



Justice

Regulatory impact statement

Criminal Procedure Regulation 2017



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1 Why is the Regulation being reviewed?

The Criminal Procedure Regulation 2010 (**the existing Regulation**) sets out the required procedures in various stages of criminal proceedings. The existing Regulation specifies court costs levy, fees payable in court proceedings, evidentiary matters and offenders' eligibility and participation in intervention programs.

The *Subordinate Legislation Act 1989* provides for regulations to have a limited life. In most cases, regulations are automatically repealed after five years. When a regulation is due for repeal, the responsible agency must review the regulation, its social and economic impacts, and the need for the regulation. The agency must then make a decision about whether the regulation should be remade. The results of this review are required to be published in a Regulatory Impact Statement (**RIS**) and submissions invited from the public.

This RIS proposes that the existing Regulation be remade under the regulation-making power set out in s 347 of the *Criminal Procedure Act 1986* (**the Act**).

2 Approach taken in this Regulatory Impact Statement

The RIS first considers the objectives of proposed Criminal Procedure Regulation 2017 (**the proposed Regulation**). The RIS then examines the following options:

- allow the existing Regulation to lapse
- remake the existing Regulation without change, or
- remake the existing Regulation with changes.

3 Submissions

Submissions about the proposed Regulation can be made to:

Criminal Procedure Regulation Review
Director, Offender Strategy
Justice Strategy and Policy
NSW Department of Justice
GPO Box 31
Sydney NSW 2001

Submissions can also be made via email to policy@justice.nsw.gov.au.

If you are deaf, or have a hearing impairment or speech impairment, please contact us through the National Relay Service:

- TTY users phone 133 677 then ask for (02) 8061 9222
- Speak and Listen users phone 1300 555 727 then ask for (02) 8061 9222

- Internet relay users connect to the NRS (www.relayservice.gov.au) and then ask for (02) 8061 9222

The final date for receipt of submissions is **26 July 2017**.

Copies of the draft Criminal Procedure Regulation 2017 and this RIS are available from the Department of Justice website at www.justice.nsw.gov.au or by emailing jsp.enquiries@justice.nsw.gov.au.

The Act and the existing Regulation can be accessed at www.legislation.nsw.gov.au

4 Objectives of regulatory proposal

The objective of the proposed Regulation is to repeal and remake the existing Regulation with changes. The proposed Regulation would retain without change most provisions in the existing Regulation and provide updated provisions about the following intervention programs:

- the Circle Sentencing Intervention Program (Circle Sentencing)
- the Traffic Offender Intervention Program (TOIP)

Recent reviews of Circle Sentencing and TOIP by the Department of Justice examined the existing structures and practices of the programs, including the existing Regulation, to identify necessary changes to enable more effective management and to allow the programs to meet their objectives. It was recommended that:

In relation to Circle Sentencing, the Regulation should:

- remove regulatory barriers to the efficient running of the Program.

In relation to the TOIP, the Regulation should:

- remove regulatory barriers to the efficient running of the Program, and
- better align with existing practices, which work well to facilitate referrals to the Program

Further information about Circle Sentencing and TOIP are in Parts 4.1-2 of this document.

The proposed Regulation retains other provisions, with minor updates only. Further information is in Parts 4.3-4.7.

4.1 Circle Sentencing Intervention Program

Circle sentencing is based upon the traditional practices conducted by Indigenous communities in Canada and was reintroduced in 1992 in the Yukon Territory and other Canadian communities, before being adopted in the United States in 1996.¹ Circle sentencing places the sentencing court in a community setting in order to achieve the following goals:

- empowering victims, community members, families and offenders by giving them a voice and a shared responsibility in finding constructive resolutions
- addressing the underlying causes of criminal behaviour, and
- building a sense of community and its capacity for resolving conflict.²

Circle sentencing is based on the idea of restorative justice, based on the premise that crime causes harm to people, to relationships and to the community; that it is not simply committed against the state.³ Restorative justice processes provide an opportunity for 'active participation by victims, offenders and their communities',⁴ a departure from the passive roles offered to them by the traditional criminal justice system. The availability of restorative justice programs at all stages of the criminal justice process was emphasised the *2002 UN's declaration of restorative justice principles*.⁵

The Circle Sentencing Program was established on a pilot basis in Nowra in 2002. The program has steadily expanded and currently circle sentencing is operating in 7 locations (Nowra, Dubbo, Kempsey, Nambucca / (Macksville), Lismore, Walgett, Mt Druitt) with the capacity of holding 168 circle sentencing sessions each year. There are currently 20 Aboriginal Community Justice Groups (ACJG) with 17 coordinators.⁶

A magistrate and community members sit in a Circle. Local Aboriginal people, commonly Elders, are included in the sentencing process with the objectives of improving the Aboriginal community's confidence in the criminal justice system, and of addressing reoffending.

¹ Bazemore, Gordon, and Mark Umbreit. "A Comparison of Four Restorative Conferencing Models". *Juvenile Justice Bulletin* (2001).

² Ibid, p6.

³ Strang, Heather. *Restorative justice programs in Australia*. A Report to the Criminology Research Council. Canberra: Australian Institute of Criminology (2001).

⁴ Van Ness, Daniel W., and Karen Heetderks Strong. *Restoring justice: An introduction to restorative justice*. Routledge (2014).

⁵ *Basic principles on the use of restorative justice programmes in criminal matters*, ECOSOC Res. 2000/14, U.N. Doc. E/2000/INF/2/Add.2 at 35 (2000).

⁶ Aboriginal Services Unit, Performance and System Design Branch, Justice Strategy & Policy, Department of Justice, 2017.

The Circle sits in a closed session at a location outside the courtroom environment, and its function is to:

- determine an appropriate plan for the offender’s treatment or rehabilitation
- recommend an appropriate sentence, and
- provide support or other assistance to the offender in completing the program or any intervention plan arising out of it together with any other functions that may be conferred on the group by regulation.

While past studies have not confirmed the impact of circle sentencing on reducing re-offending rates, the key purposes of Circle Sentencing are to reduce perceptions of cultural alienation, ensure that sentencing orders are appropriate to the cultural needs of Aboriginal and Torres Strait Islander offenders and to better educate judges about the needs of Aboriginal and Torres Strait Islander offenders.⁷

4.2 Traffic Offender Intervention Program (TOIP)

TOIP has formally been available in the Local Court since 2008. Before TOIP was formalised as a declared intervention program, traffic offender programs existed in various Local Court areas. The Secretary of Department of Justice approves courses for the program and issues guidelines.⁸

TOIP aims to provide referred traffic offenders with the necessary skills and information needed to develop positive attitudes to driving and safe driving behaviours. A person is eligible to participate in TOIP if he/she:

- pleads guilty to, or has been found guilty of a traffic offence
- has not yet been sentenced, and
- has agreed to participate in the program.

An offender may self-refer to TOIP, or be referred by their defence lawyer or the Local Court.⁹ The court must be satisfied that the person is suitable for the program.

The participant is required to adhere to the standard requirements of the order as well as any additional conditions imposed by the course provider.

Due to insufficient data, it is not possible to make any assessment of whether TOIP is effective in reducing re-offending.¹⁰ However, the general feedback from

⁷ *Law Reform Commission Report on Sentencing* (2011)

⁸ *Ibid*, p355

⁹ *Operating Guidelines, TOIP*

¹⁰ P Rourke and C Jones, “Risk of Reconviction among Traffic Offenders who Commence the Blacktown; Traffic Offender Program, Bureau Brief No 81” NSW Bureau of Crime Statistics and Research, (2012), p7.

consultations with key stakeholders is that the program gives offenders greater insight into their offence and is supported.¹¹

4.3 Processes for Criminal Proceedings and Fees

The Regulation prescribes certain procedural requirements, including:

- listing of criminal proceedings in the courts
- timeframes for submitting transcripts from proceedings to the Director of Public Prosecutions
- applying to stay an indictment and requirements on notices of appearance and readiness
- court costs levy and fees, including the persons by and to whom fees are payable, when fees are due, exemptions and waivers
- the court levy that government agencies and statutory bodies are required to pay
- fees payable to the court for applications to the court relating to criminal proceedings (e.g. to commence proceedings)
- who can commence proceedings, and
- various forms to complement sections in the Act (e.g. for notice of intention to adduce evidence of substantial impairment, statement of reasons for excusing a spouse from giving evidence in a domestic violence case).

Court fees are subject to increases on 1 July of each year. The process of reviewing fees has already occurred for the 2017-18 financial year, and involved consultation with Heads of Jurisdiction and the legal profession.

The statutory review of the *Criminal Procedure Amendment (Court Costs Levy) Act 2013* is currently underway. The levy as prescribed by Part 2A of the Regulation may be considered in the review.

4.4 Adducing Evidence of Recorded Interviews with Vulnerable Persons

Part 5 requires a prosecuting authority to notify the accused if they are adducing evidence of a previous representation by a vulnerable person by means of a recorded interview. It also sets out how an accused who receives a notice can also notify the prosecuting authority that he/she requires access to the recording before the evidence is given in the proceeding.

¹¹ Local Court practitioners, Consultation SEC9; Legal practitioners, Dubbo, Consultation SEC14

4.5 Evidentiary Matters

The key clauses of Part 6 prescribe the circumstances where short briefs of evidence are required, and offences for which briefs of evidence are not required. This part also specifies the time frame and content requirements of submitting notices on adducing evidence of mental impairment and on the intention to tender original evidence in sexual assault trials.

4.6 Forum Sentencing Intervention Program

Forum sentencing was introduced in 2005 as an alternative to custody for young adult offenders. An intervention plan is developed by the forum participants which attempts to repair the damage done by the offence and, if accepted by the court, is completed as part of the offender's sentence.

Forum Sentencing is not meeting its intended purpose to reduce reoffending and divert offenders away from custody. There is a low level of victim interest in the program, with approximately 65% of victims contacted in 2015/2016 choosing not to participate. A review is underway to further identify the needs of victims and consider the efficacy of the model. No changes to the provisions dealing with forum sentencing are proposed, pending the outcome of the review.

4.7 Child Sexual Offence Pilot Scheme

The Child Sexual Offence Evidence Pilot is targeted at child victims of sexual offence matters by providing support during the criminal trial.

As the court process can be extremely lengthy and traumatic for children, the pilot includes the use of Children's Champions (Witness Intermediaries) and an expansion of pre-recorded evidence. The Children's Champion is an accredited professional who assesses and facilitates communication needs of the child and the prosecution witness.

Part 10 provides the requirements for Children's Champions, including qualifications, suspension or revocation, the form of oath or affirmation to be taken and the fees payable to a Children's Champion.

5 Options

5.1 Allow the Regulation to lapse

Allowing the existing Regulation to lapse would cease the operation of all current provisions in the existing Regulation, including listing of court proceedings, costs and levy, adducing evidence of recorded interviews with vulnerable persons, evidentiary matters, intervention programs and the Child Sexual Offence Pilot Scheme.

Costs

The costs of not remaking the existing Regulation include:

- the Criminal Listing Director would no longer be able to request information to assist in listing of criminal proceedings
- NSW courts, government agencies and statutory bodies would no longer be able to collect court fees that contribute towards the costs of running the court system
- there would no longer be prescribed rules on certain evidentiary matters (e.g. when evidence briefs are required, timeframes for submission and adducing evidence on mental impairment and recorded interviews with vulnerable persons). This would hinder the efficient operation of the courts
- all intervention programs declared under s 347 of the Act would no longer be able to operate as a part of criminal procedure for sentencing offenders, and
- there would be barriers to meeting the support needs of child victims of sexual offences in sexual offence matters.

Benefits

None.

Discussion

Court Fees and Levy

The Regulation specifies the amount of court costs levy and fees, applicable exemptions, due time and postponement. Allowing the regulation to lapse would mean that fees would no longer be prescribed. There would no longer be the legal basis to collect court fees to contribute towards the costs of running the court system.

Evidentiary Matters

The Regulation prescribes the circumstances where short briefs of evidence are required and stipulates rules for adducing evidence of mental illness and from vulnerable persons. Allowing the Regulation to lapse would create uncertainty around these issues and potentially cause omission in procedural steps in the submission of evidence. This may cause unnecessary delays in criminal proceedings.

Intervention Programs

The existing Regulation is the key regulation that underpins the intervention programs that address underlying criminal behaviour, including the Circle Sentencing, TOIP and the Forum Sentencing Program. The Regulation provides for specific processes for participation in intervention programs. Such provisions provide concrete support for the court's power to defer sentencing in order for an offender to

participate in an intervention program under s 11 of the Crimes (*Sentencing Procedure*) Act 1999 (**CSP Act**). An offender's participation in an intervention program may then be considered as a relevant factor in sentencing under s 24 of the CSP Act. If the existing Regulation is permitted to lapse without replacement, the intervention programs would no longer be prescribed by regulation. There would be no legislative basis for judges to adjourn sentencing and make referrals for offenders to participate in the programs, nor would the measures that constitute the program be prescribed.

As the CSP Act provides for the power to defer sentencing for participation in intervention programs, the Regulation is necessary in prescribing the actual processes of participation for specific intervention program. In this context, allowing the Regulation to lapse would make the reference to 'intervention program' in the Act vague and the exercise of judicial power to defer sentencing for participation difficult and uncertain.

Allowing the Regulation to lapse may also create confusion amongst Department employees and potential participants on the operational procedures of the intervention programs, since the central processes of each program's operation are currently prescribed by the Regulation. This could hinder offender participation.

Child Sexual Offence Evidence Pilot Scheme

The Regulation specifies the qualification requirements and rules on revocation of Children's Champions, who assess and facilitate communication needs of child victims with the prosecution witness as a part of the Child Sexual Offence Evidence Pilot Scheme. Allowing the Regulation to lapse would potentially create barriers to efficiently meeting the communication needs of child victims of sexual offenses.

The costs of option 1 (allowing the existing Regulation to lapse) outweigh the benefits.

This option is not recommended.

5.2 Remake the existing Regulation without change

To remake the existing Regulation without change would continue the operation of all current provisions in the Regulation.

Costs

The main cost of remaking the existing Regulation without change is that there would be no improvement in efficiency and management of Circle Sentencing and TOIP.

Benefits

The benefits of remaking the existing Regulation without change include:

- normal operations of the courts would continue in areas such as the listing of court proceedings and imposing of court costs and fees as well as evidentiary matters, child sexual offence evidence pilot scheme and other miscellaneous issues.
- the Regulation would provide concrete support for the court's power to defer sentencing in order for an offender to participate in an intervention program under s 11 of the CSP Act, and
- the intervention programs would continue to have a clearly prescribed authority to operate.

Discussion

Under this option the normal operations of the court would continue. However, there would be no improvements in the efficiency and management of the Circle Sentencing and the TOIP.

This option is not recommended.

5.3 Remake the Regulation with changes

Remaking the Regulation with changes would continue the operation of the existing Regulation, in supporting processes of criminal proceedings (e.g. listing of criminal proceedings, imposing court costs and levy, adducing evidence), as well as the continued operation of the Child Sexual Offence Pilot Scheme.

Remaking the Regulation with changes would also include updates to the following intervention programs and to other references.

Changes to the Circle Sentencing Program

The proposed Regulation would make the following changes to assessment processes and terminology, as follows:

- out-dated terminology would be changed to reflect current usage
- an additional assessment option would be introduced to allow department employees to conduct offender assessment, if a meeting of the Aboriginal Community Justice Group is not possible. This change would improve program efficiency
- the requirement for the Project Officer to monitor offenders' compliance under the program would be removed. Compliance is monitored by Community Corrections only when supervision is a condition of a sentence, and
- the Magistrate presiding over a circle no longer needs to be the Magistrate who referred the offender to the program. This allows for more flexibility and efficiency in the process of Circle Sentencing.

Changes to the Traffic Offender Intervention Program (TOIP)

The proposed Regulation would make the following changes to achieve effective management and to allow the program to meet its objectives:

- the description of the program would no longer preclude referrals made by the offender or their legal representative, to reflect current practice.
- summary of the participation process would be broadened to include use of verbal as well as written agreements, to reflect current practice of offenders entering into verbal agreements to participate TOIP
- timeframe for approved providers to report to the local court on compliance would be widened reflect current practice, and
- Secretary would have a more general power to regulate in relation to 'the administration of the program'.

Other updates in references

The proposed Regulation would update references in other parts of the existing Regulation, including:

- the definition of 'legally assisted person' in relation to the postponement of fees
- references to legislation (e.g. repealed legislations), and
- the names of government bodies.

Costs

The costs of remaking the Regulation with the proposed changes are:

- potential increase in the workload for Department employees with the new responsibility of assessing offender suitability for Circle Sentencing.

Benefits

The benefits of remaking the Regulation with the proposed amendments are:

- normal operations of the courts would continue in areas such as the listing of court proceedings and imposing of court costs and fees as well as evidentiary matters, child sexual offence evidence pilot scheme and other miscellaneous issues.
- Circle Sentencing and TOIP would be improved to operate more efficiently with updates on terminology to reflect current practice.

Discussion

The proposed Regulation would ensure that the support processes to criminal proceedings would continue to operate.

The proposed Regulation would improve the efficiency of the Circle Sentencing and TOIP, and update references.

This is the preferred option.

6. Consultation

Transport for NSW and the Chief Magistrate's Office were consulted during the drafting of this RIS and the proposed Regulation.

Copies of this RIS and the proposed Regulation will be forwarded to:

Aboriginal Affairs NSW

Aboriginal Legal Service NSW/ACT

Centre for Road Safety

Chief Magistrate's Office

Combined Community Legal Centres

Commonwealth Attorney General's Department

Corrective Services NSW

Director of Public Prosecutions

Law Society of NSW

Legal Aid Commission

NSW Bar Association

NSW Judicial Commission

NSW Juvenile Justice

NSW Police

President of the Children's Court

Public Defenders Office

Shopfront Youth Legal Centre

The Chief Judge at Common Law, Supreme Court of NSW

The Chief Judge of the District Court of NSW

The Chief Justice of the Supreme Court of NSW

The Sheriff of NSW

Victims Advisory Board

Attachment: the proposed Regulation