

Intensive Corrections Orders

Intensive Corrections Orders (ICO's) commenced as a sentencing option in October 2010 and coincided with the abolition of Periodic Detention. The availability of ICOs was limited to certain geographical locations initially however, in more recent times it has become available to most courts as an alternative to full-time imprisonment.

What is an ICO

An ICO is an order of imprisonment for not more than 2 years made by a court, which directs that the sentence is to be served by way of intensive correction in the community. An ICO is served in the community under the strict supervision of Corrective Services NSW (CSNSW) rather than in full-time custody in a correctional centre.¹

Where does an ICO fit into the sentencing hierarchy?

1. Suspended sentence s. 12
2. Intensive Corrections Order
3. Home Detention
4. Full time imprisonment

The Legislation

ICOs are not available for prescribed sexual offences, set out in s. 66 of the Crimes (Sentencing Procedure) Act.(C(SP) Act).

S. 67 Suitability of offender for intensive correction order

(1) An intensive correction order may not be made with respect to an offender's sentence of imprisonment unless the court is satisfied:

- (a) that the offender is of or above the age of 18 years, and
- (b) that the offender is a suitable person to serve the sentence by way of intensive correction in the community, and
- (c) that it is appropriate in all of the circumstances that the sentence be served by way of intensive correction in the community, and
- (d) that the offender has signed an undertaking to comply with the offender's obligations under the intensive correction order.

(3) A court may, for any reason it considers sufficient, decline to make an intensive correction order despite the contents of the assessment report.

(4) A court may make an intensive correction order with respect to an offender's sentence of imprisonment only if the assessment report states that, in the opinion of the person making the assessment, the offender is a suitable person to serve the sentence by way of intensive correction in the community.

¹ <http://www.correctiveservices.nsw.gov.au/information/legislation/intensive-correction-order>

Sections 7 and 68 of the *Crimes (Sentencing Procedures) Act* limits the sentence for which an ICO can be imposed to a period of 2 years.

Section 69(2) provides that a court is not to refer an offender for such an assessment unless satisfied, having considered all the alternatives, that no sentence other than imprisonment is appropriate and that the sentence is likely to be for a period of no more than 2 years.

Additional conditions imposed by courts

The sentencing court may, at the time of sentence or subsequently on the application of the Commissioner or the offender, impose additional conditions on an ICO, or vary or revoke any additional conditions imposed by it on an ICO: [s 81\(3\)](#).

Additional conditions are provided for by regulation: [s 81\(4\)\(a\)](#). [Clause 176 Crimes \(Administration of Sentences\) Regulation 2014](#) sets out six additional conditions (a)–(f). These include: the offender is to accept any direction of a supervisor in relation to the maintenance of, or obtaining of employment; a condition that prohibits the offender consuming alcohol; and for the offender to comply with any direction not to go to specified places or districts or places of a specified kind.

The court may also impose any other condition that the court considers necessary or desirable for reducing the likelihood of the offender re-offending: [s 81\(4\)\(b\)](#). However before imposing an additional condition under [s 81\(4\)\(b\)](#), a court is to consider whether the condition will create a need for additional resources and must not impose the condition unless satisfied that any such additional resources that will be needed are or will be made available: [s 81\(7\)](#).² It should also be noted that the State Parole Authority (SPA) does not have the authority to add or alter conditions on ICO's, only the courts have that power.

It should be noted that SPA can impose additional conditions to Home Detention Orders so long as they are not inconsistent with the standard conditions or any additional conditions imposed by the court. S.103(2) of the *Crimes (Administration of Sentences) Act*.

Breaches. What are they and the effect?

Breach rates:

ICOs current as at 31 st December, 2012	_____	952
ICOs revoked during 2012	_____	114
Matters referred to ICO Management Committee during 2012	_____	404

S. 89 Commissioner powers to deal with breach of ICO

If the Commissioner is satisfied that an offender has breached an intensive correction order, the following sanctions may be applied

- (a) a formal warning,

² SBB

(b) a more stringent application of the conditions of the intensive correction order in accordance with the terms of those conditions (for example, further restrictions on association with other persons).

(3) As an alternative or in addition to imposing a sanction on the offender, the Commissioner can decide to refer the breach to the Parole Authority because of the serious nature of the breach.

S. 90 Parole Authority powers to deal with breach

(1) The Parole Authority may, on its own motion or on the application of the Commissioner, deal with an offender's breach of an intensive correction order by:

- (a) imposing any sanction that the Commissioner could impose under section 89, or
- (b) imposing a period of up to 7 days home detention on the offender by imposing as a condition of the offender's intensive correction order a requirement that the offender remain at his or her place of residence for the period of home detention, or
- (c) revoking the intensive correction order.

(2) In deciding whether and what action should be taken in respect of an offender's breach of an intensive correction order, the Parole Authority may have regard to any action previously taken (by the Parole Authority or by the Commissioner) in respect of the breach or any previous breach of the order by the offender.

Consideration of Revocation and Breaches

SPA may, on being informed that a breach has occurred, call the offender to appear before it and conduct an inquiry into the matter. S.162 C(AS) Act

SPA may revoke an ICO:

1. If it is satisfied that offender has failed to comply with his/her obligations under the order
2. If satisfied that it is unable to comply with his/her obligation as a result of a material change in the offender's circumstances
3. If the offender applies for the order to be revoked s.163

In descending order, the reasons for revoking ICO's by SPA are:

1. Failing to comply with the condition to perform 32 hours community work per month
2. Breach of requirement to be of good behaviour, having been arrested and charged (usually bail refused) for further offences. SPA will usually stand over for results of court proceedings if the offender has been granted bail on fresh charges. SPA will often revoke an ICO despite the court granting bail if the breach is a domestic violence offence (particularly if the offender is living at the premises where the domestic violence occurred). In cases where there is a stand-over for result of outstanding charges, revocation will only occur if a full-time custodial sentence is imposed.
3. Failing to reside at address (including leaving address –whereabouts unknown)
4. Use of illicit drugs over an extended period and failure to address addiction issues.

What happens when an ICO is revoked?

Revocation and Warrant:

A warrant is issued for the arrest of the offender. The sentence being served on the ICO ceases to run from the effective date. Because of that, the effective date of revocation is important. If there is a breach because of further offending, SPA may go back to the date of the offence, this will almost always be the case where bail is refused for the fresh offence.

As the offender is in custody, the sentence will continue to run whilst he/she is in gaol. If an offender is on bail pending the outcome of the fresh proceedings, the effective date is usually the date of conviction.

If an offender has left the approved address and whereabouts are unknown, the effective date will be the date the offender last had contact with Community Corrections.

If there has been general non-compliance the effective date may be the date SPA sits to consider the matter. The later the effective date of revocation, the shorter the sentence the offender ultimately has to serve.

Arrest and appearance at SPA

The offender is arrested and taken directly to gaol. There is no court appearance. The Secretariat of SPA will fix a Review Hearing before SPA within a month of the offender's arrest. The offender has the option of appearing at the review hearing and being legally represented, or not appearing - thus accepting the revocation and not disputing the serving of the balance of the ICO term in custody.

If the offender seeks a review, he/she can either admit the breach/es or deny them. If there is a denial, evidence is taken and SPA determines whether or not the breach/es have been established. If the breach/es are admitted or after SPA determines that the breach/es have been established, the offender may apply for reinstatement of the ICO.

Reinstatement of Revoked ICO

An offender can apply for reinstatement of an ICO for the balance of the sentence provided he/she has served at least 1 month in full-time detention and must state what the offender has done or is doing to ensure that the offender will not fail to comply with his/her obligations under the ICO in the event of reinstatement. S.165.

Reinstatement

The matter is then stood over for a Reinstatement Report by Community Corrections (usually for 2 weeks). The offender appears at the subsequent meeting of SPA and the reinstatement report will either conclude that he/she is suitable for Reinstatement in which case the Reinstatement Order is made and the offender released no later than 4pm the following day. It should be remembered that neither SPA nor a court can order an ICO unless Community Corrections has indicated that the offender is a suitable person to serve the sentence (or the remainder of the sentence in the case of reinstatement) by way of ICO.

If an offender's ICO is revoked because of a fresh gaol term imposed by a court, SPA would almost always consider reinstatement of the ICO if the sentence (only the non-parole period) expires before the expiration of the ICO.

If Unsuitable for Reinstatement

If an offender is unsuitable for reinstatement of an ICO, he/she can apply for the balance of the sentence to be served by way of Home Detention. It should be remembered that the maximum term for a Home Detention Order is 18 months. If there is more than 18 months remaining on an ICO at the time of revocation that would preclude SPA from considering the offender serving the balance by way of Home Detention.

If the offender is unsuitable for re-instatement of the ICO or for the balance to be served by Home Detention, then he/she will serve the balance of the sentence by way of full-time imprisonment. A difficulty arises in these circumstances. There is no provision for the imposition of a parole period if there is a balance in excess of 6 months whether the sentence is to be served by way of Home Detention or full time imprisonment. The effect of this is that an offender, who is sentenced to an ICO which is subsequently revoked and not reinstated, will serve the full term of the balance of the sentence. There is no provision for the setting a parole period where SPA makes a Home Detention order subsequent to the revocation of an ICO. A court will often specify a non-parole period when making a Home Detention s.5(5) C(SP) Act, in fact it is required to give reasons if it does not (and the sentence imposed is greater than 6 months).

Where an offender has been found unsuitable for reinstatement, SPA will always look to the reason(s) for the finding of unsuitability and have the author of the reinstatement report give evidence as to the reasons for the finding and investigating what the offender would have to do in custody or otherwise in order to be more likely to be found suitable for reinstatement. It is clear that the legislation envisages as many offenders as possible being reinstated back to their ICOs. SPA has adopted a practice of allowing the first reinstatement as soon as the breaches are established and a suitable reinstatement report has been received (usually 14 days after the breaches are admitted or found proved).

Where there is a second revocation of the same ICO, SPA will make further enquiries as to the cause of the breach/es and what issues the offender needs to address in order to be eligible for further reinstatement. SPA will usually consider an application to convert the ICO to Home Detention without further delay. SPA will also consider reinstatement if the offender wishes to enter residential rehabilitation in order to address substance abuse issues. In other cases, offenders will have to enrol in programs in gaol in order to address issues that brought them back into custody. As a general rule, offenders are told that they can make further application for reinstatement at any time, however a period of three months would normally be required with the offender showing compliance with prison routine and addressing the issues which brought them into custody by completing programs such as EQUIPS.

Advantages of ICO's

In 2011-12, the total net operating expenditure and capital cost per NSW prisoner per day was \$292.51. By contrast, the total net operating expenditure and capital cost per offender

being supervised in the community by Corrective Services NSW per day was \$28.75. The NSW Auditor-General has found that even home detention, the most expensive and Intensive community option available, costs about one quarter of the amount of imprisonment per offender.³

Other benefits of home detention and ICOs that were acknowledged in the submissions included:

- they avoid any potential contaminating effects arising from offenders, and particularly first time offenders, being imprisoned with other offenders; (24)
- offenders who would be at risk of losing public or community housing if they entered a period in full-time custody of more than three months are able to retain their housing; (25) and
- both orders can combine benefit to the community (through community service work) with rehabilitation and an element of punishment.⁴

Suggested Improvements

- (1) The maximum allowable length of an ICO should be extended from two to three years.
- (2) 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.⁵
- (3) The court should be able to set a non-parole period which provides that the balance of the term must of the ICO not exceed the non parole period by one third unless the court finds exceptional circumstances. Notwithstanding that provision, the maximum length of the non-parole period should be two years.
- (4) Where SPA revokes an ICO during the non-parole period, SPA should be able to commit the offender to either full-time custody or home detention. The offender should be able to apply to SPA for reinstatement of the ICO after one month.
- (5) Where an offender who is serving the parole period of an ICO breaches the conditions of parole, SPA should be able to revoke the parole and order the offender's return to full-time imprisonment or home detention. The offender should be able to reapply for parole after one month.

Timing of suitability assessments

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

- (1) The court should first set the term of imprisonment (the head sentence).
- (2) If the head sentence is of an eligible length, the court should be able to refer the offender for a single suitability assessment for home detention or an ICO or both.

³ NSWLRC Report 139 Sentencing 9.16

⁴ NSWLRC Report 139 Sentencing 9.17

⁵ NSWLRC Report 139 Sentencing Recommendation 9.4

- (3) If the court imposes an ICO or home detention order (after a positive suitability assessment) it should, at that time, either set a non-parole period or decline to do so.⁶

Removal of barriers to suitability

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.⁷

It is the Authority's experience that most Community Corrections Officer's will assess an offender as suitable for an ICO if they are engaged in full time residential drug or alcohol treatment. Community Corrections should be provided with the opportunity to have some lateral thinking regarding programs hours.

Further matters for consideration:

Reinstatement

There should be some guidance for SPA so far as reinstating ICO's are concerned. The current practice is that the first reinstatement of a revoked ICO will take place, subject to a suitable CCD report, on the application of the offender (usually) two weeks after the confirmation of the first revocation. If there is a second revocation of the same ICO it has been the practice of SPA to consider a further reinstatement after the offender has addressed the behaviour which brought about the first two revocations. That could be done by completing programs in custody or entering into residential rehabilitation. Often an offender will opt for Home Detention and that process is put in place immediately subject to the offender meeting the eligibility criteria and a report as to suitability obtained from CCD. It would be desirable for the legislation to provide that a second reinstatement should only be considered by SPA when SPA is satisfied that the offender is likely to comply with all the conditions of the ICO. Further, SPA may defer considering a further reinstatement for a period of up to three months from the date the offender came into custody as a result of the revocation of the ICO. For simplicity, it may be preferable for the offender to spend at least one month in prison after the first revocation and at least 3 months in prison after the second revocation. The current reinstatement period for Home Detention is 3 months.

General Comment

Currently most ICO's are imposed on offenders with low assessed risk of general re-offending (via the LSIR). It has also been determined by the Magistrate that a custodial

⁶ NSWLRC Report 139 Sentencing Recommendation 9.5

⁷ NSWLRC Report 139 Sentencing Recommendation 9.6

sentence is appropriate in response to the offender's offending, albeit to be served by way of an ICO. On the basis of the assessed risk level of low, a CCO will often only see such an offender once every two months. The whole focus of the ICO is on the Community Work Order and the offender performing 32 hours work per month. The title "Intensive Correction Order" is a misnomer. It is not appropriate for the CCO to see the offender more often if there are no criminogenic factors to address. It appears that a Community Service Order imposed by a court with a condition that an offender accepts the supervision of Community Corrections, would, for all intents and purposes be identical to an ICO. The difference lies in the breach provisions and the consequences thereof.

Courts and the legal profession always welcome viable alternatives to full time imprisonment.

NSW Law Reform Commission 139 Sentencing Recommendation 11

The Authority is in general agreement with the recommendations of the LRC in Chapter 11 with respect to the creation of a "Community Detention Order" to cover suspended sentences, ICOs and Home Detention.

Some comment on certain parts of Chapter 11. Those parts that are have marked "I agree" only indicate that, in the view of the Authority, they are important comments that the Authority would specifically highlight in any consideration of the proposal.

11.5-7 "Intensive Corrections Order" is a misnomer.

11.8 It is agreed that offenders who are most likely to benefit from an alternative to fulltime imprisonment with a strong rehabilitation element are those who are least likely to be assessed as suitable.

11.24 I agree that the excluding offences should be very limited.

11.28-29 I am a little conflicted about these paragraphs because often the offender will tell an assessing officer that it is thought he/she wants to hear in order to be found suitable for an alternative to full time imprisonment. It is only after a few months of supervision that it is revealed that there is an addiction, mental health or psychological issues. Meanwhile the court has inappropriately ordered a work component or an intervention which is less than ideal for the offender's ongoing needs. Often a requirement to perform a work order is inappropriate because of illicit drug use. This could be addressed in the standard conditions.

11.37-39 It is my view that the court should be able to set a non-parole period which provides that the balance of the term of the CDO not exceed the non-parole period by one third unless the court finds exceptional circumstances.

Notwithstanding that provision, the maximum length of the non-parole period should be two years.

11.41

I agree

11.51

Target group for the CDO. I agree.

11.55

I agree.

11.56

I disagree. In the view of the Authority it is more appropriate to have a parole period, essentially requiring the offender to be of good behaviour and if there is further offending, it is a matter than can be taken into account on further sentencing. The current legislation provides for the imposition of a non-parole period when courts are sentencing for Home Detention s.5(5) C(SP) Act. Home Detention is a very exacting sentence. If a CDO is made, it may include Home Detention. In my view it would be appropriate for fix a non-parole period with respect to every CDO over six months. The parole period should be supervised unless otherwise ordered by the court.

11.68

I am not in favour of SPA referring a matter to court for variation of the CDO conditions. Such a referral could take months. Section 103(2)(3) of CASA provides with respect to conditions of Home Detention:

(2) The Parole Authority may from time to time, by notice given to the offender:

(a) impose additional conditions on a home detention order, or

(b) vary or revoke any additional conditions imposed by it on a home detention order.

(3) This section does not permit the Parole Authority:

a) to revoke any standard conditions imposed by the regulations or any additional conditions imposed by the sentencing court, or

(b) to impose any additional conditions, or vary any additional conditions imposed by it, so as to be inconsistent with any standard conditions imposed by the regulations or any additional conditions imposed by the sentencing court.

I agree that SPA should not be able to impose conditions inconsistent with the additional conditions imposed by the sentencing court. There should be a provision for referral to the sentencing court, however, it should not be such that it would be likely to be used very often.

11.71

I agree.

11.72

I agree.