

# Intensive Corrections Orders in the District Court & Walama List Update

Judge Warwick Hunt

Public Defenders Conference 2024



What to think about when you are  
seeking an Intensive Corrections  
order in the District Court

# Preliminary

- Start your thinking in the Local Court *before* charge certification.
- Having more than one State or Commonwealth offence, even if on a s. 166 certificate may be important.
- If relevant, having more than one offence to justify an aggregate sentence needs to be considered.
- Is it possible to negotiate facts to potentially exclude/limit issues that will evoke judicial concerns about community safety specifically?
- Utilitarian discounts assume real importance in getting to a 2 year or 3 year aggregate sentence to permit consideration of an ICO. Almost always better to plead with a disputed facts issue to be determined in the District Court and preserving a 25% statutory discount than being stuck with 5-10% after negotiating a plea in the District Court.
- Getting in first – the virtues of being the initial offender to be committed for sentence.



# Evidence

- Gathering evidence to have the subjective case do as much work as possible.
- *Bugmy* and *De La Rosa* considerations and the evidence to sustain submissions concerning the reduction of moral culpability are both very important, where available.
- Bugmy Bar Book executive summaries and evidence of dysfunction. These considerations are not limited to First Nations offenders.
- Use credible experts. Good psychologists and psychiatrists can usually opine about what is available in the community and what is *not* available in custody – relevant to the addressing the risk of reoffending test in s. 66(2) C(SP) Act.
- Highlight tailoring ability of Additional Conditions on an ICO to address protection of the community *of* the inability to mandate parole conditions.
- Always at least consider calling your client or otherwise oral evidence from someone close.



# Written submissions

- Executive summaries – point to where you want to end up.
- Don't put all your eggs in one basket – address length of sentence and/or aggregate sentence first: *Zamagias*. Always address special circumstances in case sentencing judge is against you on ICO or the length of the proposed sentence does not permit consideration of ICO.
- Address the legislative tests at ss 66 (1) and (2). Balance the protection of the community with the balance of the s. 3A considerations.
- What is the evidence that the risk of reoffending is better addressed by a sentence served in the community than in full time detention? Set it out.



# Authorities

*Stanley v Director of Public Prosecutions* [2023] HCA 3

Three stage process:

1. Arrive at an appropriate sentence having regard to all the objective and subjective features of the case, considering all the s. 3A purposes of sentencing.
2. If the length of the sentence and the circumstances of case properly raise consideration of ICO, a court is obliged to consider s. 66(1) and (2).
3. Consideration of community safety being paramount to other s. 3A considerations at this stage, how is the question posed by s. 66(2) properly answered.



# Authorities

- *Pullen* important statements of principle that have survived *Fangaloka etc* and *Stanley*.
- *R v Chan* [2023] NSWCCA 206 is a recent decision of N Adams J regarding the correct steps to take in imposing an ICO in a Federal matter – address these steps in your written subs.
- Controversy regarding the approach to be adopting in considering pre-sentence custody, pre-bail remand time and quasi custody in arriving at the ultimate sentence to be imposed.
- *Mandranis* and the cases that follow it. *DG (No 1) v R* – what it stands for and issues to be ventilated on special leave application.
- Consider other earlier CCA authorities inconsistent with *DG (No 1)*; *Pulitano v R* [2010] NSWCCA 45 at [20] and *R v Lette* (2001) 125 A Crim R 37 at [29].



# Helpful Recent Articles

- Judicial Officers Bulletin Vol 35 No 8 published September 2023
- Contains two very helpful articles relative to this topic
- *Intensive Corrections Orders in NSW after Stanley* - Justice N Adams reviews authorities in NSW CCA since *Stanley* including n referred to earlier.
- *Intensive Corrections Orders – imposition, revocation and reinstatement* – The Honourable Geoffrey Bellew SC, Chairperson of NSW State Parole Authority



# What do you really want?

- Careful consideration of whether an ICO is either achievable or in the client's best interest?
- Competing breach considerations re ICO and parole.
- Impact of real credit for remand time served.
- Consider seeking a creative combination of sentencing dispositions.



Walama List Update

Therapeutic Justice  
in Action

# Criminal Practice Direction 26

Clause 4 provides:

The aims of the Walama List are to:

- (a) reduce the risk factors related to re-offending by Aboriginal and Torres Strait Islander offenders;
- (b) reduce the rate of breaches of court orders by Aboriginal and Torres Strait Islander offenders;
- (c) increase compliance with court orders by Aboriginal and Torres Strait Islander offenders;
- (d) reduce the overrepresentation of Aboriginal and Torres Strait Islander persons in custody in NSW;
- (e) increase Aboriginal and Torres Strait Islander community participation and confidence in the criminal justice system; and
- (f) facilitate a better understanding of any underlying issues which may increase the likelihood of re-offending.



# Criminal Practice Direction 26

Clause 5 provides:

The Walama List will seek to achieve these aims by:

- (a) enabling Aboriginal and Torres Strait Islander community participation in the court process and embedding Aboriginal and Torres Strait Islander narratives in the sentencing process;
- (b) utilising culturally appropriate programs and supports to address needs and risk factors that may impact on an offender's continued involvement with the criminal justice system; and
- (c) facilitating continuous court monitoring of appropriate therapeutic interventions to address identified needs and risk factors.



# How the List works in practice

- Walama List Judge sits with two Aboriginal or Torres Strait Islander Elders of Respected Person, eligible participant and family and stakeholders including specially trained defence and prosecution advocates, dedicated Community Corrections officer, caseworkers, Justice Health and NDIS personnel.
- Walama List Case Plan developed after intensive Sentencing Conversation.
- Monthly Case Plan Conversations to “check in” on developments regarding the Case Plan and develop next steps.
- Participant is sworn at each sitting of the Walama List,
- Release and detention applications, exclusion and breach hearing and ultimately sentence all determined accordingly to legislation and principle by Walama List Judge sitting alone and robed



# Evaluation

- Randomised ballot to determine which eligible offenders are balloted into Walama List or not to create two groups for statistical evaluation. Once only chance to be balloted in or not.
- Quantitative evaluation will take a long arc for meaningful results.
- Qualitative evaluation underway – capturing a range of benefits beyond structural criminal justice measures. Health, cultural connections, child protection, housing, NDIS, education and family.
- Anecdotal impressions of stakeholders, participants and observers.



# Anecdotal impressions

- Harnessing therapeutic engagement and culturally safe stakeholders.
- The protective power of connection, culture and family.
- Outcomes beyond or alongside traditional criminal justice outcomes.
- Immeasurable outcomes.

