Intensive Correction Orders: Revocation and the State Parole Authority

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Part I: Intensive Correction Orders

A practical approach to sentencing

by

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Introduction

In 2018 significant sentencing reforms were passed by the NSW Government in a package of criminal justice reforms. These included the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* which commenced on 24 September 2018. This Act restructured and amended provisions relating to ICOs.

As a consequence of the Government's decision to remove suspended sentences, the ICO has become the last port of call for offenders that falls short of full-time imprisonment.

The legislation significantly changed the framework around the imposition of intensive correction orders and has been followed by a number of significant decisions from the Court of Criminal Appeal.

Part I of this paper contains the questions and criteria practitioners should turn their mind to when considering whether their client's matter could be dealt with by way of an ICO in the context of the relevant legislative principles.

Appendix A to Part I of the paper contains a discussion and analysis of the way in which the Courts have interpreted these legislative principles, particularly community safety (ss66(1)-(3).

Part II is a summary of the processes involved with revocation of intensive correction orders and tips for appearing before the State Parole Authority prepared by Rebecca Simpson, Solicitor in Charge at the Prisoner's Legal Service, Legal Aid NSW.

Checklist for Intensive Correction Orders

When considering the question of an Intensive Correction Order in sentencing for your client a practical approach is to consider the following questions at the outset:

Preparing for Court Checklist

1. Does my client reside/intend to reside in New South Wales at the time of sentence? (If No – see P10 – likely precluded from an intensive correction order)

2. Is the offence precluded by the operation of s67? (See Appendix B, p 21-22)

3. Is the offence a domestic violence offence? (see Domestic violence offence considerations, P7)

   (i) If yes – how will I satisfy the Court that the victim of the domestic violence offence will be adequately protected?
   (what conditions of the ICO? What conditions of ADVO? Has relationship ended – evidence of that? Is there evidence of behavioural change/anger management programs/drug and alcohol counselling?

   (ii) Does the offender intend to reside with the victim? ***If so, this precludes a home detention condition being imposed***

4. How many offences before the Court? If one offence, is it likely to be a sentence of less than two years?

   (i) If not, precluded.

   (ii) If there is a principal offence and an offence on a Form 1, should consideration be given to placing the Form 1 offence on an indictment? (*Abel v R* – see P8*)*

5. If it is more than one offence, is the aggregate sentence likely to be 3 years or less? If not, precluded from ICO

6. Is there relevant pre-sentence custody which if deducted from the notional head sentence would bring the sentence within range for consideration of an ICO? (see *Mandranis v R* [2021] NSWCCA 97 at [59]-[61])

At Court Checklist

7. Is there a SAR before the Court? If not, can it be ordered or is there otherwise adequate material before the court? (See P9 of paper)

8. What is the local office of Community Correction my client should report to (if on bail)?

9. What conditions can be imposed? The Court must consider community safety – question of reoffending – will ICO conditions address this question?

Standard conditions are to:

i. accept the supervision of community correction and
ii. not commit any further offences

10. What conditions can be imposed in addition to the standard conditions? **(the Court must impose at least 1 of the additional conditions)**

    (i) home detention [ ] ***(precluded if DV offence and intend to reside with victim & cannot be ordered without a SAR)***
    (ii) electronic monitoring [ ] (***cannot be ordered without a SAR)***
    (iii) a curfew [ ]
    (iv) community service work requiring the performance of community service work for a specified number of hours [ ] **(*cannot be ordered without a SAR)***
    (v) a rehabilitation or treatment condition requiring the offender to participate in a rehabilitation program or to receive treatment [ ]
    (vi) abstention from alcohol or drugs or both [ ]
    (vii) a non-association condition prohibiting association with particular persons [ ]
    (viii) a place restriction condition prohibiting the frequenting of or visits to a particular place or area. [ ]

11. If none of the above conditions can be imposed, must establish exceptional circumstances. What are they? ***(No case law on this question or criteria in the legislation)***

12. Does my client understand the conditions that have been imposed?

13. Have I advised the client re non-compliance and potential revocation?

NB * Court retains a residual discretion to decline to make an ICO if objective seriousness or considerations in s3A indicate full time imprisonment is appropriate *

Post Court:

14. Can my client move or work interstate? (see P11)

The Legislation

An ICO is a custodial sentence which can only be imposed if the court is satisfied there is no possible alternative: s 5(1) *Crimes (Sentencing Procedure) Act* 1999 ("CSPA").

An ICO is a term of imprisonment that is served by way of intensive correction in the community. Section 7(1) of the *CSPA* provides that a court that has sentenced an offender to imprisonment in respect of one or more offences may make an ICO directing that the sentence be served in the community.

The intention of the amendment as expressed by the Attorney General in the Second Reading Speech was to allow offenders to access intensive supervision as an alternative to a short prison sentence and to ensure that offenders address offending behaviour and are held accountable.

An intensive correction order has been held to involve substantial punishment and a significant degree of leniency[1]. The making of an ICO requires a judge to undertake a three-step process[2]:

i. Determine pursuant to s 5 that no sentence other than a term of imprisonment is appropriate
ii. Determine the length of the sentence to be imposed
iii. Determine whether the sentence should be served by way of an ICO or full-time custody

The three-step process has been moderated by the recent decision of *Mandranis v R* [2021] NSWCCA 97 where the CCA held that relevant pre-sentence custody can be deducted from a notional head sentence to bring a sentence within range for consideration of it being served by way of an ICO.

The three-step process has also been held not to apply in Commonwealth matters[3] due to the operation of s20AB *Crimes Act 1914 (Cth)* see *Lee v R* [2020] NSWCCA 307.

Part 5 (ss 64-73B) *CSPA* set out the sentencing procedures as well as significant restrictions on the power of a Court to make an ICO.

(i) Community safety

Section 66ss(1-3) of the CSPA provides that community safety **must** be the paramount consideration when the sentencing court is deciding whether to make an ICO in relation to an offender (s66(1) and is required to assess whether the order or full-time imprisonment is more likely to address the risk of reoffending.

[1] *R v Pullen* [2018] NSWCCA 264 at 53; *R v Pogson; R v Lapham; R v Martin* (2012) 82 NSWLR 60; [2012] NSWCCA 225 at 84 [106]; *Whelan v R* (2012) 228 A Crim R 1; [2012] NSWCCA 147 at [120].

[2] Consistent with the principles stated in *R v Zamagias* [2002] NSWCCA 17 and *Douar v The Queen* [2005] NSWCCA 455; 159 A Crim R 154

[3] Section 20AB of the Crimes Act 1914 (Cth) allows for courts in a state or territory sentencing for Commonwealth offences to impose sentencing options listed in subs (1AA) that are available in that jurisdiction.

S66(3) provides that the Court must consider the purposes of sentencing: s 3A and any relevant common law sentencing principles and may consider any other matters that the court thinks relevant.

There has been a significant amount of litigation in the Court of Criminal Appeal concerning intensive correction order. What community safety being the paramount consideration means has attracted considerable attention from the Court of Criminal Appeal and Court of Appeal in various cases discussed below.
There is a tension in the decisions of the Court as to whether a sentencing Court should impose an intensive correction order **to facilitate the offender's rehabilitation** promoting the goal of community safety by reducing the risk of reoffending, or whether the court should be positively satisfied (because of rehabilitation attended to pre-sentence) that the offender is unlikely to re-offend **before** imposing an intensive correction order **("the restrictive approach").**

Case notes in relation to the relevant decisions of the Court of Criminal Appeal are Appendix A to this paper.

In the opinion of the author the following principles have been settled by the decided cases:

- S 66 **simply** requires a sentencing court to consider whether an intensive correction order or an order for full time custody is more effective at addressing the risk of reoffending (*Fangaloka)*
- The purposes of sentencing in s 3A of the *CSPA* are mandatory, rather than subordinate considerations (*Fangaloka, Karout, Wany v DPP)*
- the paramount consideration of community safety must be weighed and assessed in the context of all facts, matters and circumstances relevant to the particular sentencing task applying the instinctive synthesis approach *(Pullen, Fangaloka)*
- where the sentencing judge had determined a length of sentence that precluded the imposition of an ICO, there was no error in failing to refer to s 66 (*Cross)*
- The objective seriousness, general deterrence and other considerations in s3A may dictate that it is not appropriate to impose an ICO, even where the risk of reoffending might be mitigated by an ICO (*Karout, Cross*)
- Having reached a conclusion that an ICO is appropriate under s66(2) a sentencing court retains a discretion to refuse to make such an order (*Wany v DPP* at [64]

The question of whether a court must follow the restrictive (Court must be positively satisfied ICO will address risk or not impose one) or facilitative approach (court can impose an ICO to facilitate the rehabilitation of an offender) to imposing an ICO is yet to be settled.

From a practical perspective, where the question of whether an offenders prospect of rehabilitation may be borderline, it is likely to be of significant assistance to the Court to point to the specific conditions (D&A treatment, home detention, electronic monitoring) that might facilitate the offender's rehabilitation and provide some degree of protection to the community.

Please refer to the case notes in Appendix A for further discussion

Considerations specific to Domestic Violence offences

There are specific provisions within the CSPA (ss4A and 4B) which are relevant to consideration of intensive correction orders in the context of domestic violence offenders.

A Court must not make an ICO unless the sentencing court is satisfied the victim of the domestic violence offence any person with whom the offender is likely to reside will be protected (either by ICO or because of some other reason) (s4B(1)

The Court must not make a home detention condition if it believes the offender will reside with the victim. S4B(2)

Any intensive correction order imposed for a domestic violence offence must be supervised unless the Court gives reasons why it is not appropriate to impose that sort of an order. (S4A)

Demonstrated attendance at anger management, drug and alcohol treatment, evidence that the relationship is over or that the offender has secured alternative housing will assist the offender (and their practitioner) to discharge the requirements in s4A and 4B.

(ii) Precluded Offences

Section 67 proscribes a sentencing court from imposing an ICO for a raft of precluded offences set out in Appendix B to the paper.

It is important to have regard to s 67 when advising clients on potential sentence outcomes as even examples of certain types of offending which might not necessarily warrant a full-time sentence of imprisonment might be excluded from consideration of an ICO, leaving a sentencing court in the invidious approach of having to considering full-time imprisonment where it might otherwise have directed it be served by intensive correction.

From a practice management perspective, it is prudent to include an acknowledgment in any written instructions that the offence being pleaded to is precluded from receiving an intensive correction order.

(iv) Structuring the Intensive Correction Order

Section 68(1) provides that an ICO must not be made in respect of a single offence if the duration of the term of imprisonment imposed for the offence exceeds 2 years.

However, it can be made in respect of an aggregate sentence of imprisonment but only if the duration of the term of the aggregate sentence does not exceed 3 years (s68(2) CSPA).

Two or more ICOs may be made in respect of each of 2 or more offences, but only if the duration of the term of any individual term of imprisonment is less than 2 years and the duration of the term for all the offences is less than 3 years.

This problem arose in the case of *Cross v R (*discussed above on page 11 in relation to the issue of community safety). In that case, the sentencing judge imposed sentence for two counts of aggravated kidnapping. On each count, the judge imposed a sentence of 2 years and 6 months

with a non-parole period of 15 months. These sentences were concurrent and therefore precluded the imposition of an intensive correction order by operation of s 68(1).

The way that this particular section of the legislation is drafted has led to the anomalous outcome that unusually it may sometimes be in your client's interest not to have a less serious offence dealt with on a Form 1 with the law as it presently stands, where the principal offence on the indictment might carry more than 2 years (but less than 3) and the other offence is (by comparison to the principal offence) relatively trivial and unlikely to push the sentence over 3 years.

(v) Sentence Assessment Reports

Section 69 provides that the Court must have regard to (but is not bound by) the contents of any assessment report obtained in relation to the offender (assessment report is defined as a report made by a community correction or juvenile justice officer) and evidence from a community correction officer or any other information before the court.

The relevant statutory requirements for those reports are found in Pt 2 Division 4B (ss17b-17D) *Crimes (Sentencing Procedure) Act*.

An assessment report can be requested:

- After an offender has been found guilty and before imposing sentence
- During sentence proceedings after a sentence of imprisonment has been imposed (to consider the mode of that sentence being served)
- During proceedings to correct a sentencing error

In practice where there is ample material before the Court that an offender is engaged in rehabilitation pre-sentence, the Court may direct an ICO with supervision without recourse to a SAR being formally ordered, but cannot impose home detention or community service.

(vi) Conditions of the Intensive Correction Order

Standard conditions

The court must, at the time of sentence, impose on an ICO the standard ICO conditions, which are that the offender must not commit any offence and must submit to supervision by a community corrections officer: s 73(1), 73(2).

Additional conditions

In addition to the standard conditions, the court must, at the time of sentence, impose at least one of the additional conditions referred to in s 73A(2), unless satisfied there are exceptional circumstances: s 73A(1A). In Casella v R [2019] NSWCCA 201, the fact that the applicant had been on conditional bail while his appeal was pending was found to be an exceptional circumstance for the purposes of s 73A: at [100]. The additional conditions available include:

(a) home detention

(b) electronic monitoring

(c) a curfew

(d) community service work requiring the performance of community service work for a specified number of hours

(e) a rehabilitation or treatment condition requiring the offender to participate in a rehabilitation program or to receive treatment

(f) abstention from alcohol or drugs or both

(g) a non-association condition prohibiting association with particular persons

(h) a place restriction condition prohibiting the frequenting of or visits to a particular place or area.

A court cannot impose a home detention or community service work condition on an ICO unless an assessment report determines that the offender is suitable.

If the court determines not to impose an additional condition, it must record its reasons for doing so, however, the failure to record reasons does not invalidate the sentence: s 73A(1B).

The court must not impose a home detention or community service work condition on an ICO unless an assessment report states the offender is suitable to be the subject of such a condition: s 73A(3). The court may limit the period during which an additional condition is in force: s 73A(4).

Maximum hours and minimum periods for community service work

The maximum number of hours that may be specified for community service work in an additional condition of an ICO are set out in cl 14(1) Crimes (Sentencing Procedure) Regulation 2017:

(a) 100 hours for offences with a maximum term of imprisonment of 6 months or less

(b) 200 hours for offences with a maximum term of imprisonment exceeding 6 months but not 1 year

(c) 750 hours for offences with a maximum term of imprisonment exceeding 1 year.

The minimum period that a community service work condition of an ICO must be in force is set out in cl 14(2):

(a) 6 months if the hours of work do not exceed 100 hours

(b) 12 months if the hours of work exceed 100 hours but not 300 hours

(c) 18 months if the hours of work exceed 300 hours but not 500 hours

(d) 2 years if the hours of work exceed 500 hours.

Further conditions

The court may impose further conditions on an ICO but these must not be inconsistent with any standard or additional conditions (whether or not they are imposed on the particular ICO): s 73B.

Offenders' obligations under ICO conditions

The obligations of offenders subject to the standard ICO conditions are set out in cll 186, 187 Crimes (Administration of Sentences) Regulation 2014: s 82 Crimes (Administration of Sentences) Act. Their specific obligations with respect to home detention, electronic monitoring, curfew, community service work, rehabilitation or treatment, abstention, non-association, and place restriction conditions are set out in cll 189–189G.

(vii) Offenders who live/propose to reside interstate

The question often arises, can I do my sentence in Queensland/Victoria/anywhere but New South Wales.

Section 69 precludes the court from making an ICO for any offender who resides or intends to reside in another State or Territory unless that State or Territory is an approved jurisdiction as declared by the regulations.

No States or Territories are currently declared by the regulations to be approved jurisdictions for the purposes of section 69, 89 or 99 of the Act (Note to Part 3 *Crimes (Sentencing Procedure) Regulation 2017*)

However, post-sentence, where an offender seeks to relocate interstate, they may do so provided the 'supervision' component of their intensive correction order has been suspended and provided that they have the permission of their supervisor from Community Corrections.

There is also a procedure in Part 5 of the Crimes (Interstate Transfer of Community Based Sentences) Act 2004 No 72 to register a local sentence in an interstate jurisdiction.

Appendix A

Case notes on decisions from the Court of Criminal Appeal[4]

R v Pullen [2018] NSWCCA 264

The Court of Criminal Appeal exercised its power to re-sentence Mr Pullen following a successful Crown appeal from a sentence imposed in the District Court for dangerous driving occasioning grievous bodily harm and failing to stop offences.

Harrison J had cause to consider the meaning of community safety when considering the appropriateness of imposing an ICO on Mr Pullen (having determined that the Court would impose an aggregate sentence of 3 years):

> *84 In determining whether an ICO should be imposed, s 66(1) makes "community safety" the paramount consideration. The concept of "community safety" as it is used in the Act is broad. As s 66(2) makes plain, community safety is not achieved simply by incarcerating someone. It recognises that in many cases, incarceration may have the opposite effect. It requires the Court to consider whether an ICO or a full-time custodial sentence is more likely to address the offender's risk of re-offending. The concept of community safety as it is used in the Act is therefore inextricably linked with considerations of rehabilitation. It is of course best achieved by positive behavioural change and the amendments recognise and give effect to the fact that, in most cases, this is more likely to occur with supervision and access to treatment programs in the community.*
>
> …
>
> *86 The Court must also have regard to, but is not bound by, any assessment report obtained as well as evidence from a community corrections officer: Crimes (Sentencing Procedures) Act, s 69. The prioritisation of the consideration of community safety as the "paramount consideration" necessarily means, however, that other considerations, including those enunciated in s 3A of the Act, become subordinate.*
>
> *87 This is likely to occur most frequently in the case of a young offender with limited or no criminal history and excellent prospects of rehabilitation. In every case, however, a balance must be struck and appropriate weight must be given to all relevant factors which must be taken into account in arriving at the sentence, by way of the instinctive synthesis discussed in Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25 at [51].*
>
> …
>
> *89 The result of these amendments is that in cases where an offender's prospects of rehabilitation are high and where their risk of reoffending will be better managed in the community, an ICO may be available, even if it may not have been under the old scheme. The new scheme makes community safety the paramount consideration. In some cases, this will be best achieved through incarceration. That will no doubt be the case where a person presents a serious risk to the community. In other cases, however, community protection may be best served by ensuring that an offender avoids gaol. As the second reading speech makes plain, evidence*

[4] These summaries are the analysis of the authors. There is no substitute for a thorough reading of the decisions.

> *shows that supervision within the community is more effective at facilitating medium and long term behavioural change, particularly when it is combined with stable employment and treatment programs.* ***[my emphasis]***

Where an offender's prospects of rehabilitation are high and where their risk of reoffending is better managed in the community an ICO is available.

The purposes of s3A are subordinate to 'community safety'; subject to those factors being taken into account in the 'instinctive synthesis' approach;

In some cases, community safety is best achieved by incarceration, in others, it may be best served by ensuring the offender avoids gaol (by the imposition of an ICO)

This decision created the "facilitative approach" to the imposition of intensive correction orders. Where there are prospects of rehabilitation and someone's risk of reoffending might be better managed in the community, the Court should facilitate the rehabilitation of the offender by imposing an ICO.

R v Fangaloka [2019] NSWCCA 173

Fangaloka concerned another successful Crown appeal for offences of robbery in company, assault occasioning actual bodily harm and common assault.

In *Fangaloka* the Court of Criminal Appeal returned to issues concerning ICOs and in particular the concept of community safety and its application. This decision created a "restrictive approach" to the imposition of intensive correction orders. It has subsequently met with some criticism from other members of the Court of Criminal Appeal in further decisions.

The Court of Criminal appeal declared that s 66 obliges a sentencing court to have regard to a specific question: the likelihood of a particular form of order addressing the risk of reoffending.

That requirement does not remove the requirement to consider other relevant matters in sentencing but indicates that it is **a mandatory question to be considered**.

Contrary to the approach taken in *Pullen*, the Court of Criminal Appeal found here that it would be wrong for a court to treat each consideration other than the means of addressing the risk of reoffending as subordinate:

> *66 There is no doubt that community safety can operate in different ways in different circumstances. It is conventionally accepted that a purpose of punishment, including by way of imprisonment, is to deter the offender from further offending; it is also accepted that removal of an offender from the community for a period may have a protective function. The purpose of s 66, on this approach, is merely to ensure that the court does not assume that fulltime detention is more likely to address a risk of reoffending than a community-based program of supervised activity. Consistently with that view, s 66 does not seek to address potentially conflicting demands of community safety in the short term, as opposed to the longer term, and the risk that leniency will be abused. In short, there is nothing in s 66 which favours an ICO over imprisonment by way of fulltime custody. Further, while s 66 expressly referred to s3A, it did so,*

not by identifying it as a set of "subordinate" considerations, but as mandatory considerations. It would be wrong for a court to treat every consideration other than the means of addressing the risk of reoffending as a subordinate consideration.

Separately, and somewhat unusually, the Court considered that Part 5 of the Act should not apply typically in cases of sentences of 6 months or less:

> *56 Although, in practice, Pt 5 is unlikely to be applied to very short sentences (for 6 months or a lesser period) it does apply only in the case of individual sentences of 2 years or a lesser period. Further, it excludes from the leniency provided by an ICO an extensive range of serious offending.*

S 66 **simply** requires a sentencing court to consider whether an intensive correction order or an order for full time custody is more effective at addressing the risk of reoffending

The purposes of sentencing in s 3A of the *CSPA* are mandatory, rather than subordinate considerations. Intensive Correction Orders are unlikely to be applied to very short sentences (6 months or a lesser period)

The Court must "positively conclude that an ICO (as opposed to full-time custody) is more likely to address an offender's risk of offending[5]

The requirement of the Court to positively conclude than an ICO is more likely to address a risk of offending birthed "the restrictive approach". *Casella v R* would soon be decided questioning the correctness of that approach:

Casella v R [2019] NSWCCA 201

In this sentence appeal the Court of Criminal Appeal upheld Mr Casella's appeal against the imposition of a sentence of full-time imprisonment of 8 months with a non-parole period of 6 months for an offence of concealing a serious indictable offence.

The Court in resentencing imposed a 6-month intensive correction order. The primary judgment was given by the Chief Justice.

His Honour Beech-Jones J (N Adams J agreeing) considered the Court's construction of s 66 of the CSPA in *Fangaloka:*

> *107 In Fangaloka, Basten JA construed s 66 as follows (at [63]):*
>
> *"An alternative reading of s 66 is restrictive, rather than facilitative. Thus, the paramount consideration in considering whether to make an ICO is the assessment of whether such an order, or fulltime detention, is more likely to address the offender's risk of reoffending. That is, unless a favourable opinion is reached in making that assessment, an ICO should not be imposed. At the same time, the other purposes of sentencing must all be considered and given due weight." (emphasis added)*

[5] R v Fangaloka [2019] NSWCCA 173 at [63] per Basten JA

> *108 Read literally, the emphasised statement appears to extract from s 66 a prohibition on the imposition of an ICO unless the Court positively concludes that an ICO is more likely to address the offender's risk of reoffending as opposed to serving a sentence of full time custody. If that is what was meant then it appears to travel well beyond s 66. Nothing in s 66 purports to operate as a prohibition to that effect. On its face, s 66(2) only requires an assessment of whether making the order or serving the sentence by way of full time detention is more likely to address the offender's risk of reoffending. It does not appear to necessarily preclude the imposition of an ICO if, say, the outcome of the assessment is neutral because the offender has good prospects of rehabilitation and does not represent a danger to the community, irrespective of whether he or she is incarcerated or subject to an ICO. The imposition of an ICO in such a case would still be consistent with community safety.* ***If this is truly the effect of Fangaloka, then I have significant doubts about whether it is correct.***

This aspect of the decision cast doubt on the correctness of the approach taken in *Fangaloka* that a Court must positively conclude that an ICO is more likely to address risk of reoffending as against full-time custody.

Beech-Jones J and N Adams J had cause to make observations regarding the construction of s 66 in *Fangaloka* and some further observations that cast doubt on the statement that an order for intensive correction is unlikely to be applied to very short sentences:

> *With respect, on my review of the Sentencing Procedure Act I cannot discern any basis for this conclusion. Subsection 5(2) of the Sentencing Procedure Act imposes a particular obligation on sentencing judges to give reasons for imposing custodial sentences of 6 months or less but otherwise the Sentencing Procedure Act does not provide any indication that the imposition of an ICO for a period of 6 months should be an unusual occurrence. In Fangaloka the ICO imposed by the sentencing judge the subject of the Crown appeal was for a period of 2 years. A conclusion that an ICO for a period of 6 months or less is something that is unlikely to be imposed was not essential to the outcome in that case and is not a statement that I regard as having any binding effect on this or lower Courts. I do not take anything from Fangaloka as precluding the imposition of an ICO for a 6-month term as proposed by the Chief Justice.*

This decision created some controversy about whether the Court must 'positively conclude' that an offender's risk of reoffending is better managed by way of intensive correction as against full-time custody.

Karout v R [2019] NSWCCA 253

In this sentence appeal, Mr Karout was unsuccessful in having his sentence of 2 years with a non-parole period of 1 year converted to an intensive correction order. Mr Karout pleaded guilty to knowingly taking part in the supply of 140 grams of cocaine contrary to s 25(1) *Drug Misuse and Trafficking Act.*

Ground 2 of the grounds of appeal was *"In refusing to permit the applicant to serve his sentence of imprisonment in the community by way of an intensive corrections order, his Honour failed to have regard, as required by s 66 Crimes (Sentencing Procedure) Act 1999 to the protection of the community."*

Brereton J, in the minority, found that the sentencing judge had given insufficient reasons for declining to exercise his discretion and order that the sentence be served by way of an intensive correction order. Brereton J observed the controversy between the approach in *Fangaloka* ("the restrictive approach") and *Casella* ("the facilitative approach") and addressed it in this way:

> "It is unnecessary on this appeal to resolve that controversy, because on either approach it is necessary to form a view as to what form of sentence is more likely to address an offender's risk of re-offending…"[6]

His Honour was of the view that where there was an express submission that there should be an ICO and the Court concluded there were good prospects of rehabilitation this required "serious consideration."

Fullerton J, in determining to dismiss the ground (and by extension, the appeal), noted that Parliament had not intended that community protection be elevated to a mandatory consideration in sentencing in the sense that it should dominate broader sentencing principles, including such factors that might dictate a full time custodial sentence is the only appropriate sentence[7].

Her Honour noted (but did not seek to resolve) the issue of whether s 66 should be interpreted as restrictive rather than facilitative.

Her Honour noted that Parliament did not make it plain in the legislation that there was an obligation to give paramount consideration to community supervised programs as a means of ensuring community safety as one of the purposes of sentencing in s3A(c) of the *Sentencing Act.*

Parliament also did not impose a statutory obligation to give reasons for concluding that where the other purposes of sentencing dictate full-time custody is the appropriate outcome (even where the risk of reoffending could be addressed by an ICO).

Her Honour ultimately concluded that the fact that there were good prospects of rehabilitation and a finding that the offender was unlikely to reoffend did not mandate an ICO as the sentence which ought be imposed. The objective seriousness and principles of general deterrence overwhelmed these considerations:

> "The fact that his Honour made positive findings as to the applicant's good prospects of rehabilitation and that he was unlikely to reoffend, findings which might, in addition to a finding of special circumstances, have supported the exercise of the power in s 66 for the making of an ICO, did not dictate that an ICO was the appropriate sentencing outcome. Consistent with the obligation in s 66(3) that his Honour also take into consideration the purposes of sentencing in s3A of the Sentencing Act and any relevant common law sentencing principles, it is clear that in declining to make an ICO the objective seriousness of the applicant's offending and the principles of general deterrence (being amongst the mandator considerations his Honour was obliged to consider under s 66(3)

[6] *Karout v R* [2019] NSWCCA 253
[7] *Karout v R* [2019] NSWCCA 253 at 88

in deciding whether the power to make the ICO should be exercised) overwhelmed other considerations that were in play."[8]

Cross v R

Cross appealed her sentence of 2 years, 6 months with a 15-month non-parole period imposed for two offences of aggravated kidnapping. The sentence imposed was identical and concurrent for each offence. She was unsuccessful by operation of s68(1) *CSPA* (discussed further at page 18 "Structuring the intensive correction order").

Justice Cavanagh observed that there is no requirement to consider s 66 other than when deciding whether to make an ICO. Because the sentencing judge had determined a length of sentence that precluded the imposition of an ICO, there was no error in failing to refer to s 66.

His Honour noted that the sentencing judge had identified the objective criminality of the offending as being too serious to warrant the imposition of an intensive correction order. In conclusion His Honour noted:

> *"…If error had been demonstrated with the Court applying s 6(3) of the Criminal Appeal Act 1912 (NSW), it would have been necessary to consider the appropriate sentences for serious offences where two young persons were each victimised. This aspect would have been relevant to issues of concurrency and accumulation: R v Gommeson [2014] NSWCCA 159; 243 A Crim R 534 at [105]–[109]. The sentencing judge's approach of totally concurrent sentences was generous to the applicant given the traumatic effects of the offences on two child victims. However, as error has not been demonstrated, it is not necessary for this Court to consider this aspect further…"*

It is likely that the Court may have declined to re-sentence on the basis that no lesser sentence was warranted on the basis of the objective seriousness of the criminality involved.

Blanch v R [2019] NSWCCA 304

In this sentence appeal the appellant Blanch was successful in having her aggregate sentence of 2 years and 9 months imprisonment converted to an intensive correction order.

Justice Campbell noted, in relation to s 66 that the section had a limited sphere of operation – when considering to make an ICO and that the sentencing court is to assess which of an ICO or serving the sentence by way of full-time detention is more likely to address the risk of re-offending.

> *"…the paramount consideration of community safety must be weighed and assessed in the context of all facts, matters and circumstances relevant to the particular sentencing task applying the instinctive synthesis approach : Pullen at [87]; Fangaloka at [65] – [66]; Karout v R at [88].*"

His Honour then noted the differences of opinion in the various decisions of the Court as to whether because community safety is the paramount consideration, the matters referred to in 66(3) become subordinate and the tension between the restrictive and facilitative approach. His

[8] *Karout v R* at 94.

Honour did not seek to resolve this issue as it was not necessary for the purpose of the case at hand.

Price J, agreeing with Campbell J as to the outcome on re-sentence, adopted the reasoning of Basten JA in *Fangaloka* at [63], that is, of a restrictive approach. If not for the fresh evidence on re-sentence (that the offender had completed the IDATP program, had gained insight and had served 9 months imprisonment), His Honour would not have dealt with the matter differently to the sentencing judge.

R v Kennedy [2019] NSWCCA 242

Another successful crown appeal. The Respondent pleaded guilty to six Commonwealth offences committed in July and October 2016 and March 2017. Two of the counts related to attempts to export "regulated native specimens" contrary to s 303DD of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) ("EPBC Act") and s 11.1(1) of the Criminal Code (Cth). Two of the counts related to importations and attempted importations of "regulated live specimens" contrary to s 303EK(1) of the EPBC Act. One of the counts related to possession of non-native CITES-regulated specimens contrary to 303GN(2) of the EPBC Act. The final count related to dealing with money less than $100,000 which is reasonable to suspect is proceeds of crime contrary to s 400.9(1A) of the Criminal Code. The maximum term of imprisonment was 10 years for the exportation and importation offences, 5 years for the possession offence and 2 years for the proceeds offence.

The Court found that the sentence imposed, of 3 years imprisonment to be served by way of an intensive correction order, did not reflect the overall gravity of the offending or sentencing principles which elevated general deterrence and accountability over the objective of rehabilitation.

Kember v R [2020] NSWCCA 152

Mr Kember appealed against the sentence of full-time imprisonment imposed for taking part in the sale of a firearm and other firearm matters.

Justice Bellew confirmed in considering the third step of the three stage process that although s 66 mandates community safety as a paramount consideration, a sentencing judge must weigh and assess that against the facts, matters and circumstances which are relevant to sentencing in line with the instinctive synthesis approach (following *Blanch v R)*

The Court did not consider or resolve the issue of whether the restrictive or facilitative approach should be followed.

Wany v Director of Public Prosecutions [2020] NSWCA 318

Mr Wany pleaded guilty in the Local Court to 'operate vessel dangerously occasioning grievous bodily harm' referable to his conduct in driving a boat and causing an accident resulting in his cousin receiving injuries which amounted to grievous bodily harm. The plea of guilty was

entered (and accepted by the Crown) on the basis of momentary inattention. The Magistrate, after adjourning the matter for a SAR, rejected the factual basis of momentary inattention and subsequently sentenced Mr Wany to 15 months imprisonment with a non-parole period of 9 months.

Mr Wany appealed to the District Court, where the presiding judge found there was no error in the magistrate's reasoning process, but reduced the sentence to 12 months with a non-parole period of 6 months.

In respect of the proceedings before both courts, the offender submitted his sentence could be served by way of an ICO.

Mr Wany sought judicial review of the District Court judge's decision to the Court of Appeal asserting jurisdictional error. The key issue on the appeal was determining the proper approach to the exercise of the discretion to order that a custodial sentence be served by way of ICO.

The Court noted that when considering an ICO, community safety is a mandatory element for consideration. That requires an assessment of whether an ICO or full-time detention is more likely to address an offender's risk of reoffending ([56], [60])

The Court considered the restrictive approach (*Fangaloka* at [63) in paragraph 62 of the judgment:

> *The correctness of the proposition identified in the third sentence ("unless a favourable opinion is reached in making that assessment, an ICO should not be imposed") has been doubted. The competing views are summarised in the dissenting judgment of Brereton JA in Karout at [57]-[60]. The contested proposition was not part of the ratio in Fangaloka and the controversy has not been required to be resolved in any case since; nor is it required to be resolved here. However, as noted by Mr Game, it may be important if (as I propose) the present matter is to be remitted. In that context, for what it is worth, I would respectfully agree with the view expressed by Beech-Jones J in Casella v R [2019] NSWCCA 201 at [108], with whom N Adams J agreed at [111], and which Brereton JA appeared to approve in his dissenting judgment in Karout,* ***that s 66 is not restrictive; it should not be understood to preclude the imposition of an ICO except where the sentencing court reaches a positive determination that an ICO (as opposed to full-time detention) is more likely to address an offender's risk of reoffending****. Some support for that conclusion may be found in the reasoning in Pogson, which was concerned with a similarly restrictive interpretation of the original ICO provisions. [****emphasis added****]*[9]

The Court also noted that the determination of an offender's risk of reoffending is a matter

[9] *Wany v DPP [2020] NSWCA 318*

within the discretionary judgment of the sentencing judge: s 66(3). Neither the magistrate nor sentencing judge considered those issues and there was a constructive failure to exercise jurisdiction.

Mandranis v R [2021] NSWCCA 97

Mr Taryn Mandranis pleaded guilty to one count of ongoing supply per s 25A(1) *Drug Misuse and Trafficking Act*. A related offence of conducting drug premises was transferred to the District Court on a 166 certificate. The sentencing judge imposed a sentence of 3 years with a non-parole period of 2 years for the offence of ongoing supply and a sentence of 6 months concurrent for the drug premises offence.

The CCA in a further decision disapproved of the restrictive approach set out by Justice Basten in *Fangaloka.*

> *49 For my part I also prefer the approach taken by Beech-Jones J. Since it is necessary, in this case, to make a somewhat invidious choice between the guidance given by two powerfully reasoned and supported decisions of this Court, I will adopt the approach taken by Beech-Jones J. In other words, I do not accept that the determinative consideration in the decision whether to make an ICO is which of the two modes of serving the sentence is more likely to address the offender's risk of reoffending, and that, unless a favourable opinion in that respect is reached, an ICO is excluded. I do not accept that, unless the balance of those two considerations falls in favour of an ICO, an ICO should not be imposed. I do not see any reason why subs (2) of s 66 should be elevated to dominate or override the more general consideration required by subs (1).*
>
> *50 Like Harrison J, I consider that s 66(1) subordinates (but does not exclude) other considerations to community safety. That is the inescapable consequence of declaring community safety to be "the paramount consideration". It is important to note, however, that is so only at the point when consideration is being given to whether to make an ICO. Thus, rehabilitation (s 3A (d)) will give way to community safety where appropriate; in an appropriate case, accountability and denunciation may be given less weight than they otherwise would. In this respect, it is not to be overlooked that the s 3A purposes have already been taken into account in the selection of the term of the sentence. By s 66(3), they are again to be taken into account in relation to the specific question whether the sentence is to be served by way of ICO. It is only in this context that they may be said to be "subordinate". That does not diminish their importance at the earlier point of the sentencing determination. This is what I think Harrison J had in mind in [86] of Pullen.*
>
> *51 Primacy must be given to the clear language of s 66(1) which, in terms, places community safety as the paramount consideration. Which of the two modes of serving the sentence is more likely to address the offender's risk of reoffending is one of the factors relevant to the assessment of community safety, which, as Harrison J observed in Pullen, may best be served, in different cases, in different ways. The better way of addressing an offender's risk of reoffending is but one of the considerations that contribute to the s 66(1) assessment.*

In a development that will have big implications for defence lawyers, the CCA held that pre-sentence custody can be deducted from a notional head sentence so as to bring a sentence of imprisonment into a range of sentence where an intensive correction order might be imposed:

> *56. As mentioned above, by s 71(1) an ICO commences on the date on which it is made. By s 70 (unless it is earlier revoked) the term of an ICO is the same as the term or terms of the imprisonment in respect of which the order is made. I find it impossible to see how ss 70 and 71 admit of the making of an ICO where a sentence is fixed to commence at an earlier time than the date on which it is imposed. That means that an offender who has served a substantial period in pre-sentence custody may be forced to choose between seeking an*

ICO and having the sentence backdated. That would be an injustice. The position is even more invidious where this Court resentences after a successful appeal (whether the appeal is as to severity by the offender, or as to inadequacy by the Crown). It would be virtually impossible for this Court to take into account pre-sentence custody in the usual way (by backdating) and making an ICO.

57. *This is not an issue limited to the relatively rare case where this court resentences after a successful appeal. Sentencing offenders who have served a period of pre-sentence custody is a daily occurrence in the District Court.*

58. *It would be unjust (and contrary to ss 24 and 47) to impose a sentence that did not take account of pre-sentence custody. It would be equally unjust to deprive an offender of the opportunity to serve the sentence in the community by way of intensive correction because such an order is not possible when the commencement of the sentence is backdated to take account of pre-sentence custody.*

59. *From time to time established procedures have to be moderated in order to meet changing circumstances. The process laid down in* Zamagias *and repeatedly endorsed was and remains appropriate for the circumstances to which it applies. When Howie J wrote his judgment in* Zamagias*, there was no provision for an offender to serve a sentence by way of intensive correction in the community. An offender who had served time in custody prior to sentencing was entitled to have that time recognised without sacrificing other options that might be available.*

60. *The provision for ICOs, as explained by the Attorney General in the Second Reading Speech, was designed not only to benefit offenders, but also the community by the rehabilitation of offenders and thereby the prevention of crime. That provision should not be rendered inoperable by ss 70 and 71.*

61. *There is, in my opinion, a solution to this problem. It involves a degree of departure from the* Zamagias *three-step process. Provided that the appropriate term of the sentence is determined before consideration is given to an ICO, it would, if an ICO is found to be appropriate, be acceptable for that term to be adjusted by the deduction of a period equivalent to the term of pre-sentence custody, so that the ICO commences on the day it is made (in compliance with s 71) and is co-extensive with the term of imprisonment (as required by s 70). The sentence actually recorded and imposed would be less (by the length of the pre-sentence custody) than the sentence found to be appropriate to meet the purpose of sentencing.*

62. *I acknowledge (as was pointed out on behalf of the Crown) that taking this course has the potential to distort sentencing statistics maintained by the Judicial Commission of New South Wales, which have proved a useful resource for sentencing judges and for this court. That is an inevitable consequence of ss 70 and 71. It is the legislation that has caused the problem, wholly unanticipated as I am confident that it was. Should the process I have suggested become a problem, the remedy lies in the hands of the legislature.*

63. *It is also possible that this process might open more sentences to being served by ICOs. For example, a 4 year aggregate sentence, reduced to 3 by reason of 12 months presentence custody, would not be precluded by s*

68(2) from being served by way of ICO. Whether that would be a legitimate exercise of the sentencing discretion does not arise in this case and therefore need not (and cannot) be decided.

Abel v R [2020] NSWCCA 82

(Regarding the structure of s 68 of the CSPA)

Mr Abel had initially pleaded guilty to an offence of supplying a prohibited drug (cocaine) with an offence of dealing with the proceeds of a crime on a Form 1. At that stage following submissions, the sentencing judge indicated he would impose a sentence of 2 years 5 months, with a non-parole period of 1 year and 4 months. The foreshadowed head sentence exceeded the maximum period of 2 years with regard to which an ICO could be imposed for a single offence (s 68(1) *CSPA).*

Defence counsel submitted that Abel could withdraw his request to have the deal with proceeds offence taken into account on a Form 1 and seek to have that dealt with on an indictment. The Crown consented and the matter was adjourned for that purpose and Mr Abel ultimately received a sentence of 29 months to be served by way of an ICO. Mr Abel appealed the sentence to the Court of Criminal Appeal which was unsuccessful.

The Court expressed a view that the unorthodox approach taken by the Judge in acceding to the application to adjourn the matter (and withdraw the Form 1) should rarely be taken:

> *81 First, it will very rarely be the case that a sentencing judge, at the conclusion of his or her remarks on sentence, should accede to an application simply to adjourn the matter and "start again" months later. What happened here was not only, with respect, a waste of time, money, and effort. It was also unseemly.*
>
> *82 Secondly, without having had the benefit of any analysis from either counsel of the question, it is to be doubted that an application to have an offence taken into account on a Form 1 can simply be "withdrawn" after (at the latest) the closure of the evidence in the proceedings on sentence. And it is seriously to be doubted that it can be withdrawn right at the conclusion of the remarks on sentence.*

At [84], Justice Button noted:

> "*… the current structure of s 68 of the CSPA leads to the highly counter-intuitive result that, in some cases, offenders will believe that it is not in their interests to have an offence placed upon a Form 1. That is directly contrary to the philosophy behind Part 3, Division 3 of the CSPA. Those provisions permit the Crown and an offender to have less serious matters disposed of conveniently and consensually in a way that is fair to both parties, and in the interests of the administration of criminal justice. Other examples of the problem have arisen in this Court:* R *v Qi [2019] NSWCCA 73 and Cross v* R *[2019] NSWCCA 280. In my respectful opinion, Parliament should reconsider the mechanics of the current structure whereby the circumstances in which an ICO may be imposed are restricted, because they are leading to anomalous outcomes."*

APPENDIX B

Intensive Correction Orders - Precluded offences

(a) murder or manslaughter,
(b) a prescribed sexual offence,
(c) a terrorism offence within the meaning of the *Crimes Act 1914* of the Commonwealth or an offence under section 310J of the *Crimes Act 1900* ,
(d) an offence relating to a contravention of a serious crime prevention order under section 8 of the *Crimes (Serious Crime Prevention Orders) Act 2016* ,
(e) an offence relating to a contravention of a public safety order under section 87ZA of the *Law Enforcement (Powers and Responsibilities) Act 2002* ,
(f) an offence involving the discharge of a firearm,
(g) an offence that includes the commission of, or an intention to commit, an offence referred to in paragraphs (a)-(f),
(h) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in paragraphs (a)-(g).
(2) For the purposes of this section-- **"Commonwealth Criminal Code"** means the *Criminal Code* set out in the Schedule to the *Criminal Code Act 1995* of the Commonwealth. **"firearm"** means a firearm as defined in the *Firearms Act 1996* . **"prescribed sexual offence"** means--
(a) an offence under Division 10 or 10A of Part 3 of the *Crimes Act 1900* , being--
(i) an offence the victim of which is a person under the age of 16 years, or
(ii) an offence the victim of which is a person of any age and the elements of which include sexual intercourse (as defined by section 61H of that Act), or
(b) an offence under section 91D, 91E, 91F, 91G or 91H of the *Crimes Act 1900* , or
(c) an offence under section 91J, 91K or 91L of the *Crimes Act 1900* , being an offence the victim of which is a person under the age of 16 years, or
(d) an offence against section 50BA, 50BB, 50BC, 50BD, 50DA or 50DB of the *Crimes Act 1914* of the Commonwealth, being an offence the victim of which was a person under the age of 16 years, or
(e) an offence against section 71.8, 71.12, 271.4, 271.7, 272.8 (1) or (2), 272.9 (1) or (2), 272.10 (1), 272.11 (1), 272.12 (1) or (2), 272.13 (1) or (2), 272.14 (1), 272.15 (1), 272.18 (1), 272.19 (1), 272.20 (1) or (2), 273.5, 273.6, 273.7, 471.16 (1) or (2), 471.17 (1), 471.19 (1) or (2), 471.20 (1), 471.22 (1), 471.24, 471.25, 471.26, 474.19 (1), 474.20 (1), 474.22 (1), 474.23 (1), 474.24A (1), 474.25A (1) or (2), 474.25B (1), 474.26, 474.27 (1), (2) or (3), 474.27A of the Commonwealth Criminal Code, being an offence the victim of which was a person under the age of 16 years, or

(f) an offence against section 233BAB of the *Customs Act 1901* of the Commonwealth involving items of child pornography or child abuse material, or
(g) an offence that, at the time it was committed, was a prescribed sexual offence within the meaning of this definition.
(3) To avoid doubt, subsection (1) extends to a sentence of imprisonment for 2 or more offences any 1 of which includes an offence referred to in that subsection.