

Submission to the
NSW Sentencing Council
Review of Intensive Correction Orders

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To the Chairperson of the NSW Sentencing Council, the Hon James Wood AO QC,

This submission is made in relation to the NSW Sentencing Council's 'Review of intensive correction orders'. To give some indication of the authors experience in this area, we will briefly introduce ourselves.

Aunty Barbara Nicholson is an Elder from the Wadi Wadi people in the Illawarra region. She was on the executive of the Aboriginal Deaths in Custody Watch Committee for eight years and during this time she was engaged in a lot of work relating to Aboriginal people in the justice system. She has continued to work over many years in education in correctional institutions in NSW. Four years ago she initiated a creative writing program conducted at Junee Correctional Centre. This project is managed by a series of workshops conducted twice a year at the Junee Correctional Centre with Aboriginal inmates and has resulted in the publication of three volumes of their writing called *Dreaming Inside*¹. Volume four is in the publication process at the moment. For the last fifteen years Aunty Barbara has been a senior honorary research fellow in the School of Law at the University of Wollongong. For the last ten years she has also sat on the Human Research Ethics Committee at this University. For the last four years she has sat on the Ethics Committee of the Australian Institute of Criminology in Canberra.

Fabienne Else is a doctoral student in the School of Law at the University of Wollongong who is currently researching the impact that intensive correction orders (ICOs) are having on Aboriginal offenders and communities in NSW. She has previously volunteered and worked with the Aboriginal Legal Service NSW/ACT Limited (the 'ALS') wherein she was made aware of the difficulties that ICOs posed to Aboriginal offenders. She has also engaged in informal discussions with several Aboriginal Elders regarding the content of ICOs and how suitable they are for the needs of Aboriginal offenders. Though these initial discussions were not conducted as formal research, the views of those Elders enlighten the content of this submission.

Summary

Early evidence of the use of ICOs appears to indicate that they are an under-utilised and ineffectual sentencing option for Aboriginal offenders. This submission will focus on certain problematic aspects of the current ICO provisions and will argue that they need to be reviewed in light of consultation with Aboriginal communities, families, Elders and agency stakeholders in NSW, in order to be rendered culturally appropriate and effective.

¹ Nicholson Aunty Barbara (ed), *Dreaming Inside: voices from the Junee Correctional Centre*, Selected works with tutors Aunty Barbara Nicholson, Bruce Pascoe, Simon Luckhurst, John Muk Muk Burke and Aboriginal inmates from Junee Correctional Centre (South Coast Writers Centre, 2013).

Problematic aspects of the ICO provisions for Aboriginal offenders

This section of the submission will outline several aspects of the ICO provisions that may need to be amended based on the inequitable outcomes that they produce for Aboriginal offenders.

Accessibility of ICOs to Aboriginal Offenders

There has not been extensive research conducted on how ICOs impact on Aboriginal offenders and communities; however, early studies indicate that ICOs are being under-utilised by Aboriginal offenders.² One of the explanations given for this was the remote location of Aboriginal offenders, which is precluding them from being able to access the sentencing option due to a lack of facilities.³ The ALS has indicated that ICOs are largely unavailable in many towns in the far west and are not available at all outside of a 200km radius of large towns such as Dubbo or Bathurst.⁴ In recommending the actual state-wide implementation of ICOs,⁵ the NSW Law Reform Commission found that even for those who are technically able to access ICOs, barriers remain due to 'limited local opportunities for community service work and appropriate rehabilitation programs'.⁶ Difficulties also arise for offenders required to travel long distances to meet with supervisors or complete community service work.⁷ This may cause additional problems for offenders who are reliant on limited public transport.

Due to the higher proportion of Aboriginal people versus non-Aboriginal people living outside of major towns,⁸ the unavailability of ICOs on a state-wide basis⁹ may have a major discriminatory impact on Aboriginal offenders being able to access this sentencing option. As such, there needs to be increased latitude and flexibility of this option in remote areas, which should be informed on a local level by Aboriginal communities, families and Elders.

² Clare Ringland, 'Intensive correction orders vs other penalties : offender profiles' (2012) (163) *Crime and Justice Bulletin* 1, 9.

³ Ibid.

⁴ Aboriginal Legal Service (NSW/ACT) Limited, Submission to New South Wales Law Reform Commission, *Commission's Review of the Crimes (Sentencing Procedure Act 1999 (NSW)*, 24 January 2013, 2.

⁵ New South Wales Law Reform Commission, *Sentencing*, Report 139 (2013), 203.

⁶ Ibid 202.

⁷ Ibid.

⁸ Australian Bureau of Statistics, *2075.0 - Census of Population and Housing - Counts of Aboriginal and Torres Strait Islander Australians, 2011* <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/2075.0Main%20Features32011?opendocument&tabname=Summary&prodno=2075.0&issue=2011&num=&view=>>.

⁹ ICOs were initially wrongly described as being available 'state-wide', with Parliamentary Secretary Barry Collier stating 'The new order will be available state wide' in his agreement in principle speech, see New South Wales, *Parliamentary Debates*, Legislative Assembly, 10 June 2010, 24281 (Barry Collier, Parliamentary Secretary), this was despite the fact that it was acknowledged the order would only be available to cover a 200km radius of larger regional towns (including Goulbourn, Dubbo and Broken Hill), in a consultation paper released in 2008, see Office of the Attorney General and Minister of Justice, 'An Intensive Corrections order for NSW: Consultation Paper' (Consultation Paper, NSW, 2008), 1.

It is also important to note that the immediate accessibility of ICOs for Aboriginal offenders may be further hindered by their being unaware of the options existence or not fully understanding the suitability requirements, assessment process and mandatory conditions. The low percentage of ICOs being given to Aboriginal offenders means that they are unlikely to be aware of its existence as an option, in the same way there is awareness around imprisonment or suspended sentences.¹⁰ This is especially problematic for self-represented Aboriginal offenders. Aunty Barbara Nicholson reasons that in the interests of Aboriginal self-determination, it should be required that any Aboriginal person facing a gaol sentence of two years or less (and therefore eligible for an ICO) should be fully appraised of the availability of ICOs and made aware of all conditions relating to the order so they are able to make an informed decision in relation to applying to the Court for an assessment or agreeing to an assessment. This explanation needs to be spelt out in plain language and preferably in the presence of a community advocate who knows the offender and is able to determine whether they understand the nature of the order. Such a community advocate would also be a useful presence during the suitability assessment.

The suitability assessment reports

When volunteering at a busy ALS office in the criminal law division, one of the authors (Fabienne Else) discussed the suitability requirements of ICOs with several experienced criminal solicitors and Aboriginal field officers and they all expressed the opinion that Aboriginal offenders were generally unable to be found suitable for ICOs. In fact, in two years of volunteering in the criminal law division, this author did not hear of one Aboriginal offender receiving an ICO. That is not to state that none were received, but it appeared to be the general opinion among the solicitors and field officers that receiving an ICO was highly uncommon for Aboriginal offenders. This attitude was confirmed in the ALS submission to the Law Reform Commission in 2013, wherein it was stated:

The general impression of ALS lawyers is that the suitability assessment procedure for this disposition is very strict and many clients simply have no realistic prospect of being found suitable and/or complying with the terms of the order.¹¹

This inability of Aboriginal offenders to successfully get through the suitability assessment process leaves very few sentencing alternatives for Aboriginal offenders

¹⁰ The number of ICOs given out for a principal offence in NSW Local Criminal Courts to Aboriginal offenders in 2014 was 219, or approximately 1.36 per cent of the penalties given out to Aboriginal offenders. By contrast, the number of Aboriginal offenders imprisoned for a principal offence in 2014 was 2958 or approximately 18.43 per cent of Aboriginal offenders. The number of Aboriginal offenders given a suspended sentence with supervision for a principal offence in the same period was 677 or 4.21% of Aboriginal offenders. The only penalties given less frequently than ICOs to Aboriginal offenders in 2014 were 'Nominal sentences' and home detention. For more of these statistics, see NSW Bureau of Crime Statistics and Research, 'New South Wales Criminal Courts Statistics 2014' (NSW Bureau of Crime Statistics and Research, 2015), 35-37.

¹¹ Aboriginal Legal Service (NSW/ACT) Limited, Submission to New South Wales Law Reform Commission, *Commission's Review of the Crimes (Sentencing Procedure Act 1999 (NSW)*, 24 January 2013, 2.

facing full-time custody, which in turn could act to maintain or elevate incarceration rates.

This submission will not reiterate all the factors that need to be considered in an assessment report¹² but maintains that these factors are onerous for Aboriginal offenders, and may fail to provide individualised justice by taking into account of factors such as resource availability¹³ (which may be limited in remote regions). Some service providers, such as the NSW Law Society have also commented on the problems regarding suitability assessments, stating:

People who would benefit most from an ICO are the least likely to be assessed as suitable. Offenders with mental illness, drug and alcohol problems, and unstable housing are often assessed as unsuitable...¹⁴

It is well documented that Aboriginal offenders display higher levels of mental illness and trauma,¹⁵ drug and alcohol problems,¹⁶ and unstable or overcrowded housing.¹⁷ Therefore, under the current provisions it appears that they are less likely to be found suitable for an ICO and subsequently subject to a full-time custodial sentence.

The fact that the assessment of suitability is made by persons other than the Magistrate is also an issue of concern. The current process gives greater discrepancy in the sentencing outcome of an offender to a parole officer rather than the Magistrate. This problematic aspect has been previously identified as a concern by the Law Society.¹⁸ It is important that any person making such an important determination has an awareness of the systematic disadvantage facing Aboriginal offenders. The ALS has previously suggested that the assessment process could be improved by ensuring that the report authors were trained in identifying and detailing factors relevant to the application of the principles laid out in *R v Fernando*.¹⁹ Such authors should also be aware of the remarks made in the more recent case of *Bugmy v The Queen*,²⁰ regarding the non-diminishing effects of childhood deprivation.

¹² *Crimes (Sentencing Procedure) Regulation 2010* (NSW) s 14.

¹³ *Ibid* s 4(b).

¹⁴ The Law Society of New South Wales, Submission rbg580133 to NSW Sentencing Council, *The operation and use of Intensive Correction Orders (ICOs)*, 9 January 2012, 1, 12.

¹⁵ Eileen Baldry et al, 'A predictable and preventable pathway: Aboriginal people with mental and cognitive disabilities in the criminal justice system' (UNSW, 2015) <<https://www.mhdcd.unsw.edu.au/>>; Ed Heffernan et al, 'The Family Business Report: Improving the Understanding and Treatment of Post-Traumatic Stress Disorder among incarcerated Aboriginal and Torres Strait Islander Women' (Beyond Blue, 2015) <<https://www.beyondblue.org.au/docs/default-source/research-project-files/bw0284-the-family-business-final-report.pdf?sfvrsn=4>>.

¹⁶ Aboriginal Health Ministers' Advisory Council, 'Aboriginal and Torres Strait Islander Health Performance Framework 2014 Report' (AHMAC, 2015).

¹⁷ Australian Institute of Health and Welfare, 'Housing circumstances of Indigenous households: tenure and overcrowding' (2014).

¹⁸ The Law Society of New South Wales, Submission rbg580133 to NSW Sentencing Council, *The operation and use of Intensive Correction Orders (ICOs)*, 9 January 2012, 1, 12.

¹⁹ See *R v Fernando* (1992) 76 A Crim R 58, as mentioned in the Aboriginal Legal Service (NSW/ACT) Limited, Submission to New South Wales Law Reform Commission, *Commission's Review of the Crimes (Sentencing Procedure Act 1999 (NSW)*, 24 January 2013, 3.

²⁰ *Bugmy v The Queen* [2013] HCA 111 at [42].

Mandatory requirement: 32 hours of community service

The mandatory 32 hours of community service per month may be a barrier to effective order completion for Aboriginal offenders, particularly Aboriginal women. Aboriginal women are currently the fastest growing prisoner population in Australia,²¹ and some have argued that this stems in part from justice policies that fail to take into account their unique needs.²² Aboriginal women are known to have different needs and responsibilities than men or non-Aboriginal women. They generally have more responsibility for child caring as the primary parent, including children of other family members.²³ They are also more financially dependent on partners and subject to higher levels of family violence.²⁴ Factors such as these can greatly impinge on their capacity to commit 32 hours per month to community service activities.

Legal Aid has stated that in their solicitors experiences ICOs have been revoked for relatively minor breaches,²⁵ the most common of which were a failure to complete the 32 hours of community service or failure to comply with supervision conditions.²⁶ They note that 'In some cases there have been valid or reasonable explanations for not complying with a condition, for example, difficulty with public transport or caring for a relative who is unwell.'²⁷ Recent statistics from the State Parole Authority support these breach perceptions, with a recent report citing failure to undertake the 32 hours per month of community work is the top reason for revocation.²⁸ As mentioned before, Aboriginal women have increased responsibilities and specific disadvantages that could impact on their ability to complete this condition, increasing their risk of breaching the order and the likelihood of revocation.

While recent decisions by Corrective Services NSW (CSNSW) to offset some of the community work obligations through counselling or courses²⁹ is a positive step forward, there needs to be further consideration of how these provisions impact Aboriginal offenders. This is especially the case with recent statistics showing an

²¹ Eileen Baldry and Ruth McCausland, 'Mother Seeking Safe Home: Aboriginal Women Post-Release' (2009) 21(2) *Current Issues in Criminal Justice* 288, 289.

²² Lorana Bartels, 'Painting the picture of indigenous women in custody in Australia' (2012) 12(2) *Law and Justice Journal* 1, 1; Julie Stubbs, 'Indigenous women in Australian criminal justice : over-represented but rarely acknowledged' (2011) 15(1) *Australian Indigenous Law Review* , 48.

²³ Bartels, above n 22, 10.

²⁴ Ruth McCausland, 'Women's Access to Diversionary Programs in NSW: A Report for The Women's Advisory Council of Corrective Services NSW' (Women's Advisory Council of Corrective Services, 2014), 21.

²⁵ Legal Aid New South Wales, Submission to NSW Sentencing Council, *The operation and use of Intensive Correction Orders (ICOs)*, January 2012, 1, para 3.2

²⁶ *Ibid*, para 3.3

²⁷ *Ibid*.

²⁸ Police & Justice Sentencing Council, 'Sentencing Trends and Practices Annual Report 2013' (NSW Government, 2013) 1, 32.

²⁹ Paul Cloran, 'Intensive correction orders : three years on' (2013) 25(8) *Judicial Officers Bulletin* 65, 68.

increase in the proportion of ICOs ending in revocation and increases in revocation on the basis of breaches of work components.³⁰

No interstate travel without permission

One of the mandatory conditions of the ICO is that the offender is not able to leave or remain outside of NSW without the permission of the Commissioner.³¹ This may be problematic for Aboriginal offenders who must attend to 'sorry business'. Sorry business involves the death ceremonies and mourning of loss that accompany the passing of an Aboriginal person.³² This is a very important time for Aboriginal people and flexibility is required in the administration of ICOs to allow for offenders to engage with 'sorry business'. Aboriginal funerals can go for days and from Aunty Barbara Nicholson's experience, it is essential that 'all the right people are there'. If an offender is deemed to be an important person to attend 'sorry business' and is prevented from attending, this can be very traumatic and the whole family and larger community may suffer as a result. Aunty Barbara Nicholson argues that this holds as true for urban communities as it does for regional and remote communities.

While the authors acknowledge that there is some scope for interstate travel through application to the Commissioner³³ and that permission may be sought on the basis of compassionate grounds, or any grounds the Commissioner sees fit,³⁴ they would like to ensure that permission on the basis of 'sorry business' is simple and quick to apply for. There may be benefit in considering special powers for ICO supervisors to grant permission for offenders to travel on the basis of 'sorry business'; however, any such process should be created through consultation with Aboriginal communities to ensure that it is appropriate, especially in dealing with such a culturally sensitive topic.

ICO Supervisor Powers

The extent to which the mandatory and additional ICO conditions give power to ICO supervisors is a concern to the authors. This concern has previously been well illustrated by the Legislation Review Committee, who stated in reviewing the original Bill:

In any case, the Committee is concerned that the Bill confers onto the supervisors of offenders subject to intensive correction orders wide latitude in their management of an offender, without providing for appropriate guidelines to inform them of the suitability of their conduct. The Committee consider that, in absence of such guidelines as a safeguard, the risk exists that a supervisor's authority could be applied inappropriately. The Committee refers this matter to Parliament for its consideration.³⁵

³⁰ Police & Justice Sentencing Council, above n 28, 33.

³¹ *Crimes (Administration of Sentences) Regulation 2014* (NSW) s 186(d).

³² Creative Spirits, *Mourning an Aboriginal Death* (31 August 2015) Creative Spirits <<http://www.creativespirits.info/aboriginalculture/people/mourning-an-aboriginal-death#toc2>>.

³³ *Crimes (Administration of Sentences) Regulation 2014* (NSW), s 186(d).

³⁴ *Crimes (Administration of Sentences) Act 1999* (NSW) 2 85(2)(b)-(c).

³⁵ Legislation Review Committee, Parliament of New South Wales, *Legislation Review Digest No 9 of 2010* (2010), 31.

An important example of the powers wielded by the ICO supervisors can be seen in one of the additional conditions that can be made by the Court, that states ‘a condition that requires the offender to comply with any direction of a supervisor that the offender not associate with specified persons or persons of a specified description’.³⁶ There is no definition of ‘specified person’ or ‘persons of a specified description’ in the regulation and therefore, the decision as to who these definitions apply to appears to be left wholly at the discretion of the ICO supervisor. This could be problematic for Aboriginal families or communities if a supervisor decides that the offender cannot associate with co-offenders or people who have a criminal history, as the people who fall within these descriptions may be family members. The result could be the limitation of family access and support to Aboriginal offenders subject to ICOs. The possible outcomes of provisions such as this for Aboriginal people should therefore be examined in this review, to ensure that such powers are not being improperly used by supervisors and that appropriate guidelines are in place to guide decisions. The authors also note that the undefined terms of ‘*persons of a specified description*’ could appear to carry a discriminatory tone, the nature of which (in Elders such as Aunty Barbara Nicholson’s experience) can lead to discriminatory outcomes for Aboriginal communities.

ICO revocation and reinstatement process

As mentioned above, there is some belief that ICOs are being revoked for minor breaches of the order. It is therefore of concern that there is no court appearance for offenders if the State Parole Authority (SPA) decides to revoke the ICO (after the matter is referred to them by the ICO Management Committee).³⁷ Instead, offenders are currently required to wait anywhere up to a month before they have the opportunity to present their case or refute the alleged breaches.³⁸

Legal Aid has acknowledged that in their experience, reinstatement after rescission of ICOs is rare and to achieve reinstatement is an onerous process.³⁹ These experiences are supported by recent statistics. According to the CSNSW, between October 2010 and December 2013, the SPA revoked 561 ICOs,⁴⁰ and during the same period only reinstated 76.⁴¹ This is an average reinstatement rate of 13.5 per cent. The result of lack of reinstatement can be a very lengthy custodial period for offenders, particularly as ICOs have no non-parole period.⁴² When considering the problems that exist for Aboriginal offenders in complying with the mandatory conditions, especially the work component, the harsh nature of the revocation

³⁶ *Crimes (Administration of Sentences) Regulation 2014* (NSW) s 187(d).

³⁷ *Crimes (Administration of Sentences) Act 1999* (NSW) s 90(1)(c).

³⁸ Cloran, above n 29, 68.

³⁹ Legal Aid New South Wales, Submission to NSW Sentencing Council, *The operation and use of Intensive Correction Orders (ICOs)*, January 2012, 1, para 3.4.

⁴⁰ Police & Justice Sentencing Council, above n 28, 32.

⁴¹ *Ibid* 33.

⁴² *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7(2).

process is a real threat to the efficacy of the ICO as a rehabilitative option for Aboriginal offenders.

The importance of consulting Aboriginal families and communities regarding ICOs

In conducting a review of the ICO provisions, it is important that Aboriginal communities be consulted as key stakeholders. Consultation with Aboriginal communities, families, Elders and service providers (such as the ALS), will help ensure that the ICO provisions are culturally appropriate, accessible and effective for Aboriginal offenders, their families and surrounding communities. The importance of such consultation has previously been supported by the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), which recommended:

That in reviewing options for non-custodial sentences governments should consult with Aboriginal communities and groups, especially with representatives of Aboriginal Legal Services and with Aboriginal employees with relevant experience in government departments.⁴³

This recommendation is relevant to this review of the ICOs provisions, in order to ensure that Aboriginal communities and stakeholders are given a voice in the development of the order. The above recommendation is especially pertinent to this review, given that it was arguably not adhered to in the original development of the ICO provisions,⁴⁴ which (as this submission has outlined) have gone on to be problematic for Aboriginal offenders.

Conclusion

While this submission has outlined many problematic aspects of the ICO provisions for Aboriginal offenders, it has been cautious not to advise specific solutions (beyond the importance of consultation, cultural sensitivity and the use of plain language), as these need to come directly from Aboriginal communities, Elders, families, agencies and other Aboriginal stakeholders who understand the sentencing needs of Aboriginal offenders in their communities. It is the hope of the authors that through substantial consultation with these groups, the ICO provisions can be reformed in such a way that they will form a useful rehabilitative option for Aboriginal offenders; an option that may help to address the long-term problem of the overrepresentation of Aboriginal people in prison.

⁴³ See recommendation 111 in Elliott Johnston, 'National Report' (The Government of the Commonwealth of Australia, 1991).

⁴⁴ When referring to agency stakeholders in his second reading speech of the ICO legislation in 2010, Attorney General John Hatzistergos did not refer to the ALS or to any other Indigenous agencies, communities or groups as having contributed to the development of the reform. He did specifically cite several other non-Aboriginal stakeholders by name, including the Law Society, the Bar Association, the Office of the DPP, Legal Aid, Wesley Community Legal Centre, Victims of Crime Assistance League, Enough is Enough Anti-Violence Movement and the Homicide Victims Support Group. See Parliament of New South Wales, *Parliamentary Debates*, Legislative Council, 22 June 2010, (John Hatzistergos - Attorney General) 24439.

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