

NEW SENTENCING OPTIONS FOR NEW SOUTH WALES

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I INTRODUCTION

On 24 September 2018, the *Crimes (Sentencing Procedure) Act 1999* (NSW) (“**Sentencing Act**”) and *Crimes (Administration of Sentences) Act 1999* (NSW) will be amended,¹ bringing about a major overhaul of the sentencing regime in NSW with what has been described as ‘new, tough and smart community sentencing options that will promote community safety by holding offenders accountable and tackling the causes of offending’.²

From this date, the sentencing options available to a sentencing court in NSW under the Sentencing Act will be as follows (in descending order of seriousness):

- Full-time detention,
- Intensive Correctional Order,³
- Community Correction Order,⁴
- Conditional Release Order (with conviction),⁵
- Fine,
- Conviction with no further penalty,⁶
- Conditional Release Order (without conviction),⁷ and
- Non-conviction dismissal.⁸

Suspended sentences,⁹ which previously sat in-between full-time detention and an intensive correctional order, will be abolished as a sentencing option.¹⁰

Additionally, home detention¹¹ and community service orders¹² will no longer be available as standalone sentencing options, however, as discussed further below, they will be available as additional conditions to certain supervised orders.

¹ *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW).

² New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, 1 (Mark Speakman).

³ Sentencing Act s 7.

⁴ Sentencing Act s 8.

⁵ Sentencing Act s 9(1)(a).

⁶ Sentencing Act s 10A.

⁷ Sentencing Act s 10(1)(b).

⁸ Sentencing Act s 10(1)(a).

⁹ Sentencing Act s 12 (repealed).

¹⁰ The decision to abolish suspended sentences was because 44% them did not include any supervision (to address underlying offending behaviours) and they only required offenders to be of good behaviour (which was considered ‘a slap on the wrist’): New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, 1 (Mark Speakman).

¹¹ Sentencing Act s 6 (repealed).

¹² Sentencing Act s 8 (repealed).

Intensive correctional orders will continue as an alternative to full-time detention,¹³ however, they will be strengthened to overcome ‘structural issues that stop[ped] many offenders with complex needs from accessing these orders’.¹⁴

For example, if an offender is unsuitable to perform community service work¹⁵ as a result of cognitive impairment, mental illness, substance dependency, homelessness or unstable housing, this will no longer be a ‘key barrier for ICO suitability’.¹⁶

Further, good behaviour bonds, both with conviction¹⁷ and without conviction (conditional discharge),¹⁸ will no longer exist in their current form.

There will be no change to full-time detention, fines, convictions with no further penalty,¹⁹ and non-conviction dismissals²⁰ as sentencing options.

The effect of these changes in NSW to the Commonwealth sentencing regime under the *Crimes Act 1901* (Cth) will be addressed at the end of this paper.

These changes are discussed in further detail below.

II FULL-TIME DETENTION

Full-time detention, which will now be defined in s 3 of the Sentencing Act to mean ‘detention in a correctional centre’,²¹ will continue to be available as the most serious sentencing option.

The threshold test will continue to apply, that is, ‘a court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate’.²²

However, the Sentencing Act will now provide a presumption that if a person is found guilty of a domestic violence offence, the sentencing court must impose either full-time detention, or

¹³ Sentencing Act s 7.

¹⁴ New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, 2 (Mark Speakman).

¹⁵ Prior to the amendment an offender had to undertake a minimum 32 hours of community service work a month as a mandatory condition of their ICO.

¹⁶ NSW Sentencing Council, *Intensive correction orders: Statutory review*, September 2016, viii.

¹⁷ Sentencing Act s 9 (repealed).

¹⁸ Sentencing Act s 10(1)(b) (repealed).

¹⁹ Sentencing Act s 10A.

²⁰ Sentencing Act s 10(1)(a).

²¹ As opposed to the pre-amendment definition of ‘imprisonment that is required to be served otherwise than under an intensive correction order or by way of home detention’.

²² Sentencing Act s 5(1).

a supervised order,²³ unless satisfied that a different sentencing option is more appropriate in the circumstances and reasons for that view are provided.²⁴

To rebut this presumption, the Second Reading Speech states that the offender will need to be a very low risk of reoffending *and* unsuitable for supervision and programs. An example is where the domestic violence offence occurs between flatmates who no longer reside with each other.²⁵

The Rising of the Court will remain as the lowest form of imprisonment, which, although this rare sentencing option resembles a conviction with no further penalty sentence under s 10A of the Sentencing Act, still places a restraint on the offender's liberty in the courtroom (albeit, without the 'stigma or personal trauma of detention in a cell') until the court adjourns.²⁶

III INTENSIVE CORRECTIONAL ORDER ("ICO")

A *When will an ICO be available?*

An ICO will continue to be a sentencing option for an adult offender who *has* been sentenced up to two years imprisonment for a single offence (or three years for an aggregate sentence of imprisonment).²⁷

However, an ICO will not be available for the following offences: murder, manslaughter, a prescribed sexual offence,²⁸ offences involving the discharge of a firearm, terrorism offences and breaches of serious crime prevention orders and public safety orders.²⁹

An ICO will also not be available for a domestic violence offence, unless the sentencing court is satisfied it will adequately protect the victim or a likely co-resident of the offender.³⁰

Further, an ICO will not be available for an offender who resides, or intends to reside, in another State or Territory, unless the State or Territory is declared by the regulations to be an approved

²³ That is, an intensive correctional order, a community correction order (with a supervision condition) or a conditional release order (with a supervision condition).

²⁴ Sentencing Act s 4A(3).

²⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, 5 (Mark Speakman).

²⁶ A court imposing a Rising of the Court will generally adjourn immediately, using the words "I sentence you to a rising of the court, for which purpose the court now rises": Ian MacKinnell, 'Sentenced to the Rising of the court' (Sentencing Trends No 11, Judicial Commission of New South Wales, 1 January 1996).

²⁷ Sentencing Act ss 7, 68.

²⁸ Which is defined to include NSW or Commonwealth sexual assault and child sexual offences: s 67(2).

²⁹ Sentencing Act s 67.

³⁰ Sentencing Act s 4B(1).

jurisdiction.³¹ This provision was inserted to address ‘an issue that often arises in border areas of New South Wales where community-based sentences are imposed on offenders who reside in a neighbouring jurisdiction’.³²

B What must a sentencing court consider before imposing a ICO?

The paramount consideration for a sentencing court considering an ICO is community safety.³³ This must include an assessment as to whether full-time imprisonment is more likely to address any risk of reoffending.³⁴

However, the Second Reading Speech makes it clear that ‘community safety is not just about incarceration’, noting that ‘community supervision and programs are far more effective’ than imprisonment for under two years in ‘bringing about medium-to long-term behaviour change that reduces reoffending’.³⁵

Further, a sentencing court considering an ICO must also consider the purposes of sentencing under the Sentencing Act³⁶ and any relevant common law sentencing principles, and it may consider any other matter the court thinks relevant.³⁷

C How will an ICO be made?

A sentencing court considering an ICO will need to request an ‘assessment report’ from a community corrections officer (or a juvenile justice officer).³⁸

The purpose of obtaining an assessment report is to assist the sentencing court in determining whether an ICO or other community order is appropriate, and if so, what conditions should be imposed to address the specific needs and risk of the individual offender.³⁹

³¹ Sentencing Act s 69(3).

³² New South Wales, *Parliamentary Debates*, Legislative Council, 23 May 2018, 44 (Scot MacDonald).

³³ Sentencing Act s 66(1).

³⁴ Sentencing Act s 66(2).

³⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, 2 (Mark Speakman).

³⁶ Sentencing Act s 3A.

³⁷ Sentencing Act s 66(3).

³⁸ Sentencing Act ss 17B(3), 17C(1).

³⁹ Sentencing Act s 17B(2).

An assessment report referral will stay the execution of the sentence, and the court will have the power to either grant bail or remand the offender in custody until a decision is made as to whether to make an ICO.⁴⁰

An assessment report is required to address the following matters:

- a) the offender's risk of re-offending,
- b) any factors related to the offender's offending behaviour,
- c) any factors that may impact on the offender's ability to address his or her offending behaviour,
- d) how the matters referred to in paragraphs (b) and (c) would be addressed by supervision and the availability of resources to do so,
- e) any conditions that would facilitate the effective supervision of the offender in the community,
- f) the offender's suitability for community service work,
- g) a summary of the offender's response to any to any previous period of management in the community in respect of any relevant order, and
- h) any additional matters that the court wishes to have specifically addressed.⁴¹

However, an assessment report is not limited to the above matters,⁴² and it need not address any of the above matters if the matter is not relevant to the circumstances relating to the offender or the sentencing court does not require the matter to be addressed.⁴³

Further, an assessment report in relation to a home detention condition for an ICO must address the following matters:

- a) the offender's suitability for home detention,
- b) any risks associated with imposing home detention, including any risks to the offender or any other persons, including children, and any strategies that could manage the risks, and
- c) any other matters relevant to administering an ICO with a home detention condition.⁴⁴

⁴⁰ Sentencing Act s 17C(2).

⁴¹ *Crimes (Sentencing Procedure) Regulation 2017* (NSW) cl 12A(1).

⁴² *Crimes (Sentencing Procedure) Regulation 2017* (NSW) cl 12A(2).

⁴³ *Crimes (Sentencing Procedure) Regulation 2017* (NSW) cl 12A(3).

⁴⁴ *Crimes (Sentencing Procedure) Regulation 2017* (NSW) cl 12B(1).

A sentencing court will need to have regard to any assessment report obtained in relation to the offender, as well as evidence from a community corrections officer and any other information before the court that the court considers necessary, for the purposes of deciding whether to make an ICO.⁴⁵ However, a sentencing court will not be bound by an assessment report.⁴⁶

An ICO cannot be made until an assessment report is obtained.⁴⁷ However, unless the sentencing court is considering a home detention condition or community service work condition, an assessment report will not be required if there is sufficient information before the sentencing court to justify the making of an ICO without the need for an assessment report.⁴⁸

Once an ICO is made, the sentencing court must explain to the offender their obligations under the order, and any consequences for breaching the order (however, the ICO will not be invalidated if this explanation is not given).⁴⁹ Further, the registrar will be required to send notice of the ICO to the offender and, if a supervision condition or community service work condition is imposed, to Corrective Services NSW (however, once again, the ICO will not be invalidated if this notice is not sent).⁵⁰

D *What conditions can be imposed on an ICO?*

The standard conditions of an ICO are that the offender:

- must not commit any offence; and
- must submit to supervision by a community corrections officer.⁵¹

In addition to the standard conditions, a sentencing court *must* impose at least one of the following additional conditions (the period of which may be limited by the sentencing court):

- home detention condition,
- electronic monitoring condition,
- curfew condition,
- community service work condition, the maximum hours being:
 - 100 hours (maximum penalty of offence does not exceed 6 months)

⁴⁵ Sentencing Act s 69(1).

⁴⁶ Sentencing Act s 69(2).

⁴⁷ Sentencing Act s 17D(1).

⁴⁸ Sentencing Act s 17D(1A).

⁴⁹ Sentencing Act s 17I.

⁵⁰ Sentencing Act s 17J.

⁵¹ Sentencing Act s 73(2).

- 200 hours (maximum penalty of offence is between 6 months and 1 year)
- 750 hours (maximum penalty for offence exceeds 1 year)⁵²
- rehabilitation or treatment condition,
- abstention from alcohol/drugs condition,
- non-association condition,
- place restriction condition.⁵³

However, a sentencing court has the discretion to not impose any additional conditions if there are ‘exceptional circumstances’.⁵⁴ If a sentencing court decides to exercise this discretion, it must record its reasons for not imposing an additional condition on the ICO.⁵⁵

Further conditions may also be imposed on an ICO (the period of which may be limited by the sentencing court), provided they are not inconsistent with any standard conditions or additional conditions (regardless of whether those additional conditions are imposed).⁵⁶

A home detention condition or a community service work condition cannot be imposed on an ICO unless:

- an assessment report relating to the imposition of such a condition has been obtained (which can be included in the same assessment report, or a separate report);⁵⁷ and
- the assessment report states that the offender is suitable to be the subject of such a condition.⁵⁸

If the offender does not have accommodation suitable for the purposes of home detention, the assessment report cannot be finalised until reasonable efforts have been made by a community corrections officer, in consultation with the offender, to find suitable accommodation.⁵⁹

Furthermore, a home detention condition cannot be imposed on an ICO unless:

- a sentence of imprisonment has been imposed for a specified term;⁶⁰ and

⁵² *Crimes (Sentencing Procedure) Regulation 2017* (NSW) cl 14(1).

⁵³ Sentencing Act s 73A(1), (2).

⁵⁴ Sentencing Act s 73A(1A).

⁵⁵ Sentencing Act s 73A(1B).

⁵⁶ Sentencing Act s 73B.

⁵⁷ Sentencing Act s 17D(2), (4).

⁵⁸ Sentencing Act s 73A(3).

⁵⁹ *Crimes (Sentencing Procedure) Regulation 2017* (NSW) cl 12B(2).

⁶⁰ Sentencing Act s 17D(3).

- in the case of a domestic violence offence, the court does not reasonably believe that the offender will reside with the victim of that domestic violence offence.⁶¹

E *What happens if an offender fails to comply with their ICO?*

If an offender fails to comply with their obligations under an ICO, a community corrections officer may take any of the following actions:

- record the breach and take no further action,
- give an informal warning,
- give a formal warning (that further breaches will be referred to the Parole Authority),
- give a reasonable direction to the offender relating to the kind of behaviour by the offender that caused the breach,
- impose a curfew on the offender of up to 12 hours in any 24-hour period.⁶²

Additionally, or alternatively, the Commissioner of Corrective Services or a community corrections officer may refer the breach to the Parole Authority.⁶³

If the Parole Authority is satisfied that an offender has failed to comply with their obligations under an ICO, the Parole Authority may take any of the following actions:

- record the breach and take no further action,
- give a formal warning,
- impose any conditions on the ICO (including home detention order up to 30-days, and an electronic monitoring device condition),
- vary or revoke any conditions of the ICO (except for a standard condition, or an additional condition unless it will be replaced with another additional condition),
- make an order revoking the ICO.⁶⁴

If the ICO is revoked, the Parole Authority may issue a warrant committing the offender to a correctional centre to serve the remainder of their sentence by way of full-time imprisonment.⁶⁵

⁶¹ Sentencing Act s 4B(2).

⁶² *Crimes (Administration of Sentences) Act 1999* (NSW) s 163(2).

⁶³ *Crimes (Administration of Sentences) Act 1999* (NSW) s 163(3).

⁶⁴ *Crimes (Administration of Sentences) Act 1999* (NSW) s 164(2).

⁶⁵ *Crimes (Administration of Sentences) Act 1999* (NSW) s 181(1).

If the offender is not taken into custody until a day after the revocation of their ICO, the offender's sentence will extend by the number of days they were at large before the order revoking the ICO took effect.⁶⁶

The warrant for the offender's arrest and return to custody will be created by the Secretariat, signed and forwarded to the NSW Police Force to be uploaded onto the Computerised Operational Policing System ("COPS").⁶⁷ This warrant will appear on the offender's individual profile on COPS until it is executed by a police officer.

The warrant will detail the following information:

- the reasons for the revocation of the ICO (that is, the condition/s breached),
- the date at which the revocation was effective (that is, the date the ICO ceased), and
- the remaining balance of the ICO the offender is required to serve (that is, the time between the date of revocation and the ICO expiry).⁶⁸

Once the warrant is executed, the offender will be returned to custody and will not be eligible for bail on the outstanding matters. However, the offender will be entitled to a review hearing.⁶⁹

Once the review date is fixed by the Secretariat, the offender will be sent a bundle of documents (including the breach of ICO report, a copy of the reasons for the revocation and a document asking whether the offender would like to attend the review hearing, whether they would like to be legally represented (either through the Aboriginal Legal Service, the Prisoners Legal Service or a nominated private practitioner) and whether an interpreter is required.⁷⁰

An offender's revoked ICO may be reinstated by the Parole Authority in respect of the remaining balance of the offender's sentence.⁷¹ However, an application to reinstate an offender's ICO may not be made until the offender has, since the revocation, served at least one month of the offender's sentence by way of full-time detention. Further, the Parole Authority must state what the offender has done, or is doing, to ensure they will not fail to comply with their obligations under the ICO in the event it is reinstated.⁷²

⁶⁶ *Crimes (Administration of Sentences) Act 1999* (NSW) s 164A(3).

⁶⁷ State Parole Authority, *Revocation of an ICO* (2 July 2015) <<http://www.paroleauthority.nsw.gov.au/Pages/Function/Revocation-of-ICO.aspx>>.

⁶⁸ State Parole Authority, *Revocation of an ICO* (2 July 2015) <<http://www.paroleauthority.nsw.gov.au/Pages/Function/Revocation-of-ICO.aspx>>.

⁶⁹ *Crimes (Administration of Sentences) Act 1999* (NSW) s 174(1).

⁷⁰ State Parole Authority, *Revocation of an ICO* (2 July 2015) <<http://www.paroleauthority.nsw.gov.au/Pages/Function/Revocation-of-ICO.aspx>>.

⁷¹ *Crimes (Administration of Sentences) Act 1999* (NSW) ss 165(1), 175(1).

⁷² *Crimes (Administration of Sentences) Act 1999* (NSW) s 165(2).

IV COMMUNITY CORRECTION ORDER (“CCO”)

A *When will an CCO be available?*

A CCO will be available to a convicted person as an alternative to a sentence of imprisonment (that is, an alternative to either full-time detention or an ICO).⁷³

The term of a CCO cannot exceed three years.⁷⁴

According to the Second Reading Speech, the CCO replaces good behaviour bonds (which could be imposed for up to five years),⁷⁵ and community service orders⁷⁶ with a ‘more flexible order so that offenders can receive supervision to tackle their offending behaviour and be held accountable’.⁷⁷

If an offender is being sentenced for a domestic violence offence, a sentencing court must consider the safety of the victim before making a CCO.⁷⁸

B *How will a CCO be made?*

A sentencing court considering a CCO *may* request an ‘assessment report’ from a community corrections officer (or a juvenile justice officer) to assist in the determination of appropriate sentencing options and conditions.⁷⁹ However, unlike an ICO, assessment reports are not mandatory for a CCO, unless the sentencing court is considering the imposition of a community service work condition on the CCO.⁸⁰

Additionally, a CCO cannot be made by a Local Court if the offender is absent from court.⁸¹ However, a sentencing warrant, also known as a 25(2) warrant, will continue to be available to bring an absent offender before the Local Court for sentencing.⁸²

Once a CCO is made, the sentencing court must explain to the offender their obligations under the order, and any consequences for breaching the order (however, the CCO will not be

⁷³ Sentencing Act s 8.

⁷⁴ Sentencing Act s 85(2).

⁷⁵ Sentencing Act s 9 (repealed).

⁷⁶ Sentencing Act s 8 (repealed).

⁷⁷ New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, 2 (Mark Speakman).

⁷⁸ Sentencing Act s 4B(3).

⁷⁹ Sentencing Act ss 17B(2), 17C(1).

⁸⁰ Sentencing Act s 17D(4).

⁸¹ Sentencing Act s 25(1).

⁸² Sentencing Act s 25(2).

invalidated if this explanation is not given).⁸³ Further, similar to an ICO, the registrar will be required to send notice of the CCO to the offender and, if a supervision condition or community service work condition is imposed, to Corrective Services NSW (however, once again, the CCO will not be invalidated if this notice is not sent).⁸⁴

C What conditions can be imposed on a CCO?

The standard conditions of a CCO are that the offender:

- must not commit any offence; and
- must appear before the court if called on to do so during the term of the CCO.⁸⁵

In addition to the standard conditions, a sentencing court *may* impose any of the following additional conditions (the period of which may be limited by the sentencing court):

- curfew condition (not exceeding 12 hours in any 24-hour period),
- community service work condition, the maximum hours being:
 - 100 hours (maximum penalty of offence does not exceed 6 months)
 - 200 hours (maximum penalty of offence is between 6 months and 1 year)
 - 500 hours (maximum penalty for offence exceeds 1 year)⁸⁶
- rehabilitation or treatment condition,
- abstention from alcohol/drugs condition,
- non-association condition,
- place restriction condition,
- supervision condition.⁸⁷

Unlike an ICO, a CCO cannot include an additional condition of home detention, electronic monitoring, or a curfew exceeding 12 hours in any 24-hour period.⁸⁸

⁸³ Sentencing Act s 17I.

⁸⁴ Sentencing Act s 17J.

⁸⁵ Sentencing Act s 88(2).

⁸⁶ *Crimes (Sentencing Procedure) Regulation 2017* (NSW) cl 14(1).

⁸⁷ Sentencing Act s 89(1)-(2). Further, sub-s (2A) enables the type of officer supervising the offender under a supervision condition to change (that is, from a community corrections officer to a juvenile justice officer, and vice versa) in accordance with any arrangements between Corrective Services NSW and Juvenile Justice NSW without the need for an application being made to the sentencing court to vary the supervision condition.

⁸⁸ Sentencing Act s 89(3).

A supervision condition will not be available as an additional condition on a CCO for an offender who resides, or intends to reside, in another State or Territory, unless the State or Territory is declared by the regulations to be an approved jurisdiction.⁸⁹

A community service work condition cannot be imposed on a CCO unless:

- the offender resides:
 - in New South Wales; or
 - in another State or Territory and the court is satisfied that the offender is able and willing to travel to New South Wales to complete the community service work; or
 - in another State or Territory that is a declared approved jurisdiction under the regulations;⁹⁰ and,
- an assessment report relating to the imposition of such a condition has been obtained and it states that the offender is suitable to be the subject of such a condition;⁹¹ and,
- the offender is not a person to whom the *Children (Community Service Orders) Act 1987* (NSW)⁹² applies.⁹³

Further conditions may also be imposed on a CCO (the period of which may be limited by the sentencing court), provided they are not inconsistent with any standard conditions, the additional conditions (regardless of whether those additional conditions are imposed), or any ineligible condition (namely, home detention, electronic monitoring or a curfew exceeding 12 hours in any 24-hour period).⁹⁴

D *What happens if an offender fails to comply with their CCO?*

If an offender is suspected to have failed to comply with their obligations under a CCO, the sentencing court or any court of like jurisdiction (or a superior court with the offender's consent) may call on the offender to appear before it.⁹⁵

⁸⁹ Sentencing Act s 89(4A).

⁹⁰ Sentencing Act s 89(4B).

⁹¹ Sentencing Act ss 17D(4), 89(4).

⁹² Which allows a person who has pleaded guilty, or was found guilty, of an offence which they committed as a child, and was under 21 when they were charged, to receive a community service work order (between 100-250 hours) instead of receiving a sentence of imprisonment (or a control order in the Children's Court).

⁹³ Sentencing Act s 8(2).

⁹⁴ Sentencing Act s 90.

⁹⁵ *Crimes (Administration of Sentences) Act 1999* (NSW) s 107C(1).

If the offender fails to appear, or their whereabouts are unknown at the time of the call-up, an arrest warrant may be issued.⁹⁶

Once a court is satisfied that the offender has failed to comply with the CCO, the court may do any of the following:

- take no action, or
- vary or revoke any of the non-standard conditions, or impose further conditions, or
- revoke the CCO.⁹⁷

If a court revokes a CCO, it may then re-sentence the offender.⁹⁸ This may include requesting a fresh assessment report to assist in the determination of appropriate sentencing options and conditions.⁹⁹

V CONDITIONAL RELEASE ORDER (“CRO”)

A *When will an CRO be available?*

A CRO, either with or without a conviction, will be available as an alternative to a sentence of imprisonment or a fine (or both).¹⁰⁰

A sentencing court cannot impose a CRO and a fine on an offender in respect of the same offence.¹⁰¹

Further, the term of a CRO cannot exceed two years.¹⁰²

According to the Second Reading Speech, the CRO is a community-based sentence ‘for the lowest level of offending’ and is less onerous than an ICO or a CCO.¹⁰³

⁹⁶ *Crimes (Administration of Sentences) Act 1999* (NSW) s 107C(2)-(3).

⁹⁷ *Crimes (Administration of Sentences) Act 1999* (NSW) s 107C(5).

⁹⁸ *Crimes (Administration of Sentences) Act 1999* (NSW) s 107D(1).

⁹⁹ *Crimes (Administration of Sentences) Act 1999* (NSW) s 17C(1)(b)(v).

¹⁰⁰ A CRO with a conviction is made under s 9(1)(a) of the Sentencing Act, and a CRO without a conviction is made under s 9(1)(b) pursuant to s 10(1)(b) of the Sentencing Act.

¹⁰¹ Sentencing Act s 9(3).

¹⁰² Sentencing Act s 95(2).

¹⁰³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, 4 (Mark Speakman).

B *What must a sentencing court consider before imposing a CRO?*

In deciding whether to make a CRO, either with or without a conviction, the sentencing court is to have regard to the following factors:

- the person's character, antecedents, age, health and mental condition,
- whether the offence is of a trivial nature,
- the extenuating circumstances in which the offence was committed,
- any other matter that the court thinks proper to consider.¹⁰⁴

Furthermore, a CRO *without* a conviction may be made if the sentencing court is satisfied:

- that it is inexpedient to inflict any punishment (other than nominal punishment) on the person, or
- that it is expedient to discharge the person under a CRO.¹⁰⁵

If an offender is being sentenced for a domestic violence offence, a sentencing court must consider the safety of the victim before making a CRO.¹⁰⁶

C *How will a CRO be made?*

A sentencing court considering a CRO *may* request an 'assessment report' from a community corrections officer (or a juvenile justice officer) to assist in the determination of appropriate sentencing options and conditions.¹⁰⁷ However, unlike an ICO (or a CCO if a community service work condition is being considered), assessment reports are *not* mandatory for a CRO.

Additionally, similar to a CCO, a CRO cannot be made by a Local Court if the offender is absent from court.¹⁰⁸ However, a sentencing warrant, also known as a 25(2) warrant, will continue to be available to bring an absent offender before the Local Court for sentencing.¹⁰⁹

¹⁰⁴ Sentencing Act ss 9(2) (for a conviction), 10(3) (for a non-conviction).

¹⁰⁵ Sentencing Act s 10(2).

¹⁰⁶ Sentencing Act s 4B(3).

¹⁰⁷ Sentencing Act ss 17B(2), 17C(1).

¹⁰⁸ Sentencing Act s 25(1).

¹⁰⁹ Sentencing Act s 25(2).

D *What conditions can be imposed on a CRO?*

The standard conditions of a CRO are identical to those for a CCO, namely that the offender:

- must not commit any offence; and
- must appear before the court if called on to do so during the term of the CRO.¹¹⁰

In addition to the standard conditions, a sentencing court *may* impose at any of the following additional conditions (the period of which may be limited by the sentencing court):

- rehabilitation or treatment condition,
- abstention from alcohol/drugs condition,
- non-association condition,
- place restriction condition,
- supervision condition.¹¹¹

A CRO cannot include a condition of home detention or electronic monitoring (both being conditions only available for an ICO), or a curfew or community service work condition (both being conditions available for an ICO and a CCO).¹¹²

Equally with a CCO, a supervision condition will not be available as an additional condition on a CRO for an offender who resides, or intends to reside, in another State or Territory, unless the State or Territory is declared by the regulations to be an approved jurisdiction.¹¹³

Further conditions may also be imposed on a CRO (the period of which may be limited by the sentencing court), provided they are not inconsistent with any standard conditions, the additional conditions (regardless of whether those additional conditions are imposed), or any ineligible condition (namely, home detention, electronic monitoring, a curfew or a community service work condition).¹¹⁴

¹¹⁰ Sentencing Act s 98(2).

¹¹¹ Sentencing Act s 99. Further, sub-s (2A) enables the type of officer supervising the offender under a supervision condition to change (that is, from a community corrections officer to a juvenile justice officer, and vice versa) in accordance with any arrangements between Corrective Services NSW and Juvenile Justice NSW without the need for an application being made to the sentencing court to vary the supervision condition.

¹¹² Sentencing Act s 99(3).

¹¹³ Sentencing Act s 99(3A).

¹¹⁴ Sentencing Act s 99A.

E *What happens if an offender fails to comply with their CRO?*

Similarly with a CCO, if an offender is suspected to have failed to comply with their obligations under a CRO, the sentencing court or any court of like jurisdiction (or a superior court with the offender's consent) may call on the offender to appear before it.¹¹⁵

Additionally, if the offender fails to appear, or their whereabouts are unknown at the time of the call-up, an arrest warrant may be issued.¹¹⁶

Once a court is satisfied that the offender has failed to comply with the CRO, the court may do any of the following:

- take no action,
- vary or revoke any of the non-standard conditions, or impose further conditions, or
- revoke the CRO.¹¹⁷

If a court revokes a CRO, it may then re-sentence the offender.¹¹⁸ This may include requesting a fresh assessment report to assist in the determination of appropriate sentencing options and conditions.¹¹⁹

VI MULTIPLE ORDERS AND CONDITIONS

A *Multiple Orders*

Only one ICO, CCO or CRO can be in force at the same time in respect of the same offence in relation to the same offender.¹²⁰

However, two or more ICOs, CCOs or CROs can be in force at the same time in respect of two or more offences in relation to the same offender. If this occurs, in the event of any inconsistencies as to how any of the conditions operate together, the following will apply in relation to that inconsistency:

- a condition of an ICO will prevail over a condition of a CCO, and
- a condition of a CCO will prevail over a condition of a CRO, and

¹¹⁵ *Crimes (Administration of Sentences) Act 1999* (NSW) s 108C(1).

¹¹⁶ *Crimes (Administration of Sentences) Act 1999* (NSW) s 108C(2)-(3).

¹¹⁷ *Crimes (Administration of Sentences) Act 1999* (NSW) s 108C(5).

¹¹⁸ *Crimes (Administration of Sentences) Act 1999* (NSW) s 108D(1).

¹¹⁹ *Crimes (Administration of Sentences) Act 1999* (NSW) s 17C(1)(b)(v).

¹²⁰ *Sentencing Act* s 17F(1).

- in all cases, a standard condition will prevail over a condition that is not a standard condition (regardless of whether it is attached to an ICO, a CCO or a CRO).¹²¹

B Multiple Community Service Work Conditions

Similar to the position pre-amendment,¹²² if an ICO or CCO is made with a community service work condition (“**the new order**”), and the offender is already subject to an ICO or CCO with a community service work condition (“**an existing order**”), then the new order cannot be made unless the sum of hours under the new order and an existing order do not exceed:

- 750 hours (if one of the orders is an ICO), or
- 500 hours (if one of the orders is a CCO).¹²³

In coming to this calculation, the number of hours to be performed under the new order is to be disregarded to the extent that it runs concurrently with those to be performed under an existing order.¹²⁴ However, the hours of community service work under the new order is taken to run concurrently with those under an existing order.¹²⁵

C Multiple Curfew Conditions

If an offender is subject to two or more curfew conditions under two or more CCOs in respect of the same 24-hour period, the offender will only be required to observe the curfew of the CCO with the highest hours (as long as it does not exceed 12 hours).¹²⁶

If an offender is subject to two or more curfew conditions under two or more orders, with at least one of those orders being an ICO and the other a CCO, in respect of the same 24-hour period, the offender cannot be required to observe a curfew greater than:

- the hours imposed by the ICO, or
- 12 hours in the period of 24-hours.¹²⁷

¹²¹ Sentencing Act s 17F(4).

¹²² Sentencing Act s 87 (repealed).

¹²³ Sentencing Act s 17G(1).

¹²⁴ Sentencing Act s 17G(2).

¹²⁵ Sentencing Act s 17G(3).

¹²⁶ Sentencing Act s 17H(3).

¹²⁷ Sentencing Act s 17H(4).

VII COMMUNITY-BASED SENTENCES PRIOR TO AMENDMENT

Offenders subject to a current community-based sentence prior to the amendments will have their old sentence converted.¹²⁸

However, suspended sentences that have previously been imposed on an offender and are still current will continue until it expires or is revoked.¹²⁹ If the suspended sentence is revoked, the offender must be re-sentenced to either full-time detention or an ICO.¹³⁰

The following table illustrates this conversion process:

Existing Sentence	Converted Sentence
Home detention. ¹³¹	ICO with the following conditions: <ul style="list-style-type: none"> • standard conditions, • home detention condition, • any pre-existing conditions imposed by the sentencing court or Parole Authority.¹³²
ICO. ¹³³	ICO with the following conditions: <ul style="list-style-type: none"> • standard conditions, • any pre-existing conditions imposed by the sentencing court or Parole Authority.¹³⁴
Community service order. ¹³⁵	CCO with the following conditions: <ul style="list-style-type: none"> • standard conditions, • community service work condition.¹³⁶
Supervised good behaviour bond. ¹³⁷	CCO with the following conditions: <ul style="list-style-type: none"> • standard conditions, • any pre-existing bond condition imposed by the sentencing court.¹³⁸
Conditional discharge without conviction. ¹³⁹	CRO (without conviction) with the following conditions: <ul style="list-style-type: none"> • standard conditions, • any pre-existing bond condition imposed by the sentencing court.¹⁴⁰

¹²⁸ Sentencing Act ss 71-75.

¹²⁹ Sentencing Act s 76(2), (4).

¹³⁰ Sentencing Act s 76(3)-(4). Section 98(3) of the Sentencing Act (repealed) will continue to apply in relation to deciding whether to revoke the suspended sentence, that is, whether the offender's failure to comply with the conditions of the suspended sentence was trivial, or if there are good reasons for excusing their failure to comply.

¹³¹ Sentencing Act s 6 (repealed).

¹³² Sentencing Act s 71.

¹³³ Sentencing Act s 7.

¹³⁴ Sentencing Act s 72.

¹³⁵ Sentencing Act s 8 (repealed).

¹³⁶ Sentencing Act s 73.

¹³⁷ Sentencing Act s 9 (repealed).

¹³⁸ Sentencing Act s 74.

¹³⁹ Sentencing Act s 10(1)(b) (repealed).

¹⁴⁰ Sentencing Act s 75.

VIII IMPACT ON THE COMMONWEALTH SENTENCING REGIME

Section 20AB(1) of the *Crimes Act 1914* (Cth) provides a mechanism for offenders being sentenced in a NSW court for a Commonwealth offence to access the various sentencing options available under the Sentencing Act (for example, an ICO, CCO or CRO).

The following table is a comparison between the sentencing options for NSW offences under the Sentencing Act (both pre and post amendment) and the sentencing options for Commonwealth offences under the *Crimes Act 1914* (Cth):

NSW (Pre-Amendment)	NSW (Post-Amendment)	Commonwealth
Imprisonment	Imprisonment	Imprisonment
Suspended sentence (formerly s 12)	-	Sentence and recognizance (s 20(1)(b)) ¹⁴¹
Home detention (formerly s 6)	ICO with a home detention condition (s 7)	ICO with a home detention condition (s 20AB(1))
ICO (s 7)	ICO (s 7)	ICO (s 20AB(1)) ¹⁴²
Community service order (formerly s 8)	CCO with community service work condition (s 8)	CCO with community service work condition (s 20AB(1))
Good behaviour bond (formerly s 9)	CCO (s 8)	Conviction and recognizance (s 20(1)(a)) ¹⁴³ or CCO (s 20AB(1))
Fine	Fine ¹⁴⁴	Fine ¹⁴⁵
Conviction with no further penalty (s 10A)	Conviction with no further penalty (s 10A)	Conviction with no further penalty (s 20AB(1))
Conditional discharge without conviction (formerly s 10(a)(b))	CRO with or without a conviction (s 9)	Conditional discharge without conviction (s 19B(1)(d)) ¹⁴⁶ or CRO with or without a conviction (s 20AB(1))
Non-conviction dismissal (s 10(1)(a))	Non-conviction dismissal (s 10(1)(a))	Non-conviction dismissal (s 19B(1)(c)) ¹⁴⁷

¹⁴¹ This is similar to a suspended sentence formerly under section 12 of the Sentencing Act. Therefore, suspended sentences will technically continue to be available for Commonwealth Offences (although, they are different).

¹⁴² An ICO under s 7 of the Sentencing Act is specifically provided for in relation to Commonwealth offences pursuant to cl 6 of the *Crimes Regulations 1990* (Cth).

¹⁴³ This is similar to a good behaviour bond formerly under section 9 of Sentencing Act.

¹⁴⁴ A penalty unit for a NSW offence is currently \$110 under s 17 of the Sentencing Act.

¹⁴⁵ A penalty unit for a Commonwealth offence is currently \$210: *Crimes Act 1914* (Cth) s 4AA(1). This amount was increased from \$180 on 1 July 2017: *Crimes Legislation Amendment (Penalty Unit) Act 2017* (Cth). This amount is to increase every three years (from 1 July) in line with the consumer price index: *Crimes Act 1914* (Cth) s 4AA(3). Therefore, the next increase will occur on 1 July 2020, then 1 July 2023, 1 July 2026, 1 July 2029 etc.

¹⁴⁶ This is similar to a conditional discharge formerly under section 10(1)(b) of the Sentencing Act.

¹⁴⁷ This is similar to a dismissal under section 10(1)(a) of the Sentencing Act.