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Law Reform Commission

Sentencing
Question Paper 6

Intermediate custodial sentencing options

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Question Paper 6: Intermediate custodial sentencing options

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6.1 Intermediate custodial sentencing options are those custodial sentences that can be imposed instead of full-time imprisonment. This Question Paper outlines these options, including compulsory drug treatment detention (CDTD), home detention, intensive correction orders (ICOs), suspended sentences and sentencing to the rising of the court.[1] This Question Paper also asks whether any other intermediate custodial sentencing options should be introduced. Readers should be aware that the question of combining various sentencing options (whether custodial or non-custodial) and the framework for managing such combinations will be the subject of a future question paper.

1. For a discussion of full-time imprisonment, see NSW Law Reform Commission, *Full-time Imprisonment,* Sentencing Question Paper 5 (2012). For non-custodial sentencing options, see NSW Law Reform Commission, *Non-Custodial Sentencing Options,* Sentencing Question Paper 7 (2012).

Compulsory drug treatment detention

6.2 If a Local or District Court in the Sydney metropolitan area[2] sentences a person to a non-parole period of at least 18 months, the court must ascertain whether the person might be eligible for a compulsory drug treatment order ('CDTO') and, if so, refer the person to the Drug Court.[3] At present, the compulsory drug treatment detention program is only available for male offenders because of limited facilities.[4] The Drug Court may order that the person serve a term of imprisonment by way of CDTD.[5] A specially built facility, the compulsory drug treatment correctional centre (CDTCC) within the Parklea correctional complex, houses the participants in stages one and two of the three-stage program.[6]

6.3 Following the making of a CDTO, the Commissioner of Corrective Services, in consultation with Justice Health, prepares a treatment plan[7] which must be approved by the Drug Court in order to come into effect.[8] Mandatory conditions of all treatment plans are that the offender must not use non-prescription drugs, not use or threaten violence, comply with any community supervision order and not commit any further offences.[9] Other conditions can be included, such as attendance for counselling, drug testing, and involvement in activities, courses, training or employment.[10]

6.4 The CDTO program is divided into three treatment stages each lasting at least six months:[11]

- **Stage 1 (closed detention)**: participants are in full-time custody at the CDTCC where they undertake therapeutic and educational programs.[12]
- **Stage 2 (semi-open detention)**: participants may leave the CDTCC with approval for paid employment, training or social activities.
- **Stage 3 (community custody)**: participants are subject to intensive supervision while residing in the community.

6.5 If a participant has complied with the treatment plan, and has served at least six months of a stage, the Drug Court may progress a participant to the next stage of

2. *Drug Court Regulation 2010* (NSW) cl 9.
3. *Drug Court Act 1998* (NSW) s 18B.
4. J Dekker, K O'Brien and N Smith, *An Evaluation of the Compulsory Drug Treatment Program (CDTP)* (NSW Bureau of Crime Statistics and Research, 2010) vii.
5. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5A.
6. J Dekker, K O'Brien and N Smith, *An Evaluation of the Compulsory Drug Treatment Program (CDTP)* (NSW Bureau of Crime Statistics and Research, 2010) 1, 3.
7. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106F(1), (3).
8. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106F(2).
9. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106H.
10. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106F(6).
11. J Dekker, K O'Brien and N Smith, *An Evaluation of the Compulsory Drug Treatment Program (CDTP)* (NSW Bureau of Crime Statistics and Research, 2010) 3.
12. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106D(1); J Dekker, K O'Brien and N Smith, *An Evaluation of the Compulsory Drug Treatment Program (CDTP)* (NSW Bureau of Crime Statistics and Research, 2010) 3.

the program.[13] Before doing so, the Court must consider assessment reports prepared by an officer of the Probation and Parole Service or the Director of the CDTCC.[14] The Drug Court may regress participants to earlier stages if satisfied that a participant has failed to comply with the treatment plan.[15]

6.6 The CDTO continues until the expiry of the sentence or revocation of the order.[16] Following Stage 3, participants are released if the term of their sentence has expired. As long as the non-parole period has finished, the Drug Court may release the offender on parole.[17]

6.7 In 2010/11, 79 new offenders were referred for assessment for suitability for a CDTO. This resulted in the making of 33 orders. In 2009/10, 73 assessments were conducted and 38 orders were made.[18]

Eligibility and exclusion

6.8 Currently, a person is eligible for CDTD if:

- the person has been convicted of at least two other offences in the previous five years that resulted in a sentence of imprisonment, community service order or bond;
- the person has a long-term dependency on a prohibited drug; and
- the offence was related to a long-term drug dependency and associated lifestyle.[19]

6.9 A person is not eligible for CDTD if convicted of murder or related offences, sexual assault, sexual offences involving a child, firearm offences, or drug offences involving commercial quantities.[20] A person who has a mental illness, condition or disorder that is serious, that could lead to violence or that could restrict participation in a drug treatment program, is also ineligible.[21]

6.10 Legal Aid NSW has suggested that CDTD might be made available to offenders with no prior criminal record "as this would reduce re-offending and promote the rehabilitation of offenders".[22]

13. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106M(1), (2).
14. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106N(1).
15. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106M(3).
16. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106E.
17. J Dekker, K O'Brien and N Smith, *An Evaluation of the Compulsory Drug Treatment Program (CDTP)* (NSW Bureau of Crime Statistics and Research, 2010) 3; *Crimes (Administration of Sentences) Act 1999* (NSW) s 106T.
18. NSW Department of Attorney General and Justice, *Annual Report 2010/11*, 115.
19. *Drug Court Act 1998* (NSW) s 5A(1).
20. *Drug Court Act 1998* (NSW) s 5A(2).
21. *Drug Court Act 1998* (NSW) s 5A(3).
22. Legal Aid NSW, *Preliminary Submission PSE18*, 8.

6.11 However, the program is not intended for first time offenders, as it is an intensive program for offenders with a high risk of recidivism. The second reading speech was very clear about the type of offenders the program targets:

> The Compulsory Drug Treatment Correctional Centre will target a hard-core group of offenders with long-term drug addiction and who have an associated life of crime and constant imprisonment. It is for offenders who have failed to enter or complete other voluntary or court-based treatment programs.[23]

6.12 It appears that first-time offenders, who may present less risk of re-offending, would benefit more from voluntary or court-based treatment programs which are less intensive than CDTOs and therefore better suited to first-time offenders.

Breach and revocation

6.13 If a participant does not comply with the treatment plan, the Commissioner can withdraw privileges, increase supervision or vary the frequency of drug testing.[24] A serious breach must be referred to the Drug Court. The Drug Court can make a revocation order where a participant has committed a serious breach of the personal plan and in the opinion of the Drug Court the participant:

- is unlikely to make any further progress in the program;
- poses an unacceptable risk to the community of re-offending; or
- poses a significant risk of harm to self or others.[25]

6.14 Upon revocation of a CDTO, the Drug Court must issue a warrant requiring the offender to be transferred to a correctional centre where the remainder of the sentence is to be served.[26]

Evaluation

6.15 An evaluation of CDTOs published in 2010 reported that 26 participants in a sample size of 54 were released to parole while 26 had their CDTOs revoked.[27] Of those paroled, the majority had been regressed at least once. Many of the participants (46.2%) had their CDTOs revoked during Stage 1. Out of all 54 participants, 59.3% were regressed at least once.[28]

6.16 The authors of the evaluation noted that, while the program appears to be successful in effectively treating drug dependency, it was not possible to assess

23. NSW, *Parliamentary Debates*, Legislative Assembly, 23 June 2004, 9966 (G West on behalf of R Debus, Attorney General).
24. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106I(2).
25. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106Q(1)(a)(iii).
26. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106S.
27. The remaining 2 participants died in the community during the term of the CDTO.
28. J Dekker, K O'Brien and N Smith, *An Evaluation of the Compulsory Drug Treatment Program (CDTP)* (NSW Bureau of Crime Statistics and Research, 2010) 19-21.

whether the program successfully reduced the likelihood of relapse. This was because no suitable control group could be assembled for comparison.[29]

Other jurisdictions

6.17 The NSW CDTO program was based on models from the United States and Netherlands[30] and there are no comparable programs existing in Australia at present. Hong Kong introduced detention and compulsory drug addiction treatment of drug-addicted offenders in 2009, however no evaluation has been conducted.[31]

6.18 The Dutch program began in 2001 and, like the NSW program, involves court-ordered treatment of drug-dependant offenders in three stages. An evaluation of the Dutch program by the Amsterdam Institute of Addiction Research found that program participants performed significantly better than offenders in regular detention in terms of subsequent offending, addiction and social functioning and concluded that there was some evidence that the program was effective.[32]

6.19 The Dutch program has now been merged with another program that targets a wider group of offenders, including non drug-dependent offenders, females and offenders with psychiatric problems.[33]

Question 6.1

1. Is the compulsory drug treatment order sentence well targeted?
2. Are there any improvements that could be made to the operation of compulsory drug treatment orders?

Home detention

6.20 A court that has sentenced a person to imprisonment for up to 18 months may direct that the sentence be served by way of home detention.[34] The standard conditions of a home detention order require the offender to be of good behaviour, remain in his or her home except when authorised, obey the supervisor's reasonable directions, not consume alcohol or prohibited drugs, submit to electronic monitoring, engage in personal development activities, and undertake community

29. J Dekker, K O'Brien and N Smith, *An Evaluation of the Compulsory Drug Treatment Program (CDTP)* (NSW Bureau of Crime Statistics and Research, 2010) 42-43.
30. NSW, *Parliamentary Debates*, Legislative Assembly, 23 June 2004, 9966 (G West on behalf of R Debus, Attorney General).
31. J Dekker, K O'Brien and N Smith, *An Evaluation of the Compulsory Drug Treatment Program (CDTP)* (NSW Bureau of Crime Statistics and Research, 2010) 6-7.
32. J Dekker, K O'Brien and N Smith, *An Evaluation of the Compulsory Drug Treatment Program (CDTP)* (NSW Bureau of Crime Statistics and Research, 2010) 6, citing M W J Koeter, and M Bakker (2007), *Effectevaluatie van de strafrechtelijke opvang verslaafden (SOV) (Effect evaluation of the rehabilitation of drug-addicted offenders act (SOV))*, retrieved from Amsterdam Ministries for Justice, Research and Documentation Centre website <www.english.wodc.nl>.
33. J Dekker, K O'Brien and N Smith, *An Evaluation of the Compulsory Drug Treatment Program (CDTP)* (NSW Bureau of Crime Statistics and Research, 2010) 7.
34. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 6(1).

service work when not otherwise employed.[35] Additional conditions can be imposed by the sentencing court or the Parole Authority.[36]

6.21 Over the five year period of 2006/07 to 2010/11, the average number of offenders in home detention at any one time declined from 213 to 126. Over that period, between 80% and 87% of offenders sentenced to home detention successfully completed their orders.[37] In 2011, the District Court imposed 125 home detention orders, while the Local Court made eight home detention orders.[38]

Eligibility and exclusions

6.22 Home detention is not available for offenders being sentenced for: murder, attempted murder, or manslaughter; serious sexual offences; armed robbery; firearms offences; assault occasioning actual bodily harm or a more serious assault; stalking or intimidation; domestic violence against a likely co-resident; and certain serious drug offences.[39]

6.23 Home detention is also not available if the offender has:

- any conviction for murder, attempted murder or manslaughter; serious sexual assault, or stalking or intimidation;
- a conviction within the last five years for a domestic violence offence against a likely co-resident; or
- been subject to an apprehended violence order for the protection of a likely co-resident within the last five years.[40]

6.24 A person without stable accommodation will not normally be considered eligible for a home detention order.[41]

6.25 A court cannot make a home detention order unless it is satisfied that: the offender is a suitable person to serve the sentence in that manner; it is appropriate in all the circumstances for the sentence to be served by way of home detention; and the people with whom it is likely the offender would reside or have a relationship have consented in writing. The court is to consider the contents of an assessment report on the offender and any evidence from a probation and parole officer that the court considers necessary in order to make a decision.

6.26 The court may refer the offender for assessment of suitability for home detention only after the court has imposed a sentence of imprisonment.[42] The court is

35. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 200.
36. *Crimes (Administration of Sentences) Act 1999* (NSW) s 103(1).
37. NSW Department of Attorney General and Justice, *Annual Report 2010/11*, 97, 99.
38. NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics* (2011) Tables 1.7 and 3.8.
39. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 76.
40. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 77.
41. Homeless Persons' Advisory Service, *Preliminary Submission PSE7*, 4.
42. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 80(1).

precluded from seeking a home detention assessment if it has already sought an ICO assessment unless it has determined not to impose an ICO.[43]

6.27 The court may refuse to order home detention notwithstanding a favourable assessment but must give reasons. A home detention order must not be made if the court considers it likely that the offender "will commit any sexual offence or any offence involving violence" during the period of the order, "even though the offender may have no history of committing offences of that nature".[44]

6.28 The Chief Magistrate has pointed out the lack of consistency between the eligibility criteria for home detention and ICOs,[45] notwithstanding the similarities between them such as that ICOs involve the court imposing mandatory conditions that the offender only reside at an approved premises and be subject to visits and searches of the premises by a supervisor.[46] In particular, offenders being sentenced for assault occasioning actual bodily harm are excluded from home detention but not ICOs.[47]

Duration

6.29 A home detention order is limited to a maximum duration of 18 months.[48] The question arises whether greater flexibility would be achieved if the maximum duration were longer and whether there ought to be a uniform maximum length for all custodial alternatives to full-time imprisonment. If the maximum exceeded two years, consideration would need to be given to whether the general jurisdiction limit on sentences in the Local Court of two years should be maintained.[49]

Breach and revocation

6.30 A policy of the home detention scheme is that "every breach of a home detention condition must have a response".[50] Minor breaches can be dealt with by a warning or more stringent application of conditions.[51] Serious breaches must be reported to the Parole Authority which has a range of options including a warning, varying the conditions or revoking the home detention order.[52]

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43. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 80(1A). We will discuss streamlining assessment processes in a future question paper on procedural and jurisdictional possibilities.
44. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 78(1)-(7).
45. See para [6.35]-[6.52].
46. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 175.
47. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 76(e) and 66, respectively.
48. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 6(1).
49. See NSW Law Reform Commission, *Full-time Imprisonment,* Sentencing Question Paper 5 (2012) [5.116]-[5.120].
50. Auditor-General NSW, *Performance Audit: Home Detention: Corrective Services*, Report (2010) 24.
51. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 202.
52. Auditor-General NSW, *Performance Audit: Home Detention: Corrective Services*, Report (2010) 25.

The decline in the number of home detention orders

6.31 In the past five years, there has been a decline in both the number of home detention assessment reports being made at the request of courts[53] and the number of home detention placements. Corrective Services NSW has indicated that from November 2010, there would be capacity for approximately 300 offenders on home detention at any one time.[54] However in 2010/11 there was on average only 126 offenders in home detention, compared with 213 in 2006/07.[55] While it is not clear why, it appears that a large proportion of the overall supervision capacity is not being used.

Other jurisdictions

6.32 Home detention was abolished in Victoria in 2011[56] in order to "ensure truth in sentencing and restore the community's confidence that jail means jail".[57] There were also further concerns about the impact of home detention orders on the families of offenders and pressure that partners of offenders may feel to consent to an order that effectively confines them to their home along with the offender.[58]

6.33 Legislation in the Northern Territory allows for a term of imprisonment to be served by way of home detention order for a period not exceeding 12 months.[59]

6.34 New Zealand legislation allows for home detention to be imposed when a court would have otherwise sentenced the offender to "a short term sentence of imprisonment".[60]

Question 6.2

1. Is home detention operating as an effective alternative to imprisonment?
2. Are there cases where it could be used, but is not? If so what are the barriers?
3. Are there any improvements that could be made to the operation of home detention?

53. NSW Department of Attorney General and Justice, *Annual Report 2010/11*, 99.
54. Auditor-General NSW, *Performance Audit: Home Detention: Corrective Services*, Report (2010) 5.
55. NSW Department of Attorney General and Justice, *Annual Report 2010/11*, 97 (monthly average number of supervised home detainees).
56. *Sentencing Legislation Amendment (Abolition of Home Detention) Act 2011* (Vic).
57. Victoria, *Parliamentary Debates*, Legislative Assembly 16 June 2011, Book 9, 2199.
58. Victoria, *Parliamentary Debates*, Legislative Assembly 16 June 2011, Book 9, 2199.
59. *Sentencing Act 1995* (NT) s 44-48.
60. *Sentencing Act 2002* (NZ) s 15A. "Short-term sentence" is defined as: "(a) a determinate sentence of 24 months or less imposed on or after the commencement date; or (b) a notional single sentence of 24 months or less; or (c) in the case of a pre-[commencement date] sentence, a sentence of 12 months or less": *Sentencing Act 2002* (NZ) s 4(1); *Parole Act 2002* (NZ) s 4(1).

Intensive correction orders

6.35 Since late 2010, a court that has sentenced a person to imprisonment for up to two years has been able to order that the sentence be served by way of intensive correction in the community.[61] The court must impose certain mandatory conditions on an ICO, including residential conditions, alcohol and drug testing, community service, unannounced home visits and curfews.[62] Additional conditions can be imposed by the court.[63]

6.36 The comparatively recent introduction of this sentencing option has meant that comprehensive statistics and an evaluation of its effectiveness are not yet available.[64] However, the Corrective Services Commissioner has stated that as at 30 June 2011, there were 354 offenders who were being supervised under ICOs.[65] In 2011, 527 ICOs were imposed in the Local Court, while 93 ICOs were imposed in the higher courts.[66]

6.37 The NSW Sentencing Council will report annually on the use of the new orders and is to conduct a review of the ICO provisions as soon as possible after 1 October 2015, and to report to the responsible Minister by October 2016. The Minister is required to table a copy of the Council's report in each House of Parliament as soon as possible after receiving the report.[67] In addition, the NSW Bureau of Crime Statistics and Research will be asked to measure the effectiveness of ICOs in reducing recidivism.[68] As well as completing a five-year review of ICOs, the Council is required to report annually to the Attorney General on the use of ICOs. The Council will release its first review of the use of ICOs as part of its 2011 Annual Report.

6.38 Corrective Services NSW manages ICOs according to four levels of supervision and conditions. Offenders are progressed, or regressed, through these levels based on their conduct throughout the term of the ICO.[69] The discretionary conditions relate to curfews, electronic monitoring and the level of contact with Corrective Services. Compulsory conditions include community service work and drug and alcohol testing. Offenders may commence on Level 1 or 2 and progress up to Level 4 (see Table 6.1 below).[70]

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61. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7(1).
62. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 175.
63. *Crimes (Administration of Sentences) Act 1999* (NSW) s 81(3).
64. NSW Department of Attorney General and Justice, *Annual Report 2010/11*, 98 refers to the introduction of ICOs and the planned, "staged roll-out" of the option throughout the State "within a 100km radius" of departmental offices for community compliance and monitoring. The expected date for ICOs to become fully operational was May 2011.
65. NSW Department of Attorney General and Justice, *Annual Report 2010/11*, 87.
66. NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics* (2011) Tables 1.7 and 3.8.
67. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 73A.
68. NSW, *Parliamentary Debates*, Legislative Council, 22 June 2010, 24426 (J Hatzistergos).
69. Corrective Services NSW, *ICO Brochure,* <www.correctiveservices.nsw.gov.au/__data/assets/pdf_file/0020/220664/ico-brochure.pdf> 3.
70. Corrective Services NSW, *ICO Brochure,* 3.

6.39 ICOs were introduced by the same statute that abolished periodic detention.[71] The ICO was not intended to replace periodic detention, but was designed to address some of the latter's shortcomings, which included:

- it was not available throughout the State because of resource limitations, particularly in rural and regional areas;
- facilities were underutilised; and
- periodic detainees were not effectively case managed or rehabilitated.[72]

Table 6.1: The four levels of ICO supervision and conditions

Level 1	Level 2	Level 3	Level 4
Curfew	Discretionary curfew	No curfew	No curfew
Electronic monitoring	Discretionary electronic monitoring	No electronic monitoring	No electronic monitoring
Minimum face-to-face contact with Corrective Services NSW supervisor: weekly	Minimum face-to-face contact with Corrective Services NSW supervisor: fortnightly	Minimum face-to-face contact with Corrective Services NSW supervisor: monthly	Minimum face-to-face contact with Corrective Services NSW supervisor: six weekly
Minimum of 32 hours of community service work per month supervised by Corrective Services NSW			
Drug testing			
Alcohol testing on work and program sites – and home if non-consumption of alcohol is imposed by the court as an additional condition			
Programs as directed by Corrective Services NSW			

Source: Corrective Services NSW, ICO Brochure, 3.

Exclusions

6.40 An ICO is not to be made in relation to a sentence of imprisonment for a "prescribed sexual offence" – these include offences against children under 16 years of age and offences that include sexual intercourse.[73]

6.41 There are no other statutory exclusions, but the NSW Court of Criminal Appeal (CCA) recently held that, as Parliament made this sentencing option available in order to "reduce the offender's risk of re-offending through the provision of intensive rehabilitation and supervision in the community", it was not suitable for a person with little risk of re-offending and no need for rehabilitation.[74] The unavailability of

71. *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010* (NSW). See para [6.92]-[6.103] for a discussion on the possible reintroduction of periodic detention.
72. NSW, *Parliamentary Debates*, Legislative Assembly, 10 June 2010, 24232 (B Collier); NSW Sentencing Council, *Review of Periodic Detention* (2007) x.
73. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 66(1).
74. *R v Boughen* [2012] NSWCCA 17 [109]-[110].

what are seen as appropriate sentences to deal with offenders in this category has led to calls to reintroduce periodic detention.[75]

Eligibility

6.42 Before a court can impose an ICO, the Commissioner for Corrective Services (CCS) must conduct a suitability assessment to determine that the offender is suited to an ICO,[76] the offender must sign an undertaking to comply with his or her obligations under the order, the offender must be of or above the age of 18 years and the court must be satisfied that the order is appropriate in all the circumstances.[77] The referral for assessment must take place before the court imposes the sentence of imprisonment.[78] The referral for assessment precludes the court from seeking a home detention assessment until it has determined not to impose an ICO.[79]

6.43 A court may only make an ICO if the CCS assessment states that the offender is suitable.[80] A suitability assessment report covers factors including the offender's age, criminal history, accommodation, physical and mental health, drug and alcohol dependency, any risks associated with managing the offender in the community, such as the likelihood that the offender will commit a domestic violence offence,[81] and the availability of community work and resources to supervise the offender.[82]

6.44 If a court declines to make an ICO despite an assessment report that states that the offender is a suitable person to serve the sentence in that way, the court must indicate to the offender, and make a record of, its reasons for doing so.[83]

Duration

6.45 The maximum length for an ICO at present is two years.[84] The Young Lawyers' Criminal Law Committee has suggested that consideration should be given to extending the maximum to three years.[85]

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75. See para [6.92]-[6.103].
76. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 69(1), s 70.
77. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(1).
78. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 69. The court must be "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": s 69(2).
79. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 80(1A). We will discuss streamlining assessment processes in a future question paper on procedural and jurisdictional possibilities.
80. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(4).
81. It should be noted, however, that offenders convicted of domestic violence are not excluded from eligibility for an ICO, see Judicial Commission of NSW, *Local Court Bench Book* [10-220].
82. *Crimes (Sentencing Procedure) Regulation 2010* (NSW) cl 13; see also Corrective Services NSW, *ICO Brochure,* 2.
83. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(5).
84. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7(1).
85. NSW Young Lawyers, Criminal Law Committee, *Preliminary Submission PSE11*, 4.

Breach and revocation

6.46 If a person fails to comply with any of his or her obligations under an ICO, the CCS may impose sanctions such as a formal warning or a more stringent application of the conditions of the order.[86] The power to revoke an ICO, however, is vested in the Parole Authority.[87] If an offender is in breach of his or her ICO, the Parole Authority may impose the same sanctions as the CCS, or up to seven days' home detention, or it may revoke the ICO with the consequence that the remainder of the sentence is served in full-time custody.[88]

Criticism

6.47 Not all stakeholders approve of the ICO model. The Probation and Parole Officers' Association of NSW has been critical of ICOs as a sentencing option because:

> 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.[89]

Other jurisdictions

6.48 ICOs are available in Queensland for terms of one year or less.[90] The offender serves the sentence by way of intensive correction in the community and not in a prison. The general requirements of the order include that the offender:

- not commit a further offence during the period of the order;
- submit to reporting conditions and visits from an authorised corrective services officer at least twice a week;
- take part in counselling and satisfactorily attend programs as directed;
- satisfactorily perform community service;
- reside at community residential facilities for periods of up to seven days at a time as directed; and
- not leave Queensland without permission.

6.49 The order may contain additional requirements such as submitting to medical, psychiatric or psychological treatment and complying with orders that the court considers necessary to cause the offender to "behave in a way that is acceptable to

86. *Crimes (Administration of Sentences) Act 1999* (NSW) s 89.
87. *Crimes (Administration of Sentences) Act 1999* (NSW) s 90.
88. Unless the Parole Authority directs that the remainder of the sentence be served by way of home detention: *Crimes (Administration of Sentences) Act 1999* (NSW) s 90.
89. Probation and Parole Officers' Association of NSW, *Preliminary Submission PSE 20*, 12-13.
90. *Penalties and Sentences Act 1992* (Qld) pt 6. ICOs made up about 7% of all probation orders in Queensland between 2003 and 2006 but dropped to 5.6% in 2007: NSW Sentencing Council, *Periodic Detention* (2007) [7.43].

the community" and to prevent re-offending of the same crime or a different type of crime.

6.50 WA provides for an "intensive supervision order" of at least six months and not more than 24 months, designed to allow the offender to be monitored regularly in the community and receive regular counselling aimed at his or her rehabilitation. The order includes supervision requirements and the discretion for the court to impose requirements to take part in medical, psychiatric, psychological and educational programs, community service and/or abide by a curfew.[91]

6.51 Similarly in New Zealand, offenders can be sentenced to a period of intensive supervision of not less than six months and not more than two years. Standard conditions include regular reporting, not residing or working at a location or associating with others if so directed by a probation officer and taking part in rehabilitative programs as directed. Special conditions may include psychiatric, psychological, medical or other treatment and specific residential and training conditions.[92]

6.52 Since January 2012, ICOs are no longer available in Victoria, which now provides for a single "community corrections order" of up to the maximum term of imprisonment for the offence if imposed by the higher courts, or up to two years if imposed by the Magistrates' Court.[93] The order is designed to cover a variety of offending behaviours, but still be tailored to the needs of the individual offender. If the court is considering making an order of six months or longer, it may fix a shorter period for "intensive compliance" and attach one or more additional conditions, such as an order "that requires the offender to undergo treatment and rehabilitation specified by the court".[94]

Question 6.3

1. Are intensive correction orders operating as an effective alternative to imprisonment?
2. Are there cases where they could be used, but are not? If so what are the barriers?
3. Are there any improvements that could be made to the operation of intensive correction orders?

Suspended sentences

6.53 The NSW Sentencing Council has published a comprehensive *Background Report* on suspended sentences, including stakeholders' views and the results of a survey of judicial opinion on the operation of suspended sentences and potential options

91. *Sentencing Act 1995* (WA) pt 10. The use of ICOs increased in WA during the mid-2000s, comprising 21% of all community based orders in 2005: NSW Sentencing Council, *Periodic Detention* (2007) [7.44].
92. *Sentencing Act 2002* (NZ) s 54B-54L.
93. *Sentencing Act 1991* (Vic) pt 3A.
94. *Sentencing Act 1991* (Vic) s 48D.

for reform.[95] Some of the questions on suspended sentences listed below are related to issues raised in that report. We recommend that you read this report before responding to the questions in this section.[96]

6.54 Suspended sentences were abolished in NSW in 1974 and reintroduced under the *Crimes (Sentencing Procedure) Act 1999* (NSW) ('the Act') in 2000.[97] A court that has sentenced a person to a term of imprisonment of two years or less may choose to suspend execution of that sentence under s 12 of the Act and direct the offender to be released from custody on condition that he or she enters a good behaviour bond.[98] The bond cannot exceed the length of the suspended sentence.

6.55 Between 2006 and 2010, approximately 5% of offenders in the Local Court were given suspended sentences, with a slight majority in each year receiving a supervised bond rather than an unsupervised bond attached to the suspended sentence. In the higher courts, approximately 16% of offenders received suspended sentences during this period, with a majority receiving supervised bonds.[99] Approximately 70-80% of offenders successfully completed their suspended sentences in the 2000s.[100]

6.56 Despite being characterised by the Act as a non-custodial alternative,[101] the CCA has held that a suspended sentence is a form of imprisonment.[102] A court must, therefore, first determine that imprisonment is the only appropriate sentence in the circumstances.

6.57 While partially suspended sentences are available for Commonwealth offences,[103] for NSW state offences, a court must suspend the whole of a sentence of imprisonment or none at all.[104] Section 12 was amended to this effect in 2003 so that the "whole of the sentence" must be suspended,[105] overruling the CCA's interpretation in *R v Gamgee* that a partially suspended sentence was permitted by the section as it had been originally drafted.[106] The Government's reasoning for the

95. NSW Sentencing Council, *Suspended Sentences: A Background Report* (2011); see app 3 for the survey of judicial opinion on possible reforms to suspended sentences.
96. Also see, NSW Sentencing Council, *Suspended Sentences*, Consultation Paper (2011); NSW Sentencing Council, *Seeking a Guideline Judgment on Suspended Sentences*, Interim Report (2005); NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less*, Report (2004).
97. NSW Sentencing Council, *Suspended Sentences: A Background Report* (2011) [2.1].
98. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 12(1).
99. NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics 2006-10*. These represent substantial increases from relatively low bases when suspended sentences were reintroduced under the Act in 2000: L McInnis and C Jones, *Trends in the Use of Supended Sentences in NSW,* Bureau Brief No 47 (NSW Bureau of Crime Statistics and Research, 2010) 1.
100. NSW Sentencing Council, *Suspended Sentences: A Background Report* (2011) [3.14]-[3.19].
101. Sentences are suspended under s 12, which is contained in *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 2 div 3, entitled "Non-custodial Alternatives".
102. *R v Zamagias* [2002] NSWCCA 17 [25], citing *R v JCE* [2000] NSWCCA 498; 120 A Crim R 18 [15].
103. *Crimes Act 1914* (Cth) s 20(1)(b).
104. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 12(1)(a)
105. *Crimes Legislation Amendment Act 2003* (NSW) s 3 and sch 6[1].
106. *R v Gamgee* [2001] NSWCCA 251; 51 NSWLR 707 (Mason P and Dowd J, Sully J dissenting).

amendment was that a suspended sentence "does not come into force unless the offender breaches the terms of a good behaviour bond, and the bond is revoked by the court". The Minister referred to the "considerable hardship" that can be caused to an offender who has to enter custody after an initial period of the suspension of a sentence, but did not address the converse situation in which a court orders the offender first to serve a sentence for a specified period and then to be released on a suspended sentence.[107] It has also been suggested that partially suspended sentences were not permitted in order to prevent courts getting around the one-third rule in relation to parole periods.[108] While partially suspending a sentence in such circumstances does not differ significantly from release on parole, the court would have the authority to breach the offender for a suspended sentence whereas that responsibility lies with the Parole Authority in the case of breach of parole.[109]

6.58 Before imposing a suspended sentence on an offender, the court must undertake a three-step process whereby it must:[110]

- find that imprisonment is the only appropriate penalty;[111]
- set the term of the custodial sentence without considering "the manner in which it is to be served";[112] and
- if the term decided upon is two years or less, consider whether suspending the sentence would be appropriate in the particular case.[113]

6.59 The court must not impose a term of imprisonment of two years or less simply to allow the sentence to be suspended,[114] nor impose a longer sentence up to two years to compensate for the fact that the sentence is to be suspended.[115]

Duration

6.60 Justice Howie has observed that the limitation that a good behaviour bond imposed under s 12 cannot exceed the length of the suspended sentence is "completely inappropriate" and can lead to an "absurdity" where the court can only impose a short good behaviour bond if it is considering a short period of suspended imprisonment.[116]

6.61 This raises the issue of whether it would be desirable to allow the courts greater discretion to impose a longer good behaviour bond associated with a suspended

107. NSW, *Parliamentary Debates*, Legislative Council, 25 June 2003, 2041 (J Hatzistergos).
108. A Haesler, "The Crimes (Sentencing Procedure) Act 1999 - 2 Years On" (Public Defenders' Office, Paper, 14 March 2002).
109. See NSW Sentencing Council, *Suspended Sentences: A Background Report* (2011) [4.29]-[4.35].
110. *Douar v The Queen* [2005] NSWCCA 455; 159 A Crim R 154 [69]-[72].
111. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1).
112. *R v Zamagias* [2002] NSWCCA 17 [26].
113. *Dinsdale v The Queen* [2002] HCA 54; 202 CLR 321 [79]; *R v Zamagias* [2002] NSWCCA 17 [28].
114. *R v Ryan* [2006] NSWCCA 394 [2]; *R v Wilson* [2005] NSWCCA 414.
115. See *Stephen v The Queen* [2003] NSWCCA 377 [23] in the context of periodic detention.
116. *Bonsu v The Queen* [2009] NSWCCA 316 [22].

sentence. For example, a relatively short sentence could be suspended for several years, meaning that the offender must abide by the good behaviour bond for that longer period or face the risk of serving the short sentence.

6.62 This is perhaps more significant that it first seems. The marginal deterrent effect of longer terms of imprisonment has been queried – that is to say, researchers have doubted whether increasing the length of prison terms results in less crime in the future.[117] However, the only two formal studies conducted since 1962 which have found a reduction in recidivism that was related to length of sentence both involved situations in which the offenders knew it was very likely that they would serve a prison sentence of a definite length if they were to commit another offence.[118] The first example came from Italy in the mid-2000s, where prison overcrowding resulted in a Bill for general clemency and a reduction in prisoners' sentences of up to three years, provided that they did not re-offend within five years, in which case the residual sentence at the time of release would have to be served as well as the penalty for the new offence. This resulted in the release of some 22,000 inmates who had residual prison sentences of less than three years. The study found that "each additional month in the expected sentence reduced the propensity to re-offend by 1.24 per cent", but the longer the time already spent in prison, the weaker the relationship between the residual sentence and rate of recidivism. The second example was in California, where 'three-strike' felony legislation saw a significant reduction of 17-20% in felony arrests for 'two-strike' offenders who faced massive jail sentences if they were convicted of another felony.

6.63 In short, a determinate sentence which hangs over the head of an offender for an extended period of time – and which must be served in addition to any penalty for any new offence – may reduce the likelihood of the offender committing a further offence during that period.

6.64 In its 2011 review of suspended sentences, the NSW Sentencing Council conducted a survey of judicial opinions and found that 62% of the judicial officers who responded were in favour of increasing the maximum available length of a bond under s 12. Moreover, 82% were in favour of severing the link between the length of the bond and the length of the suspended sentence so that a bond of greater length than the suspended sentence could be imposed.[119]

6.65 At present, good behaviour bonds can be imposed for up to five years under s 9.[120] The question arises of whether it would be appropriate to allow a bond under s 12 of up to the same, or a similar, length, while maintaining the two year maximum for the suspended sentence. Separate questions are whether the maximum length of the suspended sentence should remain at two years and whether there should be consistency with the maximum lengths of other custodial sentencing options.

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117. M Bagaric and T Alexander, "(Marginal) Deterrence Doesn't Work – and What it Means for Sentencing" (2011) 35 *Criminal Law Journal* 269, 273-277, discussed in NSW Law Reform Commission, *Purposes of Sentencing*, Sentencing Question Paper 1 (2012) [1.34]-[1.43].
118. D Weatherburn, *The Effect of Prison on Adult Re-Offending*, Crime and Justice Bulletin No 143 (NSW Bureau of Crime Statistics and Research, 2010) 2-4.
119. NSW Sentencing Council, *Suspended Sentences: A Background Report* (2011) Appendix 3, 68-70.
120. See NSW Law Reform Commission, *Non-Custodial Sentencing Options,* Sentencing: Question Paper 7 (2012).

Breach and revocation

6.66 If the court is satisfied that the offender has failed to comply with the conditions of the s 12 bond, the court must revoke the bond unless it is satisfied:

(a) that the offender's failure to comply with the conditions of the bond was trivial in nature, or

(b) that there are good reasons for excusing the offender's failure to comply with the conditions of the bond.[121]

6.67 Justice Howie has indicated that "generally a breach of the conditions of the bond will result in the offender serving the sentence that was suspended".[122] If the bond is revoked, the court must resentence the offender. The court may order a term of imprisonment to be served in full-time custody or by way of intensive supervision in the community or home detention, but may not impose a further suspended sentence.[123]

6.68 Preliminary submissions have raised concerns that the revocation provision in s 98(3) is too harsh, especially if the bond is in the final days of its operation.[124] Proposals for reform include broadening the definition of "good reasons for excusing the breach", allowing the courts a greater range of responses to breach, and allowing the court to reduce the term of imprisonment to be served following revocation by the amount of time during which the offender complied with the bond or a proportion of this time, or to extend the period of the good behaviour bond or vary its terms.[125]

6.69 In the Local Court during the period 2001-2010, approximately 69 to 79% of people who breached their suspended sentence received a term of full-time custody, and just 1% received a further suspended sentence.[126]

Other jurisdictions

6.70 Suspended sentences are generally available in other Australian jurisdictions,[127] however they are restricted in Victoria, where they are unavailable for "serious

121. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 98(3).

122. *DPP (NSW) v Cooke* [2007] NSWCA 2; 168 A Crim R 379 [21].

123. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 99(2); *R v Tolley* [2004] NSWCCA 165 [29]-[30].

124. G Henson, *Preliminary Submission PSE5*, 8; Homeless Persons' Legal Service, *Preliminary Submission PSE7*, 3; The Shopfront Youth Legal Centre, *Preliminary Submission PSE13*, Annexure 2, 3; Law Society of NSW, *Preliminary Submission PSE8,* Annexure 1, 2.

125. The Shopfront Youth Legal Centre, *Preliminary Submission PSE13,* Annexure 2, 1-3, citing NSW Law Reform Commission, *Sentencing,* Final Report (1996) [4.23] which referred to the flexibility available to courts under the *Criminal Law (Sentencing) Act 1988* (SA) s 58(3); Law Society of NSW, *Preliminary Submission PS08*, Annexure 1, 2-3.

126. NSW Sentencing Council, *Suspended Sentences: A Background Report* (2011) [3.21].

127. *Penalties and Sentences Act 1992* (Qld) s 144 (terms of imprisonment up to 5 years may be suspended in whole or in part); *Sentencing Act 1995* (WA) s 76 (terms of up to 5 years may be wholly suspended, but only for a period of up to 2 years); *Criminal Law (Sentencing) Act 1988* (SA) s 38 (a short period of full-time imprisonment may be combined with a suspended sentence in limited circumstances); *Sentencing Act 1997* (Tas) pt 3 div 4 (suspension of whole or part of the sentence is permitted); *Crimes (Sentencing) Act 2005* (ACT) s 12 (suspension of whole or

offences" such as murder, manslaughter and other serious offences of violence including sexual offences,[128] and were further abolished in April 2011 in respect of recklessly causing serious injury, commercial drug trafficking, aggravated burglary and arson.[129] In his second reading speech, the Attorney-General said:

> Suspended sentences are a fiction that pretends offenders are serving a term of imprisonment, when in fact they are living freely in the community. A suspended sentence does not subject an offender to any restrictions, community service obligations or reporting requirements. … [W]here a judge considers that a jail sentence is not appropriate, the judge will openly sentence the offender to a non-custodial sentence rather than being forced to go through the legal fiction of sentencing the offender to a period of imprisonment when the offender actually does not go to prison at all.[130]

Repeal, retain or reform?

6.71 As mentioned earlier, the NSW Sentencing Council's *Background Report* contains a comprehensive discussion of the relevant issues involved in the possible reform of suspended sentences and we encourage you to read that report when considering the answers to the questions below.

6.72 One preliminary submission suggested that the community often sees suspended sentences as overly lenient, and proposed that they be phased out when "sufficient other custodial and non-custodial options are available and able to be utilised effectively".[131] Others emphasised that a suspended sentence is the last available option other than imprisonment for people who are not assessed as suitable for bonds, community service orders, ICOs or home detention.[132] Without the creation of new sentencing options or significant changes to the eligibility criteria of other alternatives to imprisonment, the repeal of suspended sentences may result in an increased number of sentences of full-time imprisonment, particularly in relation to homeless people and people who are mentally ill or have a serious alcohol or drug abuse problem.[133]

Question 6.4

1. Are suspended sentences operating as an effective alternative to imprisonment?
2. Are there cases where suspended sentences could be used, but are not? If so what are the barriers?

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part of the sentence is permitted); *Sentencing Act 1995* (NT) s 40 (the court may suspend sentences of up to 5 years in whole or in part).

128. For the full definition of "serious offence" see *Sentencing Act 1991* (Vic) s 3(1).
129. *Sentencing Act 1991* (Vic) s 27 (the maximum length of the sentence is 3 years if imposed by the higher courts, and 2 years if imposed by the Magistrates' Court, and the sentence may be suspended in whole or in part).
130. Victoria, *Parliamentary Debates,* Legislative Assembly, 21 December 2010, 17.
131. G Henson, *Preliminary Submission PSE5*, 9.
132. Homeless Persons' Legal Service, *Preliminary Submission PSE7*, 3. Crime and Justice Reform Committee, *Preliminary Submission PSE12*, 2; The Shopfront Youth Legal Centre, *Preliminary Submission PSE13*, 10.
133. Homeless Persons' Legal Service, *Preliminary Submission PSE7*, 3.

3. Are there any improvements that could be made to the operation of suspended sentences?
4. Should greater flexibility be introduced in relation to:
   a. the length of the bond associated with the suspended sentence?
   b. partial suspension of the sentence?
   c. options available to a court if the bond is breached?

Rising of the court

6.73 A sentence to the "rising of the court" is a sentence of imprisonment that lasts only until the court adjourns.[134] It is classified as a custodial sentence because the offender is restrained from the moment the sentence is passed until the court's adjournment.[135] It would, therefore, be expected that a sentence to the rising of the court would not be imposed where a court determines that no other sentence than a sentence of imprisonment was appropriate.

6.74 The rising of the court differs from an order under s 10A of the Act to convict the person but impose no further penalty because, strictly, the rising of the court involves a period of 'custody' when the offender is required to remain in court until the magistrate or judge adjourns, whereas an order under s 10A does not.[136]

6.75 In practice, the court usually adjourns as soon as the sentence has been imposed. The rising of the court is, therefore, considered to be one of the most lenient sentences available, being more lenient than the non-custodial alternatives.[137]

6.76 The rising of the court may be used where a person has been held in custody for a sufficient or excessive period, either on remand or for a previous sentence that was quashed.[138] However, it is now thought that in this situation the court should, if it considers that a custodial sentence is warranted, back-date the sentence to take into account previous custody.[139] If such a sentence has already expired when it is imposed, the defendant will be discharged but the sentence will appear as a custodial sentence on the person's criminal history and will be recorded as such in the court statistics.

134. I MacKinnell, *Sentenced to the Rising of the Court*, Sentencing Trends No 11 (Judicial Commission of NSW, 1996).
135. R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 1985) 354.
136. The rationale for introducing s 10A was to "overcome situations where inappropriate sentences have been inmposed such as fines of 50¢", leading to wastage of resources in payment and recovering of outstanding fines: NSW, *Parliamentary Debates*, Legislative Assembly, 27 October 2006, 3664 (N Newell).
137. I MacKinnell, *Sentenced to the Rising of the Court*, Sentencing Trends No 11 (Judicial Commission of NSW, 1996).
138. I MacKinnell, *Sentenced to the Rising of the Court*, Sentencing Trends No 11 (Judicial Commission of NSW, 1996).
139. *Wiggins v The Queen* [2010] NSWCCA 30 [2]-[8].

6.77 The penalty has also been used in Local Courts for secondary offences.[140] In recent times, however, use of the sentence has gone into decline. In the Local Court in 2000, 0.59% or 588 people received this penalty, but in 2010 this figure had dropped to just 0.06% or 65 people[141] and in 2011 only 0.03% or 28 people received the penalty.[142] In the higher courts just three people in 2010[143] and five people in 2011[144] were sentenced to the rising of the court. This may be explained, in part, by the introduction of s 53A of the Act in 2010[145] which empowers courts, when sentencing a person for multiple offences, to impose an aggregate sentence of imprisonment with respect to any two or more offences, but obliges the court to state what the individual sentences would have been, perhaps reducing the flexibility to simply impose the rising of the court.

Question 6.5

1. Should the "rising of the court" continue to be available as a sentencing option?
2. If so, should the penalty be given a statutory base?
3. Should the "rising of the court" retain its link to imprisonment?

Maximum terms of imprisonment that may be served by way of custodial alternatives

6.78 The Act allows for terms of imprisonment of particular lengths to be served by way of home detention, ICOs or suspended sentences, each of which is identified in the Act as a custodial option. Different custodial options are available depending on the length of the term of imprisonment a court has imposed as illustrated in the following table:

Sentencing option	Maximum term of imprisonment
Home detention (s 6)	18 months
Intensive correction order (s 7)	2 years
Suspended sentence (s 12)	2 years

140. I MacKinnell, *Sentenced to the Rising of the Court*, Sentencing Trends No 11 (Judicial Commission of NSW, 1996).
141. 0.8-1.7% of offenders received an order under s 10A (conviction with no further penalty) in the Local Courts between 2007 and 2010: NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Court Statistics* (2007-2010) Table 1.7.
142. NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Court Statistics* (2011) Table 1.7.
143. NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Court Statistics*, (2010) Table 3.7.
144. NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Court Statistics* (2011) Table 3.8.
145. *Crimes (Sentencing Procedure) Amendment Act 2010* (NSW) sch 2[14]. See NSW Law Reform Commission, *Imposing Terms of Full-Time Imprisonment,* Sentencing Question Paper 5 (2012) [5.100]-[5.103].

6.79 Prior to its repeal in 2010, periodic detention (served on weekends or specific days during the week) was available for terms of imprisonment of up to three years.[146]

6.80 This restriction on the imposition of custodial alternatives is thought to prevent "net-widening" by ensuring that only offenders who are sentenced to prison terms are sentenced to such alternatives. Net-widening in this context refers to the potential for a new penalty option, introduced as an alternative to imprisonment, to instead be imposed on offenders who would not normally have received a custodial sentence. Net-widening is generally considered to be undesirable as it represents a failure to divert offenders from custodial options, thereby imposing greater financial and non-financial costs on the community.[147]

6.81 Indeed, the second reading speech described the rationale for designating ICOs as an alternative to terms of imprisonment of up to two years was described in the second reading speech as being the prevention of net-widening "through ensuring intensive correction orders are only imposed on offenders who would otherwise have received a sentence of imprisonment".[148]

6.82 The different maximum terms of the custodial options prevents the converse form of net-widening, so that more serious offenders who are sentenced to longer terms of imprisonment are not eligible for custodial alternatives.

6.83 The current maximum terms for custodial alternatives illustrated in the above table mean that sentences of more than two years must be served in full-time custody, as there is no available custodial alternative.

6.84 There are also limits on the concurrency of custodial orders. Section 68 prevents the court from making an ICO to be served concurrently or consecutively with another ICO if the new ICO will end more than two years after the date on which it is made. Similarly, s 79 prevents the making of a home detention order to be served concurrently or consecutively with another home detention order if the new order will end more than 18 months from the date on which it is made.

6.85 The maximum lengths for custodial options raise a number of issues.

6.86 First, according to the established approach to choosing custodial sentencing options under *R v Zamagias*,[149] the court must first determine that imprisonment is the only appropriate sentencing outcome, then determine the length of the sentence and only then consider custodial alternatives to full-time imprisonment. If an alternative such as home detention or a suspended sentence is selected, it is supposed to be of the same length as the term of imprisonment initially determined by the court, even though it is obviously a far less severe sanction. It is arguable that there is an incongruity in the process of the court first determining that

146. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 6 was repealed by the *Crimes (Sentencing Legislation) Amendment (Intensive Corrections Orders) Act 2010 (*NSW).

147. NSW, Legislative Council, Standing Committee of Law and Justice, *Community based sentencing options for rural and remote areas and disadvantaged populations* (2006) [2.102]-[2.105], [5.78]-[5.85].

148. NSW, *Parliamentary Debates*, Legislative Assembly, 10 June 2010, 24281 (B Collier).

149. *R v Zamagias* [2002] NSWCCA 17.

imprisonment is the only appropriate option but then determining that an alternative to (full-time) imprisonment is appropriate. Justice Basten has doubted that courts actually follow the steps required by *Zamagias* and believes that there is a real, and not just apparent, incongruity in a court engaging in this reasoning process to impose a penalty on an offender.[150]

6.87 Secondly, the current maximum terms have been criticised on the grounds that they do not necessarily correspond with their option's position in the sentencing hierarchy. For example, the Chief Magistrate has argued that:

> the maximum length of a home detention order is 18 months, whereas the maximum length of an intensive correction order (ICO) is 2 years. This is despite home detention being higher in the hierarchy of severity of custodial sentences.[151]

6.88 Thirdly, the preliminary submission from Legal Aid NSW argued that the absence of alternatives to full-time imprisonment above two years has caused offenders who have committed what it describes as "low level offences" to serve full-time prison sentences, removing them from family, employment and community resources and exposing them to offenders who had committed relatively more serious offences and thereby increasing their chances of recidivism.[152]

6.89 Preliminary submissions have made the following suggestions for reform:

- there should be a consistent maximum length of sentence of two years for all custodial alternatives to full-time custody;[153]
- the maximum length of a suspended sentence ought to be increased to three years in the higher courts, but remain at two years in the Local Court;[154]
- consideration should be given to extending the maximum length of intensive correction orders from two years to three years.[155]

6.90 We note that any extension of the maximum term of a sentencing option beyond two years raises the issue of whether the Local Court ought to be able to make an order of the extended length. The Local Court's jurisdiction, as a general rule, is limited to imposing a sentence for any one offence of only two years,[156] there being a legislative policy to limit the terms of full-time imprisonment that the Local Court can impose.

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150. *Amado v The Queen* [2011] NSWCCA 197 [5].
151. G Henson, *Preliminary Submission PSE5*, 9. In *R v Zamagias* [2002] NSWCCA 17 [29], Howie J ranked sentencing options "in escalating order of severity: an order suspending the sentence; a home detention order; a periodic detention order; full-time custody".
152. Legal Aid NSW, *Preliminary Submission PSE18*, 2. This latter argument is described in the literature as the "criminogenic effect" of incarceration: see R Lulham and others, The Recidivism of Offenders Given Suspended Sentences: A Comparison with Full-Time Imprisonment, Crime and Justice Bulletin No 136 (NSW Bureau of Crimes Statistics and Research, 2009) 10.
153. G Henson, *Preliminary Submission PSE5*, 9.
154. Law Society of NSW, *Preliminary Submission PSE8*, Annexure 1, 1.
155. NSW Young Lawyers, Criminal Law Committee, *Preliminary Submission PSE11*, 4.
156. See *Criminal Procedure Act 1986* (NSW) s 267, s 268 but also the detailed discussion in NSW Sentencing Council, *An Examination of Sentencing Powers of the Local Court* (2010) [1.9]-[1.14]; see also the possibilities for reform of the Local Court's jurisdiction in NSW Law Reform Commission, *Full-time Imprisonment*, Sentencing Question Paper 5 (2012) [5.116]-[5.120].

Question 6.6

1. Should any of the maximum terms for the different custodial sentencing options in the *Crimes (Sentencing Procedure) Act 1999* (NSW) be changed?
2. Should there be a uniform maximum term for all of the custodial alternatives to full-time imprisonment?
3. Should the terms of custodial alternatives to full-time imprisonment continue to be tied to the sentence of imprisonment that the court initially determined to be appropriate?
4. Should the Local Court's jurisdictional limit be increased for custodial alternatives to full-time imprisonment?

Other options

6.91 There may be other options for reform of custodial alternatives to full-time imprisonment that have not been discussed in this paper and which should be considered, either separate to or, perhaps, as part of the sentencing options discussed here. We would welcome your views in relation to periodic detention (set out below) and any other options.

Question 6.7

What other intermediate custodial sentences should be considered?

Periodic detention

6.92 Periodic detention was a sentencing option available in NSW between 1971[157] and 2010.[158] The sanction was an alternative to full-time custody for periods up to three years and generally required offenders to remain in custody for two consecutive days each week for the duration of the sentence.[159] After serving one third of their sentence, or three months of periodic detention with acceptable behaviour, detainees were promoted to Stage 2 which required detainees to attend a designated work site on two consecutive days each week from 8am to 4pm but permitted them to return home in the evenings.[160]

6.93 Each consecutive two-day period of periodic detention served counted as the equivalent of one week in full-time custody.[161]

157. *Periodic Detention Act 1970* (NSW) subsequently replaced by the *Periodic Detention of Prisoners Act 1981* (NSW) and later by both the *Crimes (Sentencing Procedure) Act 1999* (NSW) and the *Crimes (Administration of Sentences) Act 1999* (NSW).
158. *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010* (NSW).
159. *Periodic Detention of Prisoners Act 1981* (NSW) s 4 defined the detention period as commencing at 7pm and ending at 4pm two days later.
160. NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) 318.
161. NSW Sentencing Council, *Periodic Detention Report* (2007) 32.

6.94 Periodic detention was abolished following the recommendations of the NSW Sentencing Council.[162] Abolition of the sanction was not widely supported by the legal profession,[163] representatives of which continue to advocate for its reinstatement.[164] Justice Simpson has observed that:

> It may be that the removal of the Periodic Detention option has deprived sentencing judges of one vehicle by which to express denunciation of the conduct under consideration; but that is the clear expression of the will of the legislature.[165]

Eligibility

6.95 Periodic detention orders were available to courts for eligible offenders sentenced to imprisonment for not more than three years.[166] Periodic detention orders could not be made where the offender had committed a prescribed sexual offence[167] or had served more than six months of full-time custody for any one sentence of imprisonment in NSW or elsewhere.[168]

Breach

6.96 Detainees absent without permission could be required to make up lost time and received a penalty of one additional week for each week of absence.[169]

6.97 The Parole Authority could revoke a periodic detention order upon breach by a detainee,[170] with the consequence that he or she was required to serve the remainder of the sentence in either full-time custody[171] or home detention.[172] Grounds for revocation included repeated failure to report or refusal to engage in community service, reporting when under the influence of alcohol or drugs, attempting to bring prohibited substances into a detention centre or engaging in unruly behaviour.[173]

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162. NSW Sentencing Council, *Periodic Detention Report* (2007).
163. NSW Young Lawyers, Criminal Law Committee, *Preliminary Submission PSE11*, 3; Law Society of NSW, *Preliminary Submission PSE8*, 4.
164. NSW Bar Association, *Preliminary Submission PSE4*, 1; Law Society of NSW, *Preliminary Submission PSE8*, 5; Office of the Director of Public Prosecutions, *Preliminary Submission PSE10*, 8; NSW Young Lawyers, Criminal Law Committee, *Preliminary Submission PSE11*, 4; see also D Shoebridge, *Preliminary Submission PSE 16*, 1 who suggested that the impact of the abolition of periodic detention should be investigated.
165. *R v Boughen* [2012] NSWCCA 17 [110].
166. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 6(1) (repealed).
167. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 65B (repealed).
168. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 65A (repealed).
169. Parliament of Tasmania, Legislative Council Select Committee, *Correctional Services and Sentencing in Tasmania* (1999) 166.
170. *Crimes (Administration of Sentences) Act 1999* (NSW) s 163 (repealed).
171. *Crimes (Administration of Sentences) Act 1999* (NSW) s 181 (repealed).
172. *Crimes (Administration of Sentences) Act 1999* (NSW) s 165 (repealed).
173. NSW Sentencing Council, *Periodic Detention Report* (2007) 27. See also *Crimes (Administration of Sentences) Act 1999* (NSW) s 86 (repealed).

Advantages and disadvantages of the previous model

6.98 The advantages and disadvantages of periodic detention have been detailed in the Sentencing Council's *Periodic Detention Report*.[174] In short, the arguments in favour of retaining periodic detention included that it was cheaper than full-time imprisonment and home detention, allowed offenders to contribute to society through community work, and caused minimal disruption to detainees' employment, housing, family and social relationships. Importantly, it avoided the contaminatory effects of prison, that is, exposing periodic detainees to the "gaol culture" attributable to the presence of "hardened criminals" in prison.

6.99 However, the staged approach to periodic detention violated the principle of 'truth in sentencing', in that it cut short the minimum duration of an offender's incarceration fixed by the court. Judicial officers became reluctant to use the sentencing option because of its strong element of leniency.[175]

6.100 Use of the order was in decline before its abolition.[176] The number of people sentenced to periodic detention in Local Court appearances fell from 1,608 in 1999[177] to 1,093 in 2004[178] and 965 in 2008.[179]

6.101 Periodic detention facilities were not uniformly available across the State due to resource limitations, and were not used every day of the week, which resulted in an ineffective application of resources.[180]

6.102 The scheme attracted public criticism for high rates of absenteeism.[181] A snapshot taken over one weekend in April 2007 revealed that over 15% or 120 of the 765 periodic detainees in NSW were absent.[182]

6.103 The order provided little to no capacity for the case management of offenders and lacked access to long-term rehabilitation programs to address the underlying causes of the offender's criminal behaviour.[183] In short, the sentence made no attempt to rehabilitate offenders, or address their offending behaviour.

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174. NSW Sentencing Council, *Periodic Detention Report* (2007).
175. A Freiberg, *Pathways to Justice: Sentencing Review 2002* (Victorian Department of Justice, 2002) 100, citing I Potas, N Marsic and S Cummies, *Periodic Detention Revisited* (Judicial Commission of NSW, 1998) 18. See also *R v Randall* (Unreported, NSWCCA, 19 April 1994) and NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) 319.
176. NSW Sentencing Council, *Periodic Detention Report* (2007) 3.
177. NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Court Statistics 1999* (2000) 14-15.
178. NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Court Statistics 2004* (2005) 25-27.
179. NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Court Statistics 2008* (2009) 25-27.
180. NSW Sentencing Council, *Periodic Detention Report* (2007) 3.
181. D Brown and others, *Criminal Laws Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 5th ed, 2011) 1165.
182. NSW Sentencing Council, *Periodic Detention Report* (2007) 33. It should be noted, however, that this figure does not distinguish between absentees on approved leave and those absent without cause.
183. NSW Sentencing Council, *Periodic Detention Report* (2007) 107-108.

Question 6.8

Should further consideration be given to the reintroduction 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; and

d. could a rehabilitative element be introduced?

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