

# **Statutory Review of Intensive Correction Orders**

**Legal Aid NSW submission to the  
Sentencing Council**

**December 2015**

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## About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance to socially and economically disadvantaged people across NSW.

Legal Aid NSW provides information, community legal education, advice, assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 Community Legal Centres (CLCs) and 28 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW provides statewide criminal law services through the in-house Criminal Law Practice and through legal aid funding to private practitioners. The Criminal Law Practice services cover the full range of criminal matters before the Local Courts, District Court, Supreme Court of NSW and the Court of Criminal Appeal as well as the High Court of Australia.

In addition to representing large numbers of clients in criminal matters, the Legal Aid NSW Prisoners Legal Service (Prisoners Legal Service) is a statewide specialist service. The Prisoners Legal Service assists prisoners in NSW gaols through the provision of advice, minor assistance and representation in certain circumstances.

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## Executive summary

Legal Aid NSW thanks the Sentencing Council for the opportunity to make recommendations to the statutory review of intensive correction orders (the Review). The following submissions draw on the experiences of Legal Aid NSW staff currently working in the Criminal Law Practice and the Prisoners Legal Service.

Legal Aid NSW acts for a significant number of clients who receive intensive correction orders (ICOs) and home detention orders (HDOs) when matters are concluded in the Local and District Courts. HDOs are not part of this statutory review but these orders are relevant to the recommendations of this submission. The Prisoners Legal Service acts for large numbers of clients appearing before the State Parole Authority (SPA) following breaches of conditions of both ICOs and HDOs.

In summary, this submission considers the existing legislation governing the assessment for and imposition of an ICO by the criminal courts as a sentence. We have also outlined the conditions that apply to ICOs and bind offenders, and the powers of the State Parole Authority to deal with breaches.

Legal Aid NSW refers to the relevant chapters of the NSW Law Reform Commission (LRC) Report 139 (Report 139), published in July 2013, which relate to ICOs, HDOs and a new proposed community detention order (CDO) to replace the existing community custodial sentences. Legal Aid NSW supports many of the recommendations contained within that report and has listed these in the narrative of this submission, distinguishing the position of Legal Aid NSW where appropriate.

It is difficult to consider reform of ICOs in isolation of broader community custodial sentence proposals, including those in Report 139, and we understand the Sentencing Council will have regard to those broader proposals in undertaking this statutory review.

The final parts of this submission set out additional recommendations of Legal Aid NSW for reform of ICOs if retained as a sentencing option in NSW, and additional recommendations relating to CDOs if these are created in revised sentencing legislation.

## Intensive correction orders – existing legislative framework

Legal Aid NSW notes the Review is to consider the legislative provisions which relate to ICOs. The legislation is summarised below.

### Power to sentence

Section 7 *Crimes (Sentencing Procedure) Act 1999* (the Sentencing Act) provides that a court that has sentenced an offender to a term of not more than two years imprisonment may make an order that the sentence be served in the community by way of an ICO. Section 7(2) expressly provides that if a court makes such an order, it is not to set a non-parole period for the sentence.

### Sentence procedure

Part 5 of the Sentencing Act contains the procedures for sentencing an offender to an ICO. The legislation includes restrictions on the types of offences for which an ICO may be imposed and on the suitability of an offender for an ICO. Section 69 requires a court to order a report to be prepared by the Corrective Services NSW (section 70) as to the suitability of the offender for an ICO and also requires a court to conclude that no sentence other than imprisonment is appropriate (and for a term of no longer than two years).

There are additional provisions relating to commencement of the ICO, explanation of the ICO to the offender, and preparation of the notice to be given to the offender and Corrective Services NSW. The requirement for statutory review is also contained within Part 5 (section 73A).

### Assessment reports

Regulation 14 of the *Crimes (Sentencing Procedure) Regulation 2010* (the Sentencing Regulation) contains the matters that the mandatory assessment is to take into account. These include factors such as the offender's criminal record, risks to the community, availability of suitable accommodation and issues relating to mental health, alcohol or drug dependency. The regulation also requires Corrective Services NSW to assist a homeless offender to find suitable accommodation (regulation 14(3)).

### ICO Conditions

Part 10 of the *Crimes (Administration of Sentences) Regulation 2014* (the Administration Regulation) contains mandatory and discretionary conditions that append to an ICO. Mandatory conditions include requirements that the offender be of good behaviour, to report to the supervising officer of Corrective Services NSW (the supervisor), to reside at premises identified by the supervisor, not to consume unlawfully obtained drugs, to undertake a minimum of 32 hours of community service per month and to comply with the reasonable directions of the supervisor.

Discretionary conditions that may be set include requirements to accept any direction of the supervising officer in relation to employment, a prohibition on the consumption of alcohol and restrictions on visiting specified places as directed by the supervisor.

## Obligations of the offender and breach

Part 3 of the *Crimes (Administration of Sentences) Act 1999* (the Administration Act) contains provisions relating to the obligations of the offender, power to grant permission for non-compliance with work or reporting requirements and breaches of ICOs.

Section 81 of Part 3 provides for the imposition of mandatory conditions at the time of sentence and concurrent or subsequent imposition, variation or revocation of ICO conditions.

Division 2 of Part 3 contains provisions relating to the powers of Corrective Services NSW to excuse an offender from complying with a work or reporting requirement. Division 2 of Part 3 allows the court to extend the ICO once, for not more than six months, to allow an offender to make up for lost work or reporting time.

Division 3 of Part 3 contains provisions relating to breach of an ICO. Section 89 contains the discretionary power of the Corrective Services NSW to deal with a breach by taking no action, giving a formal warning or referral of the breach to the State Parole Authority (SPA). Section 90 grants SPA the power to deal with a breach, including by revocation. This is the situation most likely to involve the Prisoner Legal Service.

Part 7 of the Administration Act deals with the revocation and reinstatement by SPA of certain orders, including ICOs (Division 1) and HDOs (Division 2). If an ICO is revoked, the balance of the sentence is to be served from the time of breach by the offender (section 164). This requirement is subject to a discretion to reinstate the ICO, following assessment by Corrective Services NSW, after the offender has served at least one month of the remaining sentence (section 165).

Alternatively, SPA may order the balance to be served by way of home detention, if there is 18 months or less remaining (section 165A). In practice, if the Corrective Services NSW assessment recommends reinstatement of the ICO, SPA will almost certainly follow this course. There is no legislative power for SPA to vary the conditions of the ICO to facilitate reinstatement.

Section 180 empowers SPA to issue a warrant for an offender who has failed to appear in respect of an inquiry into the breach of the ICO. Section 189 provides for SPA to issue a warrant for the offender to be committed to gaol to serve the remainder of the sentence where the ICO has been revoked.

## NSW Law Reform Commission Report

In July 2013 the New South Wales Law Reform Commission (LRC) published Report 139 on sentencing in NSW. Report 139 is a comprehensive review of the sentencing framework in NSW. Legal Aid NSW provided a submission to the LRC to assist with the preparation of the Report 139.

Chapters 9 and 11 of Report 139 set out a number of recommendations repeated in this submission. Chapter 9 contains recommendations about ICOs and HDOs if retained as sentencing options in NSW. Chapter 11 sets out recommendations for a new community detention order (CDO), as a replacement for ICOs, HDOs and suspended sentences.

Legal Aid NSW broadly supports the propositions contained within chapters 9 and 11 of Report 139. We appreciate the limited scope of the Review, but submit it is impractical to revise statutory provisions relating to ICOs in isolation, without broader consideration of community based custodial sentences addressed in Report 139.

We therefore set out below the LRC recommendations in Report 139 that relate to ICOs, HDOs and CDOs which are supported by Legal Aid NSW. We do not repeat the content of Report 139 but add comment where appropriate.

[Recommendations of the LRC contained within Chapter 9 of Report 139: 'Home detention and intensive correction orders \(if retained\)'](#)

### **Recommendation 9.1: geographic availability**

If home detention and intensive correction orders (ICO) are retained as sentencing options in a revised Sentencing Act:

- (1) Corrective Services NSW should make home detention and ICOs available across NSW.
- (2) Corrective Services NSW should provide information to the courts and to legal practitioners about the local availability of home detention and ICOs and of the necessary support services and programs.
- (3) The *Crimes (Administration of Sentences) Regulation 2014* (NSW) should be amended to make clear that, where electronic monitoring is not possible and there are adequate alternative methods for supervising compliance, alternative methods of surveillance and supervision may be used.

Legal Aid NSW supports this recommendation.

### **Recommendation 9.2: Exclusion of certain offences**

If ICOs and home detention are retained as sentencing options in a revised Sentencing Act, no offences should automatically exclude an offender from home detention and ICOs except:

- (a) domestic violence offences committed against a likely co-resident;
- (b) murder; and
- (c) offences under Part 3 Divisions 10 and 10A of the *Crimes Act 1900* (NSW) when the victim is under the age of 16 years and the offence carries a maximum penalty of more than five (5) years imprisonment.

Legal Aid NSW supports this recommendation.

### **Recommendation 9.3: Maximum length of home detention**

*This recommendation has relevance to the chapter 11 recommendations (below) relating to community detention orders which are supported by Legal Aid NSW.*

If home detention is retained as a sentencing option in a revised Sentencing Act:

- (1) The maximum length of a home detention order should be extended to three years with a maximum non-parole period of two years. If no non-parole period is set, then the maximum period of the order should be two years.
- (2) In the Local Court, the maximum length of a home detention order should continue to be two years, and three years where the offender is sentenced for multiple offences.
- (3) Where the State Parole Authority (SPA) revokes a parole order for a sentence of home detention it should be able to return the offender either to home detention or to full-time imprisonment depending on the circumstances of the case.
- (4) Offenders who have been returned to full-time imprisonment because SPA revoked the home detention order during the non-parole period should be able to apply to SPA for reinstatement of the order after one month (rather than three months as is currently the case).
- (5) Offenders who have been returned to home detention or full-time imprisonment because SPA revoked parole should be able to apply to SPA for reinstatement of parole after one month.

Legal Aid NSW supports this recommendation. Under the current law, when Parole is revoked offenders are required to serve twelve (12) months full time gaol before being eligible to re-apply for parole. If there is less than twelve (12) months parole left at the time of revocation, the remainder is served in custody. The only alternative is for SPA to rescind the revocation, for example if the breach is minor, and then the parole order is revived as if never having been revoked. The recommendation at 9.3(5) would suggest a unique position for HDOs.

### **Recommendation 9.4: Maximum length of ICOs**

If ICOs are retained as a sentencing option in a revised Sentencing Act:

- (1) The maximum allowable length of an ICO should be extended from two to three years.
- (2) In the Local Court, the maximum length of an ICO should continue to be two years, or three years where the offender is sentenced for multiple offences.
- (3) The court should be able to set a non-parole period of up to two years as part of an ICO. If the court does not set a non-parole period, the maximum length of the ICO should continue to be two years.  
*See Legal Aid NSW additional recommendation2 below.*
- (4) If the court has set a non-parole period, where SPA revokes an ICO during the non-parole period, SPA should be able to commit the offender to either full-time custody or, where appropriate, home detention. The offender should be able to apply to SPA for reinstatement of the ICO after one month.
- (5) Where an offender who is serving the parole period of an ICO breaches the conditions of parole, SPA should be able to revoke the parole and order the offender's return to full-time imprisonment or, where appropriate, home detention or to order the offender to resume parole on the ICO. The offender should be able to reapply for parole after one month

Legal Aid NSW supports this recommendation. As with recommendation 9.3(5), recommendation 9.4(5) suggests a unique position for ICOs.

### **Recommendation 9.5: Timing of suitability assessments**

If home detention and ICOs are retained as sentencing options in a revised Sentencing Act:

- (1) The court should first set the term of imprisonment (the head sentence).
- (2) If the head sentence is of an eligible length, the court should be able to refer the offender for a single suitability assessment for home detention or an ICO or both.
- (3) If the court imposes an ICO or HDO (after a positive suitability assessment) it should, at that time, either set a non-parole period or decline to do so.

Legal Aid NSW supports this recommendation. Also see below for additional Legal Aid NSW recommendations on the setting of a non-parole period or alternatively a default non parole period set by statute (recommendation 2).

### **Recommendation 9.6: Removal of barriers to suitability**

If home detention and ICOs are retained as sentencing options in a revised Sentencing Act:

- (1) It should be possible to satisfy the hours of community service work attached to an ICO by a range of activities including engaging in literacy, numeracy, work-ready, educational or other programs according to the needs of the offender.
- (2) It should be possible to serve part of a home detention order in an institution providing residential drug or alcohol treatment. This should not increase the length of the order.
- (3) Corrective Services NSW should be able to defer the offender's commencement of the work hours requirement of an ICO while the offender completes residential drug or alcohol treatment or another program. This should not increase the length of the order.

Legal Aid NSW supports this recommendation.

[Recommendations of the LRC contained with chapter 11 of Report 139: 'A new community detention order'](#)

The LRC recommended that ICOs, HDOs and suspended sentences be replaced by a new community based 'community detention order' (CDO). Legal Aid NSW does not support the removal of suspended sentences as a sentencing option but does support consideration of CDO's as an alternative to ICOs and HDOs. For further discussion see additional recommendations made by Legal Aid NSW (recommendation 3).

### **Recommendation 11.2: Custodial status of the CDO**

In a revised Sentencing Act:

- (1) The CDO should be constituted as a custodial order; that is, as a way of serving a term of imprisonment in the community.
- (2) The State Parole Authority (SPA) should deal with breaches, revocations and reinstatement applications for CDOs.

Legal Aid NSW supports this recommendation.

### **Recommendation 11.3: Features of a CDO**

In a revised Sentencing Act:

- (1) The CDO should only be imposed after Corrective Services NSW has assessed the offender favourably and the offender has consented to it.
- (2) The CDO should have automatic statutory conditions that are in force for the full term of the order. The conditions should require the offender:
  - (a) not to commit an offence;
  - (b) to submit to supervision from Corrective Services NSW as required;
  - (c) to report to Corrective Services NSW as directed by a supervisor or assigned officer;
  - (d) to reside at approved premises;
  - (e) to obey a supervisor's (or assigned officer's) reasonable directions;
  - (f) to submit to electronic monitoring if directed by a supervisor or assigned officer
  - (g) to accept home visits by a supervisor or assigned officer; and
  - (h) to submit to searches and alcohol and drug tests.

The conditions should be drafted in such a way that the offender is required to accept any supervision provided by Corrective Services NSW, but Corrective Services NSW is not obliged to supervise the offender where supervision is unnecessary.

- (3) The court may impose one or both of the following optional requirements as part of a CDO:
  - (a) a home detention requirement; and/or
  - (b) a work and intervention requirement.
- (4) The CDO should be for a maximum of three years when imposed by the District and Supreme Courts and two years where imposed by the Local Court (or three years where the case is one that attracts the extended jurisdiction of the Local Court).
- (5) The court should set the duration of the optional requirements separately from the duration of the whole CDO, to a maximum of two years.
- (6) The court should be able to add discretionary conditions to a CDO aimed at reducing the likelihood of reoffending such as alcohol and drug abstinence, place restrictions, non-association or curfews. The discretionary conditions should not include payment of any money.
- (7) The work and intervention requirement should involve a set number of hours, calculated at between a minimum of 4 hours and a maximum of 8 hours multiplied by the number of weeks during which the requirement is in force.
- (8) An offender should be able to satisfy the hours imposed as part of a work and intervention requirement by participating in any combination of community service work, psychological or psychiatric treatment, intervention programs, educational programs, vocational or life skills programs, counselling, drug or other addiction treatment.
- (9) Corrective Services NSW should have the discretion to determine the activities undertaken by the offender as part of the work and intervention requirement and set the times and speed at which the offender completes the activities. The maximum number of CDO hours that the offender may spend on community service work should be capped at 500.
- (10) The court should be able to stipulate activities to occupy some or all of the hours of the work and intervention requirement, but should only be able to specify an activity if the assessment report has indicated that the activity is available and suitable for the offender.

- (11) No offences should automatically exclude an offender from a CDO except:
  - (a) domestic violence offences committed against a likely co-resident;
  - (b) murder; and
  - (c) offences under Part 3 Divisions 10 and 10A of the *Crimes Act 1900* (NSW) when the victim is under the age of 16 years and the offence carries a maximum penalty of more than 5 years imprisonment.
- (12) If the CDO includes a home detention requirement, the offender's co-residents should also consent to the order.
- (13) Offenders without rehabilitation needs should still be eligible for a CDO with a work and intervention requirement.
- (14) The criminal history that follows the imposition of a CDO should contain a record of the conditions imposed on the offender.

Legal Aid NSW supports this recommendation. However, we submit that the power to require an offender to submit to electronic monitoring is a significant power which should vest with the court rather than officers from Corrective Services NSW.

#### 11.4: Assessment process for the CDO

In a revised Sentencing Act:

- (1) Before imposing a CDO, the court should first set the term of imprisonment that an offender must serve **but not any non-parole period**. The court may then (if the term is of an eligible length) refer the offender to Corrective Services NSW for a CDO availability assessment.
- (2) The availability assessment report should include the following information:
  - (a) the offender's current offence(s) and criminal record;
  - (b) the offender's likelihood of reoffending and other risks associated with managing the offender in the community, including risks of self-harm or harm to any other person, and the likelihood of the offender committing a domestic violence offence;
  - (c) the effect of the order on the offender's family and other co-residents, specifically including the effects of the order on any child under 18;
  - (d) whether the offender's co-residents are likely to consent to the order;
  - (e) whether the offender has (or needs) suitable residential accommodation;
  - (f) the offender's physical and mental health, including any substance dependencies or other addictions;
  - (g) the offender's employment, education and other personal circumstances; and
  - (h) the causes of the offender's criminal conduct.
- (3) The assessment report should be comprehensive, and include information about:
  - (a) the desirability of imposing either a home detention requirement or a work and intervention requirement or both;
  - (b) the likely level of supervision required given the offender's risk level;
  - (c) if a work and intervention requirement is being considered:
    - (i) the likely mix between work, programs and other activities;
    - (ii) any programs or activities that are recommended for the offender and their availability in the area where the offender lives;
  - (d) if the offender is assessed as not currently suitable for home detention or community service work, whether he or she may become suitable by completing certain

programs under a work and intervention requirement and if so, whether these programs are available; and

(e) any additional conditions that it would be desirable for the court to add to the order.

(4) A working group including representatives of Corrective Services NSW and the courts should be convened:

(a) to develop a strategy for the preparation of the assessment reports that will be required;

(b) to promote awareness of the kind of programs and work opportunities that are available; and

(c) to promote awareness of the way in which a CDO will be administered in practice.

Legal Aid NSW supports this recommendation, except the aspect of recommendation 11.4(1) in bold. See the Legal Aid NSW additional recommendation 5 for further discussion.

#### **Recommendation 11.5: Administering the CDO**

(1) Corrective Services NSW should be adequately resourced to make the CDO available across NSW, including the establishment and/or funding of appropriate programs, treatment and community service work placements for offenders subject to the work and intervention requirement.

(2) Other government agencies should support Corrective Services NSW to administer the work and intervention component of the CDO as part of a multi-agency model. The government should consider a model which imposes a statutory duty to cooperate on relevant agencies.

Legal Aid NSW supports this recommendation.

#### **Recommendation 11.6: Variation, breach and revocation of the CDO**

(1) SPA should deal with breaches and revocations of a CDO and should be able:

(a) to revoke a CDO;

(b) not to revoke a CDO where good reasons exist for excusing the breach; and

(c) to refer the CDO, where appropriate, back to the sentencing court for variation.

(2) If SPA refers the matter back to the court, the court should be able to:

(a) confirm the CDO in its current form;

(b) vary the CDO; or

(c) revoke the CDO.

(4) SPA should have the power to revoke a CDO temporarily by specifying, at the time of revocation, a date at which the CDO will be automatically reinstated.

(5) If a CDO is revoked and the offender is committed to full-time imprisonment, the offender should also be able to apply for reinstatement of the CDO after one month. If refused, SPA should set a date for any further application.

(6) A CDO management committee (constituted similarly to the current ICO Management Committee) within Corrective Services NSW should manage CDO breaches and have discretion to limit applications to revoke CDOs.

(7) The court should be able to vary a CDO on application from the offender, or from Corrective Services NSW, whether or not a breach has occurred.

(8) Corrective Services NSW and SPA should be able to make small administrative changes to a CDO, such as change of required residence or a variation to reporting requirements

Legal Aid NSW supports this recommendation. See also of Legal Aid NSW additional recommendation 6 relating to SPA power to vary conditions of a CDO.

## Additional recommendations of Legal Aid NSW

### Intensive Correction Orders

If ICOs are retained as a sentencing option in NSW, Legal Aid NSW makes the following additional recommendations to the Review.

#### **Recommendation 1**

**That SPA be empowered to vary the conditions of the ICO upon breach if the variation would be minor and would facilitate the reinstatement of the ICO**

The Prisoners Legal Service lawyers frequently appear on a duty basis to assist a large number of inmates who have been committed to gaol to serve the balance of the ICO following revocation of the order by SPA. After one month of gaol time has expired an inmate may apply to SPA for reinstatement of the ICO.

SPA will order a 'reinstatement' report from Corrective Services NSW. This usually takes around 14 days to prepare. If the report recommends reinstatement, SPA invariably adopts the recommendation. If the application to reinstate is unsuccessful, the inmate will be required to serve the balance of the ICO term in full time gaol, subject to further applications to reinstate the ICO.

In the experience of Legal Aid NSW, the reinstatement of the ICO may be frustrated by difficulties over compliance with conditions of the ICO that can no longer be satisfied, for example, the loss of availability or suitability of a rehabilitation program to address drug, alcohol or mental health problems.

Legal Aid NSW accepts that the role of SPA is not to re-sentence the offender by way of the imposition of conditions. We accept that sentencing is a judicial function of the court. However, while we support the power of SPA to refer the ICO to the court to vary or impose conditions (bearing in mind that absent express power to this effect, once an ICO is revoked there would no longer be a power to vary an ICO as the court would be *functus officio*), we also recommend that consideration be given to giving SPA the power to vary or remove conditions where the change would be minor and incidental to the lawful reinstatement of the ICO. Such a power would streamline the process of reinstatement and potentially save court and gaol time and expense.

## Recommendation 2

**That the sentencing court set a non-parole period, limited to a maximum of two years (or 18 months if sentencing within the two year single offence jurisdiction of the Local Court), but that if the sentencing court declines to do so, the default non-parole period be set by statute at seventy-five percent (75%) of the head sentence.**

When an ICO is imposed by the sentencing court, the court is of the view that full time gaol is not inevitable and that an offender should be able to serve the sentence in the community. It is the experience of Legal Aid NSW that sentencing courts will willingly extend the opportunity to offenders to retain their liberty by serving the sentence in the community where the assessment for an ICO is supportive of such an order.

Common ground exists between the LRC and Legal Aid NSW on the issue of courts setting non-parole periods when imposing an ICO, assuming this type of sentence is retained. This requires an amendment to section 7(2) of the Sentencing Act.

The current position allows an offender who is subject to ICO revocation to regain their liberty during the balance of the sentence only if the ICO is reinstated by SPA. If the ICO is not reinstated during the balance of the sentence, this is at odds with the intention of the sentencing court and also means that the offender is then released without any of the support that flow from a term of parole. Setting a non-parole period means that the offender will be released from custody to parole supervision when the non-parole period expires.

Legal Aid NSW recommends that sentencing courts should set non-parole periods at the time of imposition of the ICO. If the Review concludes that the court should be empowered but not obliged to do so (consistent with the recommendation of the LRC), we recommend that a default non-parole period set by statute of seventy-five percent (75%) of the head sentence should apply.

### Community detention orders

Legal Aid NSW supports the replacement of ICOs (and HDOs) by the more flexible community based custodial order described in chapter 11 of Report 139.

Notwithstanding issues of prison overcrowding in NSW, Legal Aid NSW supports the general concept of offenders serving custodial sentences in the community. There are obvious benefits to offenders who are able to work and rehabilitate, either in a family or independent environment, while making a contribution to the community through community service or work and development orders (WDOs). In addition to the primary aim of such orders which is to facilitate the settlement of financial liabilities owed to the state, we support the greater use of WDOs as part of a CDO.

Legal Aid NSW appreciates that the Review is concerned with the statutory review of ICOs but submits that it is difficult to review ICOs in isolation without regard to the associated issues with HDOs and consideration of the LRC proposed CDOs.

Legal Aid NSW urges the Sentencing Council to widen the scope of the review to include the ideas and recommendations contained in chapters 9 and 11 of Report 139.

In the event that CDOs are to be considered as part of the review, Legal Aid NSW makes the following recommendations additional to those in the LRC which we support.

### **Recommendation 3**

#### **That suspended sentences be retained as a sentencing option.**

Suspended sentences are currently set at a maximum of two (2) years and can be imposed by a sentencing court without the need for formal assessments. Such orders may well apply to first time offenders who have committed offences crossing the custodial threshold but not necessarily having complex criminogenic needs. Legal Aid supports the retention of suspended sentences as a sentencing option.

### **Recommendation 4**

#### **That work undertaken as part of a work and development order (WDO) be included within the bracket of work that may be undertaken to satisfy an optional work and intervention requirement for CDOs.**

As recommended in Report 139, Legal Aid NSW supports the optional work and intervention requirement<sup>1</sup> for CDOs together with the idea that offenders may satisfy the hours imposed on a flexible basis<sup>2</sup>. Legal Aid NSW also recommends that the work and intervention requirement of a CDO include work undertaken as part of a WDO.

Legal Aid NSW provides advice to clients who owe debts to the State Debt Recovery Office (SDRO), including advice about WDOs which allow a range of activities, including rehabilitation programs, to contribute to the reduction of the debt.

WDOs have significant potential for state related debt reduction for clients in socially disadvantaged urban and regional environments. To allow this work to count towards a CDO will increase awareness of WDOs within these communities and is consistent with the overall benefit of productive activity leading to a positive outcome for the client.

### **Recommendation 5**

#### **That a non-parole period be set at the time of sentence to a CDO. Alternatively, if the court is not obliged to set a non-parole period, that a default non-parole period of 75% of the head sentence be set by statute.**

Legal Aid NSW reiterates the submissions made in respect of non-parole periods in relation to ICOs. The intention of the sentencing court is for the offender to retain his or her liberty whilst serving a custodial term. For the offender to face full time gaol for the entire duration of the CDO following revocation is inconsistent with this view.

Legal Aid NSW does not support the LRC recommendation that the court not set any non-parole period.<sup>3</sup> Rather, in our experience, there is a need for a period of parole following release of the offender, as these individuals may have acute mental health, drug and alcohol problems, and their chaotic lives and criminogenic factors are likely to have been the cause of the breach which led to revocation.

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<sup>1</sup> LRC Report 139 recommendation 11.3(3)(b)

<sup>2</sup> LRC Report 139 recommendation 11.3(8)

<sup>3</sup> LRC Report 139 recommendation 11.4(1)

## **Recommendation 6**

**That SPA should deal with breaches of the CDO, and that in addition to powers of revocation, excusing breaches<sup>4</sup> and reinstatement<sup>5</sup>, that SPA be empowered to vary the conditions of the CDO where to do so would facilitate reinstatement of the CDO.**

The Prisoners Legal Service regularly appears for inmates before SPA following revocation of ICOs (and HDOs). As stated above in relation to ICOs, if SPA were empowered by statute to vary CDOs by removing conditions that would otherwise frustrate the reinstatement of the CDO, this would avoid the need for a further appearance before the sentencing court and secure the timely release of the offender, undoubtedly supported by the reinstatement report prepared by Corrective Services NSW.

The LRC envisages that DOCS and SPA should be able to make small administrative changes.<sup>6</sup> Legal Aid NSW is conscious of the importance of separating judicial and administrative functions, but urges that consideration be given to empowering SPA to make limited variations of conditions incidental to the power to reinstate the CDO.

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<sup>4</sup> LRC Report 139 recommendation 11.6(1)

<sup>5</sup> LRC Report 139 recommendation 11.6(4)

<sup>6</sup> LRC Report 139 recommendation 11.6(8)