

14 December 2015



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

By email: [sentencingcouncil@agd.nsw.gov.au](mailto:sentencingcouncil@agd.nsw.gov.au)

Dear Justice Woods,

### **Review of intensive corrections orders**

The Public Interest Advocacy Centre (PIAC) welcomes the opportunity to respond to the NSW Sentencing Council's call for preliminary submissions for the review of Intensive Corrections Orders (ICOs).

PIAC is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues. PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected.

PIAC has significant experience with the criminal justice system through its work with the Homeless Persons' Legal Service (HPLS). The HPLS Solicitor Advocate provides representation for people who are homeless and charged with minor criminal offences. The role was established in 2008 to overcome some of the barriers homeless people face accessing legal services.

Since commencing in 2008, the HPLS Solicitor Advocate has provided court representation to 543 individual clients in 846 matters. From January 2010 to June 2015, the HPLS Solicitor Advocate provided court representation to 406 individual clients facing criminal charges. Of these:

- 47 per cent disclosed that they had a mental illness;
- 65 per cent disclosed that they had drug or alcohol dependency;
- 35 per cent disclosed that they had both a mental illness and drug/alcohol dependency;
- 78 per cent had either a mental illness or drug/alcohol dependency;
- 41 per cent disclosed that they have previously been in prison.

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## Limited Eligibility for Intensive Corrections Orders

In August 2012, PIAC provided a submission to the NSW Law Reform Commission (NSWLRC) Sentencing Inquiry, in relation to Sentencing Question Papers 5-7. In that submission, PIAC made the following statements in relation to Intensive Corrections Orders, which are still relevant for the current review by the NSW Sentencing Council:<sup>1</sup>

Although potentially a valuable non-custodial sentencing option, in the experience of HPLS, intensive correction orders (ICO) are not an effective alternative to custody because it is rare that a HPLS client will be found suitable for the program.

The Question Paper explains the process for assessing eligibility for the ICO. There are few statutory exclusions, and a court can only order an ICO if the Commissioner for Corrective Services determines that the offender is suitable. Factors taken into account include criminal history, accommodation, physical and mental health, drug and alcohol dependency – a combination that generally rules out HPLS clients. There is no avenue for the court to question the pre-sentence report or take into account other evidence about suitability.

It is true that these orders are often not appropriate for people who have mental illness, drug/alcohol dependency or other chronic disability, as the onerous requirements often mean that such people have difficulty complying with the terms of the order. Moreover, using these dispositions in the sentencing of offenders with such characteristics may be 'setting them up to fail.' For these offenders, where the circumstances of the breaches involved should not warrant a term of imprisonment, there are significant sentencing dilemmas presented for judicial officers.

There seems to be a contradiction, however, between the general exclusion of HPLS clients because of the suitability requirements and the recent decision by the NSW Court of Criminal Appeal that noted that this sentencing option was intended to provide intensive rehabilitation. PIAC submits that HPLS clients are most likely to recommit offences because of the underlying causes of their homelessness and that 'intensive rehabilitation' would reduce the likelihood of reoffending – the very purpose described by the Court of Criminal Appeal.

### HPLS Case Study

SI had a long history of substance dependency and offences related to his dependency. He was convicted of theft and received a custodial sentence of six months. At the time of the sentence he had received assistance to treat his substance dependency and was making progress. SI appealed his sentence to the District Court and an application was made for SI to be assessed for an ICO. The application was supported by the presiding Judge. The Corrective Services assessment found SI not suitable because of the history of his substance dependency.

PIAC supports the conclusion of the recent BOCSAR report on intensive correction orders, that 'utilisation and accessibility of ICOs, and the impact of their introduction on the use of other penalties, should be further monitored'. Monitoring should include a wider range of demographic data than that used in the BOCSAR report. PIAC submits that future reports should also include the health and disability characteristics of those who received ISOs.

In that submission, PIAC recommended the continuation of intensive correction orders as a sentencing option, and that eligibility for HPLS clients be made more accessible by:

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<sup>1</sup> Public Interest Advocacy Centre (2013), *NSW Law Reform Commission – Sentencing Question Papers 5-7*, 28 August 2012, pp. 8-9.

- giving the court authority to attempt to resolve or negotiate matters of concern with Corrections NSW if a client is not found suitable;
- including in the ICO rehabilitative orders such as medical, psychiatric or psychological treatment;
- recommending that Corrections NSW adapt the ICO service to ensure equity of access for people with intellectual and cognitive disability.

The NSWLRC reviewed the operation of intensive correction orders in its 2013 review of sentencing (see Report 139). PIAC supports the following recommendations in relation to Intensive Corrections Orders, that are included in chapter Nine of that report: 9.1, 9.2, 9.4, 9.5 and 9.6. PIAC strongly supports recommendation 9.6, involving the removal of barriers to suitability for ICOs, namely:

If home detention and ICOs are retained as sentencing options in a revised Crimes (Sentencing) Act:

- (1) 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.
- (2) It should be possible to serve part of a home detention order in an institution providing residential drug or alcohol treatment. This should not increase the length of the order.
- (3) 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.

### **Replacing ICOs with a Community Detention Order**

The NSWLRC recommended that a new flexible community-based custodial order replace home detention, ICOs and suspended sentences (see Chapter Eleven, Report 139). The new order, provisionally named the 'community detention order' (CDO) would provide a sentencing option for a range of offenders with complex needs who would benefit from intensive administration of the sentence, and incorporate participation in community service work, medical or mental health treatment, education, intervention programs, vocational or life skills courses, counseling, drug or alcohol or any combination of these activities, as part of the approved activities to satisfy the conditions of the CDO.

PIAC strongly supports the NSWLRC recommendation for the new CDO, as described in Chapter Eleven of Report 139. This new sentencing option would address several of the concerns that PIAC has regarding the limitations of the existing ICO scheme, and the inability of HPLS clients to be assessed as suitable for ICOs, as identified in our submission to the NSWLRC referred to above.

According to the NSWLRC, the new CDO would operate in a similar manner to the existing Work and development Order (WDO) scheme, under which an individual who has a mental illness, intellectual disability or cognitive impairment; is suffering from acute economic hardship; or who is homeless, may apply to the NSW State Debt Recovery Office to participate in a WDO. A WDO allows such a person to 'pay off' their fines in ways other than with money. This may be done, for example, through volunteer work with an approved organisation, participation in approved medical or mental health treatment programs or participation in education and/or vocational courses.

The NSW Department of Justice identified several benefits from the scheme, including:

- reduced reoffending
- engagement of clients in appropriate activities

- reduction of stress and hopelessness
- promotion of agency and self-efficacy
- building client skills and an incentive to work, and
- a reduction of costs to government relating to enforcement, offending behaviour, welfare dependency, mental health problems and drug and alcohol problems.<sup>2</sup>

PIAC has been a longstanding supporter of the WDO scheme. The Scheme has transformed the effect of the NSW infringements system on the most disadvantaged in the community. Whereas the system previously reinforced the disadvantage experienced by those experiencing homelessness, people with disability or mental illness, or those in financial distress, WDOs provide a systemic response that engages people in activities that can assist them in acquiring new skills, work opportunities or medical treatment.

### HPLS WDO Case studies

MD had over \$7,000 in accumulated fines, largely as a result of travelling on public transport without a valid ticket. MD applied to the State Debt Recovery Office to reduce his fines by applying for a Work and Development Order. As part of his WDO, MD completed a 16-week computer course. He believes this will assist him to return to work and eventually obtain housing.

DT attended an HPLS clinic for assistance in managing his accrued fines debts, which were over \$6,000. He wanted to get his driver's licence back so he could take up a work offer, DT applied for a WDO, which allowed him to do volunteer work, which enabled his fine debt to be reduced so he could obtain his licence.

JH had 34 enforcement orders in place. The SDRO agreed to stay the execution of the writ for the levy of property and all enforcement action pending JH commencing a WDO. JH undertook voluntary work as part of his WDO and reduced his overall fines debt to a manageable amount.

PIAC welcomes the opportunity to respond to the NSW Sentencing Council's call for preliminary submissions for the review of Intensive Corrections Orders. The review presents as a timely opportunity to consider the recommendations of the NSWLRC in its report into Sentencing (Report No. 139) in relation to Intensive Corrections Orders and Community Detention Orders.

We would be pleased to discuss this submission with you. Please do not hesitate to contact Louis Schetzer, Senior Policy Officer on [REDACTED] if you would like to do so.

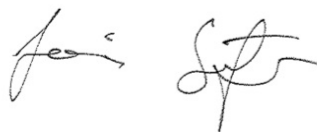
Yours sincerely



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<sup>2</sup> NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011), 40-41.