

SENTENCING REFORM FAQs

Rationale for the reforms

1. Why has the NSW Government passed these sentencing reforms?

These reforms are built primarily upon recommendations made by the NSW Law Reform Commission in its *Report 139 – Sentencing*, published in July 2013. The reforms also draw on research conducted by the Bureau of Crime Statistics and Research (BOCSAR), Judicial Commission and Sentencing Council.

Some of the key findings of that research are as follows:

- Community supervision and programs are far more effective at reducing rates of reoffending than short-term gaol sentences (less than 2 years). Supervision has the greatest impact on offenders who are assessed as being at medium- or high-risk of reoffending.
- For example, offenders on an ICO are 11-31% less likely to reoffend than those who receive a full-time gaol sentence of less than 2 years. Even larger reductions in reoffending (25-43%) are observed when offenders on an ICO of less than 6 months are compared with those who receive a full-time gaol sentence of equivalent length.
- ICOs and home detention are underused sentencing options. They have important advantages over full-time imprisonment in terms of reducing costs, reducing reoffending and keeping offenders out of prison. But they have structural problems which make them inaccessible for many offenders who would otherwise be suitable (e.g. by including a mandatory community service work requirement on an ICO).
- The use of suspended sentences has increased dramatically since they were reintroduced in 2000. However, this rise appears to have been at the expense of community-based sentencing options such as community service orders and good behaviour bonds. The increase in the use of suspended sentences appears to have led to an increase in the prison population rather than a decrease as was intended.

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New sentencing framework

2. Which existing sentencing options have been abolished?

The following existing sentencing options have been abolished as a result of these reforms: home detention orders, suspended sentences (section 12 good behaviour bonds), community service orders, section 9 bonds with conviction, section 10(1)(b) bonds without conviction and section 10(1)(c) discharges to participate in an intervention program.

3. Which existing sentencing options have been retained?

The following existing sentencing options have been retained and form part of the new sentencing framework: section 10(1)(a) dismissals without conviction, section 10A convictions with no further penalty, section 11 deferrals of sentencing for rehabilitation, and fines. Intensive correction orders ('ICOs') have also been retained, although their structure has changed in significant ways.

4. What are the new sentencing options that are being introduced?

These reforms introduce two new community-based sentencing options: community correction orders (CCOs) and conditional release orders (CROs). Each of these orders consists of two 'standard' conditions (which are mandatory for all orders), as well as 'additional' and 'further' conditions which the court considers appropriate in the particular circumstances. They are both non-custodial orders; according to the Explanatory Note and Second Reading Speech, the CCO sits above the CRO in the hierarchy of sentence orders.

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New CROs and CCOs

- 5. What are the main differences between a conditional release order (CRO) and a community correction order (CCO)?**
- There are several important differences between a CRO and a CCO. A CRO can be imposed with or without conviction, whereas a CCO necessarily carries a conviction. A CRO can be imposed for a fine only offence or an offence which carries a term of imprisonment, whereas a CCO can only be imposed for an offence which carries imprisonment (not for a fine only offence). A CRO can be made for up to 2 years, whereas a CCO can be made for up to 3 years.
- 6. Can the new sentence orders be imposed in addition to (ie. in combination with) a fine?**
- A fine can be imposed in addition to a CCO but not in addition to a CRO. In other words, a fine is an alternative to a CRO but can be imposed in combination with a CCO. This is because of section 9(3)(a) of the *Crimes (Sentencing Procedure) Act 1999*, which provides that “a fine and a conditional release order cannot be imposed in relation to the offender in respect of the same offence”, whereas there is no such limitation expressed in section 8 in respect of a CCO.
- 7. Are the new sentence orders able to be imposed for a fine only offence?**
- A CRO can be imposed for a fine only offence, but a CCO cannot. This is because the introductory words of section 8(1) of the *Crimes (Sentencing Procedure) Act 1999* provide that a CCO is imposed “[i]nstead of imposing a sentence of imprisonment”, which, as a matter of logic, limits its application to those offences which carry a sentence of imprisonment. This is in contrast to the introductory words of section 9(1), which provide that a CRO is imposed “[i]nstead of imposing a sentence of imprisonment or a fine (or both)”.
- 8. What factors does the court consider when deciding whether to impose a conviction on a CRO?**
- In deciding whether or not to impose a conviction on a CRO, the court must have regard to the following factors set out in section 9(2) of the *Crimes (Sentencing Procedure) Act 1999*: (a) the person’s character, antecedents, age, health and mental condition; (b) whether the offence is of a trivial nature; (c) the extenuating circumstances in which the offence was committed and (d) any other matter that the court thinks proper to consider. These are identical to the factors that a court was previously required to consider in deciding whether to impose a section 10(1)(b) bond.
- The court is also subject to the same exclusions as previously applied to the use of section 10 orders where the offender has previously been dealt with without conviction for certain prescribed offences. See, e.g., *Road Transport Act 2013 s 203*.
- 9. What is the procedure following an alleged breach of a CRO or CCO?**
- The procedure following an alleged breach of one of the new sentencing orders is substantially the same as the former procedure in respect of a breach of a section 9 or 10(1)(b) good behaviour bond. If a community corrections officer is satisfied that an offender has failed to comply with any of the conditions of an order, he or she may file a ‘breach report’ with the sentencing court: see cl 329(1) of the *Crimes (Administration of Sentences) Regulation 2014*. The court may then call on the offender to appear before it in order to determine whether a breach has occurred.
- If the court is satisfied that the offender has failed to comply with any of the conditions of the order, it has a range of options. These are substantially

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similar to the court's former options in respect of a breach of a good behaviour bond. The court may take no action; vary or revoke any conditions of the order (other than standard conditions), or impose further conditions; or revoke the order: see *Crimes (Sentencing Procedure) Act 1999* section 107C(5) in respect of a CCO and section 108C(5) in respect of a CRO. If a court revokes the order, it may resentence the offender for the offence to which the order relates. Upon resentencing, the court has the option of increasing the severity of the order by adding or varying conditions rather than escalating to a heavier form of sentence. This means that courts can issue the same sentence order multiple times with different conditions, depending on the offence and the offender's personal circumstances. This represents a substantial departure from the way in which the court was constrained in resentencing an offender who had breached a suspended sentence pursuant to section 99 of the former Act.

10. Can the court impose a CRO and/or CCO on an offender who resides or proposes to reside outside of NSW but near the border?

That depends on which condition(s) the court is considering imposing on the order. The court cannot impose a supervision conditions on an offender who resides or proposes to reside outside of NSW unless the other State or Territory is declared by the Regulations to be an approved jurisdiction: *Crimes (Sentencing Procedure) Act 1999* s 89(4A). In addition, the court cannot impose a community service work condition on an offender who resides or proposes to reside outside of NSW unless (a) the court is satisfied that the offender is able and willing to travel to NSW to complete the community service work, or (b) the other State or Territory is declared by the Regulations to be an approved jurisdiction: s 89(4B). At present, the Regulations do not declare any other State or Territory to be an approved jurisdiction.

11. Does the Local Court have jurisdiction to hear proceedings for a breach of a sentencing order which was imposed by the District Court sitting in its appellate capacity?

It would appear so, having regard to the interpretation of section 20 of the *Crimes (Appeal and Review) Act 2001* which was adopted by the NSW Court of Criminal Appeal in *Director of Public Prosecutions (NSW) v Jones, Dillon Michael* [2017] NSWCCA 164. That case dealt with a breach of a section 9 good behaviour bond – a sentencing option which has now been repealed – but there is no logical reason to suggest that the interpretation adopted by the court would not be similar in respect of a breach of one of the new sentence orders.

12. Can a judicial officer make a binding direction that any breach of sentence order be referred to him or her specifically?

It would appear not, having regard to the decision of the NSW Court of Criminal Appeal in *Director of Public Prosecutions (NSW) v Jones, Dillon Michael* [2017] NSWCCA 164. Basten JA (with whom Harrison and Hulme JJ agreed) stated at [9]-[10] of the judgment that such a direction:

[9] ... was legally ineffective... even if it were effective as a direction, it could not diminish the statutory authority of any other court or judicial officer to deal with a breach of the bond.

[10] No doubt the direction reflected a course which is often taken as a matter of practice; such a course makes good sense, if practically available. However, the inclusion of the direction in the conditions of the bond had no legal effect and cannot effect the resolution of the remaining issues.

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Changes to intensive correction orders

- 13. What are the main changes to intensive correction orders (ICOs)?**
- There are several important changes to ICOs. The safety of the community is now the paramount consideration for the court when deciding whether to impose an ICO. An ICO is now available not only for an individual sentence of up to 2 years but also an aggregate sentence of up to 3 years. Supervision is now a mandatory condition of an ICO, while community service work is no longer a mandatory condition and can instead be imposed as a discretionary condition for up to 750 hours. Home detention is also now able to be imposed as a discretionary condition. The range of offences for which an ICO is not able to be imposed has been expanded. Finally, the court is now required to consider specific matters when determining whether to impose an ICO for a domestic violence offence.
- 14. What is the maximum length of an ICO?**
- An ICO can be imposed in respect of a single offence for up to 2 years, or for an aggregate offence for up to 3 years.
- 15. Is an offender's eligibility to participate in community service work still a necessary requirement for the imposition of an ICO?**
- No, because community service work is no longer a mandatory component of an ICO. Instead, the court now has the discretion to impose community service work for up to 750 hours as an 'additional' condition of an ICO in appropriate circumstances. See *Crimes (Sentencing Procedure) Act* sections 73A in relation to the additional conditions of an ICO.
- 16. Are there any conditions which the court is required to impose when making an ICO?**
- Yes. Supervision is now a mandatory condition of an ICO. In addition to the two 'standard' conditions (which are mandatory), the court is required to impose at least one 'additional' condition, unless there are exceptional circumstances: see *Crimes (Sentencing Procedure) Act* 1999 section 73A(1) and (1A). The court can impose 'additional' and/or 'further' conditions it considers appropriate in the circumstances.
- 17. Are there still particular offences for which a sentencing court is not permitted to impose an ICO?**
- Yes. In fact, the range of exclusionary offences for an ICO has been expanded as a result of these reforms. Previously, the only exclusionary offences were a set of 'prescribed sexual offences'. Now, there are additional offences which preclude an offender from being sentenced to an ICO – for example, murder, manslaughter, terrorism offences and offences involving the discharge of a firearm. See section 67 of the amended *Crimes (Sentencing Procedure) Act* 1999 for a list of the excluded offences. In addition, the court is precluded from imposing an ICO on an offender in respect of a domestic violence offence in certain circumstances: see section 4B.
- 18. Can the court impose an ICO on an offender who resides or proposes to reside outside of NSW but near the border?**
- No, a sentencing court cannot impose an ICO in respect of an offender who resides, or intends to reside, outside NSW, unless the alternative State or Territory is declared by the Regulations to be an approved residential jurisdiction: see *Crimes (Sentencing Procedure) Act* 1999 section 69(3). Presently, the Regulations do not declare any other State or Territory to be an approved residential jurisdiction.
- 19. What is the procedure following an alleged breach of an ICO?**
- If a community corrections officer believes that an offender has failed to comply with any of the conditions of an ICO, he or she has a range of options set out in section 163(2) of the *Crimes (Administration of Sentences) Act* 1999. These include: record the breach and take no action; give an informal

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warning; give a formal warning that further breaches will result in referral to the Parole Authority; give a reasonable direction relating to the breach behaviour; or impose a curfew of up to 12 hours in any 24 hour period. An officer may decide to refer a more serious alleged breach to the Parole Authority: see section 163(3). This referral can include a recommendation as to any action to be taken in respect of the breach.

If an alleged breach is referred to the Parole Authority, it conducts an inquiry as to whether a breach has occurred: see section 162. An inquiry can be held even if the ICO has expired: see subsection (1). The offender is entitled to make submissions to the inquiry. If the Parole Authority is satisfied that an offender has breached the ICO, it has a range of options set out in section 164. These include: record the breach and take no action; give a formal warning; impose any conditions on the ICO; vary or revoke conditions of the ICO; or make an order revoking the ICO. Some of the conditions that can be imposed by the Parole Authority include home detention for up to 30 days and electronic monitoring.

If the Parole Authority revokes the ICO, a warrant is issued and the offender is taken into custody. The offender would ordinarily serve the remaining balance of the sentence in full-time imprisonment, because the sentencing court is not able to set a non-parole period when imposing an ICO. However, the Parole Authority can make an order reinstating the ICO: see section 165(1). A reinstatement application can be made by the offender after they have served at least 1 month in custody following revocation of the ICO: see subsection (2)(a). If a reinstatement order is made, the offender would serve the remaining balance of the sentence by way of ICO.

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Pre-sentence assessment reports

20. What are the main changes to assessment reports?

One of the main changes to the pre-sentence assessment reports prepared by Community Corrections is in their format. Previously, reports were named according to the type of order being considered by the court – for instance, an ‘ICO assessment report’, ‘home detention assessment report’, ‘community service assessment report’ or general ‘pre-sentence report’ (‘PSR’). Now, a community corrections officer provides information about an offender at the time of sentencing via a single report, called an ‘assessment report’. This report aims to assist the sentencing court to determine the appropriate sentencing options and conditions to be imposed on an offender. There are also changes to the circumstances in which a court is required to obtain an assessment report before imposing sentence. See *Crimes (Sentencing Procedure) Act 1999* Division 4B and *Crimes (Sentencing Procedure) Regulation 2017* Division 3 for the new provisions relating to assessment reports.

21. Does the sentencing court have to obtain an assessment report before imposing one of the new types of sentence order?

That depends on which type of sentencing order, and which conditions, are being contemplated by the sentencing court. A court is not required to obtain an assessment report before sentencing an offender to a CCO or a CRO. However, the court cannot impose an ICO without first obtaining an assessment report, unless the court is satisfied that there is sufficient information before it to justify the making of the ICO without obtaining an assessment report: see section 17D(1) and (1A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). Furthermore, the court cannot impose a community service work condition or a home detention condition on any order unless it has obtained an assessment report in relation to the imposition of such a condition.

22. What is the process that a court must follow when imposing a sentence of imprisonment (including an ICO)?

In *R v Zamagias* [2002] NSWCCA 17 at [25]-[26], Howie J (with whom Hodgson JA and Levine J agreed) set out a three-stage process that a court must follow when considering the imposition of a sentence of imprisonment. The preliminary question for the court, in accordance with section 5(1) of the *Crimes (Sentencing Procedure) Act 1999*, is whether there are any alternatives to the imposition of a sentence of imprisonment. Having determined that no penalty other than a sentence of imprisonment is appropriate, the court must then determine the term of the sentence. Once the term of the sentence of imprisonment has been determined, the court must consider whether any alternative to full-time imprisonment is available and should be utilised. Given that suspended sentences and home detention orders have been abolished, an ICO is the only remaining sentence of imprisonment which exists as an alternative to full-time imprisonment.

A sentencing court may request an assessment report on an offender at any time during the sentence proceedings, whether before or after imposing a sentence of imprisonment (ie. at any point prior to the finalisation of the third stage above): see section 17C(1(b)). The court is not required to obtain an assessment report in every matter in which it is contemplating a sentence of imprisonment, but it must not make an ICO unless it has obtained an assessment report: see section 17D(1)). In addition, the court must not impose a home detention condition or a community service work condition unless it has obtained an assessment report relating specifically to that condition: see section 17D(2) and (4). Furthermore, the court is not

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permitted to request an assessment report for a home detention condition unless it has already imposed a sentence of imprisonment for a specified term: see section 17D(3).

23. Is an offender who does not have a stable residence precluded from being sentenced to an ICO with a home detention condition?

Not necessarily. Obviously, an offender may not be suitable for home detention if he or she does not have a stable residence (e.g. if he or she is homeless). However, a sentencing court contemplating imposing a home detention condition on an ICO would request an assessment report addressing the offender's suitability for home detention: see section 17D(2) *Crimes (Sentencing Procedure) Act* 1999. And clause 12B(1) of the *Crimes (Sentencing Procedure) Regulation* 2017 provides that such a report is not to be finalised until "reasonable efforts have been made by a community corrections officer . . . to find accommodation" for the offender.

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Applications to vary, revoke or add further conditions

- 24. When can a variation application be made?** A variation application can be made at any time after the sentence is imposed, during the term of the order. There is no statutory time limit for a variation application to be filed (in contrast to the time limit for the filing of an appeal).
- 25. Where is a variation application made?** A variation application in respect of a CRO or a CCO is heard by the court in which the sentence was imposed. For instance, a variation application in respect of a CRO imposed in the Local Court would be heard and determined by the Local Court. However, a variation application in respect of an ICO is made to the Parole Authority: see section 81(b) of the *Crimes (Administration of Sentences) Act 1999*.
- 26. Can an offender make repeated variation applications in respect of a CRO or CCO?** There is no statutory restriction on the number of variation applications that can be made during the term of a CRO or CCO. However, the sentencing court may refuse to consider a variation application *made by an offender* if satisfied that the application is “without merit”: see *Crimes (Sentencing Procedure) Act 1999* section 91(1) in respect of CCOs and section 100(1) in respect of CROs. The legislation does not provide any guidance on what constitutes a lack of merit in this context. Note also that a variation application *made by an officer of Community Corrections or Juvenile Justice* is not subject to a statutory merit test.
- 27. Does a variation application have to be heard by the judicial officer who imposed the original sentence order?** No. A court may deal with a variation application even though it is constituted differently from the court as constituted at the time of sentence: see *Crimes (Sentencing Procedure) Act 1999* section 91(3) in respect of CCOs and section 100(3) in respect of CROs.

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Savings and transitional provisions

28. What happens to an existing sentence which is still in force on the day that the sentencing reforms commence?

That depends on which particular type of existing order. A number of existing sentences are automatically converted to a new form of sentence order on the commencement date: a home detention order will be converted to a new form of intensive correction order ('ICO'); an existing ICO will also be converted to the new form ICO; a community service order will be converted to a community correction order ('CCO'); a section 9 good behaviour bond will also be converted to a CCO; and a section 10(1)(b) bond will be converted to a conditional release order ('CRO'). A section 12 bond (suspended sentence) which is still in force on the commencement day will *not* be converted; the suspended sentence remains in force until it is either completed or breached.

29. What happens if an offender is alleged to have breached a suspended sentence after the reforms commence?

If an offender is alleged to have breached a suspended sentence after the reforms commence, the former provisions would apply in respect of a breach – namely, sections 98 and 99 of the *Crimes (Sentencing Procedure) Act 1999* as were in force immediately prior to commencement. Practitioners will still be able to make submissions to the court, in appropriate circumstances, for the court not to revoke the suspended sentence on the basis that the breach is trivial or that there are good reasons to excuse the breach (section 98(3)). However, if the court revokes the suspended sentence and resentsences the offender, upon resentence the court is only permitted to impose a sentence which is available under the new legislation: see section 76(4). In other words, a court that revokes a suspended sentence is required to re-sentence the offender to full-time imprisonment or impose an ICO, as home detention is no longer available as a separate sentence.

30. Is it possible to make a variation application in respect of a converted order?

Yes. An application can be made to vary, revoke or add conditions to a converted order at any time after the order is converted, during the term of the order. The application would be made to the sentencing court in respect of a converted CRO or CCO, or to the Parole Authority in respect of a converted ICO. A court dealing with a variation application in respect of a CRO or CCO must not, as far as practicable, make an order that would result in the conditions of the order being "more onerous" than the conditions that applied to the previous sentence prior to its conversion: see section 78(2) of the *Crimes (Sentencing Procedure) Act 1999*.

31. What happens if an offender is sentenced in the Local Court and he or she lodges a severity appeal to the District Court before the reforms commence, but the appeal is not determined until after commencement? What sentencing options are available upon resentence following a successful appeal? What

If the District Court upholds the appeal, the range of options available upon resentence are those which are set out in the new sentencing regime: see section 86(2)(a) of the *Crimes (Sentencing Procedure) Act 1999*. This means that upon resentence following a successful appeal against a term of full-time imprisonment which was imposed in the Local Court, the only alternative sentence to full-time imprisonment that may be imposed by the District Court is an ICO or a non-custodial penalty such as a CCO. This may assist an offender who was sentenced to a term of full-time imprisonment at first instance on the basis that he or she was ineligible for the mandatory community service work component of an ICO, given that this is no longer a mandatory condition of an ICO.

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happens if the appeal is refused?

If the severity appeal is refused, the court would confirm the original sentence. The savings and transitional provisions apply, which would mean that the original sentence may be converted to a new form of sentence order: see sections 71-75 of the Act.

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Domestic violence offender provisions

32. Are all domestic violence offenders likely to be sentenced to full-time imprisonment?

No. A court sentencing an offender for a domestic violence offence must impose *either* full-time imprisonment *or* a supervised order, *unless* the court is satisfied that a different sentencing option “is more appropriate in the circumstances”: *Crimes (Sentencing Procedure) Act 1999* section 4A. Note that a ‘supervised order’ includes a CRO, CCO or ICO with a supervision condition. Thus courts retain a wide discretion to impose the most appropriate sentence in the circumstances. More medium- and high-risk domestic violence offenders will be supervised, but lower risk offenders can continue to receive less serious sentencing options such as fines or unsupervised CROs and CCOs.

33. Is it possible to receive an ICO for a domestic violence offence?

Yes. However, a court is not permitted to make an ICO for a domestic violence offence unless it is “satisfied that the victim of the offence, and any person with whom the offender is likely to reside, will be adequately protected (whether by conditions of the intensive correction order or for some other reason)”: *Crimes (Sentencing Procedure) Act 1999* section 4B(1). The onus is on the offender to establish that the victim will be adequately protected.

34. Can the court impose a home detention condition on a domestic violence offender who proposes to live with the victim of the offence?

No: see *Crimes (Sentencing Procedure) Act* section 4B(2).

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