CRIMINAL LAW CPD PRACTITIONERS CONFERENCE

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THE CONTEMPORARY STATE OF THE LAW CONCERNING INTENSIVE CORRECTIONS ORDERS IN NEW SOUTH WALES

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INTRODUCTION AND LEGISLATIVE HISTORY

1. Intensive Corrections Orders (**ICOs**) were introduced into the *Crimes (Sentencing Procedure) Act 1999* (NSW) (‘**the Act’**) in 2010 by the passing of the *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010* (NSW).

2. In simple terms, an ICO is a sentencing option which allows an offender to serve a term of imprisonment within the community while subject to certain conditions. An ICO is not an alternative to custody in the same sense as a conditional release order or a community corrections order, rather it is an alternative mode of serving a term of imprisonment while subject to supervision in the community.

3. The provisions concerning ICOs as they exist today, were enshrined into the Act by the passing of the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) and are contained in Part 5 of the Act.

INTENSIVE CORRECTIONS ORDERS ARE NOT AVAILABLE FOR CERTAIN OFFENCES

4. The starting point to this paper is to understand the offences for which an ICO cannot be imposed. Parliament has specifically excluded the imposition of ICOs for certain offences.

5. Section 67 of the Act provides that an ICO **must not** be made in respect of the following 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 200,

   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).

6. Importantly, “*prescribed sexual offence*” is defined in Section 67(2) of the Act as follows:

   (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, or

(h) an offence under a previous enactment that is substantially similar to an offence referred to in paragraphs (a)-(g).

7. There is no discretion to impose an ICO in respect of any of the prescribed offences.

SENTENCING PROCESS FOR INTENSIVE CORRECTIONS ORDERS

8. If an offence is not excluded by virtue of Section 67, then consideration should always be given to whether a sentence of imprisonment is on the cards and whether such a sentence could be served by way of an ICO. Fundamental to that task is understanding the process and approach of the court in imposing such a sentence.

9. While current sentencing laws in NSW have changed in recent years, the authorities prior to those changes are nonetheless helpful in understanding how a Court is to approach the imposition of a sentence of imprisonment where alternative modes of serving the term are available: *Douar v R* [2005] NSWCCA 455 at [69]-[72] (‘***Douar***’); *R v Zamagias* [2002] NSWCCA 17 at [22]-[32](‘***Zamagia****s*’); see also *R v Foster* [2001] NSWCCA 215 at [30]; *R v Blackman and Walters* [2001] NSWCCA 121 at [50]-[52]; *JCE* at [17].

10. In *Douar,* his Honour, Johnson J, with whom McClellan CJ at CL and Adams J agreed, conveniently detailed the three-staged process referred to by his Honour Howie J in *Zamagias.* His Honour did so in the context of the imposition of a sentence of imprisonment under the Act in circumstances where alternative modes of imprisonment were available, which in *Douar* involved periodic detention (now no longer available in NSW):

> *69 Although the authorities speak of a two-stage process, it is preferable to step back a stage and to identify **a three-stage process** in passing a sentence of imprisonment to be served by*

way of periodic detention. Each step requires the Court to consider the objective gravity of the offence balanced against the subjective circumstances of the offender, but it is the first of those considerations that will principally determine which of the available sentencing alternatives the Court should adopt: Zamagias at paragraph 23.

*70 The **first question** to be asked and answered is whether there are any alternatives to the imposition of a term of imprisonment. Section 5 prohibits a Court from imposing a sentence of imprisonment unless the Court is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate. At this stage in the process, the only consideration is whether a sentence of imprisonment should be imposed, and not the manner in which that sentence of imprisonment is to be served: Zamagias at paragraph 25.*

*71 The **second step** is reached where the Court has determined that no penalty is appropriate other than a sentence of imprisonment. The Court is next to determine what the term of that sentence should be. This has been regarded as the first step of a two-step approach: Foster at paragraph 30; Zamagias at paragraph 26. The determination of the term is to be made without regard to whether the sentence will be immediately served or the manner in which it is to be served. This is because any of the alternatives available in respect of a sentence of imprisonment can only be considered once the sentence has been imposed. It follows that the term of the sentence cannot be influenced by what order might be made after the sentence has been imposed. The sentence cannot be increased because it is to be served by way of periodic detention: Wegener at paragraph 22; Zamagias at paragraph 26.*

***72 The third stage** is reached once the length of the sentence of imprisonment has been determined. The Court is then to consider whether any alternative to full-time imprisonment is available in respect of that term and whether any available alternative should be utilised. The availability of an alternative to full-time custody will generally be governed by the length of the term that has been determined, subject to the restrictions or preconditions imposed by the legislature on a particular sentencing alternative**. The appropriateness of an alternative to full-time custody will depend upon a number of factors; one of importance being whether such an alternative would result in a sentence that reflects the objective seriousness of the offence and fulfils the manifold purpose of punishment. The Court in choosing an alternative to full-time custody cannot lose sight of the fact that the more lenient the alternative, the less likely it is to fulfil all the purposes of punishment: Zamagias at paragraph 28.*

11. The three-staged process referred to by their Honours, Howie and Johnson JJ has consistently been adopted and applied to the imposition of ICOs under section 7 of the Act: *Blanch* at [87]-[86]; *Fangaloka* at [44]-[45]; *Wany* [17]-[21]; *Mandranis* at [22]-[28]; *Casella* at [62]. Although the considerations at the final stage have now changed with the introduction of Section 66 of the Act.

12. The adoption of this approach to ICOs was clearly and conveniently explained by her Honour Simpson AJA in *Mandranis* at [22]-[28]:

    *22 The **starting point in any sentencing exercise is the statutory maximum and any applicable standard non-parole period specified** in Pt 4, Div 1A of the Sentencing Procedure Act: see Muldrock v The Queen (2011) 244 CLR 120; [2011] HCA 39 at [27].*

The process thereafter was clearly and sequentially set out by Howie J in R v Zamagias [2002] NSWCCA 17. ***The next step is the application of ss 5 and 3A*** *of the Sentencing Procedure Act; s 5 precludes the imposition of a sentence of imprisonment unless, after all possible alternatives have been considered, the court is satisfied that no penalty other than imprisonment is appropriate; s 3A states the purposes for which a court may impose a sentence on an offender.*

23 This is not a case in which it could be said, in the application of s 5, that a penalty other than a term of imprisonment would be appropriate. No contrary submission was advanced.

24 Over the years, sentencing legislation has provided for a variety of options by which criminal conduct may be punished by non-custodial or partially custodial (for example, periodic detention, provided for by s 6, now repealed, of the Sentencing Procedure Act) alternatives. Non-custodial alternatives have included suspension of sentence (s 12, also now repealed). Currently, they include ICOs (s 7), community correction orders ("CCOs") (s 8) and conditional release orders ("CROs") (s 9). By s 7(1), a court that has sentenced an offender to imprisonment may make an order directing that the sentence (or sentences) be served by way of intensive correction in the community. By subs(2) of s 7 a court that makes an ICO is not to set a non-parole period for the sentence.

25 Because, as will be seen below, an ICO is a mode by which a sentence of imprisonment may be served, in contra-distinction to CCOs and CROs, it is not one of the alternatives required to be considered in the application of s 5: R v JCE [2000] NSWCCA 498; (2000) 120 A Crim R 18 at [15], as explained in Zamagias at [25]. Indeed, it would be logically wrong to do so, because s 7 proceeds on the premise that a sentence of imprisonment has been imposed. As it was put by McCallum JA in Wany v DPP [2020] NSWCA 318:

"An ICO is a way of serving a term of imprisonment; it cannot, at the same time, be an alternative to imprisonment" (at [18])."

26 Once s 5 has been applied, and satisfaction has been reached that no penalty other than imprisonment is appropriate, ***the next step is determination of the term of the sentence****. It is of considerable importance that this be done in the correct sequence because some statutory alternatives (of which an ICO is an example) have been available only where a sentence of imprisonment has been imposed, (in contrast to CCOs and CROs, each of which is stated to be an option available to be imposed "instead of" a sentence of imprisonment). That was also so in the case of suspended sentences under the then s 12, the subject of consideration in Zamagias.*

27Another development since the decision in Zamagias is the introduction, by s 53A, of aggregate sentencing (inserted into the Sentencing Procedure Act in 2010, with effect from 3 March 2011). By subs (1) of s 53A a court sentencing an offender for more than one offence may, instead of imposing separate sentences for each offence, impose a single aggregate sentence with respect to all, or two or more, of the offences.

28 The final step in the process is to consider the mode by which the sentence is to be served. *Currently, only two options are available – the sentence is to be served by way of full-time custody, or in the community by way of an ICO. Specific provisions apply where an ICO is under consideration or has been made. In circumstances where the court has made or is considering making an ICO, Pt 5 (ss 64 to 71) of the Sentencing Procedure Act applies.* ***By s 66(1), the paramount consideration in such a decision is community safety. By subs (2) of s 66, the court is to assess whether making the order or serving the sentence by way of full-time detention is more likely to address the offender's risk of re-offending. By subs (3) the court is also required to address the provisions of s 3A (Purposes of sentencing), any relevant common law principles, and any other matters the court considers relevant.***

13. In practical terms, the three staged approach to the consideration of whether to impose an ICO can be summarised as follows:

    1. A determination is to be made as to whether the 'section 5 threshold' has been crossed. That is that no other sentence other than a term of imprisonment is appropriate.

    2. If the Section 5 threshold is crossed, a determination is then to be made as to the length of the sentence of imprisonment to be imposed. At this stage, regard cannot be had to the mode in which the sentence will be served. A term of imprisonment cannot be extended due to the fact that the sentence may be served by way of an ICO.

    3. If the term of imprisonment is within the jurisdictional range of an ICO (2 years for a single offence or 3 years for an aggregate offence (section 68 of the Act)), a determination is then to be made as to the mode by which the sentence is to be served. This determination is to be made by way of reference to section 66 of the Act.

14. The determination of whether the Section 5 threshold is crossed (the first stage) and the length of the sentence (the second stage) is not within the scope of this paper. In short, the court will consider the objective seriousness of the offence, the subjective circumstances of the offender, and the presence of aggravating and mitigating factors in determining those two steps. This paper will however address the third and most important stage of the process.

THE JURISDICTIONAL RANGE OF INTENSIVE CORRECTIONS ORDERS

15. Section 68 of the Act imposes jurisdictional limits on the making of an ICO. Section 68 provides that a Court will not have jurisdiction to impose an ICO in the following circumstances:

    1. In respect of a single offence, where the duration of the term of imprisonment imposed for the offence exceeds 2 years: Section 68(1).

    2. In respect of an aggregate sentence for multiple offences, where the duration of the aggregate term of imprisonment imposed exceeds 3 years: Section 68(2).

16. In respect to a single offence, the jurisdiction limit is straightforward and speaks for itself. Notably, all sentences conducted in the Local Court concerning only a single offence, will fall

within the jurisdictional bounds of an ICO given that the Local Court cannot impose a sentence of more than 2 years for a single offence: *Criminal Procedure Act 1986* (NSW) s 267(2).

17. In respect to aggregate terms of imprisonment, some debate initially existed as to whether a court could impose an ICO if any of the indicative sentences constituting the aggregate sentence exceeded 2 years. It is however now accepted that it is irrelevant whether any indicative sentence for an offence within the aggregate sentence exceeds 2 years. So long as the aggregate sentence does not exceed 3 years, an ICO will be available: *Mustafa v The Queen* [2021] NSWCCA 164 at [103] per Rothman J ('***Mustafa'***); *R v Pullen* [2018] NSWCCA 264 at [83] per Harrison J ('***Pullen')***.

18. The initial debate in relation to this issue arose from the remarks of His Honour, Basten JA in *R v Fangaloka* [2019] NSWCCA 173 at [51] (***Fangaloka)***. However, the Court in *Mustafa* attended to correcting the position and what was in fact intended by His Honour Baten JA in *Fangaloka*.

19. On this issue, His Honour, Rothman J observed the following in *Mustafa* at [99]-[103]:

> *99 Moreover, the learned sentencing judge seems to contrast that which was said by this Court in Pullen to that which was said by Basten JA in Fangaloka. The two are not, on this aspect, inconsistent. Indeed, on this issue, the two are totally consistent.*
>
> *100 The passage extracted in the learned sentencing judge's Remarks on Sentence from the judgment of Basten JA may have been misinterpreted. The qualification in [51] of Fangaloka, to the effect that an ICO cannot be imposed where a single sentence exceeds 2 years, applies only to the case where individual sentences are being imposed and not an aggregate sentence.*
>
> *101 The reference by the sentencing judge to the comments of RA Hulme J may also disclose that those comments have been misunderstood. In Abel, [42] RA Hulme J was pointing out the anomaly in the Act, not the judgment in Pullen. Further, the reference to "total effective sentence" in Abel is a reference to sentences other than an aggregate sentence.*
>
> *102* ***An ICO, regardless of the length of any indicative sentence, may be imposed if the aggregate sentence does not exceed 3 years.*** *Lastly, in the present circumstances, an aggregate sentence of 3 years encompassing indicative sentences of 3 years and another of 3 months would be permissible under s 68(2) of the Crimes (Sentencing Procedure) Act.*
>
> *103 With respect to the learned sentencing judge, it is not accurate to confine the imposing of an ICO to an offender "who is to be sentenced for more than one offence pursuant to s 68(2) ... where an indicative sentence is greater than two years but less than three years" [43] (Emphasis Added). The length of the indicative sentence is irrelevant to s 68(2), as long as the aggregate sentence does not exceed 3 years. A sentence which is exactly three years, rather than less than three years, is amenable to an ICO.*

20. By way of observation, Section 68 seems to produce an absurd result whereby an offender who commits more than one offence is given a greater opportunity to remain in the community than a person who commits a single offence.

21. Take for example, two offenders who are charged with identical offences of supplying a commercial quantity of prohibited drug. Hypothetically, one of those offenders is additionally found to be in possession of $2000 for which the police also charge him/her for dealing with property that is reasonably suspected to be the proceeds of crime. While the proceeds of crime offence does very little, if anything, in terms of increasing the sentence that would otherwise be imposed, the Court in that case can impose an ICO for a period of up to three years, whereas the offender who was only charged with a single offence of commercial drug supply cannot receive an intensive corrections order if he is sentenced to a term of imprisonment that exceeds 2 years.

22. To make the above example good, all things being equal, let's say the offender who is charged with only the one offence of commercial drug supply is sentenced to a term of imprisonment of 2 years and 6 months for that offence. That offender cannot receive an ICO. However, take the second offender who is charged with both commercial drug supply and the proceeds of crime offence. Hypothetically, if he is given an indicative sentence of 2 years and 6 months for the supply offence and an indicative sentence of 3 months for the proceeds offence, and ultimately, an aggregate sentence of 2 years and 7 months. The second offender is eligible for an ICO despite receiving the exact same sentence for the supply offence, the only difference being that this offender committed an additional offence that the other offender did not.

23. An interesting situation also arises in circumstances where offences are placed on a Form 1. For the purposes of Section 68, an offence on a Form 1 cannot be taken into account for the purposes of concluding that there are two or more offences (See Section 53A of the Act). While in the past, it may have been beneficial to offenders to have related or less serious offences placed on a Form 1, in circumstances where doing so means that an offender only has one offence before the Court for sentence, the result of placing a second offence on a Form 1 might in fact be disadvantageous to the offender due to the fact that doing so will limit the court's ability to impose an ICO in circumstances where the sentence exceeds 2 years but is less than 3 years. This in some cases has caused offenders to withdraw their request for an offence to be dealt with on a Form 1, and the case of *Abel v R (2020) NSWCCA 82* provides an interesting read in that regard, particularly his Honour Justice Button's remarks at [80] – [84].

24. Another interesting situation is where a court refuses to impose an aggregate sentence for two or more offences, which then limits the availability of an ICO to a sentence of 2 years imprisonment. This occurred in the case of *Mustafa v R (2021) NSWCCA 164* where an offender was sentenced in relation to two offences. As opposed to sentencing the offender to an aggregate sentence (which is required by Section 68 of the Act to engage the upper jurisdictional limit), His Honour Townsden DCJ refused to impose an aggregate sentence and imposed individual sentences of 3 years for the one offence and 3 months for the other offences. However, both offences were made to run concurrently meaning that the total effective term of imprisonment was 3 years imprisonment. This meant that the offender was unable to receive an ICO.

25. The offender successfully appealed his sentence to the Court of Criminal Appeal where he was ultimately sentenced to an identical aggregate term of imprisonment to be served by way of an ICO. Importantly at [95] the Court held the following:

> *As already stated, the converse of the foregoing is also true. A judicial officer, who is sentencing an offender, must not structure the sentence, deliberately, for the purpose of*

avoiding the capacity to impose an ICO. The process must be a genuine determination of the appropriate sentence to be imposed, bearing in mind totality.

26. The final point to be made is the fact that an ICO can be imposed to take into account time which an offender has served in remand prior to being sentenced, without in fact reflecting that time in the sentence which is recorded.

27. The reason for this arises from Section 71(1) of the Act, which stated that an ICO must commence on the date on which it is made. There is accordingly no basis to backdate the starting point of an ICO to account for time that an offender has spent in custody. Of course, that would result in an unjust disposition if an offender, who had served time on remand but who was ultimately sentenced to an ICO, could not have the time served in custody taken into account on sentence.

28. This particular issue was determined by the Court of Criminal Appeal in the case of *Mandranis v R [20221] NSWCCA 97 (**Mandranis)*** at [56] – [61]:

    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.***

29. In delivering the lead judgement, her Honour Simpson AJA was of course mindful that the ultimate sentence imposed would be less than the sentence actually served by the offender, and more importantly her Honour in obiter recognised the potential that that such an approach may open sentences that exceed the relevant jurisdictional limits when such sentences are backdated to accommodate time served in custody. At [63] Her Honour said the following in relation to this point:

> *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.*

30. It is worth noting that her Honour Justice Adams in *Mandranis* expressed some reservation as to the above approach. Although equally her Honour did not determine the issue. At this stage, there does not seem to be any binding authority on this point specifically, however it is worth keeping an eye out for.

DOES THE COURT HAVE TO CONSIDER AN ICO?

31. The fact that a sentence falls within the jurisdictional limit does not in and of itself enliven an obligation on the sentencing court to consider the imposition of an ICO. The provisions of the Act do not impose such an obligation simply because that mode of imprisonment is available to an offender: *Fangaloka* at [60]; *Blanch* at [68]; *Khalil v R* [2022] NSWCCA 36 at [116].

32. His Honour, Basten JA held the following in *Fangaloka* at [59]-[60]:

> *59 In determining that Mr Pullen should be dealt with by way of an ICO, the sentencing judge had stated: [38]*
>
> *"In circumstances where the sentence is less than two years, I am required to consider whether it is appropriate that it be served by way of an intensive correction order."*

60 The basis for the stated obligation was not explained in the passage extracted in the judgment of this Court. However, ***there was no such express obligation under the provisions introduced in 2010, nor is there such an obligation expressed in the current provisions. If there were such an obligation, the Local Court*** *(where the power to impose imprisonment for an individual offence is limited to 2 years)* ***would be required to consider imposing a sentence by way of ICO in every case in which imprisonment was appropriate.***

33. His Honour's remarks were concurred with by the remainder of the bench in that case and confirmed by the Court in *Blanch* at [68] where his Honour, Campbell J stated the following at [68]:

> *"I wish to stress that I am not suggesting that in every case in which a short sentence of imprisonment is under consideration for an offence not excluded from Part 5 of the legislation by s 67, it is necessary for the sentencing judge to go through this process. For the reasons explained by Basten JA in Fangaloka (at [60]),* ***a sentencing court is not under an obligation in every case to explore this alternative. There must be some relevant material, which could include a cogent argument advanced by counsel, before the court to engage a requirement to consider the matter.*** *Basten JA said (extract omitted see Fangaloka at [60] (supra)).*"

34. The above statement of Campbell J in *Blanch* was cited with approval by McCallum J in *Wany* where her Honour stated the following at [52]:

> *"However, as explained by Campbell J in Blanch v R [2019] NSWCCA 304 at [68]-[69],* ***the obligation to consider making an ICO may be enlivened (as a requirement of practical justice if not a matter of legal duty) where a cogent argument is advanced for taking that course. There will be cases in which it will be open to the sentencing judge to reject such an argument without adjourning the proceedings to obtain a sentencing assessment report.*** *However, that is not the approach the judge took in the present case. It may be inferred that he was "considering" an ICO. As already noted, that consideration was governed by the provisions of Pt 5 which include s 66 (the provision referred to in the applicant's first ground for review)."*

35. Despite the fact that some of the above authorities have been appealed or overruled in particular respects, the above statements are still good law for this purpose.

36. Accordingly, practitioners should not assume that a sentencing court will consider the imposition of an ICO merely because the term of imprisonment imposed brings the sentence within the jurisdictional bounds of section 68. Instead, what a practitioner must do is make cogent and compelling submissions to the Court as to why an ICO should be considered. This paper will below briefly consider the matters that a practitioner should consider when preparing a sentence with the intention of making such a submission.

THE PROPER CONSTRUCTION OF SECTION 66

37. In the 2017 amendments, the current section 66 was introduced in Division 2 of Part 5 of the Act which provides as follows:

66 Community safety and other considerations

(1) Community safety must be the paramount consideration when the sentencing court is deciding whether to make an intensive correction order in relation to an offender.

(2) When considering community safety, the sentencing court is to assess 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.

(3) When deciding whether to make an intensive correction order, the sentencing court must also consider the provisions of section 3A (Purposes of sentencing) and any relevant common law sentencing principles, and may consider any other matters that the court thinks relevant.

38. Two substantial legal issues have arisen since the introduction of section 66:

    1. **Whether the failure to undertake the assessment in Section 66(2) amounts to jurisdictional error; and**

    2. **What is the correct interpretation of Section 66 in so far as it concerns:**

        a. **Whether Section 66 is facilitative or proscriptive.**

        b. **Whether Section 66 intended on making the provisions of Section 3A of the Act (the purposes of sentencing) and other sentencing provisions subordinate to the consideration of community safety.**

39. This paper will consider both of those issues separately.

<u>Does the failure to consider Section 66(2) amount to jurisdictional error?</u>

40. While this paper is not intended to canvass the topic of jurisdictional error, some explanation as to the concept of jurisdictional error is necessary for those who are unfamiliar with the concept.

41. The High Court of Australia in *Craig v The State of South Australia* [1995] HCA 58 gave an insightful explanation as to what is meant by the term 'jurisdictional error' at [12] where their Honours, Brennan, Deane, Toohey, Gaudron and McHugh JJ stated the following with agreement:

    12. Jurisdictional error is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of ***entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its functions and powers****. An inferior court would, for example, act wholly outside the general area of its jurisdiction in that sense if, having jurisdiction strictly limited to civil matters, it purported to hear and determine a criminal charge. Such a court would act partly outside the general area of its jurisdiction if, in a matter coming within the categories of civil cases which it had authority to hear and determine, it purported to make an order of a kind which it lacked power to make, such as an order for specific performance of a contract when its remedial powers were strictly limited to awarding damages for breach. Less obviously, an inferior court can, while acting wholly within the general area of its jurisdiction, fall into jurisdictional error* ***by doing something which it lacks authority to do****. If, for example, it is*

an essential condition of the existence of jurisdiction with respect to a particular matter that a certain event or requirement has in fact occurred or been satisfied, as distinct from the inferior court's own conclusion that it has, there will be jurisdictional error if the court or tribunal purports to act in circumstances where that event has not in fact occurred or that requirement has not in fact been satisfied even though the matter is the kind of matter which the court has jurisdiction to entertain. ***Similarly, jurisdictional error will occur where an inferior court disregards or takes account of some matter in circumstances where the statute or other instrument establishing it and conferring its jurisdiction requires that that particular matter be taken into account or ignored as a pre-condition of the existence of any authority to make an order or decision in the circumstances of the particular case.*** *Again, an inferior court will exceed its authority and fall into jurisdictional error* ***if it misconstrues that statute or other instrument and thereby misconceives the nature of the function which it is performing or the extent of its powers in the circumstances of the particular case. In the last-mentioned category of case, the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern (14).***

42. The errors which can be appropriately categorised as jurisdictional as opposed to an error occurring within jurisdiction are helpfully identified in the seminal case of *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; [2010] HCA 1 at [71]-[72]:

71 It is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error. Professor Aronson has collected authorities recognising some eight categories of jurisdictional error. It is necessary, however, to make good the proposition stated earlier in these reasons that the two errors that have been identified as made by the Industrial Court at first instance (and not corrected on appeal to the Full Bench) were jurisdictional errors. The Court in Craig explained the ambit of jurisdictional error in the case of an inferior court in reasoning that it is convenient to summarise as follows.

72 First, the Court (referring to Craig v South Australia (1995) 184 CLR 163) stated, as a general description of what is jurisdictional error by an inferior court, that an inferior court falls into jurisdictional error ***"if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist"*** *(emphasis added). Secondly, the Court pointed out that jurisdictional error* ***"is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its functions and powers"*** *(emphasis added). (The reference to "theoretical limits" should not distract attention from the need to focus upon the limits of the body's functions and powers. Those limits are real and are to be identified from the relevant statute establishing the body and regulating its work.)* ***Thirdly, the Court amplified what was said about an inferior court acting beyond jurisdiction by entertaining a matter outside the limits of the inferior court's functions or powers by giving three examples:***

the absence of a jurisdictional fact;

disregard of a matter that the relevant statute requires be taken to account as a condition of jurisdiction (or the converse case of taking account of a matter required to be ignored); and

misconstruction of the relevant statute thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case.

43. The first time that a Court was tasked to consider whether a failure by a sentencing court to consider section 66(2) of the Act in the sentencing exercise amounted to jurisdictional error was in the case of *Wany v Director of Public Prosecutions* [2020] NSWCA 318 ('***Wany***').

44. In concluding that a failure by a sentencing court to consider section 66(2) did amount to a jurisdictional error, her Honour McCallum JA (Simpson AJA agreeing, Meagher JA not deciding) stated the following at [67]-[68]:

> *67 It remains to consider the difficult question of whether the failure to consider the matter identified in s 66(2) amounted to jurisdictional error. Ms Mitchelmore submitted that a failure to take into account a provision of a sentencing law would not, without more, constitute jurisdictional error.* ***The question is whether the statute requires that matter to be taken into account "as a condition of jurisdiction" in the sense described in the second category of example given in Kirk at [72].*** *As already noted, it has been accepted that there is not a duty in every case where the sentence is less than two years to consider whether it is appropriate that it be served by way of an intensive correction order: Fangaloka at [60].* ***However, such a duty does arise whenever a cogent argument in favour of making an ICO is raised.*** *In such a case, the error could well be characterised as jurisdictional. Alternatively, such error may perhaps* ***more appropriately be characterised as a misconception as to the nature of the function that was being performed in the circumstances of the particular case (the third example given in Kirk).***
>
> *68 Mr Game noted that, in Kirk, both the description of the offence and what was regarded as a defence in the relevant legislation were regarded as being jurisdictional, as was the fact that the offence was determined not according to the rules of evidence, because the defendant was called as a witness by the prosecution.* ***In circumstances where Parliament has provided for different ways of serving a custodial sentence and has conferred power on the sentencing court to make the determination as to which should be adopted, I see no reason why the method of serving the sentence to be imposed should not be regarded as jurisdictional.*** *The language of the statute is clear. Community safety "must be" the paramount consideration. When considering community safety, the sentencing court "is to" make the assessment specified. As Basten JA explained in Fangaloka, that obligation "is not stated to be in derogation of the more general purposes of sentencing outlined in s 3A, nor in derogation of other relevant matters: s 66(3)" but it is mandatory.*

45. While *Wany* determined the issue, it was not long before the Court of Appeal in *Quinn v Commonwealth Director of Public Prosecutions* [2021] NSWCA 294 (**'*Quinn*'**) reconsidered the question. In *Quinn*, the Court was constituted by Leeming JA, Simpson AJA and Johnson J. His

Honour, Leeming JA wrote the primary judgement and held that *Wany* had been wrongly decided insofar as it concluded that a failure to consider section 66(2) amounted to jurisdictional error.

46. In reference to *Wany*, his Honour Leeming JA stated the following:

> *109 The statutory language of obligation in s 66(2), coupled with the statement that community safety "must be the paramount consideration" in s 66(1) is strong. But it does not follow that a breach of that obligation entails that the District Court's decision is not merely contrary to law, but that it discloses jurisdictional error.*
>
> *110 The critical point is whether the failure to adhere to a requirement imposed by statute is a condition of the court's jurisdiction. The reasoning in Wany does not address that point.*
>
> *111 Another way of making this point is to observe that the fact that a statute requires a court to consider some thing means that the thing is a mandatory relevant consideration in the sense stated by Mason J in Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24; [1986] HCA 40. Failure to do so means that the decision is susceptible to judicial review. It will disclose error of law on the face of the record. But s 176 of the District Court Act forbids review of a District Court's decision on an appeal for error of law on the face of the record.*
>
> *112 Mere failure by a court to comply with a statutory obligation does not of itself entail jurisdictional error, as well as error of law on the face of the record. As the High Court observed in Kirk, if the failure by a court to comply with the statutory obligation is to lead to jurisdictional error, then the statute must require that consideration as a condition of the court's jurisdiction.*
>
> *...*
>
> *118 Another way of making the point is that jurisdictional error is different from error of law on the face of the record. Inferior courts are authorised to decide questions of law wrongly. That is the point of the undoubted category of decisions in this country of non-jurisdictional error of law. It follows as a matter of principle that mere error of law on the face of the record is insufficient to amount to jurisdictional error. This Court said in Wang v Farkas (2014) 85 NSWLR 390; [2014] NSWCA 29 at [42]:*
>
> *"If every error of law constituted jurisdictional error, particularly in the case of a court such as the District Court, judicial review would transmogrify into an appeal for error of law, without regard to the requirement that certiorari is available only for error of law on the face of the record, and, in the case of a privative clause, only where an error is properly characterised as jurisdictional."*
>
> *...*
>
> *120 Further to the above,* ***I regard this Court as bound to hold that the disregard of something required by statute to be taken into account does not of itself amount to jurisdictional error. The qualifying words "as a condition of jurisdiction" in the formulation given in Kirk are not to be put to one side. It is not sufficient in order to reach a conclusion of jurisdictional error to find that a court has disregarded a matter***

that the relevant statute required be taken into account. It is necessary to reach the further conclusion that the taking into account of that matter was a condition of the court's jurisdiction. *It is to be recalled that the High Court stated in Craig and Kirk that a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction does not ordinarily involve jurisdictional error.*

47. Although Her Honour Simpson AJA had agreed with Her Honour McCallum JA in *Wany,* Her Honour reconsidered her concurrence in *Quinn*:

> *186* ***The flaw in the applicant's argument is that it assumes, wrongly, that the criteria stated in subss 66(1) and (2) override, or at least precede, all other considerations. The truth is that, logically, the subss 66(1) and (2) criteria come into play at the end, not the beginning, of the process.*** *If, in the opinion of the sentencing judge, any of the considerations in s 68, s 4B, or s 3A foreclose making an intensive correction order, subss 66(1) and (2) become otiose, and it is unnecessary for the sentencing judge to direct attention to them.*
>
> *187 In this case, it was the seriousness of the offending that brought the consideration of making an intensive correction order to an end. Once the primary judge concluded that the offending was too serious to be dealt with by way of a sentence served otherwise than by way of full time imprisonment, considerations of community safety (in the context of s 66) did not arise. It may be observed that s 66(1) requires community safety to be taken into account as the paramount consideration when a court is "deciding whether to make an intensive correction order". Where a court has concluded, having regard to the relevant material, that the seriousness of the conduct precludes such an order, there is no further decision to be made.*
>
> *188 There was no error, far less jurisdictional error, in the approach taken by the primary judge.*
>
> *...*
>
> *191 I acknowledge that the approach I have taken and the conclusions I have reached in these reasons are incompatible with the reasons of McCallum JA in Wany with which I agreed. On further reflection, that concurrence was misplaced. I have considered whether the views I have here expressed are inconsistent with those I expressed In Mandranis v R [2021] NSWCCA 97 at [50]-[51]. At present, I think that the two can be reconciled, although I might have expressed my conclusions in Mandranis differently. However, should others perceive any inconsistency, precedence should be given to what is contained in these reasons.*

48. While *Quinn* overturned *Wany,* it did not conclude the debate, and several weeks later, the same issue was before the Court in *Stanley v Director of Public Prosecutions* (NSW) [2021] NSWCA 337 ('***Stanley***') although, *Stanley* was heard before a five-judge bench.

49. Given that Stanley ultimately went to the High Court, it is unnecessary to elaborate on the Court of Appeal judgement save as to say that the plurality of the Court (Bell P, Basten, Leeming and

Beech-Jones JJA, with McCallum J dissenting) concluded that the assessment contemplated by section 66(2) of the Act was not a condition of the exercise of the discretionary power to impose an ICO and therefore, a failure to undertake that assessment did not amount to jurisdictional error. Their Honours also concluded that a failure to undertake the assessment did not lead to a judge fundamentally misconceiving their function thereby leading the judge into jurisdictional error.

50. In his Judgement, His Honour Beech-Jones held the following at [193] – [194]:

> *193 In relation to the second issue, like Bell P, I do not accept that the sentencing judge's failure to make the assessment referred to in s 66(2) of the Sentencing Act is a jurisdictional error. In that respect I agree with Quinn v Commonwealth Director of Public Prosecutions [2021] NSWCA 294 ('Quinn"). In reaching that conclusion, I note that Wany v Director of Public Prosecutions (NSW) (2020) 103 NSWLR 620; [2020] NSWCA 318 ("Wany") held to the contrary but, with respect, I am satisfied that that aspect of Wany was "plainly wrong" (Gett v Tabet [2009] NSWCA 76; "Gett**"). For my part, the critical aspect of the Sentencing Act that warrants that conclusion is that the outcome of any assessment under s 66(2) is not determinative of whether an ICO should or should not be made. Sub-section 66(2) is prefaced by the words "[w]hen considering community safety". In that sense the assessment referred to in s 66(2) is a component of the consideration of "community safety" dictated by s 66(1) to be a "paramount consideration". A statutory requirement to consider a particular matter is usually taken as requiring that it be "give[n] weight … as a fundamental element in making" the relevant determination (The Queen v Hunt; ex parte Sean Investments Pty Ltd (1979) 180 CLR 322; [1979] HCA 32] at 329 per Mason J). However, on any view the Sentencing Act does not make the outcome of the assessment in s 66(2) or the consideration of community safety mandated by s 66(1) determinative of a sentencing judge's consideration of whether or not make an ICO. By contrast, s 67 precludes the granting of an ICO when sentencing for particular offences.***
>
> *194 **The fact that a particular statutory provision is in this sense determinative is neither sufficient nor necessary to warrant a conclusion that it imposes a jurisdictional precondition to the exercise or non-exercise of a statutory power conferred on an inferior court. However, in this context the fact that it is not determinative is a very strong indicator that is not jurisdictional.** Save for Wany, none of the parties nor my research could locate any relevant authority in which a statutory provision which imposed a requirement on an inferior court to "consider" a particular matter has been held to impose a jurisdictional requirement that that consideration be undertaken (see Quinn at [120] and [128] per Leeming JA).*

51. Special leave was granted for *Stanley* to be heard in the High Court of Australia in relation to the issue of jurisdictional error.

52. The crux of the Appellant's argument in the High Court is best explained in the words of the appellant's learned Counsel as extracted from *Appellant's Submissions, Stanley v. Director of Public Prosecutions (NSW) & Anor (S126/2022) of 16 September 2022 at [42]-[43]:*

[42] Thus, Judge Williams 'power to impose an ICO was limited by: (1) that the Appellant had been sentenced to imprisonment, (2) that she had before her the information contained in a sentencing assessment report (as prescribed by cl 12A of the Crimes (Sentencing Procedure) Regulations 2017 (NSW)), and (3) the requirement to consider the matters listed in s 66, including the paramount consideration of community safety. As her Honour did not assess community safety in the manner mandated by s 66 of the CSP Act the exercise of the power to impose (or not impose) an ICO occurred without regards to the limits of her jurisdiction.

[43] Viewed in this manner, a failure to address the matters in s 66 may be characterised as jurisdictional error within the second category of example given in Kirk v Industrial Court of New South Wales (2010) 239 CLR 531 (Kirk) at [72] where s 66 operates as a condition on the exercise of jurisdiction. Alternatively, her Honour misconceived the function (the third category of example given in Kirk at [72]), including because she considered without reference to s 66 that it was a matter for her determination that community safety was the paramount consideration and then proceeded to assess it by reference to what had gone before rather than by reference to the future-focussed question of the Appellant's risk of reoffending.

53. The majority of the High Court (Gordon, Edelman, Steward and Gleeson JJ agreeing; Kiefel CJ, Gageler and Jagot JJ dissenting in separate judgments) determined that the error complained of by the appellant was a jurisdictional one within the second and third category of examples provided in *Kirk*: *Stanley v Director of Public Prosecutions (NSW)* [2023] HCA 3 at [47]-[118].

54. A concise explanation of what may fall within the scope of a jurisdictional error in an inferior court is conveniently provided at paragraphs [56]-[57] of the joint judgement of the majority. Relevantly, the Court held that an inferior Court will fall into error if it misconstrues the statute conferring its jurisdiction and thereby misconceives the nature of the function which it is performing or the extent of its powers in the circumstances of the particular case, and/or if it disregards some matter in circumstances where the statute conferring its jurisdiction requires that that particular matter be taken into account as a pre-condition of the existence of any authority to make an order: *Stanley v Director of Public Prosecutions (NSW)* [2023] HCA 3 at [57] referring to *Craig v South Australia* (1995) 184 CLR 163 at 177-178.

55. Their Honours formulated their reasoning in answer to the primary issue before the Court in the following terms at [79]-[82]:

79. ***The inclusion of s 66 in Div 2 of Pt 5, which, as has been observed, is headed "Restrictions on power to make intensive correction orders", is an indication that the legislature intended s 66 to operate as an enforceable limit upon power.*** *The Division heading is taken as part of the Act. As identified above, Div 2 contains several restrictions on the power to make ICOs. As a general proposition, Div 2 reveals a clear legislative intention that sentencing courts are not "islands of power immune from supervision and restraint" in respect of compliance with Div 2.* ***The requirement for the assessment under s 66 is a limit that operates at the third step in the sentencing process, that is, the limit affects the power to decide whether or not to make an ICO under s 7; it does not operate at the first and second steps of deciding whether to impose a sentence of imprisonment and, if so, the term of the sentence.***

80. A failure to undertake the assessment required by s 66(2) does not merely involve a mistake in the identification of relevant issues, the formulation of relevant questions or the determination of what was or was not relevant evidence. Rather, it is a failure to undertake a task that is mandated for the purpose of deciding whether to make an ICO by reference to community safety as the paramount consideration*. Such an error tends to defeat the evident statutory aim of improving community safety through provision of an alternative way to serve sentences of imprisonment by way of intensive correction in the community. The legislative importance of that aim is reinforced both by the characterisation of community safety as a "paramount" consideration and by the stipulation of the assessment task in s 66(2) to inform the consideration of community safety.*

81. The jurisdiction conferred by s 7 is thus to decide whether community safety as a paramount consideration together with the subordinate considerations in s 66(3) warrant full-time detention or intensive correction in the community. ***The s 66(2) assessment is integral to the function of choosing between full-time detention and intensive correction in the community in compliance with the requirement in s 66(1) to treat community safety as the paramount consideration.***

82. The question raised by this appeal is whether an error in undertaking this discrete task at the third step of the sentencing process can be characterised as one going to the jurisdiction of the sentencing court. There is no basis to assume that an error at that step is "necessarily" an error within the sentencing court's jurisdiction simply because it follows the imposition of a sentence of imprisonment. ***As explained, the jurisdiction to grant an ICO calls for a subsequent and separate decision to be made after a sentence of imprisonment is imposed. The fact that the sentencing court may have acted within jurisdiction at the first and second steps in imposing the sentence of imprisonment does not mean that the sentencing court will necessarily remain within jurisdiction when making the separate decision whether to order an ICO. Section 7 is not an inconsequential subsequent power after the sentencing process is complete. Section 66 is "more than one evaluative step amongst many" that the Act requires to be carried out after a sentence of imprisonment is imposed. Section 7 is itself a sentencing function that is to be exercised by reference to the paramount consideration in s 66(1). It is a discretionary power – which, when enlivened, comes with a corresponding duty – that fundamentally changes the nature of the sentence of imprisonment imposed from full-time detention to one of intensive correction in the community. The sentencing court may bring itself outside of jurisdiction if it misconceives the nature of that function or fails to comply with a condition on the jurisdiction when exercising the power. And, as will be seen, that is what the District Court did in this case.***

56. Accordingly, the failure to undertake the assessment in Section 66(2) will amount to jurisdictional error.

<u>Does Section 66 make community safety the "paramount consideration"?</u>

57. The Court of Criminal Appeal was first given the opportunity to construe Section 66 in the case of *R v Pullen* [2018] NSWCCA 264 ('***Pullen***'). In *Pullen*, Harrison J with Johnson and Schmidt JJ agreeing, favoured a facilitative construction of Section 66 after applying the general principles

of statutory interpretation. The relevant portion of his Honour Justice Harrison's judgment is extracted below:

> *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****.*
>
> *85 Section 66(3) also requires the Court to consider the purposes of sentencing under s 3A, any common law sentencing principles as well as any other matters that the Court thinks relevant. Section 3A provides: (omitted)*
>
> *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].***
>
> *88 This interpretation is supported by the second reading speech, in which the Attorney General said the following:*
>
> *"New section 66 of the Crimes (Sentencing Procedure) Act will make community safety the paramount consideration when imposing an intensive correction order on offenders whose conduct would otherwise require them to serve a term of imprisonment. Community safety is not just about incarceration. Imprisonment under two years is commonly not effective at bringing about medium- to long-term behaviour change that reduces reoffending. Evidence shows that community supervision and programs are far more effective at this. That is why new section 66 requires the sentencing court to assess whether imposing an intensive correction order or serving the sentence by way of full-time detention is more likely to address the offender's risk of reoffending": NSW Legislative Assembly, Parliamentary Debates (Hansard), 11 October 2017 at 2 (emphasis added).*
>
> *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 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.

58. *Pullen* essentially held that section 66 is to be read as a facilitative provision as opposed to a restrictive one. That is to say that it makes an ICO available to an offender subject to considerations rather than being proscriptive in the sense of when an ICO will not be available to an offender.

59. The practical effect of *Pullen* is essentially that it confirms all other factors to be assessed under section 66(2)-(3) at the final stage of the sentencing process (supra), are to be considered in subordination to community safety. This is not to say that a finding favourable to the offender concerning community safety will make the imposition of an ICO inevitable or mandatory but instead, may be a compelling factor which can counteract other less favourable findings. This is the consequence of community safety being the '*paramount*' consideration.

60. Following the judgement in *Pullen*, was a string of cases in the Court of Criminal Appeal which debated and conflicted the approach taken in *Pullen* to Section 66. A state of confusion where it was almost impossible to follow what the law was, with lower courts individually preferencing which authorities to follow.

61. The controversy surrounding the appropriate construction of section 66 was borne out of His Honour, Basten JA lead judgement in the case of *R v Fangaloka* [2019] NSWCCA 173 (***'Fangaloka')*** with which Johnson and Price JJ agreed. His Honour stated at [63]-[66] of his judgement:

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.

64 The first purpose of sentencing, identified in s 3A(a) of the Sentencing Act is "to ensure the offender is adequately punished for the offence." It is a fundamental principle of long-standing and requires that the sentence be reasonably proportional to the offending. [39] One would expect a clear statement or necessary implication of legislative intention for the 2018 amendments to alter that fundamental principle. Equally, there is no doubt that a sentencing court must have regard to the personal circumstances of the offender; but they should not divert the court from imposing adequate punishment, having regard to the objective gravity of the offence. [40]

> *65* ***The better view is that the legislature has, appropriately, acted upon the available evidence by requiring the court to have regard to a specific consideration, namely the likelihood of a particular form of order addressing the offender's risk of reoffending. That obligation, imposed by s 66(2), is not stated to be in derogation of the more general purposes of sentencing outlined in s 3A, nor in derogation of other relevant matters: s 66(3). Nor does the legislation limit the consideration of community safety to a means more likely to address the risk of reoffending; it merely identifies that as a mandatory element for consideration.***
>
> *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 s 3A, 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.***

62. Two propositions followed the judgement in *Fangaloka:*

    a. That Section 66 is restrictive rather than facilitative. In the sense that Section 66 restricted the imposition of an ICO unless a favourable finding was made in respect to the assessment in Section 66(2); and

    b. That Section 66 did not make considerations under Section 3A of the Act and other sentencing principles subordinate to community safety. Only that community safety was a mandatory consideration.

63. *Fangaloka* created a dichotomy in the law as to what the proper construction of section 66 was. This was despite the fact that no finding by any of the Justices in that case that the construction in *Pullen* was plainly wrong nor that there were compelling reasons not to follow it. Practically, this gave sentencing courts a choice when considering the suitability of an ICO as a mode of imprisonment. The sentencing court could apply either construction, *Pullen* or *Fangaloka,* without falling into error in the sense of acting outside the doctrine of *stare decisis*.

64. Less than a month after the Court of Criminal Appeal handed down its decision in *Fangaloka*, the Court, this time constituted by Bathurst CJ, Beech-Jones J (as his Honour then was) and Adams J handed down the decision in *Casella v R* [2019] NSWCCA 201 ('***Casella***'). In *Casella*, their Honours Beech-Jones and Adams JJ sought to address the tension surrounding the preferred construction of section 66 stemming from the judgement of Basten JA in *Fangaloka*.

65. While the Chief Justice did not find it necessary to comment on the issues raised by the decision in *Fanglaoka*. At [107] His Honour, Beech-Jones J extracted paragraph [63] from the judgement of Basten JA in *Fangaloka* and concluded the following at [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.*** *However, this matter was not the subject of argument and its correctness need not be resolved to determine this appeal. Given the findings of the sentencing judge and the Chief Justice, I am satisfied that imposing an ICO in this case gives effect to s 66.*

66. Her Honour, Adams J concurred with the remarks of Beech-Jones J (supra) at [111] of her judgement in the following terms:

> *Second, I agree with Beech-Jones J that s 66(2) of the Crimes (Sentencing Procedure) Act 1999 (NSW) ("Sentencing Act") on its face does not appear to necessarily preclude the imposition of an ICO unless the Court positively concludes that an ICO (as opposed to full-time custody) is more likely to address an offender's risk of reoffending…*

67. Although, the plurality of the Court of Criminal Appeal as it was constituted in *Casella*, clearly rejected the restrictive construction of section 66 purportedly proposed in *Fangaloka*, the issue was not determinative of the outcome in *Casella* and as such, did not constitute a binding rejection of the now defunct interpretation. However, it did leave the decision of the Court in *Fangaloka* open to doubt: see *Kennedy* at [81] per Payne JA and Fullerton J.

68. Accordingly, in the subsequent judgements of the Court of Criminal Appeal in *R v Kennedy* [2019] NSWCCA 242 ('***Kennedy***'); *Karout v R* [2019] NSWCCA 253 ('***Karout***') and *Blanch v R* [2019] NSWCCA 304 ('***Blanch***') all of which were handed down within months of *Casella*, the controversy surrounding the preferred construction of section 66 subsisted with no authoritative determinations on the issue being required for the purposes of arriving at a decision in any of those cases: see *Kennedy* at [81] per Payne JA and Fullerton J; *Karout* at [57]-[60] per Brereton J; *Blanch* at [52]-[53] per Campbell J.

69. Twelve months after the decision of the Court of Criminal Appeal in *Blanch*, the Court of Appeal was provided with the opportunity to weigh in on, and if required to, resolve the controversy, in the case of *Wany.* In *Wany*, it was however once again unnecessary for the Court to resolve the controversy however, in her Honour's lead judgement albeit in obiter, McCallum JA with whom

Meagher JA and Simpson AJA agreed, cited her approval of the facilitative rather than restrictive construction of section 66 at [61]-[62]:

> *61 As I will explain, there is a separate controversy as to the proper construction of s 66 but, on any view, it requires the sentencing magistrate or judge to form a view as to which method of serving the sentence of imprisonment (by ICO or in detention) is more likely to address an offender's risk of re-offending. The controversy arises from a suggestion offered by Basten JA in Fangaloka 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."*
>
> *62 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.*

70. In *Mandranis v R* [2021] NSWCCA 97 ('***Mandranis***') her Honour Simpson AJA with whom Garling and Adams JJ agreed, expressed a clear view as to what the preferred construction of section 66 should be at [49]-[54]:

> *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.*
>
> *...*
>
> *54 In my opinion the intention behind s 66(1) was that if community safety were endangered by allowing an offender to serve his sentence in the community, that consideration would override any and all others that would have supported the making of an ICO. Otherwise, community safety remains the "paramount consideration". One factor which must be taken into account in the consideration of community safety is the likelihood of reoffending by the offender, and which of an ICO and full-time detention would be more likely to address that risk. The latter is the specific purpose of s 66(2).*

71. Following *Mandranis*, the preferred construction of section 66 was beginning to take definitive shape in the superior court however, the remnants of *Fanglaloka* were still influencing the sentencing decisions of intermediate and lower courts in NSW. A sentencing court was in essence still at liberty to be informed by either construction.

72. The decision of *Mourtada v R* [2021] NSWCCA 211 ('***Mourtada***') came after *Mandranis* and provided his Honour Basten JA the opportunity to clarify the precise meaning of his statements in *Fangaloka*. Basten JA explained at [25]:

> *[T]here have been different views as to how s 66 requires "community safety" to operate.* ***In R v Fangaloka, I noted that on one reading of s 66, "unless a favourable opinion is reached" in assessing whether such an order would be more likely to address the risk of reoffending, "an ICO should not be imposed": at [63]. Subsequently, that has been taken to be the statutory construction preferred in Fangaloka. No doubt the judgment could have been more clearly expressed, but the view accepted at [65]-[66] did not include the proposition that a positive favourable opinion was required before an ICO should be imposed. Rather, a more nuanced***

approach was adopted to the weighing of the various considerations required to be taken into account under s 66. *At [66] the reasoning noted that the purpose of s 66 was "to ensure that the court does not assume that full-time detention is more likely to address a risk of reoffending than a community-based program of supervised activity." The sentencing court was not required to favour an ICO over full-time custody, but it was required to have specific regard to community protection and to bear in mind that short sentences were not necessarily effective as a means of deterring further offending.*

73. His Honour Basten JA in *Mourtada* clarified his position in regards to whether Section 66 restricted the imposition of an ICO unless a favourable finding was made in respect to the assessment in Section 66(2). His Honour made it clear that his remarks in that regard were incorrectly taken to support a proposition which His Honour did not intend: see *Mourtada v R* [2021] NSWCCA 211 at [25] per Basten JA.

74. However, while His Honour clarified that specific aspect of the judgement in *Fangaloka,* it remained unclear as to whether his Honour had re-considered whether community safety subordinates the other relevant sentencing considerations at the third stage of the process. His Honour's view in *Fangaloka* was that it did not.

75. On 21 December 2022, the Full Court of the Court of Appeal handed down its decision in *Stanley v Director of Public Prosecutions (NSW)* [2021] NSWCA 337 ('*Stanley*'). While the primary issue in contention in *Stanley* was whether a failure to undertake the assessment in Section 66(2) amounted to jurisdictional error, which this paper has discussed above, his Honour Justice Beech-Jones [196]-[196] in obiter made it clear that the facilitative construction in *Pullen/Mandranis* was the preferred interpretation to Section 66:

> *191 In light of the issues canvassed by some of the other judgments, it is necessary to note two further matters.*
>
> ***192 First, the relevant authorities concerning the proper approach to s 66 of the Sentencing Act that are binding in the Court of Criminal Appeal are Pullen and Mandranis.*** *To the extent that R v Fangaloka [2019] NSWCCA 173 especially at [60] and [66] to [68] (and its progeny) might be taken as departing from them then, in contrast to the approach taken in this case to Wany, they did not address Pullen in light of the principle that intermediate appellate courts should only depart from their previous decisions if they are of the view that the decision is "plainly wrong" and there are "compelling reasons" to do so (Gett at [273], [277] to [278], [281], [286] and [301]).*

76. While His Honour's remarks provided a most obvious response to the conflicting authorities, fortunately the High Court in determining the appeal in *Stanley,* dealt with this issue determinatively:

> *72. There was no dispute before this Court that s 66 imposes specific mandatory considerations upon the decision maker to make, or refuse to make, an ICO.* ***Section 66(1) requires the court to treat community safety as the "paramount consideration". In the context of s 66(2), community safety principally concerns the possible harms to the community that might occur in the future from the risk of reoffending by the offender. The issue is not merely the***

offender's risk of reoffending, but the narrower risk of reoffending in a manner that may adversely affect community safety.

73. *The identification of community safety in s 66(1) as the "paramount" consideration also indicates that s 66 is concerned with an aspect of the sentencing task that requires the sentencing court to have a particular and different focus at the third stage of the three-step process described earlier. When the court is deciding the discrete question whether or not to make an ICO,* ***community safety is the consideration to which other considerations are to be subordinated, although other considerations must or may be taken into account as prescribed by s 66(3).***

74. *Section 66(2) explains how the sentencing court must engage with the paramount consideration of community safety.* ***For the purpose of addressing community safety, s 66(2) requires the sentencing court to undertake a task of assessing the possible impacts of an ICO or full-time*** detention on the offender's risk of reoffending. Section 66(2) *gives effect to Parliament's recognition that, in some cases, community safety will be better promoted by a term of imprisonment served in the community than by full-time detention. Section 66(2) is premised upon the view that an offender's risk of reoffending may be different depending upon how their sentence of imprisonment is served, and implicitly rejects any assumption that full-time detention of the offender will most effectively promote community safety.* ***Thus, s 66(2) requires the sentencing court to look forward to the future possible impacts of the sentence of imprisonment, depending upon whether the sentence is served by way of full-time detention or by way of intensive correction in the community****.*

75. The assessment required by s 66(2) is not determinative of whether an ICO may or should be made*. To the contrary, as is plain from s 66(3),* ***the assessment is required for the purpose of addressing community safety as the paramount, but not the sole, consideration in deciding whether or not to make an ICO****. Thus, the power to make an ICO requires an evaluative exercise that treats community safety as the paramount consideration, with the benefit of the assessment mandated by s 66(2). In that respect, the nature and content of the conditions that might be imposed by an ICO will be important in measuring the risk of reoffending.***

77. In brief, the following is the state of the law in respect to the correct interpretation of Section 66:

1. Section 66 is facilitative and not restrictive.

2. At the third stage of the process, in determining the mode of imprisonment, the paramount consideration is community safety, and community safety derogates the other sentencing considerations at this stage of the process.

CONDITIONS THAT CAN BE IMPOSED AS PART OF AN ICO

78. The law requires the Court to consider the imposition of both mandatory and additional conditions as part of an ICO.

The mandatory conditions

79. Section 73(1) of the *Act* states that a sentencing Court **must** impose the standards conditions of an ICO.

80. Section 73(2)(a) and (b) outline the standard conditions of an ICO as follows:

> *(a) a condition that the offender must not commit any offence,*
>
> *(b) a condition that the offender must submit to supervision by a community corrections officer.*

Additional Conditions

81. Subject to Section 73A(1A), the Court, pursuant to section 73A(1), must also impose **at least one of the additional conditions** referred to in s 73A(2). The additional conditions specified are as follows:

> *(a) a home detention condition,*
>
> *(b) an electronic monitoring condition,*
>
> *(c) a curfew condition imposing a specified curfew,*
>
> *(d) a community service work condition requiring the performance of community service work for a specified number of hours (not exceeding 750 hours or the number of hours prescribed by the regulations in respect of the class of offences to which the relevant offence belongs, whichever is the lesser),*
>
> *(e) a rehabilitation or treatment condition requiring the offender to participate in a rehabilitation program or to receive treatment,*
>
> *(f) an abstention condition requiring 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.*

82. Section 73A(1A), provides that the Court is not required to impose an additional condition if the Court is satisfied there are exceptional circumstances.

83. Importantly, Section 73A(1) does not limit the number of additional conditions that may be imposed by the Court. Rather, it imposes an obligation on the Court to impose *at least* one additional condition.

84. Section 73B(1) of the *Act* also allows the Court to impose any other condition outside those prescribed in s73A(2). Such conditions can be specifically tailored to meet a particular offender's case in mitigating their risk of re-offending.

PRACTICAL CONSIDERATIONS FOR LAWYERS

85. The following are some of the matters that lawyers should have regard to when preparing sentences in which a term of imprisonment is anticipated:

1. When negotiating with prosecuting authorities, lawyers should consider whether seeking the withdrawal of an ancillary offence (or placement of that offence on a Form 1) is in their client's best interests having regard to the fact that having two substantive offences before the Court can allow the Court to consider imposing an ICO where the term of imprisonment is up to three years, as opposed to two years for a single offence.

2. Practitioners should consider the facts of the case and their client's background, and attempt to anticipate the risks that their client may be suggested to pose to community safety. In this regard is also important to understand the reasons for offending.

   Once the potential risks are identified, practitioners should ensure that their clients engage in early and appropriate treatment to address those risks. This can include:

   a) Drug and alcohol rehabilitation.
   b) Counselling.
   c) Psychotherapy.
   d) Domestic Violence Courses.
   e) Re-engagement with family and community.
   f) Re-engagement with religious institutions.
   g) Enrolment in study.
   h) Employment.
   i) Driving rehabilitation programs.
   j) Addictions courses, such as for gambling.
   k) Removal of past negative associations.
   l) Change of geographical location.

   Demonstrated rehabilitation can go a long way in addressing the risk of re-offending. In *Standford v R (2007) NSWCCA 73*, the Court concluded that personal deterrence and the **protection of the community had little if any part to play** in the determination of an appropriate sentence, where there was demonstrated rehabilitation.

   More recently, in Hyunwook v R (2010) NSWCCA 148, the Court stated at [32]:

   > *"... The profession ought to be aware, when giving advice to persons charged with a criminal offence,* ***that actions speak louder than words.***

   Most importantly, it is again worth noting that the assessment in Section 66(2) is a forward-facing assessment, as per the plurality in the High Court in the case of *Stanley:*

   > *In the context of s 66(2), community safety principally concerns the possible harms to the community that might occur in the future from the risk of reoffending by the offender.*

In undertaking the assessment in Section 66, demonstrated rehabilitation is a substantial factor that would weigh in favour of a positive assessment under Section 66(2).

3. Consider what evidence you will need to establish the rehabilitation that your client has undertaken and importantly the safeguards that those around your client are willing to put in place to ensure that he or she does not re-offend.

   Practitioners in this regard should be prepared to do more than simply tell their client that they need an apology letter and some references leaving it to their client to work out the contents of that material. A simple way of ensuring that all the relevant material is before the Court is as follows:

   a) Spend the time to ask your client questions about their history, their childhood, their relationships, their offending, their attempts at rehabilitation, their support networks, and their motivations. It is often overlooked as to how important this step is in preparing a sentence. Many offenders who come before the Court are either embarrassed to reveal such matters or do not appreciate the importance of these matters in a sentence.

   b) Having obtained all the relevant information from the client, seek permission to talk to other sources that might corroborate the information that your client has given you. Speak to family members, extended relatives, friends, employers, and other relevant persons. Corroborative evidence can go a long way in supporting your client's case.

      Additionally, the importance of familial supervision and support cannot be understated, particularly in regards to the risk of re-offending. The court can take a great deal of comfort in knowing that there are law-abiding citizens who will support, supervise, and monitor the offender through their rehabilitation.

   c) Once in possession of all the information, take the time to write to your client and explain to them the documents that you require them to obtain, and the topics and issues that you want those documents to discuss. Often, the more guidance you provide to your client, the better the material they produce.

   d) When engaging with experts such as psychologists, spend the time to identify the issues that you want them to discuss with your client. It is a disservice to your client to simply provide a psychologist with a fact sheet and criminal history and expect them to figure it out. Assist your client and the expert by identifying the relevant issues that need to be considered. I have found that the quality of expert reports is substantially improved when experts are given proper guidance and assistance.

   e) Where possible, attempt to obtain objective evidence of your client's rehabilitation, particularly for drug and alcohol abstinence. One example is by obtaining hair follicle testing to prove abstinence.

   f) Obtain objective evidence wherever possible to support your client's attempts at rehabilitation. Ask for treating professionals and treating programs to provide your client with written confirmation of attendance.

g) If your client has been subject to onerous bail conditions, prepare an easy-to-understand chronology of the bail conditions. In my view, an offender's compliance with onerous bail conditions over a substantial period of time, can support a submission that the offender is capable of complying with court orders and living a crime free life.

h) Consider the conditions that you seek to propose as part of the intensive corrections order. Do not just leave this as a matter for the Court to determine. As per the High Court in *Stanley:*

"the nature and content of the conditions that might be imposed by an ICO will be important in measuring the risk of reoffending."

FREQUENTLY ASKED QUESTIONS

Is an ICO an alternative to imprisonment?

No. It is an alternative mode of imprisonment. An ICO is still a prison sentence: see *R v Pogson; R v Lapham; R v Martin* [2012] NSWCCA 225 at [35]; *Wany v DPP* [2020] NSWCA 318 at [18].

Is an ICO available for all offences?

No: Section 67 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) excludes certain offences from having an ICO imposed.

When is an ICO available to my client?

An ICO is available to your client in the following circumstances:

1. They have been sentenced to a term of imprisonment for an offence not excluded by section 67 of the Act.

2. The term of the sentence is less than 2 years for a single offence and no more than 3 years for an aggregate sentence: see section 68 of the Act.

3. In the case of domestic violence offences, the Court is satisfied that the victim and any person with whom the offender is likely to reside, will be adequately protected: see section 4B(1) of the Act.

4. A relevant assessment report has been obtained in relation to the offender unless the Court is satisfied that there is sufficient information before it to justify the making of an ICO without it: see sections 17D(1)-(1A) of the Act.

Can ICOs be imposed for serious offences?

The fact that an offence is serious does not preclude the making of an intensive corrections order. Parliament specifically determined to exclude certain offences pursuant to Section 67 of the Act. Parliament additionally limited the period of imprisonment to which an ICO could apply as per Section 68 of the Act. Parliament however did not exclude the imposition of an ICO simply because an offence is serious. If that were the case, that would have been reflected in the legislation.

In *Wany* her Honour Justice McCallum stated the following at [5] in respect to the availability of Intensive Corrections Orders for serious offences:

> *"It follows as a matter of logic that the mere fact that an offence is serious enough to warrant the imposition of a sentence of imprisonment cannot of itself preclude the making of an ICO. The introduction of the ICO provisions reflected an acknowledgment that, in some cases, serving a custodial sentence by intensive correction in the community would better serve the objects of sentencing than removing the Offender from the community and keeping him or her in gaol.*

The view posed in *Wany* is consistent with the fact that Courts do not approach the delicate task of sentencing with the rigid application of penalty. In this regard, the remarks oh His Honour Justice Kirby in *Dinsdale v The Queen [2000] HCA 54; 202 CLR 321,* at [68] come to mind:

> *"...But there is no absolute rule. Each case must be judged on its own facts. The adoption of a blanket rule would itself be an error of sentencing principle. A discretion must be left to permit those with the responsibility of sentencing to take into account the peculiar circumstances of the case, any exceptional circumstances affecting the prisoner, and in some cases the prisoner's family, or some feature of the matter that reasonably arouses a judicial decision that a measure of mercy is called for in the particular case.*

And additionally, the remarks of His Honour Chief Justice Spigelman's in *R v Henry (1999) 106 A Crim R 149*, at [11]:

> *"Paramount amongst these is the achievement of justice in the individual case. To see the sentencing process as involving no more than stern punishment for each Offender is not merely simplistic; it damages the public interest. A sentencing process which is seen by the public merely as draconian and not just will lose the support of those whom it is designed to protect. If a sentencing process does not achieve justice, it should be put aside. ...if justice is not individual it is nothing…"*

Once stages 1 and 2 of the sentencing process are complete, and an ICO is available, the paramount consideration for the Court at that stage is community safety, and more specifically whether an ICO or full-time detention is more likely to address the risk of re-offending, however not in a general sense, but the narrower risk of reoffending in a manner that may adversely affect community safety.

Will the Court automatically consider an ICO?

No. A cogent and compelling argument must be made to the Court to enliven a consideration of an ICO: see *Fangaloka* at [60]; *Blanch* at [68]; *Khalil v R* [2022] NSWCCA 36 at [116].

Does the Court have to consider all the sub-provisions of section 66?

Yes. Subsection (1) provides the "paramount consideration" for the Court which must be informed by the assessment required by subsection (2) (this is the effect of the High Court's decision in *Stanley*) and the factors required by subsection (3).

Can an ICO be applied retrospectively?

No. An ICO commences from the date on which it is made: see section 71 of the Act. Although, the length of an ICO can be reduced to take into account time that is spent in custody. The Court in *Mandranis* dealt with this issue at [55] – [63]. The Court specifically held the following at [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.*

What are the mandatory requirements of an ICO?

All ICOs are subject to the standard conditions: see section 73 of the Act. In addition, an ICO must also involve at least one additional condition: see section 73A of the Act.

What are the consequences of a breach for my client?

The consequences of a breach are contained within sections 163(2) and 164(2) of the *Crimes (Administration of Sentences) Act 1999* (NSW). The former applies to the Commissioner of Community Corrections, the latter applies to the Parole Authority.