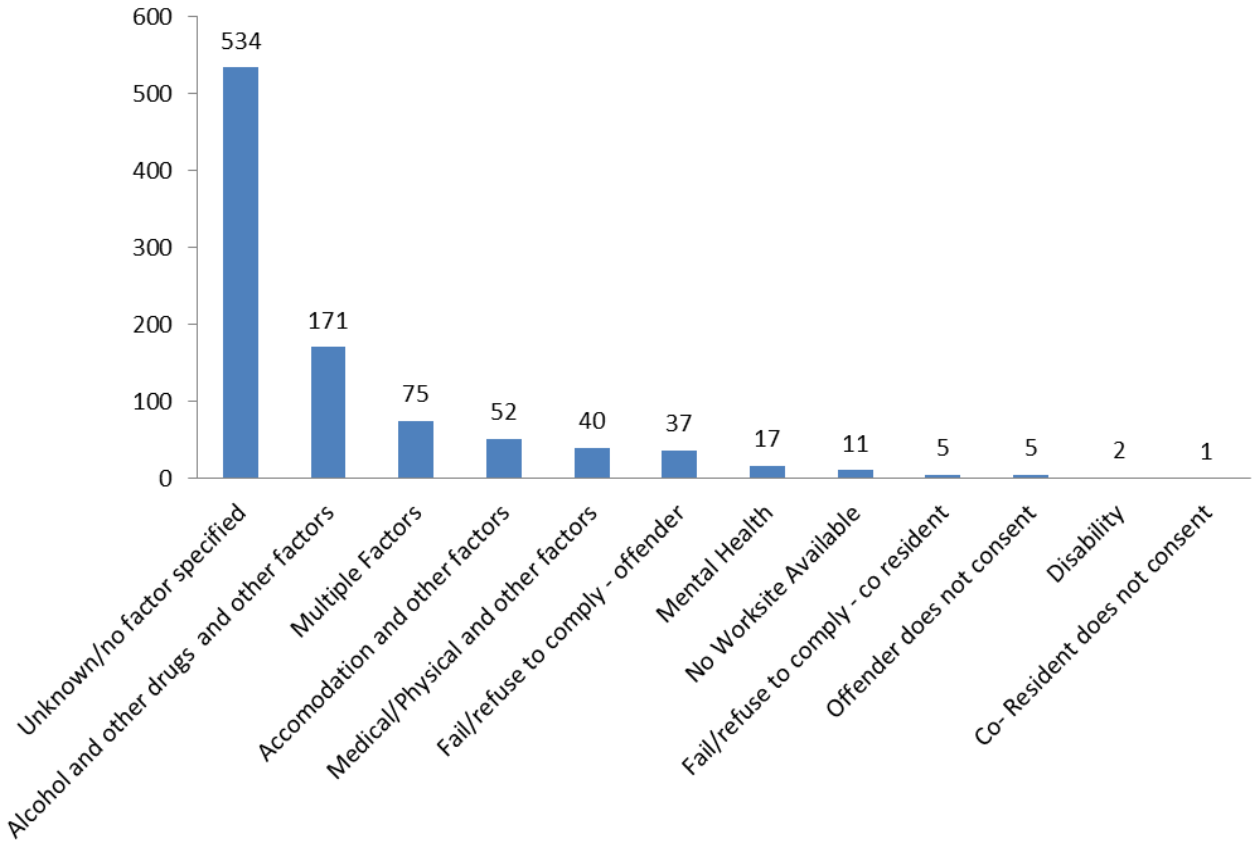
23. Offenders convicted of domestic violence are not excluded from eligibility for an ICO, see Judicial Commission of NSW, *Local Court Bench Book* [10-220].
24. *Crimes (Sentencing Procedure) Regulation 2010* (NSW) cl 13; see also Corrective Services NSW, *ICO Brochure* (2010) 2.
25. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 70(2)(b).
26 "Other" includes: resources not available, report rescinded, offender deceased and offender ineligible for ICO.
27. These figures are different to those contained in NSW Sentencing Council, *Annual Report 2015: Sentencing Trends and Practices* (2016) Table 3.3 because Corrective Services NSW has changed the counting rules to provide a more accurate measure from the records in the Offenders Information Management System. The trends in two sets of data appear broadly consistent.

2.17 Figure 2.1 shows the most common factors that contributed to offenders being assessed as unsuitable in 2015. It can be seen from Figure 2.1 that of the 950 offenders assessed as unsuitable in 2015:

- 534 offenders (56.2%) were assessed as unsuitable due to unknown or unspecified factors
- 171 offenders (18%) were assessed as unsuitable due to alcohol, drugs, and other factors, and
- 75 offenders (7.9%) were assessed as unsuitable due to multiple factors.

2.18 The large category of unknown and unspecified factors represents a significant gap in our understanding of the factors that contribute to an offender being assessed as unsuitable. In our view, more comprehensive data should be collected in order to reduce or remove the "unknown and unspecified" category. It is important that we know all factors that contribute to decision-making in this area.

Figure 2.1: Factors contributing to an offender being assessed as unsuitable, 2015




*Source: Corrective Services NSW, 2016.*

## Duration

2.19 The maximum length for an ICO is two years.[28]

2.20 Table 2.2 compares the average sentence length for offenders convicted in Local and Higher Courts for 2011–2015.

Table 2.2: Average sentence length, in months, for people sentenced to an ICO for their principal offence in the Local, District, and Supreme Court, 2011-2015

| Year | Average sentence length in months | | | |
|---|---|---|---|---|
| | Local Court | District Court | Supreme Court | Average length across all courts |
| 2011 | 9.8 | 20.4 | 24 | 11.5 |
| 2012 | 10 | 19.9 | 24 | 11.3 |
| 2013 | 10.2 | 20.1 | - | 11.7 |
| 2014 | 10.7 | 20.1 | - | 12 |
| 2015 | 10 | 20.3 | - | 11.9 |

*Source: BOCSAR, New South Wales Criminal Court Statistics, 2011–2015.*

## The use of ICOs

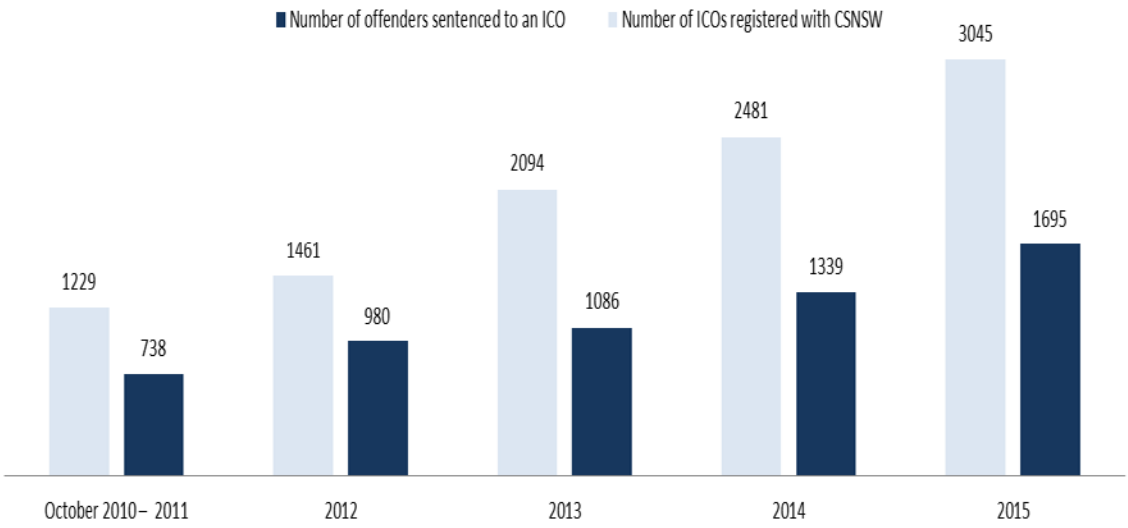
2.21 Since the introduction of the order in 2010, the number of offenders sentenced to an ICO has steadily increased though the percentage of ICOs, as a proportion of total principal penalties, has increased only marginally each year. ICOs represent only a small proportion of the offender population in NSW. Using the accessibility/remoteness index of Australia the data shows that as a proportion of all principal penalties, ICOs are used less frequently in very remote Australia compared to other regions.

2.22 Figure 2.2 shows the number of offenders sentenced to an ICO and the number of ICOs registered with Corrective Services NSW since the introduction of the order in October 2010. The data from Figure 2.2 show that:

- In 2015, 1695 offenders were sentenced to 3045 ICOs.
- Since 2011, there has been moderate growth each year in the number of offenders sentenced to an ICO and the number of ICOs registered with Corrective Services NSW.

28. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7(1).

Figure 2.2: The number of offenders sentenced to ICOs and the number of ICOs registered with Corrective Services NSW, 2010–2015

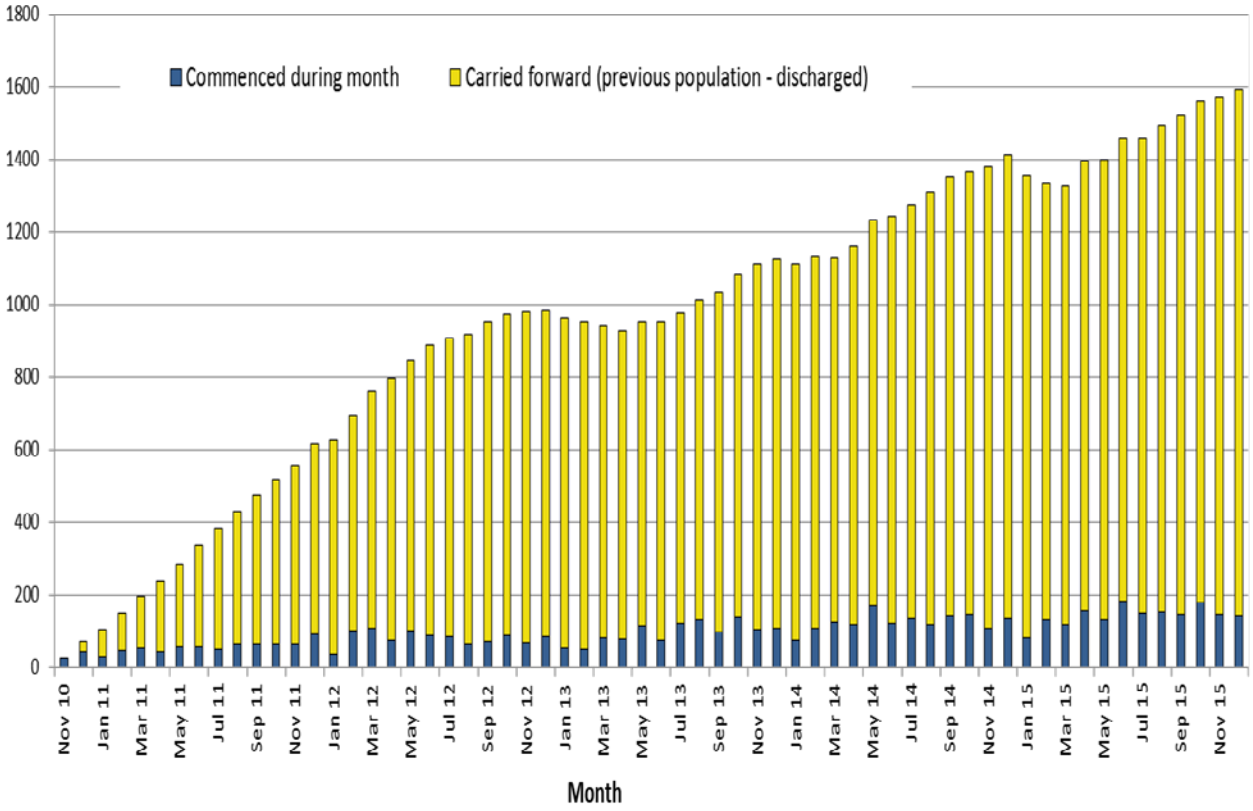



*Source: Corrective Services NSW, 2016.*

2.23 Figure 2.3 illustrates the number of offenders supervised on an ICO, active at the end of each month, for the period November 2010 to December 2015. The data in Figure 2.3 show:

- the initial upward trend in the total ICO offender population ended in December 2012, just over 2 years after the commencement of ICOs
- excluding short downward trends at the start of each calendar year, the ICO offender population has steadily increased over time
- the month which saw the highest number of offenders serving an ICO (1594) was December 2015, and
- June 2015 saw the greatest number of new offenders (182) register for the commencement of an ICO.

Figure 2.3: The number of offenders supervised on an ICO per month between November 2010 and December 2015




*Source: Corrective Services NSW, 2016*

2.24 Table 2.3 shows the number of people who received an ICO for the principal offence in the NSW Local, District, and Supreme Courts from 2011-2015. The data in Table 2.3 reveal:

- in 2015, 1.1% of all NSW offenders (1,337) were sentenced in the Local, District, and Supreme Courts to an ICO as their principal penalty
- the number of ICOs issued as the principal penalty has steadily increased each year since 2011, and
- the percentage of ICOs issued, as a proportion of total principal penalties, has increased marginally each year since 2011, except for a slight decrease in 2015.

2.25 Despite these increases, ICOs continue to represent only a small proportion of the penalties imposed on offenders in NSW.

Table 2.3: The number and percentages of persons receiving an ICO, as the principal penalty, in the NSW Higher and Local, 2011-2015

| Year | Number of penalties issued | Number of persons receiving an ICO | ICOs as a percentage of total penalties |
|---|---|---|---|
| 2011 | 112,861 | 620 | 0.6 |
| 2012 | 105,840 | 898 | 0.8 |
| 2013 | 107,012 | 1032 | 1.0 |
| 2014 | 110,702 | 1285 | 1.2 |
| 2015 | 118,121 | 1337 | 1.1 |

*Source: information provided by NSW Bureau of Crime Statistics and Research, 2016 (unpublished data, ref: Dg1613938HcLcC).*

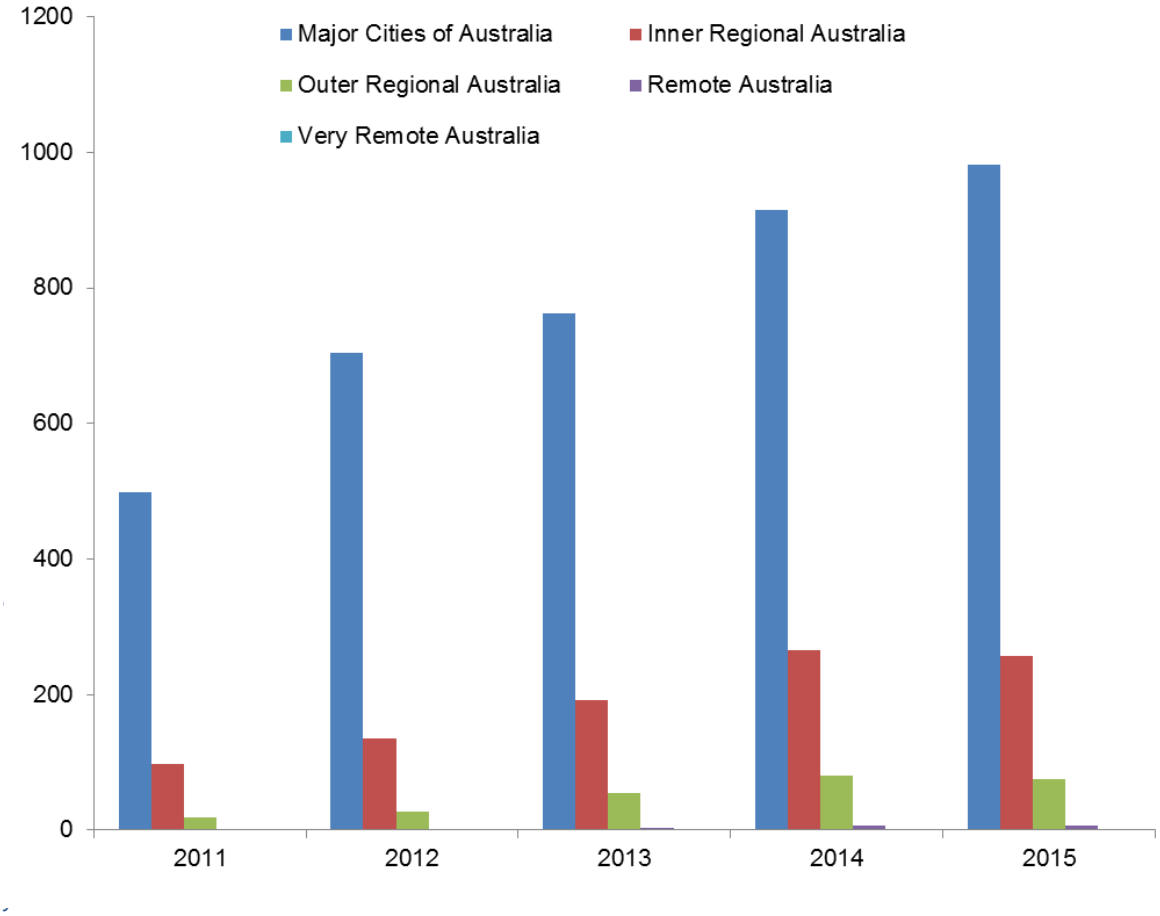
## The regional use of ICOs

2.26 Figure 2.4 illustrates the number of offenders, by accessibility/remoteness index of Australia (ARIA), who received an ICO as the principal penalty in the NSW Higher and Local Courts from 2011–2015. ARIA is a nationally recognised measure of geographic remoteness used in Australia. The data from Figure 2.4 show that in 2015:

- 982 offenders (74%) were sentenced to ICOs in the Australian major cities
- 257 offenders (19%) were sentenced to ICOs in Inner Regional Australia, and
- 9 offenders (0.6%) were sentenced to ICOs in Remote and Very Remote Australia.

Figure 2.4: The number of people, by ARIA, receiving an ICO as the principal penalty in the NSW Higher and Local courts, 2011-2015

*S*




*Source: NSW Bureau of Crime Statistics and Research, 2016 (unpublished data, ref: Dg1613938HcLcC).*

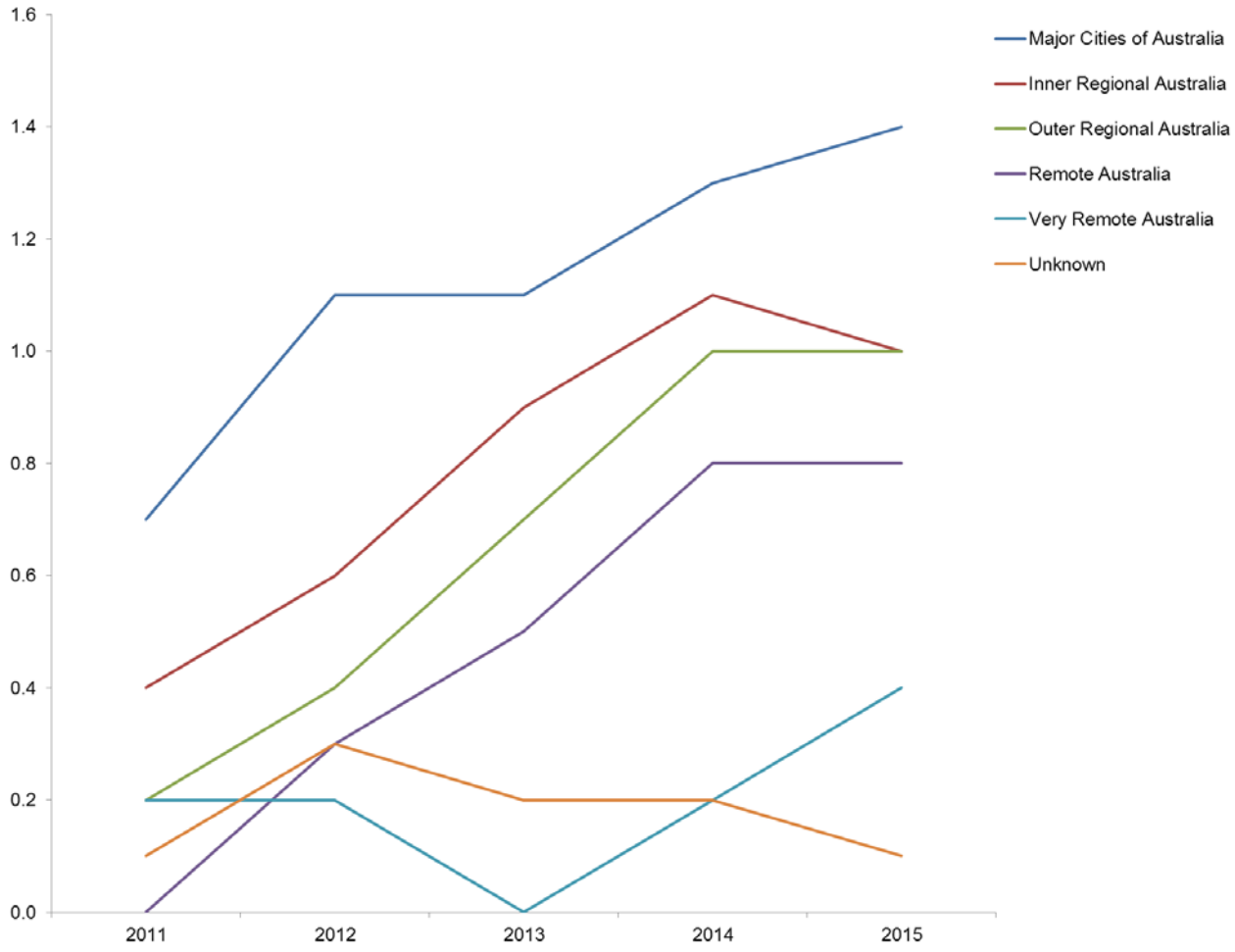
2.27 Figure 2.5 shows the percentage of people, by ARIA, who received an ICO as the principal penalty in the NSW Higher and Local Courts, as a proportion of all principal penalties for 2011–2015. The data from Figure 2.5 show that:

- since 2011, there has been modest growth in the percentage of ICOs issued as a proportion of all principal penalties handed down in the NSW Higher and Local Courts, and
- as a proportion of all principal penalties, ICOs are used less frequently in 'Very Remote Australia' compared to the other regions.

2.28 The disparity between the use of ICOs in major cities and the use of ICOs in other regions supports the concerns about geographic coverage raised in submissions to this review and to the Law Reform Commission's review.[29]

29. See para [3.11] and [3.14].

Figure 2.5: The percentage of people, by ARIA, receiving an ICO as the principal penalty in the NSW Higher and Local courts, as a proportion of all principal penalties, 2011-2015




*Source: NSW Bureau of Crime Statistics and Research, 2016 (unpublished data, ref: Dg1613938HcLcC).*

## Indigenous status

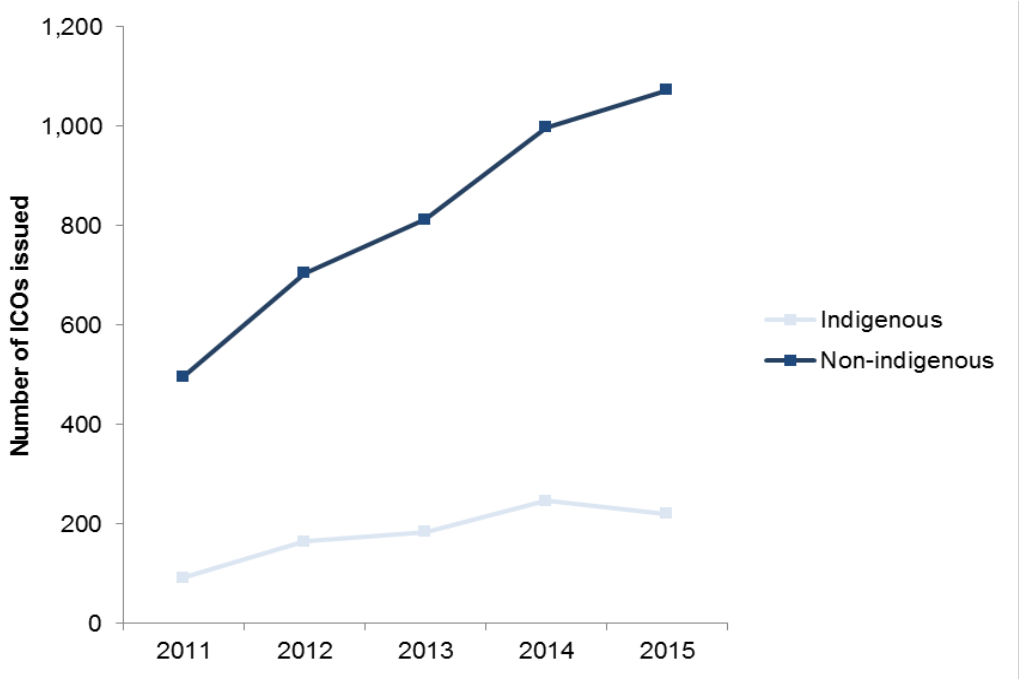
2.29 Figure 2.6 shows the number of people, by Indigenous status, who received an ICO as the principal penalty in the NSW Higher and Local Courts from 2011–2015. In 2015, 1337 offenders were issued an ICO as the principal penalty in the Higher and Local Courts, of which:

- 220 (17%) were Indigenous offenders
- 1073 (80%) were non-Indigenous offenders, and
- 44 (3%) were unknown.

2.30 The number of non-Indigenous offenders receiving an ICO as the principal penalty has steadily increased since 2011. This upward trend is also generally reflected for Indigenous offenders. However, 2015 was an exception to this trend, which saw a

10.5% reduction from the previous year for the number of Indigenous offenders receiving an ICO as their principal penalty from the NSW Higher and Local Courts.

Figure 2.6: The number of persons, by Indigenous status, receiving an ICO as the principal penalty in the NSW Higher and Local courts, 2011-2015




*Source: NSW Bureau of Crime Statistics and Research, 2016 (unpublished data, ref: Dg1613938HcLcC).*

## Offence characteristics

2.31 Table 2.4 shows the most common offences for which ICOs were imposed in 2015. The three most common offences were:

- acts intended to cause injury (545)
- traffic and vehicle regulatory offences (433), and
- illicit drug offences (193).

Table 2.4: Profile of the most common offences for which ICOs were imposed, 2010-2015

| Offence classification | 2010 - 2012 | | 2013 | | 2014 | | 2015 | |
|---|---|---|---|---|---|---|---|---|
| | Offenders | % | Offenders | % | Offenders | % | Offenders | % |
| Homicide and related offences | 5 | 0.3 | 3 | 0.3 | 2 | 0.1 | 1 | 0.1 |
| Acts intended to cause injury | 458 | 27 | 340 | 28.5 | 456 | 30.2 | 545 | 31.8 |
| Sexual assault and related offences | 23 | 1.4 | 16 | 1.3 | 22 | 1.5 | 28 | 1.6 |
| Dangerous or negligent acts endangering persons | 110 | 6.5 | 76 | 6.4 | 77 | 5.1 | 76 | 4.4 |
| Abduction, harassment and other offences against the person | 6 | 0.4 | 9 | 0.8 | 8 | 0.5 | 17 | 1.0 |
| Robbery, extortion and related offences | 39 | 2.3 | 38 | 3.2 | 40 | 2.7 | 33 | 1.9 |
| Unlawful entry with intent/burglary, break and enter | 77 | 4.5 | 65 | 5.4 | 82 | 5.4 | 85 | 5.0 |
| Theft and related offences | 65 | 3.8 | 67 | 6.5 | 65 | 4.3 | 81 | 4.7 |
| Fraud, deception and related offences | 117 | 6.9 | 66 | 5.5 | 98 | 6.5 | 97 | 5.7 |
| Illicit drug offences | 152 | 9.0 | 92 | 7.7 | 157 | 10.4 | 193 | 11.3 |
| Prohibited and regulated weapons and explosives offences | 30 | 1.8 | 13 | 1.1 | 23 | 1.5 | 25 | 1.5 |
| Property damage and environmental pollution | 25 | 1.5 | 16 | 1.3 | 16 | 1.1 | 13 | 0.8 |
| Public order offences | 24 | 1.4 | 12 | 1.0 | 27 | 1.8 | 32 | 1.9 |
| Traffic and vehicle regulatory offences | 518 | 30.6 | 349 | 29.3 | 396 | 26.2 | 433 | 25.3 |
| Offences against justice procedures, government security and government operations | 44 | 2.6 | 28 | 2.3 | 34 | 2.3 | 46 | 2.7 |
| Miscellaneous offences | 2 | 0.1 | 3 | 0.3 | 6 | 0.4 | 8 | 0.5 |
| Total | 1695 | 100 | 1193 | 100 | 1509 | 100 | 1713 | 100 |

*Source: Corrective Services NSW, 2016.*
*Offence classification in accordance with the Australian Standard Offence Classification 2008 Division.*

## Administration of ICOs

2.32 We have been asked to review Part 3 of the *Crimes (Administration of Sentences) Act 1999* (NSW). Part 3 deals with the following:

- offenders' general obligations (Division 1)
- permission for offenders' non-compliance with work or reporting requirements (Division 2)
- breaches of ICOs (Division 3), and
- other miscellaneous matters (Division 4).

2.33 Corrective Services NSW supervises ICOs and serious breaches are referred to the State Parole Authority (SPA) rather than to the courts. If an order is breached, SPA can revoke it, with the result that the offender serves the remainder of the sentence in full-time custody unless SPA reinstates the order.[30]

### Conditions governing intensive correction orders

2.34 The standard conditions of an ICO require the offender to:

- be of good behaviour and not commit an offence
- reside at approved premises and receive home visits from a supervisor
- not leave NSW without permission
- obey the supervisor's reasonable directions
- authorise medical practitioners, therapists or counsellors to provide relevant information to a supervisor
- submit to searches, alcohol and drug testing
- submit to surveillance and electronic monitoring if directed
- submit to a curfew or restricted movement if directed
- participate in rehabilitative activities if directed
- undertake 32 hours of community service work per month, and
- submit to medical examination by a specified practitioner.[31]

2.35 The court can impose additional conditions including conditions that prohibit the offender consuming alcohol, non-association conditions and place restriction conditions, as well as any other conditions that the court considers necessary to reduce the likelihood of reoffending.[32] The court can vary the additional conditions

30. *Crimes (Administration of Sentences) Act 1999* (NSW) s 88-90, s 162-168A.
31. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 186.
32. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 187; *Crimes (Administration of Sentences) Act 1999* (NSW) s 81.

later on application by either the offender or Corrective Services NSW.[33] In exceptional circumstances, Corrective Services NSW can temporarily excuse an offender from complying with any condition. It can also apply to the court to extend the ICO for up to six months in order to ensure that the offender makes up for missed work or programs.[34]

2.36 Corrective Services NSW manages ICOs according to four levels of supervision and conditions. Offenders are progressed, or regressed, through these levels based on their conduct throughout the term of the ICO.[35] The discretionary conditions relate to curfews, electronic monitoring and the level of contact with Corrective Services. Compulsory conditions include community service work, and drug and alcohol testing. Offenders may commence on Level 1 or 2 and progress up to Level 4 (see Table 2.5).[36]

### Table 2.5: The four levels of ICO supervision and conditions

| Level 1 | Level 2 | Level 3 | Level 4 |
|---|---|---|---|
| Curfew | Discretionary curfew | No curfew | No curfew |
| Electronic monitoring | Discretionary electronic monitoring | No electronic monitoring | No electronic monitoring |
| Minimum face-to-face contact with Corrective Services NSW supervisor: weekly | Minimum face-to-face contact with Corrective Services NSW supervisor: fortnightly | Minimum face-to-face contact with Corrective Services NSW supervisor: monthly | Minimum face-to-face contact with Corrective Services NSW supervisor: six weekly |
| Minimum of 32 hours of community service work per month supervised by Corrective Services NSW | | | |
| Drug testing | | | |
| Alcohol testing on work and program sites – and home if non-consumption of alcohol is imposed by the court as an additional condition | | | |
| Programs as directed by Corrective Services NSW | | | |

*Source: Corrective Services NSW, ICO Brochure (2010) 3.*

2.37 Under s 82, it is the offender's duty to comply with the requirements of the Act, any regulations and the conditions of the ICO.

2.38 Part 3 Division 4 sets out the circumstances in which an offender may obtain permission from the Commissioner for Corrective Services not to comply with work or reporting requirements under an ICO. The Commissioner may grant the permission for health reasons, on compassionate grounds or for any other reason the Commissioner thinks fit.[37]

33. *Crimes (Administration of Sentences) Act 1999* (NSW) s 81(3).
34. *Crimes (Administration of Sentences) Act 1999* (NSW) s 85-86.
35. Corrective Services NSW, *ICO Brochure* (2010) 3 <www.correctiveservices.nsw.gov.au/__data/assets/pdf_file/0020/220664/ico-brochure.pdf>.
36. Corrective Services NSW, *ICO Brochure* (2010) 3.
37. *Crimes (Administration of Sentences) Act 1999* (NSW) s 85(2).

## Breach and revocation

2.39 If a person fails to comply with any of his or her obligations under an ICO, the Commissioner for Corrective Services may impose sanctions such as a formal warning or a more stringent application of the conditions of the order.[38] The power to revoke an ICO, however, is vested in SPA.[39]

2.40 Since 2 December 2013, breaches of ICOs are referred to SPA directly by Community Corrections staff. SPA and Community Corrections inform offenders when a breach is referred to SPA and provide offenders with more information about the breach and revocation process.[40] The NSW Department of Justice submitted to the LRC that changes made to the administration of the work component of ICOs provide greater flexibility for offenders with a reasonable excuse for failing to complete this obligation, which SPA noted is the cause of most ICO revocations.[41]

### Discharges

2.41 Table 2.6 shows the numbers of ICOs discharged due to successful completion or to revocation from October 2010–December 2015. Table 2.6 counts individual orders so that one offender may have more than one ICO revoked on one or more occasions in the relevant period. These figures also include Federal offenders whose revocations are handled by the Commonwealth Attorney-General, rather than SPA.

2.42 In 2015, 2688 ICOs were discharged; of this number:

- 1917 (71%) were discharged as the result of successfully completing the ICO
- 717 (27%) were revoked, and
- 54 (2%) were discharged for other reasons.

2.43 There has been a downward trend in the number of discharges due to the successful completion of the order, as a percentage of all discharges.

38. *Crimes (Administration of Sentences) Act 1999* (NSW) s 89.
39. *Crimes (Administration of Sentences) Act 1999* (NSW) s 90.
40. NSW Department of Justice, *Submission PA54,* 27.
41. NSW Department of Justice, *Submission to LRC PA54,* 28; NSW, State Parole Authority, *Submission to LRC PA19*, 11: NSW Law Reform Commission, *Parole,* Report 142 (2015).

### Table 2.6: Discharge of ICOs

| Reason for discharge | 2010 - 2012 | | 2013 | | 2014 | | 2015 | |
|---|---|---|---|---|---|---|---|---|
| | Number | % | Number | % | Number | % | Number | % |
| ICOs successfully completed | 1032 | 78.5% | 1262 | 72.8% | 1570 | 70.9% | 1917 | 71.3% |
| ICOs Revoked | 261 | 19.8% | 436 | 25.2% | 589 | 26.6% | 717 | 26.7% |
| ICO discharged for other reasons | 22 | 1.7% | 35 | 2.0% | 54 | 2.4% | 54 | 2.0% |
| TOTAL | 1315 | 100% | 1733 | 100% | 2213 | 100% | 2688 | 100% |

*Source: Corrective Services NSW, 2016.*

2.44 Table 2.7 shows the number of offenders who had one or more ICOs revoked on a single occasion by SPA.

### Table 2.7: Offenders with ICOs revoked by the State Parole Authority

| | 2011 | 2012 | 2013 | 2014 | 2015 |
|---|---|---|---|---|---|
| Offenders with ICOs revoked | 67 | 114 | 283 | 359 | 443 |

*Source: NSW State Parole Authority, 2016.*

2.45 In 2015, SPA revoked ICOs for offenders on 443 occasions. Corrective Services NSW has advised that it cannot provide data about how many other breaches occurred that were resolved locally within this period.

2.46 The majority of ICOs revoked by SPA were revoked for breach of two or more conditions. Table 2.8 shows the number of breaches of key mandatory conditions that led to the revocation of each ICO for 2014 and 2015.

## Table 2.8: Mandatory conditions breached resulting in revocation of an ICO, 2014-2015

| The breach of conditions which lead to revocation | Number of breaches of mandatory conditions resulting in revocation | |
|---|---|---|
| | 2014 | 2015 |
| Undertake 32 hours of community service work per month | 152 | 240 |
| Be of good behaviour and not commit any offence | 181 | 227 |
| Comply with all reasonable directions of a supervisor | 169 | 219 |
| Engage in activities to address the factors associated with his or her offending | 95 | 124 |
| Reside only at premises approved by a supervisor | 73 | 77 |
| Refrain from using prohibited drugs, obtaining drugs unlawfully or abusing drugs lawfully obtained | 48 | 64 |
| Submit to breath testing, drug testing or other medically approved test procedures | 15 | 12 |
| Other | 23 | 16 |
| Total | 756 | 979 |

*Source: Corrective Services NSW, 2016.*

# 3. Existing proposals for reform

**In brief**

Intensive correction orders (ICOs) have important advantages in terms of reducing reoffending, reducing costs, and keeping offenders out of prison. The ICO scheme is underused and not targeted to those offenders who might benefit most. The mandatory community service work requirement has been identified as a key barrier to offenders accessing ICOs.

We support the Law Reform Commission's recommendations to exclude certain offences, increase the maximum length of an ICO, streamline suitability assessments and allow a wide variety of activities to satisfy the mandatory community service work requirement, including literacy, numeracy, work-ready, educational or other programs.



3.1 The NSW Law Reform Commission (LRC) has recently conducted a review of sentencing laws in NSW.

3.2 The terms of reference for the review were received on 21 September 2011 and the LRC delivered its report to the Attorney General in July 2013.

3.3 The Sentencing Council participated in the review and assisted the LRC.

3.4 The LRC made two sets of recommendations relevant to ICOs. The first set of recommendations presupposed the retention of the existing structure of penalties in NSW and proposed amendments to make ICOs more effective.[1] The second set of recommendations proposed a new structure of penalties for NSW. The new structure included a proposed community detention order that would become the sole option for custody in the community and replace ICOs, home detention and

1. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) ch 9.

suspended sentences.[2] The proposed new order incorporated features of the proposed reforms to ICOs in the first set of recommendations.

3.5 The Government is considering the LRC's recommendations, including those that would impact on ICOs.

## General support for the aims of the ICO

3.6 The LRC identified that the ICO has important advantages in terms of reducing reoffending, reducing costs, and keeping offenders out of prison.

3.7 In particular it was noted that it is much less costly than full-time custody. Figures provided by Corrective Services NSW show that, in 2014-15, the daily cost of custody services per prison inmate was $181.60,[3] while the average daily cost of community-based correctional services in the same period was $23.83 per offender.[4] It should be noted, however, that this is an average cost across all community-based sentences some of which may cost less than an ICO. The average daily cost of an ICO alone is not available, but we expect that it would be significantly less than the average daily cost per prison inmate.

3.8 Submissions to the LRC identified other benefits of ICOs including:

- ICOs avoid any potential contaminating effects of offenders, and particularly first time offenders, being imprisoned with other offenders[5]
- ICOs allow offenders to retain employment and remain in contact with family networks while serving their sentences[6]
- offenders who would be at risk of losing public or community housing if they entered full-time custody of more than three months can retain their housing,[7] and
- ICOs combine benefit to the community (through community service work) with rehabilitation and an element of punishment.[8]

### Submissions to this review

3.9 A number of submissions to this review generally supported ICOs as a community-based alternative to custodial sentences.[9] Some of them acknowledged similar

2. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) ch 11.
3. NSW, Department of Justice, Corrective Services, *NSW Prison System*, Fact sheet 1 (2015).
4. NSW, Department of Justice, Corrective Services, *Community Corrections*, Fact sheet 2 (2015).
5. Law Society of NSW, *Preliminary submission PSE8*, 5.
6. Law Society of NSW, *Submission to NSW LRC SE16*, 7.
7. Public Interest Advocacy Centre, *Submission to NSW LRC SE29*, 7.
8. Law Society of NSW, *Submission to NSW LRC SE16*, 6.
9. Enough is Enough Anti-Violence Movement Inc, *Preliminary submission PIC1*; Public Interest Advocacy Centre, *Preliminary submission PIC3*; Women in Prison Advocacy Network, *Preliminary submission PIC4*; Legal Aid NSW, *Preliminary submission PIC6*; F Else and B Nicholson, *Preliminary submission PIC7*; NSW, State Parole Authority, *Preliminary submission PIC12*, Justice Action, *Preliminary submission PIC13*.

benefits to those outlined above.[10] One highlighted a particular benefit for female offenders in that it allowed them to participate in rehabilitation programs, care for children, maintain community ties and full employment.[11] Some submissions, however, specifically preferred the LRC's proposed community detention order to replace ICOs.[12]

3.10 The submission of the Children's Court of NSW generally supported using alternative sentencing options to address an offender's criminogenic needs and promote rehabilitation but noted that it had not assessed whether the strict supervision conditions attached to ICOs would be appropriate for young people. It asked for a review of the 18 year minimum age that currently applies to ICOs.[13]

## Criticisms of the current ICO scheme

3.11 In the LRC's view, the ICO scheme has been underused and not targeted to those offenders who might benefit most. The LRC noted that:

- there have been difficulties in making ICOs available across the State (this would appear to be supported by the data set out in Figures 2.4 and 2.5)
- a large proportion of those who have received ICOs have been low risk offenders needing little in the way of intervention
- those for whom an intervention is appropriate have been excluded, and
- there was dissatisfaction about the unnecessary delay arising from the need for separate suitability assessments to be made for ICOs and home detention.

3.12 The LRC identified the mandatory community service work requirement as the "key barrier to ICO suitability" for offenders who have a cognitive impairment, mental illness, substance dependency, homelessness or unstable housing.[14]

3.13 The LRC observed that for such a sentence to be effective, "the courts and the community must have confidence that it is a serious sentence that can provide interventions that make a difference to an offender's level of reoffending".[15]

### Submissions to this review

3.14 A number of submissions to this review expressly agreed that ICOs were being underused and not targeted at those offenders who would benefit most.[16] One

10. Enough is Enough Anti-Violence Movement Inc, *Preliminary submission PIC1*; NSW, State Parole Authority, *Preliminary submission PIC12*.
11. Women in Prison Advocacy Network, *Preliminary submission PIC4*.
12. Local Court of NSW, *Preliminary submission PIC9*; NSW Young Lawyers Criminal Law Committee, *Preliminary submission PIC11*.
13. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(1)(a): Children's Court of NSW, *Preliminary submission PIC5*.
14. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [9.75].
15. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [9.2].
16. Public Interest Advocacy Centre, *Preliminary submission PIC3*; Justice Action, *Preliminary submission PIC13*; Women in Prison Advocacy Network, *Preliminary submission PIC4*.

submission described the community service work requirement as "evidently the single largest obstacle to suitability for ICOs".[17]

3.15 One submission that did not support ICOs argued that the majority of offenders who currently receive ICOs are at a low risk of re-offending and do not have rehabilitative needs that require intensive intervention.[18]

3.16 Another submission raised concerns that ICO suitability assessments may exclude female offenders with medical and/or mental health issues, or substance abuse issues and that the mandatory community service work requirement may exclude such offenders as well as those with housing instability, and full-time caring obligations.[19]

3.17 Another submission called for consultation with Aboriginal communities, families, Elders and service providers (such as the Aboriginal Legal Service) to help ensure that the ICO provisions are culturally appropriate, accessible and effective for Aboriginal offenders, their families and surrounding communities.[20]

## Reforming ICOs

3.18 The LRC's preferred option was for suspended sentences, home detention orders and ICOs to be replaced with a single community detention order (CDO).

3.19 However, in the interim, in order to increase the number of offenders who can be sentenced to an ICO, the LRC recommended amending the existing ICO provisions in order to:

- reduce the number of offences that exclude an offender from an ICO
- extend the maximum period of an ICO to 3 years (and permit setting a non-parole period for an ICO)
- enlarge the scope of the activities that can satisfy the work component of an ICO, including engaging in literacy and numeracy courses, and work-ready, educational or other programs and, where appropriate, deferring commencement of the work to complete a residential drug or alcohol treatment program, and
- require the court to set the head sentence for the term of imprisonment first before requesting a single suitability assessment for an ICO or home detention or both.[21]

3.20 The recommendations to address geographic availability involved changes to practice and did not involve changes to the statutory provisions.[22]

3.21 The LRC's view was that these recommendations represent a minimum option to improve the operation of these sentences and to increase their use.[23]

17. NSW Young Lawyers Criminal Law Committee, *Preliminary submission PIC11*.
18. Probation and Parole Officers' Association of NSW, *Preliminary submission PIC10*.
19. Women in Prison Advocacy Network, *Preliminary submission PIC4*.
20. F Else and B Nicholson, *Preliminary submission PIC7*.
21. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) ch 9.
22. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) Rec 9.1.

## Excluding certain offences

3.22 The LRC recommended that no offences should automatically exclude an offender from an ICO except for a small number of offences that are sufficiently serious to warrant their specific exclusion:

- domestic violence offences committed against a likely co-resident;
- murder; and
- sexual offences under Part 3 Divisions 10 and 10A of the *Crimes Act 1900* (NSW) when the victim is under the age of 16 years and the offence carries a maximum penalty of more than 5 years imprisonment.[24]

3.23 The LRC justified the exclusion of offenders who have committed domestic violence offences against a likely co-resident on the grounds that confining an offender to the home through restrictions imposed as part of an ICO can place added pressure on the offender and the offender's family. In the case of domestic violence offenders, this may significantly increase the risk of reoffending.[25]

3.24 The LRC noted the following reasons for limiting the range of exclusions listed in the legislation:

- The mandatory suitability assessment for ICOs assesses the *actual* risk that the offender is likely to pose to others, as well as his or her overall risk of reoffending and criminal history. It is likely to provide a more accurate mechanism for screening out high risk offenders for whom an ICO would be inappropriate than an exclusion based on offence category alone.
- The court has a role in screening offenders when it decides whether to request an assessment and in deciding whether to impose an ICO.
- Rigid exclusions that pay no regard to the objective circumstances of the case, or to the subjective circumstances of the offender, can operate to limit inappropriately the sentencing discretion that is important for a viable sentencing system.
- Crimes in the most serious category of offending are most unlikely to attract sentences that would be short enough to qualify for an ICO.[26]

### *Submissions to this review*

3.25 A number of submissions supported the LRC's recommendation.[27] None expressly opposed it.

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23. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [9.21].
24. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) Rec 9.2.
25. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [9.43].
26. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [9.39]-[9.41].
27. Enough is Enough Anti-Violence Movement Inc, *Preliminary submission PIC1*; Public Interest Advocacy Centre, *Preliminary submission PIC3*; Women in Prison Advocacy Network, *Preliminary submission PIC4*; Legal Aid NSW, *Preliminary submission PIC6*; NSW Bar Association, *Preliminary submission PIC8*; Local Court of NSW, *Preliminary submission PIC9*; NSW Young Lawyers Criminal Law Committee, *Preliminary submission PIC11*; NSW, State Parole Authority, *Preliminary submission PIC12*; Justice Action, *Preliminary submission PIC13*.

## Maximum length of an ICO

3.26 The LRC recommended changes to the maximum length of an ICO, to align with its proposed maximum period for home detention,[28] so that:

- The maximum length of an ICO should be extended from two to three years.
- In the Local Court, the maximum length of an ICO should continue to be two years, or three years where the offender is sentenced for multiple offences.[29]

3.27 The LRC also recommended that the court should be able to set a non-parole period of up to two years as part of an ICO and that, if SPA revokes an offender's ICO or parole, the offender should be able to apply for reinstatement of the ICO or reapply for parole after one month.[30]

### *Submissions to this review*

3.28 A number of submissions expressly supported the LRC's recommendations on the length of ICOs.[31] None expressly rejected them.

3.29 The Local Court of NSW raised the unresolved problem of the potential conflict between the sentencing court's power to extend the term of an ICO by up to 6 months under s 86 of the *Crimes (Administration of Sentences) Act 1999* (NSW) and the Local Court's jurisdictional limit of 2 years for a single offence.[32]

## Streamlining suitability assessments

3.30 The LRC proposed aligning the assessment processes for ICOs with those for home detention so that:

- the court should first set the term of imprisonment (the head sentence), and
- if the head sentence is of an eligible length, the court should be able to refer the offender for an ICO (and home detention) suitability assessment.[33]

3.31 This approach conforms to the principle that the term of a sentence of imprisonment should be set without regard to the manner in which it will be served.[34] In the LRC's view this approach would ensure that the sentence remains proportionate and applies appropriately in situations where an offender who breaches an order must serve the term in full-time custody.[35]

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28. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) Rec 9.3(1).
29. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) Rec 9.4(1)-(2).
30. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) Rec 9.4(3)-(4).
31. Enough is Enough Anti-Violence Movement Inc, *Preliminary submission PIC1*; Public Interest Advocacy Centre, *Preliminary submission PIC3*; Women in Prison Advocacy Network, *Preliminary submission PIC4*; Legal Aid NSW, *Preliminary submission PIC6*; NSW Bar Association, *Preliminary submission PIC8*; Local Court of NSW, *Preliminary submission PIC9*; NSW Young Lawyers Criminal Law Committee, *Preliminary submission PIC11*; NSW, State Parole Authority, *Preliminary submission PIC12*; Justice Action, *Preliminary submission PIC13*.
32. Local Court of NSW, *Preliminary submission PIC9.*
33. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) Rec 9.5.
34. *R v Zamagias* [2002] NSWCCA 17 [26].
35. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [9.69].

### *Submissions to this review*

3.32 A number of submissions supported these recommendations.[36] None expressly opposed them. One submission raised the issue of the need for appropriate review mechanisms for the suitability assessment process.[37]

## The work component

3.33 The LRC identified particular problems about offenders being assessed as suitable for the mandatory community service work component of ICOs and recommended that a wide variety of activities should be allowed to satisfy the 32 hour per month requirement:

- It should be possible to satisfy the hours of community service work attached to an ICO by a range of activities including engaging in literacy, numeracy, work-ready, educational or other programs according to the needs of the offender.
- Corrective Services NSW should be able to defer the offender's commencement of the work hours requirement of an ICO while the offender completes residential drug or alcohol treatment or another program. This should not increase the length of the order.[38]

3.34 In the LRC's view, the implementation of these recommendations would ensure broader access to ICOs.

3.35 The LRC also noted that when we recommended the introduction of ICOs, in our 2007 report, we did not envisage that community service work would be a mandatory component of the order.[39]

3.36 The LRC saw particular value in work ready and literacy or numeracy programs:

> The high level of illiteracy and innumeracy and consequent marginal histories of employment within the prison population is of serious concern. The provision of basic vocational and pre-vocational training can have a significant rehabilitative effect, not only in improving self-esteem but also in opening the way for employment. Counting participation in intervention programs, educational and literacy/numeracy programs, counselling or drug treatment towards the work hours requirement would, in our view, be an effective and appropriate method of expanding access to ICOs if they are to be retained. Work and Development Orders, which are used as a fine enforcement option under the *Fines Act 1996* (NSW), already provide one example of this in practice.[40]

36. Enough is Enough Anti-Violence Movement Inc, *Preliminary submission PIC1*; Public Interest Advocacy Centre, *Preliminary submission PIC3*; Women in Prison Advocacy Network, *Preliminary submission PIC4*; Legal Aid NSW, *Preliminary submission PIC6*; NSW Bar Association, *Preliminary submission PIC8*; Local Court of NSW, *Preliminary submission PIC9*; NSW, State Parole Authority, *Preliminary submission PIC12*; Justice Action, *Preliminary submission PIC13*.
37. NSW Young Lawyers Criminal Law Committee, *Preliminary submission PIC11*.
38. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) Rec 9.6(1) and (3).
39. NSW Sentencing Council, *Review of Periodic Detention*, Report (2007) 161-162.
40. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [9.81]. See NSW, State Debt Recovery Office, *Work and Development Order Guidelines 2012* (2012).

### *Submissions to this review*

3.37 A number of submissions supported these recommendations.[41] One, however, considered that the rehabilitative and punitive aspects of the sentence would be undermined without the punitive element of community service work so that, while supporting making ICOs more widely available, it did not support altering the community service work requirements.[42]

3.38 Other submissions highlighted the fact that the current arrangements impeded access to ICOs for:

- people with intellectual and cognitive disability[43]
- women who have housing instability, full time caring obligations, substance misuse issues or mental illnesses[44]
- Aboriginal people who often display higher levels of mental illness and trauma, drug and alcohol problems, and unstable or overcrowded housing,[45] and
- more generally, people with mental illness, alcohol and drug dependency.[46]

3.39 The Probation and Parole Officers Association of NSW observed that removing community service work as a mandatory condition would open the order up to a large number of higher risk/needs offenders, who are currently assessed as unsuitable.[47]

## A new order

3.40 The LRC proposed a new flexible community-based custodial order to replace home detention, ICOs and suspended sentences.[48] The LRC provisionally named the new order a "community detention order". The CDO is a custodial order that combines and strengthens the main features of home detention and ICOs in a way that should increase the number of offenders who are able to serve their terms of imprisonment in the community and help to address the causes of their offending.

3.41 The main features of the proposed CDO include:

- A core condition that requires an offender not to commit a further offence and to submit to supervision.
- Optional requirements, which the LRC expected would be widely used, of a period of home detention or a work and intervention requirement (or both). A

41. Enough is Enough Anti-Violence Movement Inc, *Preliminary submission PIC1*; Public Interest Advocacy Centre, *Preliminary submission PIC3*; Women in Prison Advocacy Network, *Preliminary submission PIC4*; Legal Aid NSW, *Preliminary submission PIC6*; NSW Bar Association, *Preliminary submission PIC8*; NSW Young Lawyers Criminal Law Committee, *Preliminary submission PIC11*; NSW, State Parole Authority, *Preliminary submission PIC12*.
42. NSW Young Lawyers Criminal Law Committee, *Preliminary submission PIC11*.
43. Public Interest Advocacy Centre, *Preliminary submission PIC3*.
44. Women in Prison Advocacy Network, *Preliminary submission PIC4*.
45. F Else and B Nicholson, *Preliminary submission PIC7*.
46. Local Court of NSW, *Preliminary submission PIC9*; Justice Action, *Preliminary submission PIC13*.
47. Probation and Parole Officers' Association of NSW, *Preliminary submission PIC10*.
48. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) Rec 11.1.

court could also impose additional conditions like alcohol and drug abstention, place and association restrictions and curfews. The requirements would only be imposed after Corrective Services NSW has assessed the offender favourably as part of a single assessment process.

- In many cases, the most important element of the CDO would be a work and intervention requirement. The hours imposed as part of such a requirement could be satisfied by participating in any combination of community service work, psychological or psychiatric treatment, intervention programs, educational programs, vocational or life skills programs, counselling, drug or other addiction treatment. The times and speed at which the offender completes these hours should be left to the discretion of Corrective Services NSW. This would improve flexibility and provide both a punitive and rehabilitative aspect to the sentence.[49]

3.42 SPA would deal with breaches of a CDO. Revocation should lead to the offender serving the remainder of the sentence in full-time imprisonment, unless SPA reinstates the CDO. This would take advantage of SPA's breach and revocation procedures already in place for ICOs, home detention and parole. It would also ensure consistency through having a single agency deal with breaches, revocation and reinstatement.[50]

3.43 The recommendations for the CDO and the recommendations to reform the ICO provisions respond to similar problems. Because the recommendations for the CDO deal with the replacement of home detention and suspended sentences, as well as ICOs, they respond to many other provisions in the sentencing statutes that are beyond the scope of this review. We, therefore, have not dealt with the CDO recommendations in any detail.

### Submissions to this review

3.44 Some submissions generally supported replacing ICOs with CDOs as the preferred approach,[51] however, some did so only if CDOs did not also replace suspended sentences.[52] No submissions specifically opposed CDOs replacing ICOs.

## The Sentencing Council's view

3.45 We agree with the LRC's support for the aims of ICOs. We also agree with its assessment of the problems with ICOs that need to be addressed, including their limited availability. The statistics and trends identified in Chapter 2 bear this out.

3.46 The Government is considering the LRC's recommendations. Any changes that might result will inevitably involve some departure from the precise terms of the LRC's recommendations. We, therefore, see no need at this stage to put forward further recommendations (whether they were to agree with the LRC's recommendations or seek to depart from them). We do however note the submissions recorded in the paragraphs above.

49. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) Rec 11.3.
50. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) Rec 11.2 and 11.6.
51. Public Interest Advocacy Centre, *Preliminary submission PIC3*; Probation and Parole Officers' Association of NSW, *Preliminary submission PIC10*; NSW, State Parole Authority, *Preliminary submission PIC12*.
52. Legal Aid NSW, *Preliminary submission PIC6*; Local Court of NSW, *Preliminary submission PIC9*; Justice Action, *Preliminary submission PIC13*.

# Appendix A: Preliminary submissions

PIC1 Enough is Enough Anti-Violence Movement Inc, 17 November 2015

PIC2 Confidential submission

PIC3 Public Interest Advocacy Centre, 14 December 2015

PIC4 Women in Prison Advocacy Network, 16 December 2015

PIC5 Children's Court of NSW, 17 December 2015

PIC6 Legal Aid NSW, 17 December 2015

PIC7 Fabienne Else and Barbara Nicholson, 18 December 2015

PIC8 NSW Bar Association, 21 December 2015

PIC9 Local Court of NSW, 21 December 2015

PIC10 Probation and Parole Officers' Association of NSW, 21 December 2015

PIC11 NSW Young Lawyers Criminal Law Committee, 23 December 2015

PIC12 State Parole Authority, 31 December 2015

PIC13 Justice Action, 18 January 2016