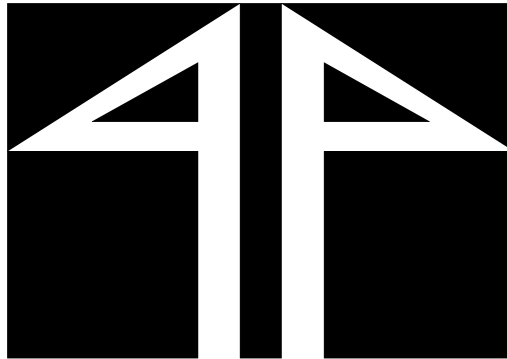
PROBATION AND PAROLE OFFICERS' ASSOCIATION OF NEW SOUTH WALES



SUBMISSION TO THE NEW SOUTH WALES LAW REFORM COMMISSION ON SENTENCING

Question 6

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SUBMISSION ON SENTENCING

QUESTION 6

The Probation and Parole Officers' Association of NSW (referred to in this document as 'the Association') welcomes the opportunity to make a submission to the NSW Law Reform Commission's (NSWLRC) *Review of Sentencing*. This submission should be read in conjunction to the Association's submission to other questions as they are interrelated. This submission addresses question 6.

Before addressing the elements to Question 6, the Association would like to draw to NSWLRC's attention an obvious irregularity in its introductory remarks to the discussion paper. Section 6.1 clarifies that 'Intermediate custodial sentencing options are those custodial sentences that can be imposed instead of full-time imprisonment' and includes compulsory drug treatment detention (CDTD), home detention, Intensive Corrections Orders (ICOs), suspended sentences, and the rising of the court. The use of the collective term 'intermediate custodial sentencing options' is perplexing. While CDTD, home detention and the rising of the court are custodial in nature, ICOs and suspended sentences are not. In law and in fact, they are alternatives to custody, not forms of custody.

An ICO is made *instead of* a sentence of imprisonment. Some of its conditions may be punitive, but they are not custodial in essence. Curfew is not custody. The nature of the ICO sentencing option is somewhat confused at the present time, because of its potential overlap with home detention administration. A reading of statute renders ICOs as a sentence of imprisonment in the weakest sense. The *Crimes (Sentence Administration) Act 1999 No 93* NSW Part 4 describes ICOs as 'Imprisonment by way of intensive correction in the community'. This is the strongest association between ICOs and imprisonment but is more rhetorical than real, given the nature of ICOs compared to home detention and (the former) periodic detention which are and were means of serving a sentence of imprisonment. S 67 of the *Crimes (Sentencing Procedure) Act 1992 No 92* NSW refers to ICOs merely as a sentence, not a sentence of imprisonment. S 68 states that an ICO cannot be made and served concurrent to a sentence of imprisonment and S 69 (2) states that the court must decide that no sentence other than imprisonment is appropriate, but in making an ICO does so instead of a sentence of imprisonment. In contrast, home detention requires that a sentence of imprisonment be imposed and the sentence is be served by way of home detention. Periodic detention similarly required a sentence of imprisonment be imposed followed by a direction.

A suspended sentence holds a more direct relationship to imprisonment, since the terms of an order of imprisonment are explicitly made. Nonetheless it also constitutes a form of bond comparable to s 9 and s 10. But the nature of the penalty option is not custodial, as the offender is released to the community, subject to conditions. Breach of the order can result in the imposition of the custodial sentence, but not necessarily.

Taxonomy is not a precise science and there is good reason to separate fines and bonds from intermediate penalty options and the most severe penalty of imprisonment. For the purposes of this review, 'alternatives to custody' would be too broad a category and

reverts to a view overly centered on imprisonment, rather than the range of penalty options within the penalty hierarchy.

The collective term 'intermediate sentencing options' better describes this group, but raises the question as to why community service orders (S 8) should not be included. Community service orders have a tenuous relationship to custody,[1] but they have an obvious penalty element and differ from bonds in their focus on restitution rather than rehabilitation. The Association argues their inclusion in this 'intermediate sentencing options' group.

The Association strongly recommends that the NSWLRC accordingly amend its subsequent review documentation so as to reduce rather than perpetuate confusion.

Question 6.1

1. Is the compulsory drug treatment order sentence well targeted?

The Association generally considers this order as well intentioned and administered. The combined use of custody and compulsory treatment is warranted for a limited number of cases. It should thus be reserved for hardcore offenders who repeatedly commit drug-related crime and have failed to complete community-based drug treatment. It should remain the treatment option of last resort.

The Association regards the target group for this sentence as appropriate. Offenders should have an entrenched drug problem with numerous failures in treatment and rehabilitation. It is important that offenders not be channeled into compulsory drug treatment prior to having opportunities for voluntary drug treatment in the community. Custody should not compete with community drug treatment centres and programs for the same clientel.

Compulsory treatment orders should be reserved for those who have an established pattern of absconding or being discharged from treatment programs and reverting to drug abuse. It should not be made available to first offenders or those with a limited drug history. Community treatment centres and programs cater for these lesser offenders.

However, the eligibility and exclusion criteria should be revised. The criterion 'Long-term dependency on a prohibited drug' excludes those who abuse such restricted drugs as benzodiazepines and relies on a definition of 'dependency'. Dependency is a controversial and ambiguous term within the community and rejected by some alcohol and other drug agencies. 'Long-term drug use' or 'Long-term drug problems' are more useful terms. The criterion 'the offence was related to a long-term drug dependency and associated lifestyle' repeats the problem of definition of 'dependency' and should be amended.

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[1] Community service orders (CSOs) were initially regarded as an alternative to imprisonment and provisions for breach of CSO included a table of equivalent hours and terms of imprisonment. These were removed, but the provision limiting CSOs to offences that carry a possible term of imprisonment (eg excluding Low Range PCA).

2. Are there any improvements that could be made to the operation of compulsory drug treatment orders?

The Association would like to see greater availability and use of compulsory drug treatment orders, but recognizes that the number of inmates who can participate in the scheme is constrained by the number of treatment places.

It submits that the exclusion criteria in relation to offences should be revised. The fact that a person who has a mental illness, condition or disorder that is serious, could lead to violence or that could restrict participation in a drug treatment program seems both to be a form of discrimination on the basis of disability and counterintuitive. The custodial setting would seem to be an environment where such complex cases could be managed, rather than not. These criteria should be reduced from ineligibility to practical considerations of suitability.

Question 6.2

1. Is home detention operating as an effective alternative to imprisonment?

The Association notes the continuing under-utilisation, if not effective decline of home detention orders. Its submission in relation to Question 5 specifically addressed the Commission's interest in whether a back-end home detention program should be introduced in NSW.

The Association supported the current home detention sentencing option as an alternate means of serving a sentence of imprisonment. These arrangements permit the whole of the sentence to be served in home detention. But it noted that home detention was no longer administered by the Probation and Parole Service. Five years ago,[2] the administration of home detention orders was taken over by the Commissioner's Compliance Group. From that point, it has operated in a quite different manner, notably in the orientation, qualifications and case management practices of the staff. The Association does not regard the current operation of home detention case management as consistent with research-based practice because it is largely concerned with compliance rather than case management.

However, a recent review of the management of high risk offenders has proposed important changes in how home detention is to be administered. The review has recommended that the management and administration of these orders be undertaken within the Probation and Parole district office structure by experienced officers skilled in case management of these offenders. Importantly also, it is to be conducted in

[2] In July 2007 the then Commissioner for Corrective Services removed the home detention program operations from the Probation and Parole Service and assigned it to the new Commissioner's Compliance Group. The Association regarded this decision as unfounded and largely negating the favourable evaluation and Cabinet decision to implement a legislation-based home detention scheme.

accordance with a case management plan, with such services as electronic monitoring, urinalysis, additional home visits and intelligence gathering provided by specialist units.[3]

Home detention assessments should remain a separate requirement following sentence, rather than be included generally in Pre Sentence Reports, because is a means of serving a sentence of imprisonment imposed by the court.

2. Are there cases where it could be used, but is not?

The Association questions the reasoning behind statutory exclusion criteria and submits that the existing criteria should be either considered as part of the home detention assessment or narrowed to *the index offence being a conviction for serious sexual assault or stalking and intimidation, etc*. At the present time, offenders with prior convictions in these offences are also excluded. Prior convictions for these matters should be examined for their relevance and potential impacts during the home detention assessment.

3. Are there any improvements that could be made to the operation of home detention?

The question of whether to extend the length of home detention orders is considered in a subsequent question. The Association argues that parole is a viable means of extending the limit from 18 months to three years.

The Association submits that home detention should be assessed and administered by experienced Probation and Parole staff. Orders should be administered using a case management framework.

Question 6.3

1. Are intensive corrections orders operating as an effective alternative to imprisonment?

The Association's preliminary submission outlined some of the failings of intensive corrections orders. Since that time, it has formed the view that intensive corrections orders are a debacle that must be remedied at the earliest possible point.

The Association reiterates its earlier criticisms:

> 'The Association is critical of ICOs as a sentencing option as they blur the boundaries between probation, community service and home detention; because they are administered in a coercive manner that is contrary to effective practice, outcomes and research; and because, in their current form, they do not provide an *intensive* penalty option.
>
> The effect of discontinuing Periodic Detention and commencing Intensive Corrections Orders has been to create a further delay in the sentencing process because of the procedural requirement for an ICO assessment.

[3] Corrective Services NSW into the Future: A new way of doing business – striving for continuous improvement (Updated 3 September 2012), p 5.

> The current arrangements dictate that this be completed after the Pre Sentence Report by the CCMG as a separate, sequential and independent process. The introduction of ICOs included sentencing provisions similar to Periodic Detention in that the Court is required to impose a term of imprisonment of not more than two years but make an ICO and direct that the sentence be served by way of intensive correction in the community.
>
> The creation of ICOs blurs the distinction between community and custodial penalties. Periodic Detention was a custodial penalty, albeit periodic. That much was unambiguous. But ICOs are clearly not a custodial penalty, being a combination of community service and community supervision. If electronic monitoring is a condition of the order, the order is barely distinguishable from Home Detention. Without that element, the supervision program becomes more akin to probation or parole, but without reporting obligations and focused case management. It functions on a coercive premise that directing and controlling offenders in the community are effective means towards completion of orders. While this may be satisfactory as political rhetoric, research contraindicates this approach.'[4]

Recently conducted reviews of CSNSW have concluded that the standing arrangements for the administration of intensive community supervision orders should be largely discontinued. As with home detention, the review has recommended that the management and administration of these orders is to be undertaken within the Probation and Parole district office structure by experienced officers skilled in case management of these offenders in accordance with the case management plan. Such services as electronic monitoring, urinalysis, additional home visits and intelligence gathering will be provided by specialist units.[5] So CSNSW has acted to transform the nature of the administration of these orders.

Nonetheless, these measures do not fully address the faults and problems pertaining to intensive corrections orders, which stem not only from design but also ongoing sentencing and administration practice.

Design Faults

Perhaps the design faults are most serious because they have downstream impacts. The broad range of components that can be conditions of ICOs almost encompass the sentencing options of probation, community service (work and programs) and home detention. Such broad scope confuses not only the penalty hierarchy but also the supervision framework by blurring the boundary with parole.

The exclusion criteria, while justifiable, reduce the range of offences (and therefore offenders) for which an intensive corrections order can be made. Inclusion of community service work as a mandatory component of intensive corrections orders further limits the

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[4] Probation and Parole Officers Association *Preliminary Submission* PSE 20, p 12.

[5] Corrective Services NSW into the Future: A new way of doing business – striving for continuous improvement (Updated 3 September 2012), p 5.

range of offenders who can receive an order to those with physical capability and access to a community service work site. While intensive corrections orders have become more widely available than periodic detention, they are less available than community service work.

The other effect of including community service work as a mandatory component is to place ICOs and CSOs in competition as penalty options for offenders, though the courts can find reasons for imposing one option rather than another.

There is considerable confusion as to the purport of ICOs. On the one hand, ICOs postulate punishment through stringent conditions such as electronic monitoring or curfew. The regulations outline the punitive elements of ICOs in the condition, namely the forfeiture of certain rights, the imposition of regimes and practices. The attendance at community service work is a type of imposition and a form of penalty. On the other hand, ICOs postulate rehabilitation through participation in programs and the assignment of a supervising officer(s).

The duplicitous nature of ICOs was evident in the (then) Attorney-General's second reading speech of 30 June 2010, when he described ICOs both as a sentence of imprisonment and designed to reduce an offender's risk of re-offending. This combination of punitive and rehabilitative elements within the same order is perplexing.

What evidence supports this combination of elements? Imprisonment followed by parole supervision separates punishment and rehabilitation by the parole release date. Further, it is possible for inmates to undertake programs within custody as a form of rehabilitation. A home detainee accepts certain constraints in order to avoid full-time imprisonment and retain important features of community life, such as family relationships and employment. Rehabilitation can occur in this context, since the home detainee can also attend services and programs according to a case management plan.

However, the focus of ICOs has been quite the antithesis of probation and parole supervision, where case management frames intervention. ICO compliance regimes have concentrated on the elements of electronic monitoring, curfew, unannounced home visits, urinalysis and breath testing, rather than rehabilitation-focused case management.[6]

The conflicted nature of ICOs has also been recognised by the courts, who have expressed the view that ICOs 'are not appropriate for a person with little need for rehabilitation and no need for rehabilitation.'[7] As mentioned earlier, the Chief Magistrate has similarly questioned the worth of ICOs and suggested the alternative of imposing a bond and a community service order for the one offence. This proposal is further canvassed below.

Sentencing and Sentence Administration Problems

Truth in sentencing principles dictate that the orders of the court are carried out faithfully and without alteration. While the courts regard ICOs as substantially a rehabilitative

[6] While CSNSW has taken steps to redress this inversion, the statute remains unchanged.

[7] Law Reform Commissioner of NSW *Sentencing Question Paper 6*, p 10 paragraph 6.41.

sentencing option, CSNSW has administered these orders in coercive manner. At best, it regards them as both punitive and rehabilitative. But the actual practice of administration of orders raises perhaps the more serious concerns.

While much of the evaluation of ICOs remains in progress, some facts and findings are known. The annual Intensive Corrections Annual Report 2010-11[8] indicated that between 1 October 2010 and 30 June 2011:

- 931 assessments were completed, but only 374 (40%) were found as suitable. 528 (57%) were assessed as unsuitable.
- 367 offenders received an Intensive Corrections Order.
- 55 ICOs were discharged while 19 were revoked by the State Parole Authority.
- The most common offences for orders were: Acts intended to cause injury (181), followed by Traffic and vehicle offences (162), then Fraud, theft and deception (73).

The effect of the high rate of unsuitable assessments following the introduction of the scheme frustrated the judiciary to the point of consternation. Further to this obstacle, the Association has received frequent reports of sentence administration problems including:

- Offenders not being contacted for weeks, even months
- Offenders not attending community service according to the terms of the order without apparent consequence
- Program participation being limited to an induction group without continuing to offence-based programs
- Offenders attending the same work agencies and programs as offenders with a community service order
- Referrals to community agencies not being made
- Persistent threats of breach and revocation action
- An emphasis on compliance and breach, rather than preventing offending.

The other feature of ICOs that requires considerable scrutiny is its breach process. The current process is convoluted and overly bureaucratic. It is hard to contemplate a more dense passage.

2. Are these cases where they could be used, but are not? If so, what are the barriers?

The Association argues that this sentencing option should be discontinued, preferably repealed.

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[8] Corrective Services NSW, 2012, Intensive Corections Annual Report 2010-11, http://www.correctiveservices.nsw.gov.au/__data/assets/pdf_file/0006/422619/ico-annual-report-2010to2011publishedversiondoc.pdf Accessed 26/09/2012.

3. Are there any improvements that could be made to the operation of intensive corrections orders?

The Association argues that intensive corrections orders cannot continue within the current legislative parameters, without perpetuating the serious problems outlined above. Consequently reform and repeal options are outlined.

Any path of reform ought to clearly differentiate ICOs from home detention. This would be achieved by removing electronic monitoring and curfew from ICOs.

A further reform option would be to adopt the course proposed by the Chief Magistrate, whereby a bond and community service could be made for the same offence. Such a sentencing options would couple restitution and rehabilitation with a degree of punishment (inherent in attending community service).

A further reform option would be to meld suspended sentences and ICOs to construct a suspended sentence with the components of community service work, program attendance and case management supervision focused on rehabilitation and prevention of further offending. This option aligns with the Chief Magistrate's proposal to permit community service with probation supervision for the one offence, but incorporates further elements. The suspended sentence would remain a s12 bond, clearly differentiated from bonds made under s 9 and s 10, with a greater onus of co-operation upon the offender. Further changes to suspended sentences are elaborated in the next question.

Repeal is consistent with CSNSW's resolve to align intensive supervision assessment and administration with the probation and parole district office structure. It would remove ICOs from the sentencing hierarchy, in which case the Chief Magistrate's proposal to permit a sentence of both community service work and probation could provide an intermediate penalty. In addition or as an alternative, the modified suspended sentence outlined in the previous paragraph is well positioned to provide a more serious sentencing option.

Question 6.4

1. Are suspended sentences operating as an effective alternative to imprisonment?

The Association argues that suspended sentences are, by definition, an alternative to imprisonment. It re-iterates the key points of its preliminary submission:

> 'Suspended sentences may not truly divert offenders from prison, if offenders persistently breach the conditions imposed. If the breach rate is high, suspended sentences may deliver offenders *to prison* rather than divert offenders *from prison*. A major risk with all alternative sentencing options is that sentencing authorities may impose those penalties on offenders who would not otherwise have been given a custodial sentence. While the same or similar number of offenders may be sentenced to prison, a wider circle of lesser offenders are brought within the ambit of

the alternative penalties. When a proportion of those offenders breach the terms of their orders, they run the risk of full-time imprisonment.

The balancing argument is to recognize suspended sentences as the form of bond that carries the greatest consequences, compared to s9 and s10 bonds. As such s12 bonds provide sentencers with an alternative to custody in circumstances where they believe that lesser penalty options are inadequate.'[9]

2. Are there cases where suspended sentences could be used, but are not? If so, what are the barriers?

The existing provisions that limit the length of the bond to the length of the sentence perhaps prevent the courts from suspending sentences because they regard the length of the bond as too lenient. Permitting the length of the bond to be increased to a maximum of five years would overcome this limitation.

3. Are there any improvements that could be made to the operation of suspended sentences?

As iterated in Questions 6.3, the Association poses the option of reforming the suspended sentence substantially, melding it with some elements ICOs while retaining a contrasting degree of simplicity. Further improvements are outlined below.

4. Should greater flexibility be introduced in relation to:

a. the length of the bond associated with the suspended sentence?

The Courts should be able to determine a longer period for the bond, to a maximum of five years.

b. partial suspension of the sentence?

The Association countenances this possibility but cautions that it is effectively the same as a sentence consisting of a term of imprisonment followed by release to parole supervision. Its main difference would be the jurisdiction of the court to hear breaches, rather than the State Parole Authority. Perhaps it introduces a degree of complexity for little substance.

However, it could be useful when dealing with cases where a period of custody on remand has occurred and the court seeks to include such a custodial component in the sentence.

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[9] Probation and Parole Officers Association *Preliminary Submission* PSE 20, p 13.

c. options available to a court if the bond is breached?

When dealing with breaches of the bond, the Courts should be able to acknowledge and give credit for the time spent observing the conditions of the bond, and then reduce the period of imprisonment in the event of revocation.

Question 6.5

1. Should the 'rising of the court' continue to be available as a sentencing option?

The Commission's introductory material demonstrates that this option has become an arcane legacy from Dickensian times, effectively discontinued in practice, replaced by s 10 dismissals. It has lost its application and meaning. It could remain as an option or become the formal means of disposing of some matters with a nominal penalty.

2. If so, should the penalty be given a statutory base?

The Association sees little case to retain the penalty, let alone incorporate it into statute, unless it were to become the formal means of disposing of matters with a nominal penalty.

3. Should the 'rising of the court' retain its link to imprisonment?

The Association considers that the links to imprisonment are nominal, but as such could be retained to differentiate 'rising of the court' from s 10. However, the lack of use in practice suggests discontinuation.

Question 6.6

Should any of the maximum terms for the different custodial sentencing options in the *Crimes (Sentencing Procedure) Act 1999* NSW be changed?

The Association advocates that the maximum terms for both home detention and suspended sentences could be extended to three years, provided certain circumstances prevailed. It has advocated the repeal of ICOs.

The home detention component of a sentence should remain within a maximum of 18 months but the duration of the sentence could be extended by a parole component to a maximum of 18 months. The parole component could include or exclude the supervision and guidance of the Probation and Parole Service.

Suspended sentences could similarly be permitted for sentences up to three years. The proposals for changes to suspended sentences have been articulated earlier in this document.

The Association's proposal to increase the maximum to three years is consistent with its submission that the Local Courts retain the jurisdictional limit of three years.

Question 6.7

What other intermediate custodial sentences should be considered?

The Association supports the predominant use of community based sentencing options. It argues that the sentence components should reflect the elements of the offence(s). Hence a sentence should include compensation, restitution, rehabilitation and punishment, where relevant. The seriousness of the crime relates to the degree of sentence, with imprisonment being the harshest penalty.

Consequently, it supports sentences with various components that address the elements and impacts of particular crimes. The varying nature of crimes and offenders is best dealt with by a flexible model of sentencing. Allowing components of penalty options to be made as part of an order makes good sense but carries some risks.

The Association argues that compensation and restitution should be ordered whenever relevant. So compensation and community service work could be included in s9, s10, s12 bonds, community service orders and home detention, when circumstances warrant.

Question 6.8

Should further consideration be given to the re-introduction of periodic detention? If so:

a. **What should be the maximum term of a periodic detention order or accumulated periodic detention orders?**

b. **What eligibility criteria should apply?**

c. **How could the problems with the previous system be overcome and its operation improved?**

d. **Could a rehabilitative element be introduced?**

The Association opposes the re-introduction of periodic detention, believing that home detention is a preferable alternative. Prior administration of periodic detention revealed a high-cost program that could not be established across NSW, posed various problems pertaining to associations and focused on custodial priorities, such as safety and security.

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