

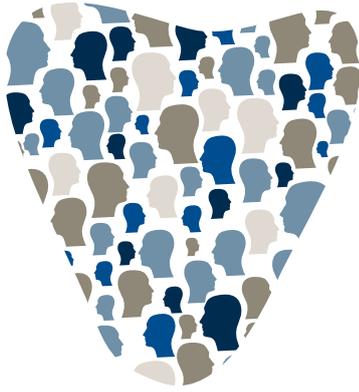


*sentencing*  
ADVISORY  
COUNCIL

# PHASING OUT OF SUSPENDED SENTENCES

FINAL REPORT No.6

*March 2016*



## *About this Final Advice*

This reference to the Sentencing Advisory Council was made by the Attorney-General and Minister for Justice, the Hon Vanessa Goodwin MLC in July 2014.

In August 2015, the Council released a consultation paper, *Phasing out of Suspended Sentences: Consultation Paper*, which set out the Council's preliminary views and draft recommendations following its deliberations on the approach to be taken to the phasing out of suspended sentences in Tasmania and the possible replacement sanctions. The Council also released a companion document, *Phasing out of Suspended Sentences: Background Report* to provide contextual information to inform the phasing out of suspended sentences and the development of alternative sentencing options.

The Council also commissioned a report to advise on the costs of phasing out suspended sentences in Tasmania. The report, *Exploring the Costs of Alternatives to Suspended Sentences in Tasmania*, was prepared for the Council by John Walker, CEO, John Walker Crime Trends Analysis and Lorana Bartels, University of Canberra.

This final report makes recommendations to the Attorney-General in relation to the sentencing options that may be introduced in Tasmania as part of the phasing out of suspended sentences.

## *Information on the Sentencing Advisory Council*

The Sentencing Advisory Council was established in June 2010 by the then Attorney-General and Minister for Justice, the Hon Lara Giddings MP. The Council was established, in part, as an advisory body to the Attorney-General. Its other functions are to bridge the gap between the community, the courts and the government by informing, educating and advising on sentencing issues in Tasmania. At the time that this paper was concluded, the Council members were Emeritus Professor Arie Freiberg AM (Chair), Dr Jeremy Prichard, Mr Scott Tilyard, Mr Peter Dixon, Ms Kim Baumeler, Mr Graham Hill, Mr Chris Gunson, Professor Rob White, Ms Terese Henning, Ms Jo Flanagan and Ms Linda Mason.

## *Acknowledgments*

The Council would like to thank all those provided information in relation to this reference, in particular Mr Robert Williams, the then Deputy Secretary, Department of Justice; Mr Nick Evans, Deputy Secretary, Department of Justice; Sergeant Gen Hickman, Southern Prosecution Services, Tasmania Police; Ms Betty Evans, Policy Support and Research Officer, Department of Justice, Ms Georgette Chilcott, Senior Practice Consultant, Community Corrections; Mr Daniel Goss, Team-Leader — Court Mandated Diversion (N/NW) and Mr Tristan Bell, Team Leader (South) — Court Mandated Diversion; Mr Craig Joel and Mr Neil Ward, Tasmania Police; Mr Dave van't Veld and Ms Michelle Lowe, Senior Policy Officers, Department of Justice.

This paper was written by Dr Rebecca Bradfield and Associate Professor Lorana Bartels.

## *Consultation*

Responses to the *Consultation Paper* were received from:

- The Hon A Blow OAM, Chief Justice of the Supreme Court
- D Shuttler, community member, Tasmania
- M and Y Gorrige, community member, Tasmania
- C Emmerton, community member, Tasmania
- L Spence, community member, Tasmania
- B Holderness-Roddam, community member, Tasmania
- D Coates SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions<sup>1</sup>
- L Rheinberger, Executive Director, The Law Society of Tasmania<sup>2</sup>
- D Hine, Commissioner of Police, Department of Police and Emergency Management
- J Smith, Chief Executive Officer, Alcohol, Tobacco and Other Drugs Council Tasmania Inc
- K Klugman OAM, President, Civil Liberties Australia
- C Bennett and M Zirnsak, Synod of Victoria and Tasmania, Uniting Church of Australia
- B Bartl, Policy Officer, Community Legal Centres Tasmania
- L Moore, Tasmanian Delegate, Probation and Community Corrections Officers Association

<sup>1</sup> It is noted that at the time the submission was received Mr Coates SC was the Acting Director of Public Prosecutions.

<sup>2</sup> It is noted that the Law Society's submission is the response of the Society's Specialist Criminal Law Committee as there was insufficient time for the Council of the Society to consider and endorse the submissions.

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# *Abbreviations*

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Alcohol and Other Drugs – AOD  
Alcohol, Tobacco and other Drugs Council Tasmania  
Inc – ATDC  
Civil Liberties Australia – CLA  
Community Correction Order – CCO  
Community Correctional Services Victoria – CCS  
Community Detention Order – CDO  
Community Legal Centres, Tasmania – CLC Tas  
Community Service Order – CSO  
Community-based orders – CBO  
Court Mandated Diversion – CMD  
Department of Police and Emergency Management –  
DPEM  
Director of Public Prosecutions – DPP  
Drug Court Victoria – DCV  
Fully Suspended Sentence – FSS  
Good Behaviour Bonds – GBB  
Non-custodial Order – NCO  
NSW Bureau of Crime Statistics and Research –  
BOSCAR  
NSW Law Reform Commission – NSWLRC  
Partly Suspended Sentence – PSS  
Probation and Community Corrections Officers’  
Association – PACCOA  
Sentencing Advisory Council, Tasmania – TSAC  
Sentencing Advisory Council, Victoria – VSAC  
State Parole Authority New South Wales – SPA  
Tasmania Law Reform Institute – TLRI

# Executive Summary

## TERMS OF REFERENCE

On 16 July 2014, the Attorney-General and Minister for Justice, the Hon Vanessa Goodwin MLC, wrote to the Sentencing Advisory Council asking it to examine how to phase out suspended sentences in Tasmania. In particular, consistent with the government's election commitment to phase out suspended sentences and examine alternative sentencing options, the following Terms of Reference were given to the Council:

1. Examine Tasmania's current use of suspended sentences of imprisonment for adults and young offenders including:
  - (a) the frequency with which they are used;
  - (b) the offences for which they are used;
  - (c) the length of sentences;
  - (d) breach rates;
  - (e) sentencing practices on breach; and
  - (f) recidivism rates including where reoffending does not result in a breach;
2. Examine Tasmania's current use of other sentencing options including actual terms of imprisonment, community-based orders and conditional release orders and the possible effect on them of the abolition of suspended sentences;
3. Research legislative approaches to suspended sentencing options in other jurisdictions in Australia and overseas, including an analysis of (and commentary on any published statistics on) suspended sentences and breaches and of the effect of the abolition of suspended sentences on imprisonment numbers;
4. Investigate the range, adequacy and cost of alternative sentencing options such as, but not limited to, home detention, intensive correction or supervision, deferred sentencing, restorative and therapeutic options;
5. Explore approaches to phase out Tasmania's existing sentencing option of suspended sentences including transitional arrangements and discuss the possible effect of this on imprisonment numbers;
6. Provide recommendations for any necessary sentencing reforms consequent on the abolition of suspended sentences;
7. Any other sentencing reform matters the SAC considers relevant to the Terms of Reference; and
8. Consult with key stakeholders including, but not limited to, members of the judiciary, the legal profession, victims of crime and the wider community in relation to alternative sentencing options.

## WHAT IS A SUSPENDED SENTENCE?

In Tasmania, a court can impose a term of imprisonment and then can either fully or partly suspend the sentence under the *Sentencing Act 1997* (Tas) s 7(b).

A suspended sentence is a sentence of imprisonment that is not executed at the time when it is imposed by the court. A fully suspended sentence (FSS) means that the whole sentence is not activated and the offender is immediately released into the community. A partly suspended sentence (PSS) means that the offender spends a specified period of time in prison before being released into the community.

Suspended sentences are a contentious sentencing option. They are viewed variously as either the penultimate criminal sanction (operating as a sanction like a 'sword' that hangs over an offender's head as a threat of future imprisonment if the offender reoffends or otherwise breaches the sanction) or as in reality no punishment at all (a 'butter knife').

## THE APPROACH OF THE COUNCIL

The Council has limited its discussions to the Terms of Reference and this report does not necessarily reflect the views of individual members of the Council as to the desirability or otherwise of suspended sentences. In view of the desire of the government to phase out suspended sentences, the Council's approach in this reference has been to consider current sentencing practice in Tasmania as a means of developing credible intermediate sentencing options to replace the suspended sentence. The abolition of suspended sentences creates the potential for innovative responses to offending and a reassessment of the traditional notion that a sentence of imprisonment (suspended or unsuspended) is the only appropriate response to serious offending.

The Council aims to provide judges and magistrates with credible and effective sentencing options to fill the gap left by the abolition of suspended sentences. However, this presents considerable challenges given the widespread use of suspended sentences in Tasmania and judicial support for the sentencing disposition. The Council is also mindful of community concerns and expectations about the use of suspended sentences that have informed government policy. In particular, the Council recognises concerns in relation to the perception that offenders 'walk free' following the imposition of a suspended sentence and the fiction that a suspended sentence is a sentence of imprisonment, when in reality only a small proportion of offenders who receive a FSS will be required to serve time in prison.

## THE REVIEW PROCESS

In August 2015, the Council released a consultation paper, *Phasing out of Suspended Sentences: Consultation Paper*, which set out the Council's preliminary views and draft recommendations, following its deliberations on the approach to be taken to the phasing out of suspended sentences in Tasmania and the possible replacement sanctions. The *Consultation Paper* set out 52 draft recommendations and the Council invited submissions on the package of sentencing reforms it had suggested. In addition, the Council asked for feedback on its preliminary views and proposals, including any negative consequences or difficulties that might arise from the draft recommendations. In response, the Council received 14 written submissions.

The Council also released a companion document, *Phasing out of Suspended Sentences: Background Paper*, to provide contextual information to inform the phasing out of suspended sentences and the development of alternative sentencing options. This report provided a detailed response to Terms of Reference 1–3,

including information about the use of suspended sentences in Tasmania and other comparable jurisdictions.

The Council also commissioned a report to advise on the costs of phasing out suspended sentences in Tasmania. This report was prepared by John Walker, CEO, John Walker Crime Trends Analysis and Lorana Bartels, University of Canberra. The report, *Exploring the Costs of Alternatives to Suspended Sentences in Tasmania*, examines alternative sentencing options through the use of a number of scenarios that might be hypothesised from the Council's proposed reforms. This report is available on the Sentencing Advisory Council website.

## TASMANIA'S CURRENT USE OF SUSPENDED SENTENCES

Term of Reference 1 requires the Council to report on the current use of suspended sentences of imprisonment in terms of the frequency with which they are used, the offences for which they are used, the length of sentences, breach rates, sentencing practices on breach and recidivism rates including where reoffending does not result in a breach. This is addressed in chapter 3 of the *Consultation Paper* and of this report and in a more detailed manner in the *Background Paper*.

The Council's analysis found that Tasmania's use of suspended sentences is higher than in all other Australian jurisdictions. In the Supreme Court of Tasmania in 2013–14, 37.9% of offenders received a FSS as their principal sentence compared with the national average of 16.7%. In the period 2011 to 30 June 2014, 428 of all offenders (36.1%) received a FSS and 195 offenders (16.4%) received a PSS. Similarly, Tasmania's Magistrates Court also had the highest use of FSSs in Australia. In the period 2011 to 30 June 2014, 4352 offenders (8%) received a FSS and 749 (1.4%) received a PSS.

Suspended sentences (fully and partly) were used for a range of offences with property offences accounting for nearly half of suspended sentences imposed in the Supreme Court, (48.4%) followed by drug offences (22.5%), non-sexual offences against the person (16.7%) and sexual offences (6.6%). In the Magistrates Court, suspended sentences were most commonly imposed for traffic offences (32.1%) and property offences (31.2%) followed by other offences<sup>3</sup> (23.3%), drug offences (7.2%) and offences against the person (6.2%).

<sup>3</sup> This is a broad category of offences that includes weapons offences, environment offences, public nuisance and disorder offences, animal welfare offences, justice procedure offences and public health and safety offences, see Sentencing Advisory Council, Tasmania, (TSAC) *Phasing Out Suspended Sentences: Background Paper* (2015), Appendix I, J.

In the Supreme Court, the median sentence length for FSSs was six months and for PSSs it was 10 months. In the Magistrates Court, the median sentence length for FSSs was two months and for PSSs it was four months.

The Council examined breach rates for FSSs in the Supreme Court and found that, as at 30 September 2014, 34% of offenders (n=44) had breached their sentence by committing an imprisonable offence. This means that nearly two-thirds of offenders (66%) had not breached their sentence by committing an imprisonable offence. Over half of offenders who breached their sentence were subject to breach action (55%) and of those actioned cases over half were required to serve a period of imprisonment (42% were activated in full and 13% were partially activated or a lesser sentence of imprisonment imposed). Recidivism rates, where reoffending did not result in a breach of the suspended sentences, were identical to the breach rates.

## **TASMANIA'S CURRENT USE OF OTHER SENTENCING OPTIONS AND EFFECT ON THESE OPTIONS AS A RESULT OF ABOLITION OF SUSPENDED SENTENCES**

Term of Reference 2 required the Council to examine Tasmania's current use of other sentencing options including actual imprisonment, community-based orders and conditional release orders. In addition, the Council was asked to examine the possible effect on these orders as a result of the abolition of suspended sentences. Term of Reference 5 requested that the Council discuss the possible effect of the phase out of suspended sentences on imprisonment numbers. These issues are addressed in chapters 3 and 4 of the *Consultation Paper* and of this report and in chapters 3 and 4 of the *Background Paper*.

In the Supreme Court, in the period 2011–14, 37.2% of offenders received a prison sentence, 52.5% of offenders received a suspended sentence and 10.4% of offenders received a non-custodial order (NCO) (analysed on the basis of their most serious offence).

In the Magistrates Court, in the period 2011–14 (analysed on the basis of their most serious offence), 2.9% of offenders received a prison sentence, 9.4% of offenders received a suspended sentence, 4.4% of offenders received a community service order (CSO), 1.3% of offenders received a probation order, 55.4%

of offenders received a fine, 4% received some other monetary penalty, 10.9% received a good behaviour bond (GBB), 1.7% received a licence disqualification<sup>4</sup> and 10.1% received a nominal penalty (a conviction only or dismissal without conviction).

Given the reliance on suspended sentences in Tasmania, their abolition will have a considerable effect on other sentencing options. The question remains as to the likely approach of Tasmanian courts to the sentencing of those offenders who previously would have received a suspended sentence — how many offenders will be sentenced to immediate imprisonment and how many will receive a NCO? It is difficult to accurately determine how judicial officers might sentence if suspended sentences were not available. While a suspended sentence should only be imposed if a sentence of immediate imprisonment would be appropriate, other evidence suggests that some judicial officers impose FSSs as a form of NCO.

The Council has undertaken modelling in relation to the possible effect on the use of different sentencing options following the phasing out of suspended sentences, based on three different scenarios:

- Scenario 1 – replacing fully suspended sentences with equivalent terms of imprisonment;
- Scenario 2 – replacing fully suspended sentences with community correction orders (CCOs) of 12 or 24 months (in the Magistrates and Supreme Court respectively); and
- Scenario 3 – replacing fully suspended sentences with alternatives including fines, imprisonment, CCOs, home detention and treatment orders, according to the offence type.

In each of these scenarios, it was assumed that PSSs would be replaced with a combination of a CCO and imprisonment.

Based on this analysis, both Scenario 1 and 3 hypothesised a substantial increase in the number of offenders sentenced to imprisonment.

In this context, it is noted that if all of the offenders in receipt of FSSs in 2013–14 alone received a prison sentence instead, this would result in 1117 additional prison admissions, far more than prison and PSSs combined (n=698). Further, this should be viewed in light of the prison population in Tasmania, which at

4 It is noted that the data only show the most serious penalty imposed and so do not show all the penalties imposed on an offender. So for example, in relation to driving offences, in a case where an offender received a fine and a licence disqualification, the data only show the fine.

15 December 2015 was 552. This was an increase from January 2015, when the prison population was 458. The resolution of this issue also has implications for Community Corrections given that, as at the end of September 2015, there were 1903 offenders under supervision.

## SUSPENDED SENTENCES IN OTHER JURISDICTIONS

Term of Reference 3 asked the Council to research legislative approaches to suspended sentencing options in other jurisdictions in Australia and overseas, including an analysis of suspended sentences and breaches of such sentences (and commentary on any published statistics) and of the effect of the abolition of suspended sentences on imprisonment numbers. These matters are addressed in chapters 3 and 4 of the *Consultation Paper* and of this report and chapters 3 and 4 of the *Background Paper*.

The Council's analysis of the experience of reforming suspended sentences in other jurisdictions revealed that a critical factor in the outcome of such reforms was the influence of the particular legal and political context on the sentencing practices in the jurisdiction in which the reforms took place. It found that the abolition of suspended sentences will affect the use of imprisonment as a sanction, but not always in ways that are anticipated. However, once suspended sentences are abolished, evidence suggests that imprisonment numbers will significantly rise unless there are credible alternative intermediate sanctions that judicial officers are prepared to use as a replacement.

## OTHER INTERMEDIATE SANCTIONS AND RECOMMENDATIONS FOR SENTENCING REFORMS

Term of Reference 4 required the Council to investigate the range, adequacy and cost of alternative sentencing options such as, but not limited to, home detention, intensive correction or supervision, deferred sentencing, restorative and therapeutic options. The Council has examined higher-level intermediate sentencing options available in other jurisdictions. Intermediate sanctions refer to those sentencing orders that fall between immediate imprisonment and dismissals, discharges and adjournment. The Council has examined the following sentencing options: home detention, periodic detention, community detention, intensive supervision/correction type orders and CCOs in chapter 7.

The Council's approach in developing a sentencing model to replace suspended sentences in Tasmania has been not only to consider appropriate intermediate

sanctions that may replace suspended sentences but also to examine other sanctions that operate in Tasmania to determine how those orders might be restructured to accommodate offenders who previously would have received a suspended sentence. Accordingly, the Council has examined the operation of the drug treatment order, which is a therapeutic sentencing order available under the *Sentencing Act 1997* (Tas) (see chapter 6) and has considered the current operation of probation and community service orders and has drawn upon these in the development of an enhanced CCO (see chapter 7).

The Council also considered possible replacements for PSSs (see chapter 8) and examined deferred sentencing (see chapter 9).

Term of Reference 6 required the Council to provide recommendations for any necessary sentencing reforms consequent on the abolition of suspended sentences.

In chapters 5 to 9, the Council sets out its approach to a new sentencing model for Tasmania to accompany the phasing out of suspended sentences in Tasmania. The proposed changes would provide the court with the following sentencing options under the *Sentencing Act 1997* (Tas):

- imprisonment (with or without parole);
- imprisonment (of up to two years) without parole combined with a CCO (of up to three years);
- an alcohol and drug treatment order with a two year review period;
- home detention of up to 18 months;
- a CCO of up to three years with or without a conviction;
- rehabilitation program order (only for family violence offences);
- a fine with or without a conviction; and
- an adjourned undertaking, conviction only, or a dismissal without conviction.

In addition, the court would have power to defer sentencing an offender for up to 12 months, with a discretion to adjourn for a longer period where this is necessary to allow an offender to participate in a rehabilitation program.

It is the Council's view that imprisonment combined with a CCO would serve as an effective replacement for PSSs in Tasmania.

In view of the likely extent of drug and alcohol use among offenders who currently receive suspended sentences, the Council's view is that for offenders who are sentenced under the *Sentencing Act 1997* (Tas), Court Mandated Diversion (CMD) should be expanded to accommodate offenders with a history of alcohol

abuse and/or illicit drug use where that substance abuse contributed to an offender's criminal behaviour. It is also the Council's view that the order should be available in the Supreme Court as well as the Magistrates Court. The Council considers that CMD is an onerous and rigorous order that should be reserved for serious offending in circumstances where the principles of sentencing require a more severe penalty than a CCO with treatment conditions attached.

The Council also makes recommendations in relation to the introduction of home detention and an enhanced community-based order called a CCO.

The Council's view is that home detention should be introduced as a sentencing option in Tasmania. Home detention would not be a substitutional sanction but would be a sanction in its own right and not an alternative means of serving a term of imprisonment. Home detention is an effective sentencing option in other jurisdictions with high completion rates and low recidivism rates. It is able to address multiple aims of sentencing and provides an onerous sentencing order that both punishes an offender, deters the offender and others from committing offences and assists in addressing the offender's rehabilitative needs.

As indicated, the Council also makes recommendations in relation to the introduction of a new intermediate order called the CCO. This order replaces suspended sentences, and incorporates aspects of the current community service and probation orders. While the model proposed by the Council has similarities with the order that exists in Victoria, it is not an identical order.

The Council's approach has been to consider sentencing options that are suitable for the Tasmanian context and not simply to replicate approaches taken in other jurisdictions that have different social, political and judicial contexts. In Tasmania, the CCO would sit below imprisonment, alcohol and drug treatment orders (CMD) and home detention and above a fine. It would not be a substitutional sanction but would be a sanction in its own right and not an alternative means of serving a term of imprisonment. It would be an enhanced probation and CSO that allows the court to impose a range of conditions on an offender directed towards reducing the likelihood of reoffending, punishing the offender and protecting the community.

Consistent with the Council's view that sentencers should have maximum flexibility to address the offender and the offence, the Council's view is that a wide range of conditions should be available under a CCO. Accordingly, under the proposed CCO it will be possible for the court to make an order that contains only core conditions, which would be akin to a suspended sentence with the only condition being

that the offender not commit an imprisonable offence. However, the CCO with core conditions is more onerous for an offender given the restrictions and reporting requirements and so addresses the concerns that arose in relation to a suspended sentence that the offender 'walks free' with no consequences unless the offender commits another offence. In addition, the Council's view is that breach of a CCO should have serious consequences. There needs to be a robust administrative procedure in place in relation to recording breaches (even if those breaches are not actioned) and there should be a clear process for making an application to the court in cases where an offender has committed an imprisonable offence or a serious breach (or multiple minor breaches) of other conditions of a CCO.

It is the Council's view that greater use could be made of fines in combination with CCOs as a means to increase the punitive component of the sanction. This would be particularly appropriate if an offender was sentenced to a 'core conditions' only CCO. In expressing this view, the Council is mindful of the problem of the unequal impact of fines. In imposing a fine, while the court can take into account an offender's inability to pay, there is currently no power to increase a fine on the grounds of the affluence of an offender and this means that the fine has unequal impact. Accordingly, the Council's recommendation is that the court should be required to consider the offender's financial circumstances, whether this has the effect of increasing or decreasing the amount of a fine.

In developing these recommendations, the Council's approach has been informed by the following principles:

- imprisonment should only be imposed where the offending was so serious that neither a fine nor a community sentence can be justified;
- intermediate sentencing orders should generally not be substituted sanctions, that is they should exist as sentences in their own right rather than as an alternative means of serving a term of imprisonment;
- sentencing orders should be transparent and mean what they say;
- courts should have the most flexibility possible to tailor a sentence to the offence and the offender;
- community-based sanctions should be available for a wide range of offending, including where imprisonment may also have been justified;
- offenders who previously received FSSs and PSSs should not necessarily be sentenced to full-time imprisonment in the absence of suspended sentence orders but should be considered for community-based sanctions;

- the conditions attached to community-based orders should be realistic in length and should (consistent with parsimony and proportionality) only have the minimum number of conditions necessary to fulfil the purpose(s) of sentencing;
- the necessary funding should be made available to support community-based orders, including resources for the provision of pre-sentence reports, judicial monitoring, supervision of offenders and treatment in the community; and
- the breach of an order should have serious consequences but breach should not itself constitute a separate offence.

The Council has also recommended that the option of introducing guideline judgments in Tasmania be further explored. In addition, the Council has recommended that substantial and meaningful engagement with all sectors of the community is necessary to build confidence and support for the sentencing reforms.

## TRANSITIONAL ARRANGEMENTS AND FUNDING

Term of Reference 5 requested that the Council explore approaches to phase out Tasmania's existing sentencing option of suspended sentences including transitional arrangements.

The Council is aware that the changes suggested in this report will have considerable resource implications given that an unconditional suspended sentence is currently resource neutral.

If the proposed alcohol and drug treatment order is to be an effective replacement for a suspended sentence, the necessary funding will need to be provided for assessment, appropriate drug and alcohol treatment programs, other programs and services that address the criminogenic needs of the offenders, as well as the monitoring of compliance with the conditions (such as drug and alcohol testing).

There are also resource implications arising from the introduction of home detention, including the preparation of pre-sentence reports, the provision of appropriate support and information to co-residents and support to offenders. Other barriers to suitability that need to be addressed are homelessness and substance abuse. Resources will also be necessary to ensure that geographical barriers do not preclude home detention for offenders otherwise assessed as suitable. Surveillance to ensure compliance is also essential to the credibility of the order for the judiciary and the community.

While the Council's view is that additional resources will be required for the surveillance of home detainees, this does not necessarily mean electronic monitoring for all offenders or for the entire period of the order, and other effective methods of supervising compliance should be explored with Community Corrections and Tasmania Police. However, the Council does recommend that a feasibility study should be undertaken in relation to the introduction of electronic monitoring of offenders sentenced to home detention.

Similarly, all offenders who receive a CCO will require supervision from Community Corrections and in cases where special conditions are imposed, there will need to be appropriate resourcing for pre-sentence reports, judicial monitoring, programs, treatment, testing and monitoring of curfew and exclusion conditions. The increase in resources extends both to increase in demand for services and also to the ongoing development of the skills and capacity of workers involved in the delivery of programs and treatments.

In relation to deferred sentencing, the Council is also mindful of concerns raised in relation to the potential for disadvantaged offenders to be further marginalised as a result of a lack of resources to access rehabilitation services. Accordingly, its preliminary recommendation is that appropriate supports and services be made available for offenders who require financial assistance to access such services.

It is the Council's strongly held view that the success (or failure) of any sentencing reform will be dependent on any new sanction being properly funded. In view of this, the Council has examined the possible resource implications of the recommendations outlined in this report. In terms of costs, the modelling conducted on behalf of the Council found that:

- Scenario 1, replacing fully suspended sentences with equivalent terms of imprisonment, would cost around \$50.9 million per annum;
- Scenario 2, replacing fully suspended sentences with CCOs of 12 or 24 months, would cost around \$34.0 million per annum; and
- Scenario 3, replacing fully suspended sentences with alternatives including fines, imprisonment, CCOs, home detention and treatment orders, according to the offence type, would cost around \$30.6 million per annum.

There is also a need to consider the additional resources that will be required in the courts, prosecution and defence services, as well as non-government organisations that will have an increased workload with the introduction of the new sentencing orders.

The Council aims to develop new sanctions that from their introduction are accepted by the courts as substitutes for the suspended sentence, and makes recommendations in relation to the implementation (and monitoring) of these sanctions to ensure that this is the case. Accordingly, the Council's recommendation is that there needs to be an appropriate transition period. The Council strongly suggests that there must be a long phase-in period for the reforms suggested in this report, during which time any new sentencing option introduced should operate in conjunction with the suspended sentence. The Council's view is that the use, operation and resource implications of any new sanction needs to be carefully monitored, analysed and understood to allow any unintended consequences of the reforms to be identified and addressed. A long phase-in period will also allow time to plan the change process, to assess and develop the necessary infrastructure and services, and to obtain the necessary human and financial resources to ensure that the reforms can be successfully implemented. A significant transition period is also necessary to allow courts, service providers, government agencies and the community to develop confidence in the new orders. The Council's view is that a transition period (where the new sanctions and suspended sentences operate side by side) of at least five years is appropriate for these purposes.

During the phase-in period, the Council considers that no substantive changes are required to the current provisions of the *Sentencing Act 1997* (Tas) that relate to the operation of suspended sentences. Based on the research undertaken by the Council examining the use of suspended sentences in Tasmania, the Council's view is that FSSs are not being used inappropriately for serious crimes in Tasmania. In addition, the Council recognises the complexity of the sentencing process and the need for the court to impose an appropriate sentence means that even in relation to serious offences (such as manslaughter) there may be significant personal mitigating factors (such as in a euthanasia case). Accordingly, as part of the transitional arrangements, restrictions should not be placed on the offence categories for which FSSs can be imposed.

While the Council considers that suspended sentences should operate along side the CCO during the transition period, given that the CCO replicates many features of probation and the CSO, it is the Council's view that these orders should be replaced by the CCO from its introduction.

# Recommendations

## Recommendations 1 – 4 (see [1.4])

### *Transitional arrangements*

1. There should be a transition period of at least five years during which time suspended sentences and any new sanctions should operate concurrently.
2. There needs to be ongoing monitoring and analysis of the use of suspended sentences, the use and effectiveness of new sanctions and the resource implications of the sentencing reforms.
3. Substantial and meaningful engagement with all sectors of the community is necessary to build confidence and support for the sentencing reforms.
4. The option of introducing guideline judgments in Tasmania should be explored further.

## Recommendation 5 (see [3.3.1])

### *Transitional arrangements*

5. As part of the transitional arrangements, restrictions should not be placed on the offence categories for which suspended sentences can be imposed.

## Recommendations 6 – 11 (see [6.4])

### *Alcohol and drug treatment orders*

6. Court Mandated Diversion (CMD) should be expanded to accommodate offenders with a history of alcohol abuse and/or illicit drug use where that substance abuse contributed to an offender's criminal behaviour.

7. CMD orders should be available in the Supreme Court as well as the Magistrates Court.
8. CMD should be reserved for serious offending in circumstances where the principles of sentencing require a more severe penalty than a CCO with treatment conditions attached.
9. The following changes should be made to Part 3A of the *Sentencing Act 1997* (Tas) to expand its operation and allow it to function as a replacement (in appropriate cases) for a suspended sentence:
  - allow the order to be made by the Supreme Court and the Magistrates Court;
  - change the name of the order to alcohol and drug treatment orders;
  - change the provisions to refer to alcohol in addition to illicit drug use (where appropriate);
  - extend the order to all offences, except for sexual offences. This would mean that the order would be available where the harm caused was not minor; and
  - remove the reference in the *Sentencing Act 1997* (Tas) s 27B(c)(ii) to suspended sentences and insert a provision (akin to the *Sentencing Act 1991* (Vic) s 36(2)) to provide that without limiting when an alcohol and drug treatment order may be imposed, it may be an appropriate sentence where, before the ability of the court to impose a suspended sentence was abolished, the court may have imposed a sentence of imprisonment and then suspended that sentence of imprisonment.

10. Funding needs to be provided for the assessment of offenders, appropriate drug and alcohol treatment programs, other programs and services that address the criminogenic needs of the offenders, as well as the monitoring of compliance with the conditions (such as drug and alcohol testing) and judicial monitoring.
11. There needs to be regular monitoring and review of the CMD program to ensure that it operates according to best practice principles.

## Recommendation 12 *(see [7.1])*

### *Nature of intermediate sanction*

12. That any replacement intermediate sanction should be a sentencing option in its own right and should not be a substitutional order.

## Recommendation 13 *(see [7.2])*

### *Periodic detention*

13. Periodic detention should not be introduced in Tasmania.

## Recommendations 14 – 29 *(see [7.3.8])*

### *Home detention*

14. Home detention should be introduced as a sentencing option in Tasmania.
15. Home detention should not be a substitutional sanction and should be a sanction in its own right.
16. As a protection against net-widening, there should be a legislative direction that a home detention order is only permitted in circumstances where the court would otherwise have imposed a sentence of imprisonment (suspended or otherwise) and only where a less onerous or restrictive sanction would not satisfy the purposes for which the sentence is being imposed. It should also be made clear that the order is appropriate where a suspended sentence would previously been imposed.
17. There should be very few offence-based restrictions for home detention. Instead, the court should have the discretion to impose a home detention order if such an order is proportionate to the circumstances of the offence and the offender.

18. Restrictions that should be imposed are that home detention should not be used for domestic violence offences or sexual offences when the victim is likely to be a co-resident (although alternative community-based accommodation for home detention could be used provided that there were appropriate conditions to protect the victim). In relation to drug cultivation offences, the court should not sentence an offender to home detention in the same home where the offender was cultivating drugs. In addition, the court should not impose a home detention order on an offender who poses a significant risk in terms of committing a further violent offence.

19. A maximum term of 18 months for home detention should be specified in the legislation.

20. A home detention order should include as core conditions that the offender:

- must not commit another imprisonable offence;
- must live only at approved premises;
- must remain at approved premises for the time specified in the order except to:
  - (a) seek urgent medical or dental treatment;
  - (b) avoid or minimise a serious risk of death or injury to the offender or any other person; or
  - (c) with the approval of a probation officer, comply with any special condition, to seek or engage in employment, to attend training or other rehabilitative or reintegrative activities or program and for any other purpose specifically approved by the probation officer;
- accept visits from Community Corrections;
- submit to searches of approved premises or things;
- submit to electronic monitoring if directed;
- comply with any reasonable directions including in relation to employment;
- not consume alcohol or drugs;
- submit to breath testing, urinalysis and other test procedures for detecting drug and alcohol use; and
- engage in personal development activities or in counselling or treatment as directed.

21. The following special conditions should be available in relation to a home detention order:
  - judicial monitoring;
  - conditions in relation to taking prescription medicine; and
  - any other condition that reduces the likelihood of reoffending.
22. Legislative direction should be provided that the imposition of any of the special conditions are required to reduce a significant risk of reoffending by the offender that could not be met by core conditions alone and that the imposition of the special condition(s) may reduce the likelihood of further reoffending by the rehabilitation and reintegration of the offender.
23. There should be a presumption in favour of resentencing if an offender breaches the order by committing an offence punishable by imprisonment, unless exceptional circumstances exist. The court can also vary the order, confirm the order or cancel the order or make no further order if an offender breaches the order by committing an offence punishable by imprisonment.
24. If an offender is in breach of any of the other conditions, the court can vary the order, confirm the order, cancel the order and resentence the offender or cancel the order and make no further order.
25. It should not be a separate offence to breach a home detention order but it is necessary to ensure that breaches are enforceable beyond the expiration of the order.
26. The consent of any co-resident should be a precondition to an offender's assessment of suitability for a home detention order. A co-resident is defined as a person who has a legal right to occupy the property and is not a licensee. However, if consent is not provided, the sentence should be able to be served in some other community-based accommodation.
27. Resources must be made available to provide appropriate support and information to co-residents and also support to offenders.
28. Other barriers to suitability that need to be addressed are homelessness and substance abuse. Resources will also be necessary to ensure that geographical barriers do not preclude home detention for offenders otherwise assessed as suitable.
29. While surveillance to ensure compliance is essential to the credibility of the order for the judiciary and the community, and additional resources will be required for the surveillance of home detainees, this does not necessarily mean electronic monitoring for all offenders or for the entire period of the order, and other effective methods of supervising compliance should be explored with Community Corrections and Tasmania Police. However, a feasibility study should be undertaken in relation to the introduction of electronic monitoring of offenders sentenced to home detention.

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### Recommendation 30 *(see [7.4])*

#### *Community detention orders*

30. A community detention order should not be introduced in Tasmania.

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### Recommendation 31 *(see [7.5.10])*

#### *Intensive correction/supervision orders*

31. Intensive correction/supervision orders should not be introduced in Tasmania.

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### Recommendations 32 – 46 *(see [7.6.11])*

#### *Community correction order (CCO)*

32. A new intermediate sanction called a CCO should be introduced in Tasmania with a maximum term of three years.
33. The CCO should not be a substitutional sanction but should be a sanction in its own right and not an alternative means of serving a term of imprisonment.
34. The CCO should sit below imprisonment, alcohol and drug treatment orders and home detention, and above a fine.

35. The current provisions for probation orders and community service orders contained in the *Sentencing Act 1997* (Tas) should be repealed following the introduction of the CCO.
36. The current provisions for suspended sentences of imprisonment contained in the *Sentencing Act 1997* (Tas) should be retained for at least five years following the introduction of the CCO.
37. Appropriate funding should be made available for the CCO.
38. There should be legislative direction that:
  - the CCO is an appropriate order where the court would have imposed a suspended sentence of imprisonment and that the order can be used for serious offending;
  - the overarching principles of the imposition of the CCO are proportionality and suitability;
  - the requirement of proportionality requires the court to first assess the objective nature and gravity of the offence and the moral culpability of the offender. The court should then consider whether, in view of the seriousness as assessed, imprisonment is the only just punishment or whether a CCO, either alone or in conjunction with a sentence of imprisonment, would satisfy the requirements of just punishment. Proportionality also precludes imposing a longer sentence merely for the purpose of protecting society by ensuring the treatment for a mental illness or drug or alcohol addiction;
  - suitability requires that the court should ensure that the CCO is carefully tailored to the circumstances and particular needs of the offender;
  - mental illness, drug addiction and/or homelessness do not preclude an offender from consideration for a CCO. In considering whether the imposition of a CCO is appropriate where there may be difficulties in an offender complying with the order and its conditions, the court should proceed on the assumption that any difficulties with compliance will abate once a treatment process is underway, although there may be cases where a CCO will not be appropriate as there is no realistic prospect of compliance;
- a pre-sentence report should be a pre-condition of a CCO if the court is considering imposing special conditions on an offender; however, there should be no need for a pre-sentence report if the court only intends to impose core conditions;
- the maximum term of a CCO should be three years;
- an order should only contain the minimum number of conditions consistent with proportionality, the purposes of sentencing and the purposes of a CCO.
39. The following core conditions should be attached to a CCO:
  - not commit an offence punishable by imprisonment;
  - report within one clear working day to a probation officer at the place specified in the order;
  - report to a probation officer as required;
  - not leave or stay outside Tasmania without the permission of a probation officer;
  - comply with reasonable and lawful directions given by a probation officer;
  - give notification to a probation officer of any change of address or employment before, or within two working days after, the change.
40. In addition to the core conditions, the court should be able to attach any of the following special conditions:
  - submit to the supervision of a probation officer;
  - the offender attend educational and other programs as directed by the court or a probation officer;
  - the offender undergo assessment and treatment for alcohol or drug dependency as directed by a probation officer;
  - the offender submit to testing for alcohol or drug use as directed by a probation officer;
  - the offender submit to medical, psychological or psychiatric assessment or treatment as directed by a probation officer;
  - the offender undertake community service up to a maximum period of 240 hours;

- place and non-association conditions are imposed on the offender;
  - the offender is subject to judicial monitoring;
  - alcohol exclusion is imposed on the offender;
  - a curfew is imposed on the offender; and
  - such other special conditions as the court thinks necessary or expedient.
41. A breach of a CCO should have serious consequences. There needs to be a robust administrative procedure in place in relation to recording breaches (even if not actioned) and there should be a clear process for making an application to the court in cases where an offender has committed an imprisonable offence or a serious breach (or multiple minor breaches) of other conditions of a CCO.
42. The following powers should be available on breach:
- confirm the order as originally made;
  - increase the period during which the order has effect;
  - vary the special conditions to which the order is subject;
  - cancel the order and deal with the offender for the offence or offences in respect of which the order was made in any manner in which the court could deal with the offender had it just found the offender guilty of that offence or those offences; or
  - cancel the order and, if it considers it appropriate, any other order made by the court in respect of the offence in respect of which the CCO was made and deal with the offender for that offence in any manner in which the court could deal with the offender had it just found the offender guilty of that offence.
43. A breach of a CCO should not be a separate offence but it is necessary to ensure breaches are enforceable beyond the expiration of the order.
44. The CCO should be able to be combined with a rehabilitation program order for family violence offences, driving disqualification and/or a fine.
45. In imposing a fine, the court should be required to consider the offender's financial circumstances, whether this has the effect of increasing or decreasing the amount of the fine.

46. The CCO should be able to be combined with a term of imprisonment of up to two years (including pre-sentence detention).

## Recommendations 47 and 48 (see [8.1])

### *Combined imprisonment and community correction orders as a replacement for partly suspended sentences (PSS)*

47. PSSs should be replaced by the use of a combination sentencing order of imprisonment of a term of two years or less and a CCO of up to a maximum term of three years.
48. There should be a legislative direction that if the court imposes a combined sentence of imprisonment and a CCO, then the court must not impose a non-parole period.

## Recommendation 49 (see [8.2])

### *Parole as a replacement for PSS*

49. The parole system should not be used as a replacement for PSSs.

## Recommendations 50 – 55 (see [9.9])

### *Deferred sentencing*

50. Deferred sentencing should be available for offenders sentenced under the *Sentencing Act 1997* (Tas) as well as offenders sentenced under the *Youth Justice Act 1997* (Tas).
51. The maximum period of deferral should be 12 months, with a discretion to adjourn for a longer period where the offender is or will be participating in a program aimed at addressing the underlying causes of offending, if the court is satisfied that —
- (a) the defendant has, by participating in, or agreeing to participate in, the program, demonstrated a commitment to addressing the problems underlying his or her offending; and
  - (b) if the proceedings were not adjourned for such a period,

- (i) the defendant would be prevented from completing, or participating in, the program; and
  - (ii) the defendant's rehabilitation would be prejudiced.
- 52. Deferral should be available even if the court is intending to impose a term of imprisonment.
- 53. The Council's view is that the purposes for a deferral of sentence should be specified in the legislation. These should include the following:
  - allowing the offender's capacity for and prospects of rehabilitation to be assessed;
  - allowing the offender to demonstrate that rehabilitation has taken place;
  - allowing the offender to participate in a program or programs aimed at addressing the underlying causes of the offending;
  - allowing the offender to participate in a program or programs aimed at addressing the impact of the offending on the victim; or
  - for any other purpose that the court considers appropriate having regard to the offender and the circumstances of the case.
- 54. Appropriate support and services should be made available to offenders who require financial assistance to access rehabilitation services.
- 55. The court should not be able to impose formal conditions on an offender as part of the deferral of sentence. Instead, the court should be able to adjourn the proceedings, grant the offender bail under the *Bail Act 1994* (Tas) and defer sentencing until the date specified in the order.



# 1.

## *Introduction*

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### **I.1 BACKGROUND TO THIS REPORT**

In 2013, the Tasmanian Liberal Party made a pre-election commitment to abolish suspended sentences with a view to ensuring that the 'community can once again feel safe and that sentencing reflects the gravity of the crime committed'.<sup>5</sup> The Liberal Party indicated that it would instead 'introduce best practice sentencing options that provide an opportunity for rehabilitation and represent an appropriate response to the gravity of the crime committed'.<sup>6</sup> Following its election to office in 2014, the Attorney-General requested that the Sentencing Advisory Council undertake a reference in relation to the phasing out of suspended sentences.

### **I.2 TERMS OF REFERENCE**

Consistent with the government's election commitment to phase out suspended sentences and examine alternative sentencing options, the following Terms of Reference were given to the Council:

1. Examine Tasmania's current use of suspended sentences of imprisonment for adults and young offenders including:
  - (a) the frequency with which they are used;
  - (b) the offences for which they are used;
  - (c) the length of sentences;
  - (d) breach rates;
  - (e) sentencing practices on breach; and
  - (f) recidivism rates including where reoffending does not result in a breach;
2. Examine Tasmania's current use of other sentencing options including actual terms of imprisonment, community-based orders and conditional release orders and the possible effect on them of the abolition of suspended sentences;
3. Research legislative approaches to suspended sentencing options in other jurisdictions in Australia and overseas, including an analysis of (and commentary on any published statistics on) suspended sentences and breaches and of the effect of the abolition of suspended sentences on imprisonment numbers;
4. Investigate the range, adequacy and cost of alternative sentencing options such as, but not limited to, home detention, intensive correction or supervision, deferred sentencing, restorative and therapeutic options;

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5 Tasmanian Liberals, *Abolishing Suspended Sentences*, (nd), 2 <<https://www.tas.liberal.org.au/sites/default/files/policy/Abolishing%20suspended%20sentences.pdf>>.

6 Ibid.

5. Explore approaches to phase out Tasmania's existing sentencing option of suspended sentences including transitional arrangements and discuss the possible effect of this on imprisonment numbers;
6. Provide recommendations for any necessary sentencing reforms consequent on the abolition of suspended sentences;
7. Any other sentencing reform matters the SAC considers relevant to the Terms of Reference; and
8. Consult with key stakeholders including, but not limited to, members of the judiciary, the legal profession, victims of crime and the wider community in relation to alternative sentencing options.

### 1.3 THE REVIEW PROCESS

In August 2015, the Council released a consultation paper, *Phasing out of Suspended Sentences: Consultation Paper*, which set out the Council's preliminary views and draft recommendations, following its deliberations on the approach to be taken to the phasing out of suspended sentences in Tasmania and the possible replacement sanctions. The *Consultation Paper* set out 52 draft recommendations and the Council invited submissions on the package of sentencing reforms it had tentatively suggested. In addition, the Council sought feedback on its preliminary views and proposals, including any negative consequences or difficulties that might arise from the draft recommendations.

In response, the Council received 14 written submissions. Many of the submissions addressed the retention or abolition of suspended sentences, with the majority supporting retention of the sentencing option. The Law Society of Tasmania stressed that it did not support the abolition of suspended sentences. Similarly, Community Legal Centres, Tasmania (CLC Tas) did not believe that suspended sentences should be phased out. The Department of Police and Emergency Management (DPEM) indicated that the issue was not with suspended sentences per se, but with their application, in particular the enforcement of breaches. Concerns about the enforcement of breaches were also raised in the submissions of Mr Holderness-Roddam and the Uniting Church in Australia, Synod of Victoria and Tasmania (the Synod).

Responses also provided feedback on the Council's draft recommendations, which have been taken into account in the Council's deliberations in relation to its final recommendations and incorporated into this report.

As well as a consultation paper, the Council also released a companion document, *Phasing out of Suspended Sentences: Background Paper* to inform the phasing out of suspended sentences and the development of sentencing options to replace them. It contained detailed information about the use of suspended sentences in Tasmania and other comparable jurisdictions.

In addition, the Council commissioned a report to advise on the costs of phasing out suspended sentences in Tasmania. This report was prepared by John Walker, CEO, John Walker Crime Trends Analysis and Lorana Bartels, University of Canberra. The report, *Exploring the Costs of Alternatives to Suspended Sentences in Tasmania*, examines alternative sentencing options through the use of a number of scenarios that might be hypothesised from the Council's proposed reforms. While there are a large number of possible scenarios, the modelling focussed on only three models based on various assumptions regarding the number of suspended sentences currently imposed. The scenarios are:

- Scenario 1: Imprisonment for offenders sentenced to fully suspended sentences (FSSs) and imprisonment combined with a community correction order (CCO) for partly suspended sentences (PSSs) for both the Supreme Court and the Magistrates Court. The sentence length was determined as the average sentence length imposed during 2011-14 in the relevant court, taking into account standard practice on parole and remissions;
- Scenario 2: In the Supreme Court, a 24 month CCO for FSSs and imprisonment combined with a CCO for PSSs, and in the Magistrates Court, a 12 month CCO for FSSs and imprisonment combined with a CCO for PSSs;
- Scenario 3: In the Supreme Court, for FSSs an assessment was made for each offence as to likely sentencing practices, based on existing sentencing practices, and for PSSs imprisonment was combined with a CCO. In the Magistrates Court, for FSSs an assessment was made for each offence as to likely sentencing practices, based on existing sentencing practices, and for PSSs imprisonment was combined with a CCO.<sup>7</sup>

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<sup>7</sup> For more detail see John Walker and Lorana Bartels, *Exploring the Costs of Alternatives to Suspended Sentences in Tasmania* (2015).

## 1.4 THE APPROACH OF THE COUNCIL

The Council has limited its discussions to the Terms of Reference and this report does not necessarily reflect the views of individual members of the Council as to the desirability or otherwise of suspended sentences. In view of the desire of the government to phase out suspended sentences, the Council's approach in this reference has been to consider current sentencing practice in Tasmania as a means of developing credible intermediate sentencing options to replace the suspended sentence. The Probation and Community Corrections Officers' Association (PACCOA) expressed the view that there needed to be a broad range of community-based sentencing options and it 'did not wish to limit the options available to judicial officers who we regard as best placed to impose the most appropriate penalties in all the circumstances of individual cases'. Accordingly, PACCOA supported the Council's recommendations to expand the range of community-based sentencing options. The Council's approach to the development of new sentencing options was based on a view that the abolition of suspended sentences creates the potential for innovative responses to offending and a reassessment of the traditional notion that a sentence of imprisonment (suspended or unsuspended) is the only appropriate response to serious offending. In this endeavour, the Council has drawn encouragement from the recent decision of the Victorian Court of Appeal in *Boulton v The Queen*<sup>8</sup> that has challenged the notion that imprisonment is the only response to serious offending and has accepted that a non-custodial sanction (the CCO) can serve the purposes of punishment in a more balanced and coherent way.<sup>9</sup>

The Council aims to provide judges and magistrates with credible and effective sentencing options to fill the gap left by the abolition of suspended sentences. However, this presents considerable challenges, given the widespread use of suspended sentences in Tasmania and judicial support for the sentencing disposition. Previous research has found that Tasmanian judicial officers (Supreme Court and Magistrates Court) do not support the abolition of suspended sentences, with views being expressed that suspended sentences were 'filling a vital role in the sentencing hierarchy' with 'strong support in both courts for their retention'.<sup>10</sup> In view of these sentiments, there is likely to be judicial concern about the abolition of suspended sentences and the use of other sanctions as alternatives to immediate imprisonment. The Council is also mindful of community concerns and expectations about the use of suspended sentences that have informed government policy. In particular, the Council recognises concerns in relation to the perception that offenders 'walk free' following the imposition of a suspended sentence and the fiction that a suspended sentence is a sentence of imprisonment, when in reality only a small proportion of offenders who receive a FSS will be required to serve time in prison.

The Council's approach in developing a sentencing model to replace suspended sentences in Tasmania has been not only to consider appropriate intermediate sanctions that may replace suspended sentences but also to examine other sanctions that currently operate in Tasmania (in particular the drug treatment order, community service order (CSO) and probation order) to consider how those orders might be restructured to accommodate offenders who previously would have received a suspended sentence. Accordingly, in addition to the introduction of a new intermediate sanction (home detention), the recommendations of the Council also require expansion to the operation of the drug treatment order and the restructuring of probation and community service orders into an enhanced CCO.

The Council is aware that the changes suggested in this paper will have considerable resource implications, given that an unconditional suspended sentence is currently resource neutral. It is the Council's strongly held view that the success (or failure) of any sentencing reform will be dependent on any new sanction being properly funded. The resource implications of the sentencing reforms were also identified in several of the submissions received by the Council. The Director of Public Prosecutions (DPP) noted that, in addition to the supervision, assessment and counselling requirements which will require additional resources,

there would [also] be significant pressure on judicial, prosecutorial and defence counsel resources. Sentencing procedures will become more complicated and take considerably longer than at present, while judges receive reports and hear submissions on the various options that would apply.<sup>11</sup>

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8 [2014] VSCA 342.

9 See further discussion at [7.6].

10 Lorana Bartels, 'Sword or Feather: The Use and Utility of Suspended Sentences in Tasmania', (PhD Thesis, University of Tasmania, 2008) 109.

11 Submission, 28 September 2015, 2.

The Law Society encouraged the 'significant commitment at a political and resourcing level ... over a significant period of time to effectively implement [the] recommendations'.<sup>12</sup> The Alcohol, Tobacco and other Drugs Council Tasmania Inc (the ATDC) stressed that its most important comment in relation to the draft recommendations was that any reforms would only succeed if properly funded. The DPEM submission made it clear that there was every likelihood that the alternative sentencing options would see a significant rise in the financial and human resources costs of agencies such as the DPEM and that '[r]egardless of which combination of alternative sentencing options are adopted, [the] DPEM would not support these options, unless they were adequately resourced to cater for the increased demand on their services'.<sup>13</sup> In the submission from CLC Tas (which focused on the expanded Court Mandated Diversion (CMD) order), the need for a significant injection of funds and resources was acknowledged. PACCOA also agreed with the Council that the reforms proposed in the *Consultation Paper* would not be cost-neutral and that proper resourcing was essential to the success or failure of any new sentencing reforms. In view of this, the Council examined the possible resource implications of the recommendations outlined in this report, which are set out in summary in chapter 4 and in detail in the report, *Exploring the Costs of Alternatives to Suspended Sentences in Tasmania*.<sup>14</sup>

The Council's recommendations in the *Consultation Paper* were that there needed to be an appropriate transition period of at least five years, as well as appropriate monitoring of the new sanctions. The Law Society agreed that there should be at least a five-year transition period with ongoing monitoring, on the basis of the complexity of the sentencing process and the need to have flexibility to meet any issues that may arise with the new sentencing options. Similarly, the ATDC also supported the Council's recommendation that the reforms should be gradual. PACCOA agreed with the Council's draft recommendations in respect of transitional arrangements. The Synod did not support the need for a transition period on the basis that it opposed the abolition of suspended sentences. However, the Synod did agree that there was a need for ongoing monitoring.

The Council continues to believe that a long phase-in period for the reforms suggested in this report is essential, during which time any new sentencing option introduced should operate in conjunction with the suspended sentence. The reforms outlined in this paper make a significant change to the sentencing and management of offenders. Accordingly, it is the Council's view that it would be a mistake to abolish suspended sentences before the use, operation and resource implications of any new sanctions were carefully monitored, analysed and understood. This phased transition will allow any unintended consequences of the reforms to be identified and addressed. It will also allow time to plan the transition process, to assess and develop the necessary infrastructure and services, and to obtain the necessary human and financial resources to ensure that the reforms can be successfully implemented.<sup>15</sup> A significant transition period is also necessary to allow courts, service providers, government agencies and the community to develop confidence in the new orders. Civil Liberties Australia (CLA) highlighted the need for substantial and meaningful community engagement in relation to the new sentencing options in order to ensure that they are not misunderstood in the community and to promote the effective operation of the new sentencing regime. The Council agrees that community engagement to develop confidence in the orders is essential. The Council's view is that a transition period (where the new sanctions and suspended sentences operate side by side) of at least five years is appropriate for these purposes. In this regard, Tasmania can learn from the Victorian experience, where the hasty abolition of suspended sentences created considerable and ongoing difficulties for the prison system and community corrections, and ultimately the broader community, and where subsequent legislative reform was required to ensure that custodial resources were not over-stretched.<sup>16</sup>

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12 Submission, 29 September 2015, 1.

13 Submission, 1 October 2015, 4.

14 See Walker and Bartels, above n 7.

15 These features have been identified as preconditions to the successful implementation of sentencing reform and to provide protection against unintended consequences, see Sentencing Advisory Council, Victoria (VSAC), *Suspended Sentences and Intermediate Sentencing Orders*, Final Report Pt 2 (2008) [13.8] referring to the Halliday review (Home Office, UK, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* (2001)).

16 See [4.2.1].

As part of the transition process, the DPP highlighted the considerable effect that the abolition of suspended sentences and the implementation of alternative sentencing options will have on sentencing practice in Tasmania. The DPP's view was that it would be:

useful for the *Criminal Code* to be amended to include guideline judgments so that when an appropriate vehicle occurs a guideline judgment may be obtained from the Court of Criminal Appeal which will assist all the courts in relation to these matters. Otherwise it could take a considerable period of time to obtain consistent judicial rulings concerning the sentencing range and the types of circumstances where it is appropriate to utilise the various sentencing options.

The Council acknowledges the significant change that the new sentencing regime will have on settled sentencing practice in Tasmania. Accordingly, it has formulated its recommendations with a view to ensuring that the legislative framework provides clear guidance to the courts in relation to the new sentencing options. However, as the DPP has observed, there is scope for initial uncertainty and inconsistency in the use of the new sentencing options. The Council agrees with the DPP that a guideline judgment would be useful in relation to the use of the new sentencing options and, in this context, notes the clarification recently provided by the Court of Appeal in Victoria in its guideline judgment relating to an equivalent order.<sup>17</sup>

Tasmania does not have guideline judgments, nor has the legislature, or any law reform or sentencing advisory body, released any sentencing guidelines. In contrast, legislative provision for guideline judgments exists in the majority of Australian jurisdictions.<sup>18</sup> Guideline sentences are issued, depending on the jurisdiction, either by the judiciary (an appellate court) or a sentencing advisory body. In New South Wales, Victoria, South Australia and Western Australia, the appeal courts have power to issue guideline judgments. In the United Kingdom, the Sentencing Council has responsibility for writing guidelines, which courts must follow unless it is contrary to the interests of justice to do so.<sup>19</sup> The Council has previously recommended that consideration be given to introducing guideline judgments in Tasmania in the context of sentencing for sexual offences<sup>20</sup> and reiterates its earlier recommendation that the introduction of guideline judgments should be explored further.

## Recommendations

### *Transitional arrangements*

1. There should be a transition period of at least five years during which time suspended sentences and any new sanctions should operate concurrently.
2. There needs to be ongoing monitoring and analysis of the use of suspended sentences, the use and effectiveness of new sanctions and the resource implications of the sentencing reforms.
3. Substantial and meaningful engagement with all sectors of the community is necessary to build confidence and support for the sentencing reforms.
4. The option of introducing guideline judgments in Tasmania should be explored further.

<sup>17</sup> See discussion at [2.6]. See also Sarah Krasnostein, 'Boulton v The Queen: The Resurrection of Guideline Judgments in Australia?' (2015) 27 *Current Issues in Criminal Justice* 41; Lorana Bartels, 'Sentencing Review 2014-15' (2015) 39 *Criminal Law Journal* 326, 336-348.

<sup>18</sup> *Sentencing Act 1991* (Vic) s 6AB; *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 37 and 37A; *Penalties and Sentences Act 1992* (Qld) Pt 2A; *Sentencing Act 1995* (WA) s 143; *Criminal Law (Sentencing Act) 1988* (SA) s 29A. See also Krasnostein, above n 17.

<sup>19</sup> *Coroners and Justice Act 2009* (UK) s 125(1). See Andrew Ashworth, *Sentencing and Criminal Justice* (Oxford University Press, 5<sup>th</sup> ed, 2010) 55-56.

<sup>20</sup> TSAC, *Sex Offences Sentencing*, Final Report No 4 (2015) Recommendation 3.

## I.5 SCOPE OF THIS REPORT

Chapter 2 sets out the sentencing orders that are currently available in Tasmania for offenders sentenced under the *Sentencing Act 1997* (Tas), including combination orders, and also considers the current sentencing hierarchy in Tasmania and the concepts of custodial sanctions and intermediate orders.

Chapter 3 provides an overview of the current legal framework that governs the use of suspended sentences in Tasmania and examines the use of suspended sentences. It provides a comparison with the law in other Australian jurisdictions, as well as the position in Canada and the United Kingdom. This chapter summarises the more detailed consideration contained in the *Background Paper* and is intended to provide brief background information about the current legal landscape in order to inform the development of sentencing options to replace suspended sentences.

Chapter 4 considers the likely effect of the abolition of suspended sentences on imprisonment numbers and the use of community-based sanctions in Tasmania and the implications for the Tasmania Prison Service and Community Corrections. It also details the effect of the abolition of suspended sentences on imprisonment numbers in other jurisdictions.

Chapter 5 sets out the Council's approach to a new sentencing model for Tasmania to accompany the phasing out of suspended sentences in Tasmania.

Chapter 6 examines the operation of the drug treatment order available under s 7(ab) of the *Sentencing Act 1997* (Tas) in the Magistrates Court and makes recommendations to expand the order to include drugs and alcohol, as well as extend the power to make the order to the Supreme Court as well as the Magistrates Court.

Chapter 7 examines higher-level intermediate sentencing options that are available in other Australian jurisdictions as well as in New Zealand. It also considers reforms that have been proposed in these jurisdictions to improve existing intermediate sanctions and/or to create new sentencing options. The Council also expresses its view in relation to sentencing orders that are appropriate to replace FSSs. These are home detention and CCO orders. The Council also considers the use of combination sentences and concludes that a CCO order used in combination with a fine provides a sanction with a significant punitive component.

Chapter 8 considers alternatives to PSSs that exist or have been proposed in other jurisdictions, and how they might operate in the Tasmanian context. The Council's recommendation is that a combination sentence of imprisonment (of up to two years) followed by a CCO (of up to three years) be introduced in Tasmania as a replacement for a PSS. This may also be an appropriate sentencing option in cases of serious offending where a FSS was previously used.

Chapter 9 considers the power of the court to defer the sentencing of an offender and makes a recommendation that the power should be available in relation to all offenders in Tasmania.

It is noted that the Council has only examined the phasing out of suspended sentences in the context of the *Sentencing Act 1997* (Tas) and has not considered suspended sentences in the context of *Youth Justice Act 1997* (Tas).

# 2. Current sentencing framework in Tasmania

This chapter sets out the sentencing orders that are currently available in Tasmania (including combination orders) and also considers the current sentencing hierarchy and the concepts of custodial sanctions and intermediate orders.

## 2.1 SENTENCING ORDERS IN TASMANIA

The *Sentencing Act 1997* (Tas) applies to matters heard in the Supreme Court and the Magistrates Court in relation to all adult offenders. It does not generally apply to youth offenders,<sup>21</sup> unless the youth is dealt with in the Supreme Court and the court exercises its discretion to sentence the youth under the *Sentencing Act 1997* (Tas).<sup>22</sup>

There are a number of sentencing options available to courts in Tasmania under the *Sentencing Act 1997* (Tas). The commonly used orders are set out in Table 2–1.<sup>23</sup>

Table 2–1: Sentencing Orders in Tasmania under the *Sentencing Act 1997* (Tas)<sup>24</sup>

Disposition	Description
Imprisonment (ss 12–23 <i>Sentencing Act 1997</i> (Tas))	<p>The Supreme Court can impose sentences of imprisonment for all crimes. The general maximum is 21 years' imprisonment, except for murder and treason, where the penalty is imprisonment for natural life or such other term as the court decides.<sup>25</sup></p> <p>The Supreme Court can also declare that an offender is a dangerous offender, which results in imprisonment until the offender satisfies the court that he or she is no longer a danger to the public.</p> <p>The ability of a magistrate to impose a sentence of imprisonment depends on the specific penalty provisions for the offence.<sup>26</sup> There are also limits on the term of imprisonment that a magistrate can impose for an indictable offence — a sentence up to 12 months imprisonment for a first offence and five years for a subsequent offence.<sup>27</sup></p> <p>The court must record a conviction.</p>

21 *Sentencing Act 1997* (Tas) s 5. The authority of a court to make an area restriction order, under the *Sentencing Act 1997* (Tas) div 3 pt 9, applies to offenders regardless of their age or the court hearing the matter.

22 *Sentencing Act 1997* (Tas) s 107. A youth is a person who is aged 10 or more and under the age of 18 at the time that the offence was committed, *Youth Justice Act 1997* (Tas) s 3. Most offences committed by youths are heard in the Magistrates Court (Youth Justice Division) and the sentencing options and principles that apply are set out in the provisions of the *Youth Justice Act 1997* (Tas). Youth offenders are dealt with in the Supreme Court for 'prescribed offences', which are listed offences that vary depending on the age of the offender, *Youth Justice Act 1997* (Tas) ss 3, 161. A youth aged 15 years or older who is charged with an indictable offence that is not a prescribed offence has the option of having the matter heard by a jury in the Supreme Court, *Youth Justice Act 1997* (Tas) s 161(2).

23 The *Sentencing Act 1997* (Tas) also provides the court with the power to order driver disqualification, restitution, compensation, and area restriction. There are also orders that can be made in relation to a person suffering from a mental illness (assessment, continuing care, supervision and restriction orders).

24 This is adapted from the VSAC, *Suspended Sentences*, Discussion Paper (2005) [1.6].

25 *Criminal Code* (Tas) s 389 (general sentence), s 158 (murder), s 56 (treason).

26 Tasmania Law Reform Institute (TLRI), *Sentencing*, Final Report No 11 (2008) [3.2.1].

27 *Sentencing Act 1997* (Tas) s 13.

Disposition	Description
Drug treatment order (ss 27A–27Y <i>Sentencing Act 1997</i> (Tas)) [Magistrates Court only]	There are two parts to a drug treatment order: 1. a term of imprisonment that is not immediately activated; and 2. a treatment and supervision component. An offender must agree to the making of the order and to comply with the treatment and supervision part of the order. The court must record a conviction.
Suspended sentence of imprisonment (ss 24–27 <i>Sentencing Act 1997</i> (Tas))	A term of imprisonment is imposed and then suspended (in whole or in part), on condition that the offender does not commit another offence punishable by imprisonment during the period the order is in force. The court can also impose other conditions, including community service, supervision and attendance at a rehabilitation program. The court must record a conviction.
Community service order (ss 28–36A <i>Sentencing Act 1997</i> (Tas))	Community service orders require an offender to perform some work or other activity in the community under the direction of a probation officer or supervisor. The maximum number of hours is 240. The offence must be punishable by imprisonment. The court must record a conviction.
Probation order (ss 37–42A <i>Sentencing Act 1997</i> (Tas))	A probation order requires the offender to be of good behaviour during the period of the order and to refrain from doing things specified in the order. The order contains mandatory conditions (such as not committing an offence punishable by imprisonment, submitting to the supervision of probation officer and reporting to the officer, not leaving or staying outside Tasmania without permission, complying with the directions of the probation officer and reporting change of address or employment). It may also contain special conditions in relation to educational programs, assessment and treatment for alcohol or drug dependency, submission to testing for drugs and alcohol, and submission to medical, psychological or psychiatric assessment or treatment. The maximum term of the order is three years. This order can be imposed with or without a recorded conviction.
Fine (ss 43–53 <i>Sentencing Act 1997</i> (Tas))	A fine is a sum of money payable by an offender under an order of a court made on the offender being convicted of an offence. The court must record a conviction. <sup>28</sup>
Rehabilitation program order (s 54A <i>Sentencing Act 1997</i> (Tas)) [family violence offences]	A rehabilitation treatment order is an order to attend and participate in a rehabilitation program. This is a structured treatment program designed to reduce the likelihood of a person who has committed a family violence offence reoffending. This order can be imposed with or without a recorded conviction.
An adjournment with an undertaking (s 7(f) order) (ss 58–64 <i>Sentencing Act 1997</i> (Tas))	Release (unsupervised) with conditions relating to good behaviour. The term cannot exceed 60 months.
Conviction only (ss 58, 64 <i>Sentencing Act 1997</i> (Tas))	The court can record a conviction and order the discharge of the offender.
Dismissal without conviction (ss 58, 63–64 <i>Sentencing Act 1997</i> (Tas))	The court cannot record a conviction and dismisses the charge for the offence.

28 TSAC has recommended that the court have the power to impose a fine without recording a conviction, *Non-conviction Sentences: Not Recording a Conviction as a Sentencing Option*, Final Report (2014), Recommendation 30.

## 2.2 COMBINATION ORDERS

Under s 8 of the *Sentencing Act 1997* (Tas), the court has the power to combine a number of sentencing orders. For example, a court can impose a suspended sentence and combine it with a CSO, a probation order, a fine, a rehabilitation program order and/or a driving disqualification order. The range of combination orders is set out in Table 2–2.

Table 2–2: Combination Orders in Tasmania under the *Sentencing Act 1997* (Tas)

Disposition	Combination orders
Imprisonment (s 8(1) <i>Sentencing Act 1997</i> (Tas))	Community service order (if offender is 18 or over) Probation order (if offender is 18 or over) Fine Rehabilitation program order Driving disqualification order
Community service order (s 8(2) <i>Sentencing Act 1997</i> (Tas))	Probation order Fine Rehabilitation program order Driving disqualification order
Probation order (if a conviction is recorded) (s 8(3) <i>Sentencing Act 1997</i> (Tas))	Fine Rehabilitation program order Driving disqualification order
Fine (s 8(4) <i>Sentencing Act 1997</i> (Tas))	Rehabilitation program order Driving disqualification order

## 2.3 HIERARCHY OF SENTENCING ORDERS

Unlike the position in some other jurisdictions,<sup>29</sup> the *Sentencing Act 1997* (Tas) does not expressly create a hierarchy of sentencing orders that sets out the relative severity of sentences.<sup>30</sup> Section 7 does, however, set out the sentencing orders in descending order of severity from imprisonment to discharge.<sup>31</sup> A suspended sentence is the penultimate sanction — sitting below actual imprisonment and above a CSO in the sentencing hierarchy.<sup>32</sup>

The principle of parsimony (that the court should only impose the least severe sanction that is consistent with the purposes of the legislation) is also not legislatively prescribed in Tasmania, and neither is the principle that imprisonment should be used as a sanction of last resort.<sup>33</sup> However, parsimony and restraint in the use of imprisonment remain principles of common law relevant to the exercise of the sentencing discretion.<sup>34</sup>

The Council's view is that imprisonment should continue to be a sanction of last resort and that the reforms to sentencing in Tasmania should be guided by the principle that imprisonment should only be used when no other sanction is appropriate.

29 See for example, *Sentencing Act 1991* (Vic) s 5(3), (4), (4B), (4C), (5), (6), (7).

30 Bartels, above n 10, 7.

31 Mirko Bagaric and Richard Edney, *Sentencing in Australia*, (Thomson Reuters, 2<sup>nd</sup> ed, 2014) fn 12. The hierarchy is recognised by the TLRI, above n 26, [3.7.1], [3.8.1], [3.9.1], [3.10.1].

32 Lorana Bartels, 'The Use of Suspended Sentences in Australia: Unsheathing the Sword of Damocles' (2007) *Criminal Law Journal* 113, 114.

33 The TLRI has recommended that the principle of restraint in the use of imprisonment should be enacted: TLRI, above n 26, Recommendation 2. Note that some commentators observe that s 12(2) of the *Sentencing Act 1997* (Tas) provides that 'where the punishment for an offence is only provided for as imprisonment a sentencing court may nevertheless impose a non-custodial sentence if the court "considers that the justice of the case will be better met" through the imposition of such a penalty': Bagaric and Edney, above n 31, [12.10].

34 Kate Warner, *Sentencing in Tasmania* (Federation Press, 2<sup>nd</sup> ed, 2002) [3.301]–[3.301], [9.118]–[9.119]; TLRI, above n 26, [3.2.15]–[3.2.18].

## 2.4 CUSTODIAL/NON-CUSTODIAL ORDERS

Under the *Sentencing Act 1997* (Tas), a distinction can be made between custodial and non-custodial sentencing orders. Custodial orders include imprisonment, drug treatment orders and suspended sentences. Non-custodial orders (NCOs) include CSOs, probation orders, fines, rehabilitation program orders, conditional adjournment, discharge and dismissal.

In the context of suspended sentences, as noted by the Victorian Sentencing Advisory Council (VSAC), the ‘use of the term “custodial” may be seen by some as misleading’, given that a person who receives a suspended sentence may not spend any time in prison.<sup>35</sup> However, formally, a suspended sentence is a sentence of imprisonment.<sup>36</sup> As Warner and Spiranovic observed, ‘the legal position is that a suspended sentence is a custodial sentence. It is not merely another non-custodial sentencing option; rather it is the penultimate penalty known to law’.<sup>37</sup> Community dissatisfaction with suspended sentences has been attributed, in part, to the mismatch between judicial perception of the suspended sentence as a serious punishment and community perception that the offender has ‘walked free’ without punishment.<sup>38</sup> This accords with the media portrayal of suspended sentences that present the offender as having received a sentence less than they deserved — for example, that the offender was ‘let-off’, ‘walked free’ or ‘avoided’ prison.<sup>39</sup>

In developing alternative sanctions to replace the suspended sentence, the Council’s view is that there should be greater transparency in sentencing to ensure public acceptance of alternatives to imprisonment. Recent Tasmanian research that examined public opinion on sentencing by surveying the views of jurors found public acceptance of the appropriateness of keeping some offenders out of prison. Contrary to the commonly held assumption that the public are dissatisfied with suspended sentences, Warner and Spiranovic found that ‘overall [results] from the jury surveys suggest that informed members of the public have a much greater acceptance of wholly suspended sentences than has generally been assumed’.<sup>40</sup> This finding was confirmed in face-to-face interviews with jurors, where jurors ‘were prepared to endorse a wholly suspended sentence in a wide variety of cases, including for violent offences where the offender had prior convictions ... and in a family violence case’.<sup>41</sup> However, in the interviews, it was apparent that acceptance of a suspended sentence was based on a view that the juror did not want to send the particular offender to prison rather than any attachment to the ‘intrinsic value of suspended sentences’.<sup>42</sup> Warner and Spiranovic suggest that the desire of the jurors to avoid sending an offender to prison ‘can be read as support for non-custodial alternatives to imprisonment rather than specifically for wholly suspended sentences’.<sup>43</sup> They suggest that this purpose may be better served by an ‘enhanced intermediate sanction ... which is more transparent and less likely to attract the criticism that a suspended sentence is a “let off”, not a real punishment and not in any meaningful sense a substitute for a term of imprisonment’.<sup>44</sup> The Council shares the view that any new intermediate sanction should not be a ‘prison’ sentence that does not involve serving time in prison.

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35 VSAC, above n 24, [1.8] fn 9. However, the concept of ‘custody’ is broader than ‘imprisonment’ as it covers both actual custody (imprisonment) and notional custody (in the custody of the state in the community), Arie Freiberg, *Fox and Freiberg’s Sentencing: State and Federal Law in Victoria* (Thomson, 3<sup>rd</sup> ed, 2014) [12.05].

36 *Sentencing Act 1997* (Tas), s 25(1). See also Bartels, above n 32.

37 Kate Warner and Caroline Spiranovic, ‘Jurors’ Views of Suspended Sentences’ (2014) 47 *Australian and New Zealand Journal of Criminology* 141, 142.

38 See Leslie Sebba and Gad Nathan, ‘Further Exploration in the Scaling of Penalties’ (1984) 24 *British Journal of Criminology* 221; Nigel Walker and Catherine Marsh, ‘Does the Severity of Sentences Affect Public Disapproval?’ in Nigel Walker and Mike Hough (eds), *Public Attitudes to Sentencing: Surveys from Five Countries* (Aldershot, 1988), 60 cited in Warner and Spiranovic, *ibid* 142, 157; Jenny Pearson and Associates, *Review of Community-based Offender Programs*, Final Report (Justice Strategy Unit, Attorney-General’s Department, South Australia, 1999) cited in Arie Freiberg, *Pathways to Justice: Sentencing Review 2002* (Department of Justice, 2002) fn 139; VSAC, *Suspended Sentences*, Interim Report (2005) [2.3], [2.7]; Arie Freiberg and Victoria Moore, ‘Disbelieving Suspense: Suspended Sentences of Imprisonment and Public Confidence in the Criminal Justice System’ (2009) 42 *Australian and New Zealand Journal of Criminology* 101, 105–106.

39 VSAC, above n 24, [7.4]. For example, Cameron Whiteley, ‘Man Escapes Jail for Attack’ *The Advocate*, 15 February 2013; David Killick, ‘Football Player Avoids Jail Time’ *The Mercury*, 25 April 2013; Cameron Whiteley, ‘Victim Dismayed at Culprit’s “Slap on Wrist” for Burning Car’, *The Advocate*, 26 April 2013; Michelle Paine, ‘Underage Sex man Avoids Prison’, *The Mercury*, Wednesday, 29 May 2013; Patrick Billings, ‘Let-off for Rip-off Merchant’, *The Examiner*, 12 November 2013; Caroline Tang, ‘Another Suspended Sentence after Breach’, *The Examiner*, 1 August 2014; Michelle Paine, ‘Pregnant Mum Avoids Jail for Knife Attack’ *The Mercury*, 15 August 2014; Caroline Tang, ‘Another “Last Chance” for Community Service’, *The Examiner* 11 October 2014. These articles were located using the Newsbank Database. See also Freiberg, above n 38, 120.

40 Warner and Spiranovic, above n 37, 155.

41 *Ibid*.

42 *Ibid* 157.

43 *Ibid* 156.

44 *Ibid* 157.

## 2.5 INTERMEDIATE SANCTIONS

Suspended sentences are a form of intermediate sanction. Although the precise scope of 'intermediate sanction' is uncertain,<sup>45</sup> VSAC states that such sanctions 'can generally be understood to be those sentencing orders that fall between immediate imprisonment and dismissals, discharges and adjournments'.<sup>46</sup> Intermediate sanctions can be broadly categorised into two categories:

- (1) 'substitutional sanctions', which empower a court on imposing a term of imprisonment to alter the form of imprisonment (such as suspended sentence orders); and
- (2) 'alternative sanctions', which are not dependent on a term of imprisonment being imposed, but rather exist as sentencing orders in their own right.<sup>47</sup>

In Tasmania, there are currently four intermediate sanctions: drug treatment orders, suspended sentences of imprisonment, probation and CSOs. Drug treatment orders and suspended sentences are 'substitutional sanctions', as they are dependent on the court imposing a term of imprisonment. Probation orders, CSOs and rehabilitation program orders are 'alternative sanctions'.

Since the mid-20th century, a range of intermediate sanctions have been developed in many Western jurisdictions as a response to concerns about increasing prison populations and the need to better address the rehabilitation of offenders.<sup>48</sup> These sanctions provide the court with graduated sanctions that allow greater flexibility to 'craft a sentence that more closely reflects the offender's criminality, the intended purpose or purposes of sentencing and the circumstances of the individual offender'.<sup>49</sup> Further details about these sentencing options are provided in chapters 5 to 9, which provide an overview of possible models for alternative intermediate sanctions to replace fully and partly suspended sentences in Tasmania and contain the Council's recommendations in relation to these options.

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45 Arie Freiberg and Stuart Ross, *Sentencing Reform and Penal Change: The Victorian Experience* (Federation Press, 1999) 107.

46 VSAC, above n 15, [3.6].

47 Ibid [3.7] referring to Freiberg and Ross, above n 45, 108. See Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) 171.

48 VSAC, above n 15, [3.11]; Mackenzie and Stobbs, above n 47, 161.

49 VSAC, above n 15.

# 3.

## *Suspended sentences in Tasmania*

This chapter provides an overview of the current legal framework and examines the use of suspended sentences in Tasmania. This chapter is a summary of the more detailed consideration provided in the *Background Paper* and is intended to provide brief background information about the current legal landscape to inform the development of sentencing options to replace suspended sentences.

### 3.1 WHAT IS A SUSPENDED SENTENCE?

A suspended sentence is a sentence of imprisonment that is not executed at the time when it is imposed by the court. A FSS means that the whole sentence is not activated and the offender is immediately released into the community. A PSS means that the offender spends a specified period of time in prison before being released into the community. Two key steps are involved in the imposition of a suspended sentence:

- the imposition of a term of imprisonment; and
- an order that all or part of the gaol term be held in suspense for a set period ('the operational period').<sup>50</sup>

Conditions may be attached to a suspended sentence.<sup>51</sup> If the offender commits another offence punishable by imprisonment, they will generally be required to serve the term of imprisonment as there is a presumption of activation of the original sentence on breach. If the offender breaches other conditions of the sentence, the offender may be required to serve the term of imprisonment. In this way, a suspended sentence has been described as a 'Sword of Damocles hanging over the offender's head' — it contains the threat of future imprisonment if the offender reoffends or otherwise breaches the sanction.<sup>52</sup> Others have described the suspended sentence as a 'butter knife' in acknowledgment of the reality that if an offender does not reoffend, then there is no punishment.<sup>53</sup>

The suspended sentence is a contentious sentencing option and, in recent years, many jurisdictions have undertaken reviews of, and made legislative changes to, its structure and operation. Suspended sentences have been abolished in New Zealand and Victoria, their abolition recommended in NSW, and their use curtailed in South Australia, the Northern Territory and Canada.<sup>54</sup>

In Tasmania, suspended sentences were considered by the Tasmania Law Reform Institute (TLRI) in its 2008 sentencing report<sup>55</sup> and by Bartels in her comprehensive analysis of the use and utility of suspended sentences in Tasmania.<sup>56</sup> Both these reviews highlighted difficulties with the current operation of suspended sentences but did not recommend their abolition. Instead, recommendations were made for reform of the law to improve their operation. Some of these recommendations, relating to conditions that could attach to a suspended sentence and the consequences of breaching a suspended sentence, were adopted by the government of the day, with changes to the *Sentencing Act 1997 (Tas)* coming into effect in 2011.

50 VSAC, *Suspended Sentences*, Final Report Part I (2006).

51 *Sentencing Act 1997 (Tas)*. See [3.3.6]; TSAC, above n 4, [2.4.4].

52 Bartels, above n 10, 4.

53 *R v Brady* cited in Lorana Bartels, 'Sword or Butter Knife? A Breach Analysis of Suspended Sentences in Tasmania' (2009) 21 *Current Issues in Criminal Justice* 119, 220.

54 See TSAC, above n 4, [2.2.2], [2.4.1].

55 TLRI, above n 26.

56 Bartels, above n 10.

## 3.2 THE PURPOSE OF SUSPENDED SENTENCES

Suspended sentences are linked to principles of specific deterrence, denunciation and rehabilitation.<sup>57</sup> Suspended sentences are 'seen as having an important place in the sentencing hierarchy for first-time offenders or offenders with limited criminal histories, who had committed serious offences but who do not require a program intervention and who have proved themselves to be rehabilitated'.<sup>58</sup> These sentiments are evident in the views of Tasmanian judicial officers, who have affirmed the utility of suspended sentences as a means of achieving justice in individual cases, in the absence of a broader range of sentencing options.<sup>59</sup> Suspended sentences are viewed as a 'last chance' for the offender to avoid an immediate custodial sentence.<sup>60</sup>

### 3.2.1 SUPPORT FOR SUSPENDED SENTENCES

The following reasons are commonly advanced in support of suspended sentences:

- they have a symbolic effect. Suspended sentences 'allow for the seriousness of the offence and/or the offender's conduct to be appropriately acknowledged by imposing a sentence of imprisonment, while at the same time allowing for mercy';<sup>61</sup>
- they provide a useful sentencing option and have an important place in the sentencing hierarchy;
- they are an effective specific deterrent;
- they enable offenders to avoid short prison sentences, which is 'expected to have a protective effect against re-offending';<sup>62</sup>
- they may reduce the prison population. The effect of the abolition of suspended sentences on imprisonment numbers is addressed in chapter 4; and
- they may provide an incentive for offenders to plead guilty.

### 3.2.2 CRITICISMS OF SUSPENDED SENTENCES

The main criticisms of suspended sentences are that:

- they do not amount to a 'real' punishment and are viewed by the public and offenders as a 'let-off';
- the process for imposing a suspended sentence (deciding that imprisonment is the only suitable penalty and then not sending the offender to prison) is difficult to apply and illogical;
- they may also benefit middle-class offenders by double counting factors such as good employment history, lack of prior offending and stable family background;
- they cause net-widening, 'which occurs when sentencers use a more severe sentencing option in lieu of appropriate more lenient alternatives'.<sup>63</sup>
- they violate the proportionality principle.

The Council takes account of the perceived utility of suspended sentences for some offenders and the criticisms that are directed at them in its recommendations for new alternative intermediate sanctions. In the responses received to the *Consultation Paper*, concerns were expressed by DPEM, the Synod, and Mr Holderness-Roddam about the enforcement of breaches of suspended sentences. As discussed in detail at [7.3.8] and [7.6.11], the Council is mindful of the need to ensure that rigorous enforcement procedures are in place for any new intermediate sanctions that are created. The Council also acknowledges the symbolic function of the suspended sentence and the need for judicial officers to have a serious sanction that denounces the offender's conduct while not requiring an offender serve an actual term of imprisonment, in appropriate cases.

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57 VSAC, *Suspended Sentences in Victoria: A Preliminary Information Paper* (2005) 3–4. See *Director of Public Prosecutions v Broadby* (2010) 20 Tas R 399.

58 VSAC, above n 24, [8.19].

59 Bartels, above n 10, 109–110.

60 NSW Law Reform Commission (NSWLRC), *Sentencing*, Report 139 (2013) [10.24]. See Bartels, *ibid* 122, 235–236.

61 VSAC, above n 24, [8.20].

62 Lorana Bartels, 'An Examination of the Arguments For and Against the Use of Suspended Sentences' (2010) 12 *Flinders Law Journal* 119, 132. See VSAC, above n 4, Chapter 5 for the discussion of recidivism rates and suspended sentences.

63 Bartels, above n 62, 160.

### 3.3 THE CURRENT LEGAL FRAMEWORK AND USE OF SUSPENDED SENTENCES IN TASMANIA

This part briefly considers the current legal framework governing the use of suspended sentences in Tasmania. It also sets out information in relation to the current use of suspended sentences in Tasmania. This draws upon the more detailed information set out in the *Background Paper*.

#### 3.3.1 WHEN CAN A SUSPENDED SENTENCE ORDER BE MADE IN TASMANIA?

##### Sentencing principles

In Tasmania, a court may 'record a conviction and order that the offender serve a term of imprisonment that is wholly or partly suspended'.<sup>64</sup> Aside from the restriction that only sentences of imprisonment can be suspended, there is no legislative test prescribed in the *Sentencing Act 1997* (Tas) for the imposition of a suspended sentence. However, certain principles that guide the exercise of the court's discretion can be discerned from the interpretation of the provisions by the courts. The leading authority is the High Court decision in *Dinsdale v The Queen*,<sup>65</sup> which makes it clear that the court must decide that a sentence of immediate imprisonment is appropriate before it makes a decision about whether to suspend the sentence. Accordingly, there are two steps involved in making a suspended sentence order:

- (1) a decision to impose a sentence of imprisonment; and
- (2) a decision to suspend the operation of the term of imprisonment.<sup>66</sup>

The decision to impose a sentence of imprisonment is crucial and it follows that a suspended sentence 'is not to be regarded in any sense as a half-way house between community service orders and custody'.<sup>67</sup> Further, if courts were strictly following the *Dinsdale* approach, then it would follow that all offenders who currently receive a suspended sentence would be sentenced to immediate imprisonment following the abolition of the sentencing order. However, this is not the reality.<sup>68</sup> There is evidence that in Tasmanian courts suspended sentences are being used as a substitute for non-custodial sentences in some cases and, as Bartels' interviews with 16 Tasmanian judicial officers (all six Supreme Court judges and 10 out of 12 magistrates) in 2006–07 revealed, 'there [was] far from universal application of the two-step process laid down in *Dinsdale*'.<sup>69</sup> This has implications for the likely approach to sentencing and the use of actual imprisonment following the abolition of suspended sentences.

In making the decision to suspend a term of imprisonment, the court must take account of all the circumstances of the offence and the offender.<sup>70</sup> In an attempt to identify the factors that were influential in the decision of a judge to suspend a sentence of imprisonment, Bartels conducted a qualitative analysis of sentencing decisions in the Supreme Court. She identified 15 factors that were cited in at least 20 of the 351 cases where partly or wholly suspended sentences were imposed. These were (in descending order of frequency):

- first offender;
- employment;
- drug/alcohol rehabilitation;
- youth;

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64 *Sentencing Act 1997* (Tas) s 7(b).

65 (2000) 202 CLR 321.

66 VSAC, above n 24, [4.5].

67 Warner, above n 34, [9.205].

68 TSAC, above n 4, [2.4.1].

69 Lorana Bartels, 'Suspended Sentences – Judicial Perspectives' (2009) 9 *Queensland University of Technology Law and Justice Journal* 44, 48. For this reason, the TLRI recommended 'that guidance be given about the imposition of suspended sentences in a way that does not interfere with judicial discretion but that makes it clear that two distinct steps are involved': TLRI, above n 26, [3.3.31]. The Institute recommended that a new section be inserted into the *Sentencing Act 1997* (Tas) that should provide that 'a court must not impose and suspend a term of imprisonment (wholly or partly) unless, having regard to the provisions of this Act (and in particular s 13A), it has first determined that it would be appropriate in the circumstances that the offender be imprisoned for the term of imprisonment imposed': at [3.3.32]. This recommendation was not adopted.

70 *Dinsdale v R* [79]–[8] (Kirby J) confirmed in *Langridge v The Queen* (2004) 12 Tas R 470.

- good character;
- mental health/intellectual disability/family responsibility;
- guilty plea;
- remorse;
- adverse personal circumstances;
- supportive relationship;
- co-operating/informing;
- degree of participation/parity; and
- risk of reoffending.<sup>71</sup>

It was noted that '[m]ore than one factor will generally be cited, and it appears to be the intersection of various factors which ultimately determines the decision to suspend a sentence'.<sup>72</sup>

It is likely that these factors will remain relevant to the court's decision to impose a non-custodial sanction (rather than a term of immediate imprisonment) following the abolition of suspended sentences. The challenge in making recommendations for new sanctions remains to create new sentencing order/s that can be used for a similar group of offenders who currently receive a suspended sentence. In this regard, the Council can draw on the experience in Victoria, where courts initially tended to view the CCO (which was introduced as a replacement for the suspended sentence) as an imperfect substitute for the FSS. In Victoria, it appeared that in both the Magistrates Court and the higher courts, CCOs and suspended sentences 'were still viewed by sentencers as appropriate for different groups of offenders'.<sup>73</sup> This led to an increase in the use of imprisonment as a sanction and a consequent substantial increase in the prison population.<sup>74</sup> In response, Parliament has made it clear that the CCO is an appropriate order in circumstances where the court would previously have imposed a suspended sentence.<sup>75</sup> An examination of sentencing practice conducted by VSAC following the legislative amendment in Victoria suggests that both the higher courts (County Court and Supreme Court) and the Magistrates Court are increasingly using CCOs as a replacement for suspended sentences.<sup>76</sup> The Court of Appeal has also set out guidelines for the courts in relation to the use of the CCO to facilitate its use in the manner intended by Parliament.<sup>77</sup>

In Tasmania, the Council aims to develop new sanctions that from their introduction are accepted by the courts as substitutes for the suspended sentence and makes recommendations in relation to the implementation (and monitoring) of these sanctions with a view to ensuring that this is the case.

### Limitations on the power to suspend

Unlike the approach in some jurisdictions,<sup>78</sup> the Tasmanian legislation does not impose any restriction on the availability of a suspended sentence. The *Sentencing Act 1997* (Tas) also does not impose any offence-based restrictions that would prevent suspended sentences being imposed in more serious types of offending.<sup>79</sup> Based on the research undertaken by the Council examining the use of suspended sentences in Tasmania, the Council's view is that FSSs are not being used inappropriately for serious crimes in Tasmania. As shown in [3.3.2] and [3.3.3], suspended sentences are more commonly used for drug and property offences and are used less commonly for offences against the person. Community concern is usually enlivened when a suspended sentence is imposed in cases of sexual assault or violent incidents.<sup>80</sup> Ultimately, these data indicate that FSSs are not widely used for these types of offences, although combined they represent approximately a quarter of suspended sentences imposed.

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71 Lorana Bartels, 'To Suspend or Not to Suspend: A Qualitative Analysis of Sentencing Decisions in the Supreme Court of Tasmania' (2009) 28 *University of Tasmania Law Review* 23, 27, 28.

72 Ibid 28.

73 VSAC, *Community Correction Orders: Monitoring Report* (2014) 57.

74 See [4.2.1].

75 *Sentencing Act 1991* (Vic) s 36(2). See further discussion at [7.6].

76 VSAC, *Community Correction Orders: Second Monitoring Report (Pre-Guideline Judgment)* (2015) 20.

77 *Boulton v The Queen* [2014] VSCA 342, [25]. See [7.6].

78 See TSAC, above n 4, Appendix A Table A-1.

79 See TLRI, above n 26, [3.3.28]; TSAC ibid [2.4.1].

80 VSAC, above n 50, 4.

To an extent, however, this supports the TLRI's recommendation against introducing offence-based restrictions on the use of suspended sentences.<sup>81</sup>

In addition, the Council recognises the complexity of the sentencing process and the need for the court to impose an appropriate sentence means that even in relation to serious offences (such as manslaughter) there may be significant personal mitigating factors (such as in a euthanasia case). This was expressly supported by the Law Society and the Synod. PACCOA also agreed with the Council's draft recommendations in respect to transitional arrangements. Accordingly, as part of the transitional arrangements, restrictions should not be placed on the offence categories for which suspended sentences can be imposed.

## Recommendation

### *Transitional arrangements*

5. As part of the transitional arrangements, restrictions should not be placed on the offence categories for which suspended sentences can be imposed.

### 3.3.2 USE OF SUSPENDED SENTENCES

Tasmania's use of suspended sentences is higher than in all other jurisdictions and this is important for projections as to what might happen to prison populations following the abolition of suspended sentences in Tasmania. In the higher courts in Tasmania in 2013–14, Australian Bureau of Statistics (ABS) data show that 37.9% of offenders received a FSS as their principal sentence, compared with the national average of 16.7%.<sup>82</sup> Similarly, in the Magistrates Court, Tasmania has the highest use of FSSs at the Magistrates Court level in Australia (10.3%) compared with other jurisdictions — the Northern Territory (5.7%), South Australia (5.6%), the ACT (5.6%), Victoria (4.9%), NSW (4%), Queensland (2.8%), and Western Australia (2.7%).<sup>83</sup>

Analysis of local data of offenders sentenced in the Supreme Court between 1 January 2011 and 30 June 2014 found that there were 1186 sentences imposed in respect of 4039 offences committed by 1186 offenders. In this period, 441 offenders (37.2%) received a prison sentence, 428 offenders (36.1%) received a FSS, 195 offenders (16.4%) received a PSS and 122 offenders (10.4%) received a non-custodial sanction.<sup>84</sup> In the Magistrates Court, in the same period, there were 114195 offences for which sentences were imposed in respect of 54576 offenders. 1589 offenders (2.9%) received a prison sentence, 749 offenders (1.4%) received a PSS, 4352 offenders (8%) received a FSS, 2388 offenders (4.4%) received a CSO, 717 offenders (1.3%) received a probation order, 30308 offenders received a fine (55.4%), 2207 offenders (4%) received another monetary penalty, 5932 offenders (10.9%) received good behaviour bonds (GBB), licence disqualification was imposed on 927 offenders (1.7%) and a nominal penalty was imposed on 5507 offenders (10.1%).<sup>85</sup>

81 TLRI, above n 26, Recommendation 10.

82 TSAC, above n 4, [3.2].

83 Ibid [4.2].

84 See TSAC, above n 4, for more detail about the findings and methodology.

85 See *ibid*.

### 3.3.3 OFFENCES FOR WHICH SUSPENDED SENTENCES ARE IMPOSED

#### Supreme Court

##### Offences resulting in suspended sentences

Based on all offences finalised in the Supreme Court between 2011 and 2014 (n=4039), there were 711 PSSs and 1052 FSSs imposed in the Supreme Court. Non-sexual offences against the person accounted for 16.7% of all offences for which suspended sentences were imposed, although they accounted for a higher proportion of PSSs (20.1% vs 14.4%). Sexual offences represented 6.6% of offences for which both PSSs and FSSs were imposed. Property offences accounted for nearly half of all offences resulting in suspended sentences (48.4%), although such offences comprised a higher proportion of PSSs than FSSs (59.1% and 41.3% respectively). Drug offences represented 22.5% of offences for which suspended sentences were imposed, but such offences accounted for a much higher proportion of offences attracting FSSs (32.6%) than PSSs (7.5%). Finally, other offences accounted for 5.8% of all offences for which suspended sentences were imposed (6.8% of PSSs and 5.2% of FSSs).

##### Most common offences attracting a suspended sentence

PSSs were imposed in respect of 40 offence types, while FSSs were imposed in relation to 49 offence types. Collectively, the top 10 offences represented 74.8% of offences resulting in PSSs and 70.3% of offences attracting FSSs. Accordingly, the likely effect of the proposed abolition of suspended sentences will be determined to a large extent by the new sentencing practices in respect of these specific offences.

Table 3–1: Top 10 offences attracting suspended sentences

	PSS (n=711)		FSS (n=1052)	
	Offence	% of PSS	Offence	% of FSS
1	Serious assault resulting in injury	12.4%	Deal or traffic in illicit drugs — commercial quantity	14.6%
2	Obtain benefit by deception	12.1%	Serious assault resulting in injury	9.8%
3	Unlawful entry with intent/ burglary etc	10.1%	Obtain benefit by deception	9.0%
4	Dishonest conversion	10.1%	Arson	7.2%
5	Arson	7.7%	Cultivate illicit drugs	6.0%
6	Forgery of documents	5.9%	Dishonest conversion	5.6%
7	Theft from a person (excluding by force)	4.6%	Forgery of documents	4.9%
8	Deal or traffic in illicit drugs — commercial quantity	4.2%	Possess illicit drugs	4.8%
9	Aggravated robbery	3.8%	Aggravated sexual assault	4.3%
10	Aggravated sexual assault	3.8%	Use illicit drugs	4.1%
	Total	74.8%	Total	70.3%

*\* figures do not sum to total due to rounding*

### Offences for which offenders most likely to receive a suspended sentence

Excluding offences where there were fewer than 20 sentences imposed,<sup>86</sup> Table 3–2 sets out the 10 offences for which an offender was most likely to receive a PSS. These offences also accounted for 57.7% of offences resulting in PSSs and 10.2% of all offences finalised.

PSSs were imposed in respect of 17.6% of all offences (n=711), but were imposed in relation to 56.5% of cases involving breach of bail (n=13) and 33.5% of burglaries (n=72). Offenders were also disproportionately likely to receive PSSs for theft from a person (32.7% of such offences resulted in PSSs) and non-aggravated robbery (31.3%). Of all offences for which PSSs were imposed, serious assault resulting in injury contributed the most to the use of PSSs (n=88), accounting for 12.4% of all offences attracting such an outcome. As set out below, PSSs were also imposed in respect of 72 counts of burglary and 72 counts of dishonest conversion, so future sentencing practices in relation to these offences will also determine the likely impact of the abolition of PSSs as a sentencing option to a significant extent.

Table 3–2: Offences most likely to result in PSSs

	Offence	N (PSS)	N (Total)	% of offences
1	Breach of bail	13	23	56.5%
2	Unlawful entry with intent/burglary etc	72	215	33.5%
3	Theft from a person (excluding by force)	33	101	32.7%
4	Theft of a motor vehicle	27	86	31.4%
5	Non-aggravated robbery	15	48	31.3%
6	Arson	55	209	26.3%
7	Misuse of regulated weapons/explosives	8	34	23.5%
8	Aggravated robbery	27	122	22.1%
9	Serious assault resulting in injury	88	419	21.0%
10	Dishonest conversion	72	381	18.9%
	Total for offences most likely to receive PSS	410	1638	25.0%
	Total for all PSSs	711	4039	17.6%

Excluding offences where there were fewer than 20 sentences imposed, Table 3–3 sets out the 10 offences for which an offender was most likely to receive a FSS. These offences also accounted for 47.3% of offences resulting in FSSs and 12.3% of all offences finalised.

FSSs were imposed in respect of 26% of all offences (n=1052), but were imposed more frequently for drug offences, which dominated the imposition of FSSs and accounted for 32.6% of offences attracting such an outcome. Further, the top five offences for which an offender was most likely to receive a FSS as an outcome related to drug matters. In fact, 69.6% of 'other illicit drug offences, nec'<sup>87</sup> resulted in FSSs. This was also the most common outcome for using illicit drugs (69.4%), cultivating illicit drugs (67.7%), dealing or trafficking in a commercial quantity of illicit drugs (65.8%) and possessing illicit drugs (56.2%). Of these drug offences, dealing was also the offence which accounted for by far the largest proportion of FSSs imposed (14.6%; n=154), and so future sentencing practices in relation to this offence will be strongly determinative of the impact of the proposed abolition of suspended sentences.

86 See Patrizia Poletti and Sumitra Vignaendra, 'Trends in the Use of Section 12 Suspended Sentences' (Sentencing Trends and Issues No 3, Judicial Commission of NSW, 2005).

87 Nec means not elsewhere classified and refers to minor matters such as possessing drug-related paraphernalia.

Table 3–3: Offences most likely to result in FSS

	Offence	N (FSS)	N (Total)	% of offences
1	Other illicit drug offences, nec	32	46	69.6%
2	Use illicit drugs	43	62	69.4%
3	Cultivate illicit drugs	63	93	67.7%
4	Deal or traffic in illicit drugs — commercial quantity	154	234	65.8%
5	Possess illicit drugs	50	89	56.2%
6	Arson	76	209	36.4%
7	Subvert the course of justice	14	39	35.9%
8	Non-aggravated robbery	14	48	29.2%
9	Theft of a motor vehicle	24	86	27.9%
10	Theft from a person (excluding by force)	28	101	27.7%
	Total for offences most likely to receive FSS	498	1007	49.5%
	Total for all FSSs	1052	4039	26.0%

## Magistrates Court

### Offences resulting in suspended sentences

Based on all offences for which sentences were imposed in the Magistrates Court in 2011–14 (n=114 195), there were 6621 offences attracting PSSs and 18 263 attracting FSSs. Offences against the person accounted for 6.2% of all offences for which suspended sentences were imposed, and represented similar rates for PSSs and FSSs (6.1% and 6.2%). Offences against property accounted for 31.2% of offences resulting in suspended sentences although such offences comprised a higher proportion of PSSs than FSSs (38.1% and 28.7% respectively). Conversely, traffic offences accounted for a similar proportion (32.1%), but these comprised a higher proportion of FSSs rather than PSSs (35.1% vs 23.9%). Drug offences also accounted for a higher proportion of FSSs (8.2% vs 4.6%), and such offences accounted for 7.2% of offences resulting in suspended sentences. Finally, almost a quarter of offences resulting in suspended sentences (23.3%) were imposed for other offences, with such offences representing 27.4% of offences for which PSSs were imposed and 21.8% of FSSs.

### Most common offences attracting a suspended sentence

Table 3–4 presents the 10 most common offences for which PSSs or FSSs were imposed. Collectively, the top 10 offences represented 72.5% and 72.1% of offences for which PSSs and FSSs respectively were imposed in 2011–14. Accordingly, the likely impact of the proposed abolition of suspended sentences will be determined to a large extent by the new sentencing practices in respect of these offences. In its submission, the Law Society observed that statistics about matters in the Magistrates Court that attract suspended sentences may be misleading. This was on the basis that in the majority of cases where someone receives a FSS or a PSS for breach of bail and registration charges, there will have been a number of offences and the imposition of a global sentence. The Council acknowledges that global sentencing makes it difficult to predict how the courts will sentence for offences following the abolition of suspended sentences.<sup>88</sup> However, the discussion in this report provides some insights into possible future sentencing practice based on current practice.

88 In the *Background Paper*, the Council discussed global sentencing and the respective limitations of analysing sentencing practice according to both the most serious offence approach and all offences approach: see Appendix B.

Table 3–4: Top 10 offences attracting suspended sentences

	PSS		FSS	
	Offence	% of PSS	Offence	% of FSS
1	Theft from a person (excluding by force)	16.1%	Theft from a person (excluding by force)	13.2%
2	Breach of bail	12.1%	Breach of bail	9.7%
3	Unlawful entry with intent/burglary, break, enter	7.8%	Drive while licence disqualified, cancelled or suspended	9.2%
4	Breach of violence order	6.6%	Exceed PCA	9.1%
5	Drive while licence disqualified cancelled or suspended	6.4%	Registration offences	7.3%
6	Exceed PCA	6.2%	Unlawful entry with intent/burglary, break, enter	6.0%
7	Registration offences	4.9%	Drive without a licence	4.8%
8	Illegal non-fraudulent trade practices	4.5%	Common assault	4.8%
9	Common assault	4.5%	Possess illicit drug	4.5%
10	Drive without a licence	3.5%	Breach of violence order	3.5%
	Total	72.5%	Total	72.1%

There was little difference between the offences for which PSSs and FSSs were most commonly imposed, with nine out of the 10 offences appearing in both lists. However, possessing an illicit drug appeared as the ninth most common offence for which FSSs were imposed (4.5% of offences resulting in FSSs) and was not in the PSSs list, while illegal non-fraudulent trade practices was eighth on the PSSs list (4.5% of PSSs) and not in the FSSs list.

Theft from a person (excluding by force) (hereafter 'theft from a person') was the offence for which both forms of suspended sentence were most commonly imposed, although it represented a higher proportion of PSSs than FSSs (16.1% vs 13.3%). Breach of bail was the second most common offence for both types of sentence, although this again accounted for a higher proportion of PSSs (12.1% vs 9.7%). PSSs were more commonly imposed for a breach of a violence order (6.6% vs 3.5%), while driving while licence disqualified, cancelled or suspended (hereafter 'drive disqualified') or exceeding the prescribed content of alcohol (hereafter 'exceed PCA') accounted for a larger proportion of FSSs than PSSs (9.2% vs 6.2% and 9.1% vs 6.2% respectively).

#### Offences for which offenders most likely to receive a suspended sentence

Excluding offences where there were fewer than 20 sentences imposed overall, Table 3–5 sets out the 10 offences for which an offender was most likely to receive a PSS. These offences also account for 40.6% of all PSSs imposed.

PSSs accounted for 5.8% of all sentences imposed, but were imposed in 48.1% of child pornography offences. However, this did not contribute significantly to the number of PSSs overall, as the number of child pornography cases was quite small (n=27). Offenders were around four times as likely as offenders overall to receive a PSS for theft of a motor vehicle (imposed in 23.4% of cases), obtain benefit by deception (22.5%) and stalking (22.2%). Offenders sentenced for burglary received a PSS in 17.7% of cases and this offence contributed significantly to the number of such sentences imposed (n=517). Offenders were also disproportionately likely to receive a PSS for the two offences for which such sentences were most commonly imposed, theft from a person (imposed in 12.3% of such cases) and breach of bail (8.8%).

Table 3–5: Offences most likely to result in PSSs

	Offence	N (PSS)	N (Total)	% PSS
1	Child pornography offences	13	27	48.1%
2	Theft of a motor vehicle	199	851	23.4%
3	Obtain benefit by deception	135	599	22.5%
4	Stalking	6	27	22.2%
5	Non-aggravated sexual assault	11	61	18.0%
6	Burglary	517	2927	17.7%
7	Illegal non-fraudulent trade practices	301	1920	15.7%
8	Criminal intent	7	51	13.7%
9	Theft from a person	1064	8619	12.3%
10	Breach of violence order	434	3573	12.1%
	Total	6621	114195	5.8%

FSSs were imposed in relation to 16% of all offences. Excluding offences with fewer than 20 cases, the Table 3–6 sets out the 10 offences for which an offender was most likely to receive such a sentence. These offences represent 23.4% of all FSSs imposed in 2011–14, with two offences alone (burglary and theft from a person) accounting for 19.2% of all FSSs imposed. Two other offences for which an offender was disproportionately likely to receive such a sentence (albeit not in the top 10 of such sentences) and that contributed significantly to the overall number of FSSs were drive disqualified (n=1679), which was imposed in 22.4% of sentences for that offence and breach of bail (n=1771) imposed in 19.6% of sentences for that offence.

Offenders sentenced for the following offences were at least twice as likely to receive FSSs, compared with offenders overall:

- non-aggravated sexual assault — imposed in 39.3% of cases;
- burglary — imposed in 37.3% of cases and, as stated above, a major contributor to the overall number of FSSs;
- subverting the course of justice — 36.8%;
- prison regulation offences — 36.0%; and
- offences against public order sexual standards — 32.1%.

Table 3–6: Offences most likely to result in FSSs

	Offence	N (FSS)	N (Total)	% FSS
1	Non-aggravated sexual assault	24	61	39.3%
2	Burglary	1092	2927	37.3%
3	Subvert the course of justice	32	87	36.8%
4	Prison regulation offences	9	25	36.0%
5	Offences against public order sexual standards	9	28	32.1%
6	Criminal intent	16	51	31.4%
7	Receive or handle proceeds of crime	310	1052	29.5%
8	Theft from a person	2422	8619	28.1%
9	Driving under the influence of alcohol/other substance	135	491	27.5%
10	Theft of a motor vehicle	233	851	27.4%
	Total	18263	114195	16.0%

### 3.3.4 MAXIMUM TERM AND OPERATIONAL PERIOD

#### Maximum term

In Tasmania, there are no statutory restrictions on the minimum or maximum term of imprisonment that can be suspended.

In the research undertaken by the Council, in the Supreme Court only 2% of offenders received FSSs for a period exceeding 18 months and no such sentences exceeded three years. There were no PSSs imposed in the Supreme Court for less than three months, while there were only three sentences exceeding three years (1.5%).<sup>89</sup> The median sentence length for FSSs was six months and 10 months for PSSs.

The Council's analysis of the terms of imprisonment imposed supports the argument that suspended sentences allow offenders to avoid serving short, but nevertheless deleterious, terms of imprisonment.<sup>90</sup> It also suggests that, in general, courts are suspending sentences for offences at the lower end of the severity scale. This finding also supports the TLRI's recommendation that it would be ineffectual and unnecessary to impose a restriction on the length of sentences that can be suspended.<sup>91</sup>

In the Magistrates Court, there were no PSSs imposed with sentences longer than two years and only 0.4% of offenders received FSSs exceeding 18 months.

#### The operational period

Similarly, there is no statutory limit on the period of time for which a sentence can be suspended (the operational period). However, courts do not generally impose lengthy operational periods.

The Council's analysis of the use of suspended sentences in the Supreme Court demonstrates that operational periods for FSSs ranged from 12 to 60 months, with a median of 24 months.<sup>92</sup> The operational period for PSSs ranged from 12 months to 36 months, with a median of 24 months.

89 See TSAC, above n 4, [3.1.3].

90 For discussion, see Bartels, above n 62, 119.

91 See TLRI, above n 26, [3.3.27], Recommendation 10.

92 See TSAC, above n 4, [3.1.4].

### 3.3.5 COMBINATION ORDERS

In Tasmania, suspended sentences can be combined with other sentencing orders, such as community service, probation, fines, rehabilitation program and/or driving disqualification.<sup>93</sup> In Bartels' analysis of suspended sentences imposed by the Supreme Court in the period 2002–04, a combination order was made in 60% of PSSs and 68% of FSSs.<sup>94</sup> In relation to FSSs, suspended sentences were most commonly combined with compensation (in 21% of cases) or community service (20% of cases).<sup>95</sup> A FSS was combined with a probation order in 11% of cases. In the Magistrates Court, a FSS was most commonly combined with a fine (33%) followed by probation (16%) and a CSO (9%).<sup>96</sup> It was not possible to repeat this analysis for all combination sentences for the most recent data over the entire period. However, data were available in relation to combination sentences in the Supreme Court for 2011 (see below). Data were also available for the combination of suspended sentences and fines. In the Supreme Court, in the period 2011–14, 49 of the 428 offenders (11%) who received a FSS also had a fine imposed. The fines ranged from \$130 to \$340 200 with \$1350 being the median fine and \$1000 being the most commonly imposed fine. In the Magistrates Court, in the financial year 2013–14, there were 6496 matters finalised where a FSS was imposed and in 4% of those cases a fine was also imposed.

### 3.3.6 CONDITIONS OF SUSPENDED SENTENCE ORDERS

A suspended sentence is subject to a mandatory condition that the offender does not commit another offence punishable by imprisonment during the operational period.<sup>97</sup> In addition, the *Sentencing Act 1997* (Tas) s 24(2) provides that the court may impose any one or more of the following conditions:

- that the offender perform community service;
- that the offender is subject to the supervision of a probation officer;
- that the offender is required to undertake a rehabilitation program;
- any other conditions as the court considers necessary or expedient.

Any condition imposed can be 'made subject to any condition as the court considers necessary or expedient'.<sup>98</sup>

The Council's analysis found that in the Supreme Court in 2011, the majority of offenders (70%) did not have any additional order imposed on their suspended sentence, while 15% were subject to a probation order and 20% were subject to a CSO (multiple additional orders were possible).<sup>99</sup>

### 3.3.7 BREACH OF ORDERS

A suspended sentence order can be breached if the offender is found guilty of an imprisonable offence or if the offender breaches another condition of the suspended sentence.<sup>100</sup> Different consequences attach depending on the nature of the breach. If an offender is found guilty of an imprisonable offence, the *Sentencing Act 1997* (Tas) s 27(4B) creates a presumption that 'the court must activate the sentence of imprisonment that is held in suspense and order that the offender serve it'. Section 27(4C) provides the court with other options (partial activation, substituting a new sentence, varying the conditions on which the sentence was suspended, or making no order) only if the court is of the opinion that the activation of the original sentence would be unjust. Relevant factors to the issue of whether such an order would be unjust include:

the offender's attempts at rehabilitation, the seriousness of the offence giving rise to the breach, whether the offences are similar in character to that which gave rise to the suspended sentence, and the time lapse from the imposition of the suspended sentence to when the offences were committed.<sup>101</sup>

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93 *Sentencing Act 1997* (Tas) s 8(1). See also *ibid* [2.2], [2.4.4].

94 Bartels, above n 10, 176.

95 *Ibid* 177.

96 *Ibid*. The data from the Magistrates Court did not disclose the number of compensation orders imposed in combination with suspended sentences.

97 *Sentencing Act 1997* (Tas) s 24(1). See [3.1]; TSAC, above n 4, [2.4.4].

98 *Sentencing Act 1997* (Tas) s 24(3).

99 TSAC, above n 4, [2.4.4].

100 *Sentencing Act 1997* (Tas) s 27.

101 *Tanner v Brown* [2011] TASSC 59, [94] (Wood J).

These factors need to be assessed in light of 'the statutory imperative that the sentence be activated unless that consequence would be unjust' and that 'ordinarily a suspended sentence is meant to operate as a last chance'.<sup>102</sup> If the court does not activate the sentence, the court must state the reasons for its decision.<sup>103</sup>

There is no statutorily enshrined presumption of activation if the offender unreasonably breaches a condition of the suspended sentence other than by committing a new offence. In this case, the court may activate all or part of the sentence, impose a substituted sentence, vary the conditions of the suspended sentence or make no order.<sup>104</sup>

The Council examined breach rates in Tasmania for FSSs imposed in the Supreme Court in 2011 by committing an imprisonable offence. As at 30 September 2014, 44 of the 128 offenders examined (34%) had breached their sentence by committing an imprisonable offence.<sup>105</sup> This represents a decrease from 41% in Bartels' study, but remains higher than in Victoria (28%)<sup>106</sup> and NSW (22%).<sup>107</sup> It should be noted that nearly two-thirds of offenders (66%) subject to a FSS were not convicted of an imprisonable offence committed within the operational period of the sentence. Offenders who received suspended sentences for robbery or violent offences (63% and 55% respectively) were more likely to breach suspended sentences compared with offenders who received a suspended sentence for sexual offences (13%) and property offences (0%).<sup>108</sup> The Council found that 24 of the 44 offenders (55%) who breached their suspended sentence by committing an imprisonable offence were subject to breach action, with breach action being more likely for high frequency offenders and offenders who committed serious breach offences. Of the 24 actioned cases, 10 (42%) were activated in full and three (13%) partially activated or a lesser period of imprisonment imposed.<sup>109</sup>

The failure to activate the sentence in almost half of breach actions suggests that the punitive nature of this sentencing measure remains somewhat illusory, which may contribute to negative public perceptions of leniency. However, a stricter presumption would increase the imprisonment rate, as has recently been found to be the case in NSW, where 'far from reducing the rate of imprisonment, suspended sentences have increased it'.<sup>110</sup> In contrast, in Tasmania, it would appear that (given the activation rate for breach) suspended sentences currently have the effect of reducing imprisonment, at least for those offenders who would otherwise have received an immediate custodial sentence. If FSSs were only imposed in circumstances where an immediate term of imprisonment would be imposed (which is unlikely), then of the 128 offenders who received a FSS in 2011, 115 were successfully diverted from prison.

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102 Ibid [96] (Wood J).

103 *Sentencing Act 1997* (Tas) s 27(4D).

104 Ibid s 27(4E).

105 TSAC, above n 4, [5.1.1].

106 VSAC, above n 15, 37.

107 Sentencing Council, NSW, *Suspended Sentences: Report* (2011) 23.

108 TSAC, above n 4, [5.1.1].

109 Ibid.

110 Patricia Menéndez and Don Weatherburn, 'The Effect of Suspended Sentences on Imprisonment' (Issue Paper No 97, NSW Bureau of Crime and Statistics Research, 2014) 5.

# 4. *The effect of abolition of suspended sentences on imprisonment numbers and the use of community-based sanctions*

Term of Reference 2 requires the Council to consider the effect on the use of other sentencing options on the abolition of suspended sentences and Term of Reference 5 asks the Council to discuss the effect of the abolition of suspended sentences on imprisonment numbers. Term of Reference 3 asks the Council to research the effect of the abolition of suspended sentences on imprisonment numbers in other jurisdictions.

This chapter considers the likely effect of the abolition of suspended sentences on imprisonment numbers and the use of community-based sanctions in Tasmania and the implications for the Tasmania Prison Service and Community Corrections. This is based on modelling undertaken on behalf of the Council that considered three possible scenarios that might be hypothesised from the Council's proposed reforms.<sup>111</sup> It also details the effect of the abolition of suspended sentences on imprisonment numbers in other jurisdictions.

## 4.1 THE TASMANIAN CONTEXT

In the 2013–14 financial year, 143 offenders were sentenced to suspended sentences in the Supreme Court (53 partly suspended and 90 fully suspended) and the same number of offenders were sentenced to an unsuspended immediate term of imprisonment as those who received a FSS. In the Magistrates Court, 1349 offenders received a suspended sentence (232 partly suspended and 1117 fully suspended) and almost two and half times as many offenders received a FSS as received a sentence of immediate imprisonment (n=466). Once suspended sentences are abolished, the question remains as to the likely approach of Tasmanian courts to the sentencing of those offenders — how many offenders will be sentenced to immediate imprisonment and how many will receive a NCO? The resolution of this issue has clear implications for the Tasmania Prison Service and Community Corrections, particularly the approach taken in the Magistrates Court given the volume of offenders.

The possible effect on the prison system and Community Corrections has been considered in detail by the Council, based on an analysis of three possible models of sentencing in the Supreme Court and the Magistrates Court following the phasing out of suspended sentences.<sup>112</sup> The Council observes that it is a complicated matter to determine the effect of the abolition of suspended sentences on imprisonment numbers, as imprisonment numbers are likely to be influenced by several factors rather than by a single factor — such as the abolition of suspended sentences — alone.<sup>113</sup> A trend towards more punitive sentencing practices, judicial practice regarding the imposition of suspended sentences and judicial acceptance of any new sentencing options that replace suspended sentences will all have an influence on prison numbers following the abolition of suspended sentences. This complexity also highlights the contradictory nature of the criticisms of suspended sentences; on the one hand, there is the perception that suspended sentences are too lenient and that offenders avoid appropriate punishment,<sup>114</sup> and on the other, the concern that suspended sentences cause net-widening.<sup>115</sup> In addition, the practice in Tasmania of global sentencing makes it difficult to predict sentencing outcomes for particular offences following the phasing out of suspended

111 For details see Walker and Bartels, above n 7.

112 See *ibid.* This analysis is based on sentencing data from 2011–14 for the Supreme Court and the Magistrates Court.

113 Bartels makes this point in relation to the introduction of suspended sentences, above n 62. Bartels observes that the question of whether suspended sentences actually lower prison numbers is complex and that 'the ability of suspended sentences to reduce the prison population cannot be easily disentangled from policies affecting its use and other sentencing policies': at 141.

114 See [3.2.2].

115 Bartels, above n 62, 160; see [3.2.2].

sentences. Accordingly, the Council acknowledges that a large number of possible scenarios are possible. However, it considers that the three scenarios used in the modelling reflect outcomes that might be hypothesised from the Council's proposed reforms. This approach is also informed by the experience in Victoria following the abolition of suspended sentences and introduction of CCOs.

The models are as follows:

**Scenario 1:**

**Supreme Court**

Previous Sentence	Revised Sentence
Fully Suspended Sentence	Imprisonment with or without parole, the length being determined as the average sentence length imposed during 2011-14 in the Supreme Court for each offence type, taking into account standard practices on parole and remissions (as advised by Tasmanian Corrections).
Partly Suspended Sentence	Imprisonment with or without parole, the length being determined as the average sentence length imposed during 2011-14 in the Supreme Court for the same offences, combined with a CCO.

**Magistrates Court**

Previous Sentence	Revised Sentence
Fully Suspended Sentence	Imprisonment with or without parole, the length being determined as the average sentence length imposed during 2011-14 in the Magistrates Court for each offence type, taking into account standard practices on parole and remissions (as advised by Tasmanian Corrections).
Partly Suspended Sentence	Imprisonment with or without parole, the length being determined as the average sentence length imposed during 2011-14 in the Magistrates Court for the same offences, combined with a CCO.

**Scenario 2:**

**Supreme Court**

Previous Sentence	Revised Sentence
Fully Suspended Sentence	A 24-month CCO.
Partly Suspended Sentence	Imprisonment with or without parole, the length being determined as the average sentence length imposed during 2011-14 in the Supreme Court for similar offences, combined with a CCO.

**Magistrates Court**

Previous Sentence	Revised Sentence
Fully Suspended Sentence	A twelve month CCO.
Partly Suspended Sentence	Imprisonment with or without parole, the length being determined as the average sentence length imposed during 2011-14 in the Magistrates Court for the same offences, combined with a CCO.

### Scenario 3:

#### Supreme Court

Previous Sentence	Revised Sentence
Fully Suspended Sentence	An assessment was made for each offence as to likely future sentencing practices, based on existing sentencing practices. This was the subject of discussion by the Council, which agreed with the approach and overall spread of sentences.
Partly Suspended Sentence	Imprisonment with or without parole, the length being determined as the average sentence length imposed during 2011-14 in the Supreme Court for the same offences, combined with a CCO.

#### Magistrates Court

Previous Sentence	Revised Sentence
Fully Suspended Sentence	An assessment was made for each offence as to likely future sentencing practices, based on existing sentencing practices. This was the subject of discussion by the Council, which agreed with the approach and overall spread of sentences.
Partly Suspended Sentence	Imprisonment with or without parole, the length being determined as the average sentence length imposed during 2011-14 in the Magistrates Court for the same offences, combined with a CCO.

Applying the strict approach in *Dinsdale* (that a suspended sentence should only be imposed in circumstances where a sentence of imprisonment would be the only appropriate sanction),<sup>116</sup> logically all offenders who would previously have received a suspended sentence will be sentenced to immediate imprisonment following the abolition of suspended sentences. This is reflected in Scenario 1, where it was assumed that all offenders who previously received a FSS were sentenced to imprisonment and all offenders who previously received a PSS were sentenced to imprisonment followed by a CCO. If this were the case, this would have dramatically effected prisoner numbers in Tasmania with an additional 4780 offenders sentenced to imprisonment in the period 2011 to 2013-14 (428 offenders in the Supreme Court and 4352 offenders in the Magistrates Court).<sup>117</sup> In the last financial year, an additional 1207 offenders who would not have served time in prison would have been sentenced to immediate imprisonment and 285 offenders who would have served reduced time in prison would be required to serve a longer sentence of imprisonment.

An increase in the numbers of offenders who are sentenced to imprisonment will have significant implications for the Tasmania Prison Service, which has an operational capacity of 630 prisoners (across all sections of the prison). The Risdon Complex has an operational capacity of 303 prisoners, Ron Barwick Minimum Security has an operational capacity of 202 prisoners and the Mary Hutchinson Women's Prison has an operational capacity of 46 prisoners. And, ideally, 10% of operational capacity should be retained in order to effectively manage high-risk behaviours, association issues (for example, family and gang association issues) and temporary transfers. This is necessary in a small system as significant pressure points can arise in the management of prisoners.<sup>118</sup> As at 15 December 2015, there were 552 prisoners.<sup>119</sup> This is an increase from 7 January 2015 when Tasmania had a prison population of 458 prisoners.<sup>120</sup> There were 143 prisoners who were unconvicted awaiting court hearing or trial, one prisoner under sentence awaiting appeal, eight with no identified legal status and 389 under sentence with no current appeal. There were 264 prisoners at the Risdon Prison complex, 174 male minimum security prisoners and 48 female prisoners.<sup>121</sup>

116 See [3.1].

117 Walker and Bartels, above n 7, 42.

118 Interview with Robert Williams, then Deputy Secretary, Department of Justice, Tasmania.

119 Email from Nick Evans, Deputy Secretary, Department of Justice to Rebecca Bradfield, 15 December 2015. The total operational capacity of Tasmanian Prison Service is 589 prisoners.

120 Email from Robert Williams, then Deputy Secretary, Department of Justice to Rebecca Bradfield, 8 January 2015.

121 Evans, above n 119.

While the Tasmanian Prison Service is not operating at 100% capacity, it is clearly not able to accommodate a large influx of prisoners. In addition, there would be a significant resourcing issue to fund the anticipated increase in prison population. Based on the modelling, Scenario 1 would cost approximately \$50 900 000 per annum based on an annual cost per offender of \$121 394 for imprisonment.<sup>122</sup> The budget allocation for the prison service in the 2014–15 budget was \$61 000 000.<sup>123</sup> Tasmania's net recurrent expenditure per prisoner per day in 2013–14 was \$332.36.<sup>124</sup> However, it is incorrect to assume that each additional prisoner will cost an additional \$332 per day. Most of the operational fixed costs of running a prison system are not dependent on prisoner numbers. The greatest cost is staffing and these costs do not necessarily fluctuate with the prison population.<sup>125</sup> Nevertheless, a substantial increase in prisoner numbers would have an effect on the cost of operating the Tasmania Prison Service, especially if new facilities were required to cope with increased demand. Increased prisoner numbers also create the potential for the negative consequences associated with overcrowding.<sup>126</sup>

It is also likely that there would be an increase in the number of short sentences of imprisonment if all FSSs were converted to actual imprisonment. This would raise concerns about exposing offenders to the deleterious effect of imprisonment without any benefits.<sup>127</sup> There are also concerns about increased reoffending (and imprisonment) given research that has shown that imprisonment is associated with higher rates of recidivism than suspended sentences and other community-based sanctions.<sup>128</sup>

Determining the likely effect of prisoner numbers following the abolition of suspended sentences, however, is not as straightforward as applying *Dinsdale*. This is recognised in Scenario 3, which makes a more nuanced attempt to predict future sentencing practice following the phasing out of suspended sentences. This is based on existing sentencing practices for offenders who received a FSS and includes alternatives such as fines, imprisonment, CCOs, home detention and treatment orders. Unlike Scenario 1, under Scenario 3 it was not envisaged that all offenders who currently receive a FSS would receive a sentence of imprisonment. Instead, it was hypothesised that there would be 359 offenders who would have been sentenced to imprisonment in the period 2011 to 2013–14 (104 in the Supreme Court and 255 in the Magistrates Court).<sup>129</sup> It was also hypothesised an additional 260 offenders who previously received a FSS would receive a sentence of imprisonment combined with a CCO (96 in the Supreme Court and 164 in the Magistrates Court).<sup>130</sup> While this involves a smaller increase in prisoner numbers than presented in Scenario 1, it still represents an additional 619 offenders who would have been sentenced to imprisonment over the period 2011 to 2013–14, which is a substantial increase relative to the current prison population.

As indicated, it is likely that a proportion of offenders who currently receive a suspended sentence will receive a non-custodial sanction following the abolition of suspended sentences and, if there is judicial acceptance of a new intermediate sanction, this may be a significant proportion of offenders. While Community Corrections is already involved in the supervision of some offenders who have received a suspended sentence, it is likely that this number will increase following the abolition of suspended sentences.<sup>131</sup> An increase in the number of offenders sentenced to orders supervised by Community Corrections was hypothesised in Scenarios 2 and 3. In Scenario 2, it was assumed that offenders who currently receive a FSS would receive a CCO of 12 months (for offenders sentenced in the Magistrates Court) or 24 months (in the Supreme Court). This would result in 4780 offenders receiving a CCO based on the period 2011 to 2013–14. There would also be 944 offenders who would have received a term of imprisonment followed by a CCO. In Scenario 3, in the period 2011 to 2013–14, 30 offenders who previously would have received a suspended sentence would receive a CMD order, 36 would be sentenced to home

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122 Walker and Bartels, above n 7, 41.

123 Parliament of Tasmania, *Government Services Budget Paper No 2: Volume 1*, 5.7, <[http://www.treasury.tas.gov.au/domino/dtf/dtf.nsf/LookupFiles/2014-15-Budget-Paper-No-2%E2%80%93Volume-1.pdf/\\$file/2014-15-Budget-Paper-No-2%E2%80%93Volume-1.pdf](http://www.treasury.tas.gov.au/domino/dtf/dtf.nsf/LookupFiles/2014-15-Budget-Paper-No-2%E2%80%93Volume-1.pdf/$file/2014-15-Budget-Paper-No-2%E2%80%93Volume-1.pdf)>.

124 Williams, above n 118.

125 Ibid.

126 See Karen Gelb, *The Perfect Storm: The Impacts of Abolishing Suspended Sentences in Victoria* (2013) 18–20. See also [4.2.1].

127 See TLRI, above n 26, [3.2.7].

128 See TSAC, above n 4, [5.2.2].

129 Walker and Bartels, above n 7, 42.

130 Ibid.

131 There were 517 orders that related to supervision of an offender who had received a suspended sentence (200 community service orders and 317 probation orders). It is noted that this relates to order types not offender numbers as Community Corrections is only able to provide statistics relating to order types, Williams, above n 118.

detention and 753 sentenced to a CCO. There would also be 1204 offenders who would receive a sentence of imprisonment combined with a CCO. These numbers have significant implications for Community Corrections when contrasted with its current workload. At the end of September 2015, there were 1903 offenders under the supervision of Community Corrections in Tasmania.<sup>132</sup> As at 1 December 2014, there were 1998 offenders (444 females and 1554 males) under supervision in relation to 3281 orders.<sup>133</sup> Of these orders, 15.8% (517 orders) related to suspended sentences in combination with another community order (probation or community service).<sup>134</sup> The allocation for Community Corrective Services in the 2014–15 budget was \$9 477 000<sup>135</sup> and the net recurrent expenditure per community-based offender per day in 2013–14 was \$11.77.<sup>136</sup> In 2013–14 the offender to operational staff ratio was 30:7. However, Community Corrections does not have the same contact with all offenders and allocates its resources based on assessment of risk with low risk offenders having limited contact.<sup>137</sup> There has been significant restructuring in Community Corrections in recent years, involving re-profiling of risk management and staff training, which has led to increased demand for community-based programs as courts have developed confidence in their effectiveness.<sup>138</sup> This is a positive development as it demonstrates the capability of Community Corrections to deliver effective programs. However, increased demand without allocated funding is problematic as demand now exceeds the funding available for Community Corrections to offer the programs.<sup>139</sup> This highlights the need for any increase in the workload of Community Corrections as a consequence of the abolition of suspended sentences to be adequately funded. In terms of estimated costs, Scenarios 2 and 3 represent a cost of around \$34 000 000 and \$30 600 000 per annum respectively. This is in contrast to unsupervised suspended sentences, which are currently cost-neutral.<sup>140</sup>

In terms of costs, in summary, the modelling conducted on behalf of the Council found that:

- Scenario 1, replacing fully suspended sentences with equivalent terms of imprisonment, costs around \$50.9 million per annum;
- Scenario 2, replacing fully suspended sentences with CCOs of 12 or 24 months, costs around \$34.0 million per annum; and
- Scenario 3, replacing fully suspended sentences with alternatives including fines, imprisonment, CCOs, home detention and treatment orders, according to the offence type, costs around \$30.6 million per annum.

## 4.2 THE EXPERIENCE IN OTHER JURISDICTIONS

In understanding the possible consequences of abolishing suspended sentences on imprisonment numbers in Tasmania, guidance can also be sought from the experience of other jurisdictions in relation to the effect of suspended sentences on prisoner numbers, bearing in mind the different legal cultures (and ‘culture[s] of sentencing behaviour’)<sup>141</sup> that exist in each jurisdiction. This can be done by considering the effects on rates of imprisonment when the sentencing option was abolished.

In recent years, suspended sentences have been abolished in two jurisdictions — Victoria and New Zealand. The abolition of suspended sentences has also recently been proposed in NSW.

132 Australian Bureau of Statistics, *Corrective Services, Australia, September Quarter 2015, Cat. 4510.0* (2015).

133 Williams, above n 120.

134 Ibid. It is noted that the statistics provided by Community Corrections relate to order types and not offender numbers.

135 Parliament of Tasmania, above n 123.

136 Williams, above n 120.

137 Ibid.

138 Ibid.

139 Ibid.

140 See [3.3.5] and [3.3.6] for a discussion of the combination of suspended sentences with community service and/or probation.

141 VSAC, above n 15, [3.87].

## 4.2.1 VICTORIA

In Victoria, suspended sentences were initially abolished in 1958 and were reintroduced in 1986. In 2004, VSAC commenced a project to examine the use of suspended sentences and provide advice on whether there was a need for reform.<sup>142</sup> In its Final Report — Part 1, released in 2006, VSAC recommended the gradual phase-out of suspended sentences and the creation of a new range of intermediate orders. The process implemented by successive governments is set out in Table 4–3:<sup>143</sup>

Table 4–3: Phasing out of suspended sentences in Victoria

2006	Wholly suspended sentences could only be used for serious offences in 'exceptional circumstances' for offences committed on or after 1 November 2006.
2010	Wholly and partially suspended sentences abolished for serious offences.
2011	Wholly and partially suspended sentences abolished for serious and significant offences for offences committed on or after 1 May 2011.
2013	Suspended sentences were abolished in the higher courts for any offences committed after 1 September 2013.
2014	Suspended sentences were abolished in the Magistrates Court for offences committed from 1 September 2014.

In addition to the gradual abolition of suspended sentences, a new intermediate sanction (the CCO) was introduced in January 2012.<sup>144</sup>

While acknowledging that the removal of suspended sentences could cause prison numbers to increase,<sup>145</sup> the initial prediction of VSAC was that judges would use the new intermediate sanctions and so rates of imprisonment would not increase substantially:

We are confident that cases which previously may have resulted in a wholly suspended sentence would be adequately accommodated within the new sentencing framework ... without attendant significant increases in the prison population.<sup>146</sup>

VSAC stressed that it was not the intention of the proposed reforms for offenders who would have received suspended sentences to be imprisoned. Rather, it was 'an attempt to find a more creative solution to address the principal concerns expressed to [VSAC] by creating a new range of orders that performed substantially the same function as a suspended sentence and other substitutional sanctions, but in a different form'.<sup>147</sup> This is now the challenge for Tasmania.

Following additional research on the use of suspended sentences, in its Final Report — Part 2, which was completed in 2008, VSAC stressed the need to delay the abolition of suspended sentences to allow for monitoring of the operation of the new intermediate order:

While the Council continues to be concerned with what we believe are fundamental flaws with the structure of suspended sentences, and the impact of suspended sentences on community confidence, we equally believe that any changes to other intermediate orders should be fully tested before any additional moves are made to restrict further sentencers' ability to make this order. To do otherwise would risk increasing the prison population substantially, resulting in a sharp rise in correctional systems costs.<sup>148</sup>

142 Ibid xxi.

143 Information obtained from Gelb, above n 126, 6–7.

144 See [7.6].

145 VSAC, above n 50, [3.59], [3.86].

146 Ibid. Gelb drew a similar conclusion in her analysis of the consequences of suspended sentences, where she expressed the view that it was 'potentially more likely' that 'only 5% or 10% of former wholly suspended sentences will become sentences of imprisonment' in the higher courts' and that 'people who previously would have received a wholly suspended sentence in the Magistrates' Court will instead receive a community correction order': Gelb, above n 126, 26, 30.

147 VSAC, above n 50, [3.73].

148 Ibid [2.107].

VSAC reiterated this recommendation in its 2010 report and again stressed the need for credible alternatives to suspended sentences.<sup>149</sup> This monitoring and review did not occur, and instead the prison population in Victoria increased dramatically.

While it is too early to identify the impact on imprisonment numbers from the complete abolition of suspended sentences in all courts for offences committed after 1 September 2014, it is clear that there has been a significant increase in Victoria's prison population in recent years. The Victorian Ombudsman released a report in September 2015 investigating the rehabilitation and reintegration of prisoners, which found that in the four years between 2009 and 2012, the Victorian prison population increased by just under 11%. In the next three years, between 2012 and 2015, the prison population grew by more than 25%.<sup>150</sup> The prison population increased from 4350 in June 2009 to 6140 at 8 October 2014.<sup>151</sup> The prison population was 6506 as at 11 December 2014<sup>152</sup> and stood at 6301 on 5 November 2015. It is predicted that the prison population will be at least 8,300 by June 2019.<sup>153</sup> The Ombudsman identified several reforms — changes to the parole system and bail processes, the phasing out and ultimate abolition of suspended sentences as contributing to the increase in prison population.<sup>154</sup> In addition to the rising prison population, the report also found that rate of people returning to prison is rising:

Since 2012 there has been a significant increase in the number of prisoners who were in prison as an adult for a second or subsequent period. In 2013, 51 per cent of all Victorian prisoners had previously served a prison sentence as an adult. This compares to 48 per cent in 2012.<sup>155</sup>

The Ombudsman's report has highlighted that over-crowded prisons (attributed to the abolition of suspended sentences and changes to the parole system) are affecting the ability to deliver effective rehabilitation programs in prisons and that this is compounding the problem of rising prison numbers. The Ombudsman concluded that the 'current system is not sustainable. We are witnessing spiralling numbers of prisoners and higher rates of return than even before'.<sup>156</sup>

Research conducted by VSAC also attributes increases in the prison population to 'a number of factors including the courts' increased use of straight imprisonment sentences following the abolition of suspended sentences and the Adult Parole Board's lower rate of granting prisoners release on parole'.<sup>157</sup> Earlier research conducted by VSAC found that, between 2004 and 2010, there had been a decline in the use of suspended sentences imposed in the higher courts and an increase in the number of offenders sentenced to immediate imprisonment.<sup>158</sup> This trend continued in the later data.<sup>159</sup> The decline in the use of suspended sentences from late-2011 to mid-2013 was also initially accompanied by an increase in the use of community sentences, which suggested that community custody orders were being viewed as a 'credible alternative to suspended sentences for some offenders'.<sup>160</sup> However, from early 2013, while the use of suspended sentences continued to fall and imprisonment continued to rise, the use of community corrections orders declined. These contrasting patterns made it difficult to predict the future impact of the abolition of suspended sentences on the proportion of offenders who are sentenced to an immediate custodial sentence in the higher courts:

If the pattern evident in 2012, which saw over half of suspended sentences being replaced by CCOs, is extrapolated into the future, more than half of suspended sentences are likely to move to CCOs. If, however, the pattern evident in the first half of 2013, which saw the vast majority of suspended sentences being replaced by imprisonment, is extrapolated, less than half of suspended sentences are likely to move to CCOs.<sup>161</sup>

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149 VSAC, *Suspended Sentences in Victoria: Monitoring Report* (2010) [5.14]–[5.17].

150 Ombudsman, Victoria, *Investigation Into the Rehabilitation and Reintegration of Prisoners in Victoria*, Report (2015) [3].

151 Ombudsman, Victoria, *Investigation Into the Rehabilitation and Reintegration of Prisoners in Victoria*, Discussion Paper (2014) [15].

152 Information provided by Arie Freiberg.

153 Ombudsman, Victoria, above n 150, [76].

154 Ibid [95]–[131]. See also Gelb, above n 126; Lorana Bartels, 'Parole and Parole Authorities in Australia: A System in Crisis' (2013) 37 *Criminal Law Journal* 357.

155 Ombudsman, Victoria, above n 150, [21].

156 Ibid [44].

157 VSAC, above n 76, 5.

158 See VSAC, above n 149.

159 See VSAC, above n 73.

160 Ibid 33.

161 Ibid 56.

Subsequent analysis by VSAC, published in 2015, sought to assess changes in sentencing practices following the phasing out of suspended sentences and legislative reform to the CCO framework in September 2014.<sup>162</sup> It found there was an increasing acceptance of CCOs in the higher courts, with suspended sentences being 'replaced (in order of magnitude) by CCOs, combined CCO-imprisonment sentences, and imprisonment orders'.<sup>163</sup> In contrast, in the Magistrates Court, earlier research found that while there had been a decline in the use of suspended sentences, there had not been a corresponding increase in the use of imprisonment as a sanction.<sup>164</sup> There had also not been a move to use CCOs instead of suspended sentences. Initially, VSAC found that there was 'little evidence of any shift away from suspended sentences towards CCOs in the Magistrates' Court'.<sup>165</sup> It noted that there had not been any trend towards the increased use of any other sanction and so suggested that the reduction in the use of the suspended sentence was likely to be caused by magistrates declining to use the suspended sentence in combination with other orders.<sup>166</sup> The consequences of the abolition of suspended sentences in the Magistrates Court from 1 September 2014 are yet to be determined.<sup>167</sup> However, there have been several developments in Victoria that suggest an expanded operation of the CCO. As a result of apparent judicial reluctance to use CCOs, legislative amendments were introduced that aimed to increase their use. The 2014 amendments made it clear that the CCO is an appropriate sentencing option in circumstances that may have previously attracted a suspended sentence of imprisonment (*Sentencing Act 1991* (Vic) s 36(2)) and for cases of more serious offending (*Sentencing Act 1991* (Vic) s 5(4C)).<sup>168</sup> The amendments appear to have had some success, as the 2015 VSAC analysis showed that the use of the CCO increased more than any other sentencing option between January 2013 and December 2014. VSAC therefore concluded that, as with the higher courts, 'CCOs along with imprisonment and the combined CCO-imprisonment sentence were used in place of suspended sentences in the Magistrates Court'.<sup>169</sup> In addition, the Victorian Court of Appeal, in its landmark decision in *Boulton*, established greater certainty in relation to the use of the order and affirmed the appropriateness of the order for offenders who previously would have received a term of imprisonment.<sup>170</sup> The full effect of this judgment has not been examined as yet, but it appears that the changes may have had some effect as prison numbers appear to have peaked and are now declining.<sup>171</sup>

## 4.2.2 NEW SOUTH WALES

As part of its 2013 report on sentencing in NSW, the NSW Law Reform Commission (NSWLRC) recommended the introduction of a new 'community detention order' (CDO) to replace suspended sentences, intensive correction orders and home detention.<sup>172</sup> The new order was considered more appropriately structured to address the rehabilitative requirements of offenders with complex needs in contrast to the suspended sentence, which often set these offenders up to fail.<sup>173</sup> Consideration was given to the likely sentencing outcomes of the proposed reforms for offenders who currently receive a suspended sentence and it was

envisage[d] that the majority of offenders ... would instead receive a CDO. However, given the net widening effect of suspended sentences, it might be expected that at least some of these offenders would receive a community correction order; the strengthened non-custodial order we have proposed in place of CSOs [community service orders] and s 9 bonds [good behaviour bonds].<sup>174</sup>

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162 VSAC, above n 76, 5.

163 Ibid 11.

164 See *ibid* 28.

165 Ibid 11.

166 Ibid 28.

167 VSAC observes that the impact of abolishing suspended sentences in the Magistrates Court is likely to be felt more quickly (in view of the shorter time between the date of the offence commission and the offence sentence date) and the impact is likely to be greater on the correctional system in view of the volume of suspended sentences imposed in the Magistrates Court: *ibid* 56.

168 See discussion further at [7.6.6].

169 VSAC, above n 76, 18.

170 See [7.6].

171 However, Bartels has conducted a case law analysis of the effect of the decision but there is no quantitative analysis available as yet, see Bartels, above n 17, 336-348.

172 NSWLRC, above n 60, Recommendation 11.1. See [7.4.2].

173 NSWLRC, above n 60, [10.35]–[10.39].

174 Ibid [10.40].

It can be inferred that the Commission did not consider that the abolition of suspended sentences would cause imprisonment rates to increase. The NSW government has not acted as yet on the recommendations of the NSWLRC.

### 4.2.3 NEW ZEALAND

In New Zealand, suspended sentences were only part of the legal landscape for a limited period of time (between 1993 and 30 June 2002). They were abolished as a result of concerns about sentence escalation where offenders were being imprisoned as a consequence of breach in circumstances where neither the initial offence nor the breach offence warranted imprisonment.<sup>175</sup> The Ministry of Justice expressed the view that while suspended sentences were '[d]esigned to reduce the prison population, [they] have actually increased it and there is no evidence to suggest they are effective as a deterrent or rehabilitative measure'.<sup>176</sup>

Although it was anticipated that the abolition of suspended sentences would result in a reduction in rates of imprisonment, initially the abolition of suspended sentences was accompanied by a steady rise in the proportion of custodial sentences imposed from 8.2% in 2001 to 9.3% in 2006. The Ministry of Justice expressed concern that the higher proportion of custodial sentences might be attributable to the abolition of suspended sentences.<sup>177</sup>

As a result of these concerns, the New Zealand government established three new intermediate sanctions in 2007 — home detention as a sentence in its own right and two new community sentences (community detention and intensive supervision).<sup>178</sup> Commentary on trends in sentencing in New Zealand published by the Ministry of Justice has shown an increased use of home detention, community detention and intensive supervision since their introduction and has highlighted a decrease in the number of offenders sentenced to imprisonment (down 11% from 2009 (8,992 offenders) to 2011 (8,001 offenders)).<sup>179</sup> Optimism was expressed that the decline in the number of people sentenced to imprisonment was set to continue.<sup>180</sup> However, as Figure 4–1 shows, though there was a rise in the imprisonment rate following the abolition of suspended sentences and a reduction following the introduction of the new community sanctions in 2007, the overall rate of imprisonment for 2013–14 is essentially unchanged from the rate for 2002–03 (11.6% vs 11.5%).

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175 Ministry of Justice, New Zealand, *Sentencing Act 2002*, (2002) <[http://www.justice.govt.nz/publications/publications-archived/2002/sentencing-act-2002/questions-answers#Why\\_have\\_suspended\\_sentences\\_been\\_abolished](http://www.justice.govt.nz/publications/publications-archived/2002/sentencing-act-2002/questions-answers#Why_have_suspended_sentences_been_abolished)>. See also Julian Roberts, 'Sentencing Reform in New Zealand: An Analysis of the Sentencing Act 2002' (2003) 36 *Australian and New Zealand Journal of Criminology* 249 for a discussion of the political context of the reforms introduced by the *Sentencing Act 2002* (NZ).

176 Ministry of Justice, New Zealand, *ibid*.

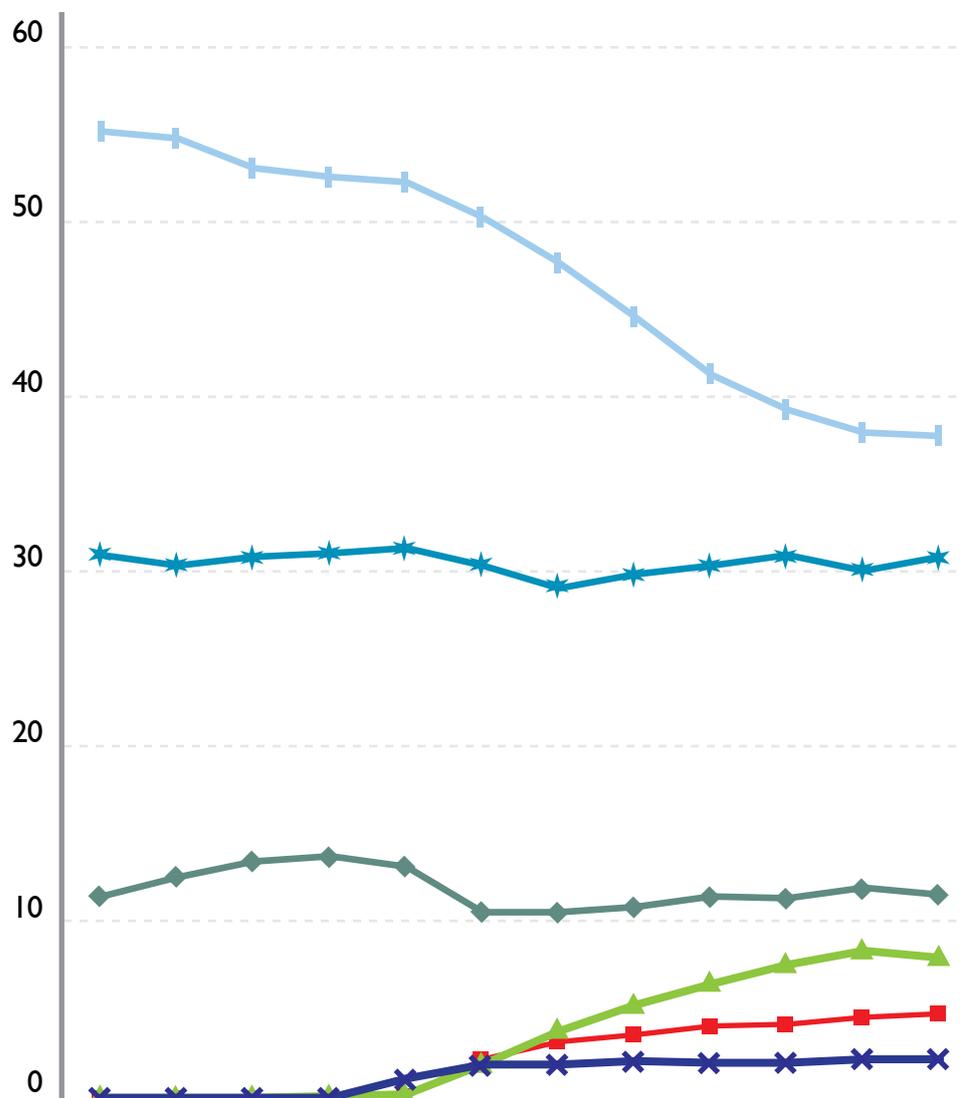
177 Philip Spier and Barb Lash, *Conviction and Sentencing of Offenders in New Zealand: 1994 to 2003* (Ministry of Justice, 2004) 104.

178 VSAC, above n 15, [2.33].

179 Ministry of Justice, New Zealand, *Trends in Conviction and Sentencing in New Zealand 2011*, Report (2011) <<http://www.justice.govt.nz/publications/global-publications/t/trends-in-conviction-and-sentencing-in-new-zealand-2011-1/sentences-imposed-by-the-court>>.

180 *Ibid*.

Figure 4–1: Adults convicted in New Zealand court by proportion of sentence type (excluding reparation, disqualification from driving, conviction and discharge and other) — most serious offence fiscal year 2002–03 to 2013–14<sup>181</sup>



LEGEND	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14
◆ Imprisonment	11.5	12.6	13.5	13.8	13.2	10.6	10.6	10.9	11.5	11.4	12.0	11.6
★ Home Detention	0	0	0	0	0.1	2.2	3.2	3.6	4.1	4.2	4.6	4.8
■ Community Detention	0	0	0	0.1	0.2	1.9	3.8	5.3	6.5	7.6	8.4	8
✕ Intensive Supervision	0	0	0	0	1.1	1.9	1.9	2.1	2	2	2.2	2.2
▲ Community Work, Corrections	31	30.4	30.9	31.1	31.4	30.4	29.1	29.9	30.4	31	30.1	30.9
● Supervision by Community Corrections	2.2	2.1	2.4	2.4	2.7	3.3	3.7	3.6	4.2	4.5	4.8	4.6
+ Fines	55.2	54.8	53.1	52.6	52.3	50.3	47.7	44.6	41.3	39.3	38	37.8

181 Ministry of Justice, New Zealand, *Adults Convicted in Court by Sentence Type — Most Serious Offence Fiscal Year*, <<http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7373>>.

### 4.3 SUMMARY

The experience of reforming suspended sentences in other jurisdictions shows that the abolition of suspended sentences will affect the use of imprisonment as a sanction, but not always in ways that are anticipated. It also shows the influence of the particular legal and political context on the sentencing practices in the jurisdiction in which the reforms take place.

In the Tasmanian context, in view of the long history of suspended sentences and their popularity with the judiciary, the question arises as to the extent to which judicial officers are prepared to use a non-custodial sentencing option for offenders who would previously have received a custodial sentence (albeit suspended). As Ashworth has identified, although the threshold for custody is reserved for the most serious offences, a review of case law suggests that judicial culture may be resistant to change:

judges have a fixed idea that only imprisonment is capable of marking the seriousness of certain offences ... [in circumstances where] conviction combined with a fine or community order or both would surely be proportionate. To some extent there seems to be an underlying assumption about deterrence in many judgments — the idea that, if the sentence was not custodial, many people would take advantage and commit these offences.<sup>182</sup>

Once suspended sentences are abolished, evidence suggests that imprisonment numbers will significantly rise unless there are credible alternative intermediate sanctions that judicial officers are prepared to use as a replacement.

As discussed elsewhere in this report, a suspended sentence is only to be imposed if a sentence of immediate imprisonment would be appropriate. Other evidence suggests, however, that some judicial officers impose FSSs as a form of NCO. It is difficult, therefore, to accurately determine how judicial officers might sentence if suspended sentences were not available. However, more than twice as many offenders received FSSs as full-time prison sentences (4352 vs 1589). Even if PSSs are included, only 2338 offenders received prison sentences. A similar number received CSOs (n=2388), the most severe form of NCO. If all of the offenders in receipt of FSSs in 2013–14 alone received a prison sentence instead, this would result in 1117 additional prison admissions, far more than prison and PSSs combined (n=698). In this context, it should be noted that the daily average prison population in Tasmania in December 2014 was 461.<sup>183</sup> Hypothetically, even if it were assumed that only half the offenders who currently receive FSSs would instead receive a prison sentence and the other half would receive a community-based order this would still mean another 558 offenders admitted to prison, a 121% increase in admissions. It is acknowledged, however, that most of these sentences would be for relatively short periods.

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182 Andrew Ashworth, *Sentencing and Criminal Justice* (Oxford University Press, 5<sup>th</sup> ed, 2010) 299.

183 Williams, above n 118.

# 5.

## *A new sentencing model: overview*

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In chapters 5 to 9, the Council sets out its approach to a new sentencing model for Tasmania to accompany the phasing out of suspended sentences in Tasmania. Guided by the approach of VSAC,<sup>184</sup> the Council's approach has been informed by the following principles:

- imprisonment should only be imposed where the offending was so serious that neither a fine nor a community sentence can be justified;<sup>185</sup>
- intermediate sentencing orders should generally not be substituted sanctions, that is they should exist as sentences in their own right rather than as an alternative means of serving a term of imprisonment;
- sentencing orders should be transparent and mean what they say;
- courts should have the most flexibility possible to tailor a sentence to the offence and the offender;
- community-based sanctions should be available for a wide range of offending, including where imprisonment may also have been justified;
- offenders who previously received FSSs and PSSs should not necessarily be sentenced to full-time imprisonment in the absence of suspended sentence orders but should be considered for community-based sanctions;
- the conditions attached to community-based orders should be realistic in length and should (consistent with parsimony and proportionality) only have the minimum number of conditions necessary to fulfil the purpose(s) of sentencing;
- the necessary funding needs to be made available to support community-based orders, including resources for the provision of pre-sentence reports, judicial monitoring, supervision of offenders and treatment in the community;
- the breach of an order should have serious consequences but breach should not itself constitute a separate offence.

### **5.1 THE NEW SENTENCING HIERARCHY**

The Council's structure is set out in Figure 5–1. Under the proposed changes, a court will have the following sentencing options available under the *Sentencing Act 1997* (Tas):

- imprisonment (with or without parole);
- imprisonment up to two years without parole combined with a CCO (of up to three years);
- an alcohol and drug treatment order (CMD) with a two year review period;
- home detention of up to 18 months;
- a CCO of up to three years with or without a conviction;
- rehabilitation program order (family violence offences);

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184 See VSAC, above n 38, [3.1].

185 This was the recommendation of the TLRI, above n 26.

- a fine with or without a conviction;
- adjourned undertaking, conviction only, dismissal without conviction.

In addition, the court would have power to defer sentencing an offender for up to 12 months.

Further details about these orders are contained in chapters 6 to 9.

Table 5–1: Current and revised hierarchy for adult offenders

CURRENT HIERARCHY		REVISED HIERARCHY
<b>Imprisonment</b>	<b>No Change</b> →	<b>Imprisonment</b>
<p><b>Drug treatment order (Magistrates Court only)</b></p> <p>Term: 2 year review period.</p> <ul style="list-style-type: none"> <li>• treatment and supervision.</li> <li>• sentence of imprisonment.</li> </ul> <p>Substitutional sanction (unactivated sentence of imprisonment).</p> <p>Not available for sexual offences or where harm is caused that is not minor.</p> <p>Only used if would have imposed immediate imprisonment.</p> <p>Judicial monitoring available — court can give compliance reward or can cancel the order for compliance and progress.</p> <p><b>Core conditions:</b></p> <ul style="list-style-type: none"> <li>• must not, in Tasmania or elsewhere, commit another imprisonable offence;</li> <li>• must attend the court whenever it directs;</li> <li>• must report to a court diversion officer at a specified place within 2 clear working days after the order is made;</li> <li>• must undergo such treatment for the offender's illicit drug use problem as is specified in the order or from time to time specified by the court;</li> <li>• must report to, and accept visits from case manager or court diversion officers;</li> <li>• give the offender's case manager at least two clear working days' notice before any change of address;</li> <li>• must not leave Tasmania except with the permission, granted either generally or in a particular case, of the court;</li> <li>• must comply with all lawful directions of the court;</li> <li>• must comply with all reasonable directions of the offender's case manager and court diversion officers concerning the core conditions and program conditions of the order.</li> </ul> <p>There are additional conditions if offence is a domestic violence offence: must not commit another family violence offence; must comply with any family violence order, interim family violence order or police family violence order; must attend and undergo assessment for, and treatment under, rehabilitation programs as directed by court diversion officers; if directed to undergo any rehabilitation programs, must attend and satisfactorily complete those programs and comply with the reasonable directions of the persons employed or engaged to conduct them.</p>	<p><b>Expanded Operation</b> →</p>	<p><b>Alcohol and drug treatment order (all courts)</b></p> <p>Term: 2 year review period.</p> <ul style="list-style-type: none"> <li>• treatment and supervision.</li> <li>• sentence of imprisonment.</li> </ul> <p>Order can be made in Magistrates Court and Supreme Court.</p> <p>Extend to alcohol as well as drugs.</p> <p>Extend to all offences, except sexual offences. This would mean that the order would be available where the harm caused is not minor.</p> <p>Remove the reference in <i>Sentencing Act 1997</i> (Tas) s 27B(c)(ii) to suspended sentences so that it can operate as a replacement and insert a provision (akin to <i>Sentencing Act 1991</i> (Vic) s 36(2)) which provides that without limiting when an alcohol and drug treatment order may be imposed, it may be an appropriate sentence where, before the ability of the court to impose a suspended sentence was abolished, the court may have imposed a sentence of imprisonment and then suspended in whole that sentence of imprisonment.</p> <p><b>Core conditions</b></p> <p>As with current order expanded to include alcohol as well as drugs.</p> <p><b>Program conditions</b></p> <p>As with current order expanded to include alcohol as well as drugs.</p> <p><b>Consequence of breach</b></p> <p>As with current order expanded to include alcohol as well as drugs.</p>

CURRENT HIERARCHY		REVISED HIERARCHY
<p><b>Program conditions</b></p> <p>Court may attach one or more of the following conditions to the treatment and supervision part of the order:</p> <ul style="list-style-type: none"> <li>• submit to drug testing as specified in the order;</li> <li>• submit to detoxification or other treatment, whether or not residential in nature, as specified in the order;</li> <li>• attend vocational, educational, employment, rehabilitation or other programs specified in the order;</li> <li>• submit to medical, psychiatric or psychological treatment specified in the order;</li> <li>• must not associate with persons or classes of persons specified in the order;</li> <li>• must reside at such place, and for such period, as is specified in the order;</li> <li>• must do or not do anything else that the court considers necessary or appropriate concerning the offender's illicit drug use or the personal factors that the court considers contributed to the offender's criminal behaviour.</li> </ul> <p><b>Consequences of breach</b></p> <p>If a court is satisfied that an offender has failed to comply with a condition of a drug treatment order, other than by committing an offence punishable by a term of imprisonment exceeding 12 months, the court must take one of the following actions:</p> <ul style="list-style-type: none"> <li>• confirm the treatment and supervision part of the drug treatment order;</li> <li>• vary the treatment and supervision part of the drug treatment order;</li> <li>• make an order requiring the offender to perform up to 20 hours of community work under the supervision of the offender's case manager;</li> <li>• order that the custodial part of the drug treatment order is activated for a specified period, of not less than one day and not more than 7 days, to be served in prison (s 27M(1)).</li> </ul> <p>If the offender commits an offence punishable by a term of imprisonment exceeding 12 months, the court must:</p> <ul style="list-style-type: none"> <li>• take one of the actions under s 27M(1) as though the offender had failed to comply with any other condition of the order; or</li> <li>• cancel the treatment and supervision part of the order and, after taking into account the extent of the offender's compliance with that part, make an order activating some or all of the custodial part of the drug treatment order; or</li> <li>• cancel the custodial part of the drug treatment order and, other than by making an order of imprisonment, deal with the offender for each offence in respect of which the drug treatment order was made in any way in which it could deal with the offender had it just found the offender guilty of each such offence.</li> </ul>		

CURRENT HIERARCHY		REVISED HIERARCHY
<p><b>Suspended sentence</b>  Max Term: not specified  Term of imprisonment held fully or partly in suspense for period of order. Court may attach conditions or combine with other order.  Substitutional sanction.  No offence exclusions.  <b>Core conditions:</b>  Not commit offence punishable by imprisonment.  <b>Special conditions:</b></p> <ul style="list-style-type: none"> <li>• perform community service;</li> <li>• supervision of a probation officer;</li> <li>• undertake a rehabilitation program;</li> <li>• any other condition as the court considers necessary or expedient.</li> </ul> <p>Can also be combined with CSO and probation.  <b>Consequence of breach:</b>  <b>Guilty of new offence:</b> must activate the sentence of imprisonment that is held in suspense and order the offender to serve it unless unjust to do so. If considers unjust, can:</p> <ul style="list-style-type: none"> <li>• activate part of the sentence that is held in suspense and order the offender to serve it; or</li> <li>• order that a sentence take effect in place of the suspended sentence; or</li> <li>• vary the conditions on which the execution of the sentence was suspended, including extending the period of suspension in the order to a day no later than 12 months after the day the offender was found guilty of the new offence; or</li> <li>• make no order in respect of the suspended sentence.</li> </ul> <p><b>Other breach:</b></p> <ul style="list-style-type: none"> <li>• activate part of the sentence that is held in suspense and order the offender to serve it; or</li> <li>• order that a sentence take effect in place of the suspended sentence; or</li> <li>• vary the conditions on which the execution of the sentence was suspended, including extending the period of suspension in the order to a day no later than 12 months after the day the offender was found guilty of the new offence; or</li> <li>• make no order in respect of the suspended sentence.</li> </ul>	<p><b>FSSs replaced with HD and CCO (remodelled probation and CSO - see below)</b></p> <p>→</p> <p><b>PSSs replaced with prison and CCO (remodelled probation and CSO - see below)</b></p>	<p><b>Home detention</b>  Max Term: 18 months (this would capture 97.9% of FSSs in Supreme Court and 99.6% in Magistrates Court).  Nature of sanction: Not substitutional.  No offence exclusions but court not to impose home detention if a domestic violence or sexual offences and victim is a likely co-resident (although alternative community-based accommodation for home detention could be used provided that there were appropriate conditions to protect the victim).  In relation to drug cultivation offences, the court should not sentence an offender to home detention in the same home where the offender was cultivating drugs. In addition, the court should not impose a home detention order on an offender who poses a significant risk in terms of committing a further violent offence.  This order is only likely to be used for a small proportion of offenders.  <b>Core conditions:</b></p> <ul style="list-style-type: none"> <li>• not commit another imprisonable offence;</li> <li>• live only at approved premises;</li> <li>• remain at approved premises for time specified in the order;</li> <li>• accept visits;</li> <li>• submit to searches of approved places or things;</li> <li>• submit to electronic monitoring if directed;</li> <li>• comply with any reasonable directions;</li> <li>• not to consume alcohol or drugs;</li> <li>• submit to breath testing, urinalysis and other test procedures for detecting drug and alcohol use;</li> <li>• accept reasonable directions in relation to employment;</li> <li>• engage in personal development activities or in counselling or treatment as directed.</li> </ul> <p><b>Special conditions: (NZ)</b></p> <ul style="list-style-type: none"> <li>• judicial monitoring;</li> <li>• conditions in relation to taking prescription medicine;</li> <li>• any other condition to reduce likelihood of reoffending.</li> </ul> <p><b>Consequences of breach</b></p> <ul style="list-style-type: none"> <li>• If offender commits a new offence punishable by imprisonment, then there is a presumption that the court will cancel the order and resentence for the original offence unless there are exceptional circumstances. The court can also vary, confirm or cancel the order (and make no further order).</li> </ul>

CURRENT HIERARCHY		REVISED HIERARCHY
		<ul style="list-style-type: none"> <li>In breach of other conditions, the court can vary the order, confirm the order, cancel the order and resentence or cancel the order (and make no further order).</li> </ul> <p>It is not a separate offence to breach a home detention order but it is necessary to ensure that breaches are enforceable beyond the expiration of the order.</p>
<p><b>Community service order</b> Max Term: 240 hours.</p> <p>CSOs require an offender to perform some work or other activity in the community under the direction of a probation officer or supervisor.</p> <p>Not a substitutional sanction.</p> <p>Can be combined with a probation order, a fine, a rehabilitation program order and a driving disqualification order.</p> <p><b>Core conditions:</b></p> <ul style="list-style-type: none"> <li>report within one clear working day to a probation officer or supervisor, at the place specified in the order;</li> <li>satisfactorily perform community service, as directed by a probation officer or supervisor, for the number of hours specified in the order;</li> <li>comply with the reasonable directions of a probation officer or supervisor;</li> <li>give notification to a probation officer of any change of address or employment before, or within 2 clear working days after, the change;</li> <li>not leave or stay outside Tasmania without the permission of a probation officer;</li> <li>attend educational and other programs as directed by a probation officer.</li> </ul> <p>A probation officer may arrange for an offender who is subject to a CSO to perform community service for the benefit of the victim of the offender's offence.</p> <p><b>Consequence of breach:</b></p> <ul style="list-style-type: none"> <li>confirm the order as originally made; or</li> <li>increase the number of hours of community service that the offender is required to perform under the order; or</li> <li>cancel the order and deal with the offender for the offence or offences in respect of which it was made in any manner in which the court could deal with the offender had it just found the offender guilty of that offence or those offences; or</li> <li>cancel the order and, if it considers it appropriate, any other order made by the court in respect of the offence in respect of which the community service order was made, and deal with the offender for that offence in any manner in which the court could deal with the offender had it just found the offender guilty of that offence.</li> </ul> <p>Can be combined with probation, a fine, rehabilitation program order and driving disqualification order.</p>	<p><b>Expanded operation to replace suspended sentences</b></p> <p>→</p>	<p><b>Community correction order</b> Max term: 3 years. There were no FSSs imposed in the Supreme Court where sentence exceeded 3 years and only 3 PSSs longer than 3 years.</p> <p>In relation to the community service component (if ordered) the maximum period is 240 hours.</p> <p>Non-substitutional sanction.</p> <p><b>Core conditions:</b></p> <ul style="list-style-type: none"> <li>not commit an offence punishable by imprisonment;</li> <li>report within one clear working day to a probation officer at the place specified in the order;</li> <li>report to a probation officer as required;</li> <li>not leave or stay outside Tasmania without the permission of a probation officer;</li> <li>comply with reasonable and lawful directions given by a probation officer;</li> <li>give notification to a probation officer of any change of address or employment before, or within 2 working days after, the change.</li> </ul> <p><b>Special conditions:</b></p> <ul style="list-style-type: none"> <li>submit to the supervision of a probation officer;</li> <li>attend educational and other programs as directed by the court or a probation officer;</li> <li>undergo assessment and treatment for alcohol or drug dependency as directed by a probation officer;</li> <li>submit to testing for alcohol or drug use as directed by a probation officer;</li> <li>submit to medical, psychological or psychiatric assessment or treatment as directed by a probation officer;</li> <li>undertake community work up to a maximum period of 240 hours;</li> <li>place and non-association conditions;</li> <li>judicial monitoring;</li> <li>alcohol exclusion;</li> <li>curfew; and</li> <li>such other special conditions as the court thinks necessary or expedient.</li> </ul> <p>The court can make an order that only contains core conditions (akin to a suspended sentence with the only condition that offender not commit an imprisonable offence).</p> <p>The order may also have an intensive compliance period (where the special conditions operate) and thereafter the order has only core conditions.</p>

CURRENT HIERARCHY		REVISED HIERARCHY
		<p>Can be combined with rehabilitation program order, driving disqualification order and a fine. It can also be combined with a term of imprisonment of 2 years or less (which includes pre-sentence detention). For example, the combination of 2 years' imprisonment plus 3 year CCO gives a total 5 year sentence, which would be sufficiently severe to cover most suspended sentences cases.</p> <p><b>Consequences of breach</b></p> <ul style="list-style-type: none"> <li>• confirm the order as originally made; or</li> <li>• increase the period during which the order has effect; or</li> <li>• vary the special conditions to which the order is subject; or</li> <li>• cancel the order and deal with the offender for the offence or offences in respect of which the order was made in any manner in which the court could deal with the offender had it just found the offender guilty of that offence or those offences; or</li> <li>• cancel the order and, if it considers it appropriate, any other order made by the court in respect of the offence in respect of which the probation order was made, and deal with the offender for that offence in any manner in which the court could deal with the offender had it just found the offender guilty of that offence.</li> </ul> <p>It is not a separate offence to breach a CCO. However, there needs to be a robust administrative procedure in place in relation to recording breaches (even if not actioned) and there needs to be a clear process for making an application to the court in cases where an offender has committed an imprisonable offence or a serious breach (or multiple minor breaches) of other conditions of a CCO. There needs to be a formalised non-compliance regime to facilitate judicial and public confidence in the order. It is also necessary to ensure that breaches are enforceable beyond the expiration of the order.</p>

CURRENT HIERARCHY		REVISED HIERARCHY
<p><b>Probation order</b>  Max Term: 3 years.  A probation order requires the offender to be of good behaviour during the period of the order and to refrain from doing things specified in the order.  Not a substitutional sanction.</p> <p><b>Core conditions:</b></p> <ul style="list-style-type: none"> <li>• not commit an offence punishable by imprisonment;</li> <li>• report within one clear working day to a probation officer at the place specified in the order;</li> <li>• submit to the supervision of a probation officer as required by that probation officer;</li> <li>• report to a probation officer as required by that probation officer;</li> <li>• not leave or stay outside Tasmania without the permission of a probation officer;</li> <li>• comply with reasonable and lawful directions given by a probation officer;</li> <li>• give notification to a probation officer of any change of address or employment before, or within 2 working days after, the change.</li> </ul> <p><b>Special conditions:</b></p> <ul style="list-style-type: none"> <li>• attend educational and other programs as directed by the court or a probation officer;</li> <li>• undergo assessment and treatment for alcohol or drug dependency as directed by a probation officer;</li> <li>• must submit to testing for alcohol or drug use as directed by a probation officer;</li> <li>• must submit to medical, psychological or psychiatric assessment or treatment as directed by a probation officer;</li> <li>• such other special conditions as the court thinks necessary or expedient.</li> </ul> <p>Can be combined with a CSO, fine, rehabilitation program order and driving disqualification order.</p> <p><b>Consequences of breach</b></p> <ul style="list-style-type: none"> <li>• confirm the order as originally made; or</li> <li>• increase the period during which the order has effect; or</li> <li>• vary the special conditions to which the order is subject; or</li> <li>• cancel the order and deal with the offender for the offence or offences in respect of which the order was made in any manner in which the court could deal with the offender had it just found the offender guilty of that offence or those offences; or</li> </ul>	<p><b>Expanded operation to replace suspended sentences</b></p> <p>↗</p>	

CURRENT HIERARCHY		REVISED HIERARCHY
<ul style="list-style-type: none"> <li>cancel the order and, if it considers it appropriate, any other order made by the court in respect of the offence in respect of which the probation order was made, and deal with the offender for that offence in any manner in which the court could deal with the offender had it just found the offender guilty of that offence.</li> </ul> <p>Current programs offered by Community Corrections: Sober Driver (see below), Family Violence Offender Intervention Program (see below), Self Management and Recovery Training (getting SMART) Program, which is a substance abuse program that teaches offenders tools and techniques to abstain from addictive behaviours.</p>		
<p><b>Rehabilitation program order (family violence offences)</b></p> <p>Max Term: 5 years</p> <p>A rehabilitation treatment order is an order to attend and participate in a rehabilitation program. This is a structured treatment program designed to reduce the likelihood of a person who has committed a family violence offence reoffending.</p> <p>It is imposed with conditions. Offenders are referred to the Family Violence Offender Intervention Program. There is an individual 12 hour and 50 hour group program. Only available for high-risk offenders.</p> <p>Currently order is used as part of probation and not the <i>Sentencing Act 1997 (Tas) s 7(ea)</i>.</p> <p><b>Consequences of breach</b></p> <ul style="list-style-type: none"> <li>order the offender to resume undertaking the program; or</li> <li>cancel the rehabilitation program order and deal with the offender in any manner in which the court could deal with the offender had it just found the offender guilty of the offence which gave rise to the order.</li> </ul>	<p><b>Expanded Operation</b></p> <p>→</p>	<p>Limitations in relation to the rehabilitation program order and the availability of treatment were identified as part of family violence reference recently undertaken by the Council.<sup>186</sup></p> <p>Currently, 3.5% of FSSs and 6.6% of PSSs imposed in Magistrates Court are for breach of a violence order. Breach of a violence order was also an offence that was disproportionately likely to result in a PSS (12.1% of offenders convicted of that offence received a PSS compared with 5.8% overall).</p>
<p><b>N/A but currently ‘Sober Driver’</b> is a program that can be imposed as a condition of suspending a sentence of imprisonment or as part of probation order or community service order. This is an educational and skill-based program which targets adult offenders who are convicted of two or more drink driving offences in the last 5 years.</p>	<p><b>Expanded Operation</b></p> <p>→</p>	<p><b>Driving while intoxicated list</b></p> <p>Formalised list that allows court to impose treatment/ education requirement as part of CCO.</p> <p>It is a post-sentence order (rather than a diversionary list as suggested in previous paper prepared by Alexander McKenzie with the Magistrates Court of Tasmania that recommended using the framework of the Mental Health and Cognitive Disability Diversion List).</p> <p>Currently, 9.1% of FSSs and 6.2% of PSSs imposed in Magistrates Court are for driving while exceeding the prescribed concentration of alcohol.</p>

186 See TSAC, *Sentencing of Adult Family Violence Offenders*, Final Report No 5 (2015).

CURRENT HIERARCHY		REVISED HIERARCHY
<p><b>Fine</b> Max: as prescribed under the relevant offence provision (which is unlimited under the <i>Criminal Code</i> (Tas)). Can be combined with imprisonment, community service order, probation.</p>	<p>No Change →</p>	<p><b>Fine (conviction or non-conviction: see SAC report (2014))</b> Max: as prescribed under the relevant offence provision (which is unlimited under the <i>Criminal Code</i> (Tas)).</p>
<p><b>Adjourned undertaking</b> Max Term: 5 years Release (unsupervised) with conditions relating to good behaviour.</p>	<p>No Change →</p>	<p><b>Adjourned undertaking</b> Max Term: 5 years Release (unsupervised) with conditions relating to good behaviour.</p>
<p><b>Conviction only</b> The court can record a conviction and order the discharge of the offender.</p>	<p>No Change →</p>	<p><b>Conviction only</b> The court can record a conviction and order the discharge of the offender.</p>
<p><b>Dismissal without conviction</b> The court cannot record a conviction and dismiss the charge for the offence.</p>	<p>No Change →</p>	<p><b>Dismissal without conviction</b> The court cannot record a conviction and dismiss the charge for the offence.</p>
<p><b>Other powers</b> <b>Deferral of sentencing (youth offenders only)</b> Max Term: 12 months. Following a finding of guilt, proceedings adjourned for up to 12 month.</p>	<p>Expanded Operation →</p>	<p><b>Deferral of sentencing (all offenders)</b> Max Term: 12 months with a limited discretion to defer for a longer period of time. Following a finding of guilt, proceedings adjourned for up to 12 months (unless discretion exercised to defer for a longer period).</p>

# 6. Offenders who are alcohol or drug dependent: the alcohol and drug treatment order

Australian research suggests that many offenders have a history of substance abuse and many commit crime while under the influence of alcohol and/or drugs.

The relationship between crime and substance use (including illicit drugs and alcohol) is complex, particularly when examined over the life course of offenders. However, substance use is clearly a risk factor for criminal behaviour.<sup>187</sup> In the largest national study of adult prisoners, 62% of male inmates and 67% of female inmates reported being 'intoxicated' — that is, because of consuming any substance — at the time of the most serious offence for which they had been incarcerated.<sup>188</sup> The rate appears to be lower, yet still notable, among people who have been arrested. In an analysis of self-reported data from Australian arrestees (n=1884) approximately 40% of participants indicated that they were intoxicated at the time of offending.<sup>189</sup> When arrestees were asked more broadly whether they attributed their offence to drugs or alcohol or both, the figure rose to 45%. Across the entire cohort of arrestees, 30% attributed their offence to alcohol compared with 19% for any illicit drug.

These figures bear similarities to findings from national studies of people who regularly inject drugs. In 2013, 36% reported committing some sort of crime in the month preceding their interview, whether it was drug dealing (23%), a property offence (18%), fraud (2%) or a crime of violence (3%).<sup>190</sup> Two in every three participants reported being intoxicated at the time of the offences. The most commonly identified substances linked to the different categories of offending behaviour were: cannabis (about 30% for drug dealing and fraud); benzodiazepines for property offences (29%); and alcohol and heroin for violence (both 32%). Compared with their counterparts from other parts of Australia, Tasmanians who regularly inject drugs appear to be more inclined to report criminal activity in the month preceding their interview. In fact, in 2013 and 2012 the Tasmanian cohort had the highest level of self-reported criminal activity: 47% and 56%<sup>191</sup> respectively.

The Council does not have data that would indicate the number of offenders sentenced to a suspended sentence in Tasmania where illicit drugs and/or alcohol contributed to the commission of the offence, but in light of the available research, it would likely be a significant proportion of offenders. The Council also notes the number of offenders in the Magistrates Court who receive a suspended sentence for drink driving. Drink driving cases account for 6.2% of all PSSs and 9.1% of all FSSs imposed in the Magistrates Court and research suggests that 'many repeat drink drivers are alcohol dependent and also have higher rates of co-morbidity than the general population'.<sup>192</sup> In its submission,

187 Daniel Nagin, David Farrington and Terrie Moffitt, 'Life-course Trajectories of Different Types of Offenders' (1995) 33 *Criminology* 111.

188 Toni Makkai and Jason Payne, 'Drugs and Crime: A Study of Incarcerated Male Offenders' (Research and Public Policy Series No 52, Australian Institute of Criminology, 2003); Holly Johnson, 'Drugs and Crime: A Study of Incarcerated Female Offenders' (Research and Public Policy Series No 63, Australian Institute of Criminology, 2004).

189 Jason Payne and Antonette Gaffney, 'How Much Crime is Drug or Alcohol Related? Self-reported Attributions of Police Detainees' (Trends and Issues in Crime and Criminal Justice No 439, Australian Institute of Criminology, 2012).

190 Jenny Stafford and Lucinda Burns, 'Australia Drug Trends 2013: Findings from the Illicit Drug Reporting System (IDRS)' (Australian Drug Trends Series No 109, National Drug and Alcohol Research Centre, 2014).

191 Jenny Stafford and Lucinda Burns, 'Australia Drug Trends 2012: Findings from the Illicit Drugs Reporting System (IDRS)' (Australian Drug Trends Series No 91, National Drug and Alcohol Research Centre, 2013).

192 Kate Warner, 'Sentencing Review 2012–2013' (2013) 37 *Criminal Law Journal* 390, 398, referring to Elizabeth Richardson, 'A Driving While Intoxicated/Suspended Court List for Victoria' (Background Paper for the Australian Centre for Justice Innovation, Monash University 2013) 7. It is noted that the Tasmania Law Reform Institute is currently undertaking a project that examines the approach to sentencing for recidivist drink drivers.

CLC Tas undertook a review of all sentencing decisions handed down in the Supreme Court between 2008-14 and examined the number of offenders sentenced with a history of alcohol and/or illicit drug abuse. This research found that there were a total of 610 offenders sentenced in this period who had a recognised history of alcohol and/or illicit drug abuse. Further, the CLC Tas submission reported that a high proportion of offenders had received a suspended sentence and that 'this figure [had] increased to 55-60 per cent over the last four years. Furthermore, of those offenders with a history of alcohol and/or illicit drug abuse who were sentenced to suspended sentences, the overwhelming majority were sentenced to wholly suspended sentences'. The CLC Tas noted that its analysis found that 'a large number of offenders with a history of alcohol and/or illicit drug abuse are subject to both a suspended sentence and a probation order'. It noted the lack of judicial oversight that accompanies a probation order in contrast to a CMD order. In relation to probation order, the CLC Tas reported that discussions with both the legal and community sectors revealed that 'drug testing is not regularly required and the failure to undertake urinalysis or other forms of drug testing, or unattended appointments with counselling services, treatment programs or probation officers, is not necessarily likely to warrant a review of the probation order'. For the CMD order:

the offender is intensively and actively managed for two years, is regularly subject to urinalysis and other forms of drug testing, and is required to attend court fortnightly. Overseeing these efforts is a judicial officer who forms a close working relationship with defence, prosecutorial and department staff to ensure that the offender is given every opportunity to rehabilitate.

The expansion of the Court Mandated Diversion program to the Supreme Court is likely to be a win-win-win that reduces recidivism as offenders undergo treatment for their drug abuse, increases confidence in the Judiciary by ensuring that orders are complied with and provides a level of accountability that is currently lacking for many offenders sentenced to a suspended sentence in the Supreme Court of Tasmania.

The Council agrees that the CMD order provides a valuable sentencing option and the Council's view remains that the CMD should be expanded to accommodate offenders with a history of alcohol abuse and/or illicit drug use where that substance abuse contributed to an offender's criminal behaviour and the order should be available for all courts. This chapter sets out the current law and outlines broad changes that will need to be made to Part 3A of the *Sentencing Act 1997* (Tas) to allow the CMD order to accommodate offenders who previously would have received a suspended sentence.

## 6.1 THE CURRENT LAW

Under s 7(ab) of the *Sentencing Act 1997* (Tas), a drug treatment order can be made under Part 3A of the Act in the Magistrates Court. This sentencing option was introduced in 2007 as an intensive intervention program aimed at addressing the cycle of drugs and crime for offenders with substance abuse issues.<sup>193</sup>

The program is currently capped at 80 participants and this cap includes both offenders on a CMD order and those being assessed for suitability for the order. The number of offenders on a CMD order fluctuates — as of 30 June 2014, there were 66 offenders participating in the CMD Program under a CMD order<sup>194</sup> and as at 20 May 2015 there were 42 offenders participating in the program — five offenders under bail conditions and 37 offenders under a CMD order.<sup>195</sup> Of the 37 offenders participating under a CMD order, offenders ranged in age from 19 to 57 with a median age of 32.5. There were 29 male offenders and eight female offenders. All but two of the offenders were sentenced for multiple offences.<sup>196</sup> There was a range of illicit drugs used by offenders with the principal drug of concern being methamphetamine for 17 offenders, cannabis for 10 offenders, morphine for five offenders, amphetamines for two offenders and other opiates and OxyContin (Oxycodone) each for one offender.

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193 Email from Tristan Bell, Team Leader (South) — Court Mandated Diversion to Rebecca Bradfield, 18 May 2015.

194 Department of Justice, Tasmania, *Annual Report 2013—14* (2014) 65.

195 Interview with Tristan Bell, Team Leader (South) — Court Mandated Diversion and Daniel Goss, Team Leader — Court Mandated Diversion (N/NW), 18 May 2015.

196 Email from Tristan Bell, Team Leader (South) — Court Mandated Diversion to Rebecca Bradfield, 21 May 2015.

### 6.1.1 NATURE OF THE ORDER

The CMD order 'aims to provide viable pathways for offenders by increasing their access to drug, alcohol, or other welfare services in order to deal with their drug use and break their cycle of contact with the criminal justice system'.<sup>197</sup> CMD is a Commonwealth funded program. The order reflects a problem-solving or therapeutic approach to sentencing where the judicial officer has a role in the ongoing supervision of the offender. There is provision for judicial monitoring over the period of the order and the court may vary the order based on the offender's progress, including adding or removing program conditions, varying conditions to adjust the frequency of treatment, the degree of supervision and the type or frequency of vocational, educational, employment or other programs that the offender must attend.<sup>198</sup> The court may reward an offender for compliance by varying or cancelling the order.<sup>199</sup> The authority of the court also facilitates access to services and treatment necessary to address the issues that contribute to an offender's criminal behaviour.<sup>200</sup>

There are four explicit purposes of a CMD order: (1) to provide an alternative sanction to imprisonment; (2) through treatment, to facilitate the offender's rehabilitation and reintegration into the community; (3) to reduce the incentive for the offender to resort to criminal activity; and (4) to reduce risks to the offender's health and well-being.<sup>201</sup>

A CMD order has two components: (1) a custodial part; and (2) a treatment and supervision component. The court imposes on the offender the sentence of imprisonment it would have imposed were it not making the order, but the offender is not required to serve the custodial component of the order unless it is activated by contravention of the order.<sup>202</sup> Of the 37 offenders on CMD orders as at 20 May 2015, the range of sentences imposed ranged from three to 18 months with a median sentence length of eight months. The treatment and supervision component contains core conditions and program conditions (these are discussed at [6.1.3]). There is no set period for the order and, usually, offenders take between 18 and 24 months to complete the program.<sup>203</sup> The *Sentencing Act 1997* (Tas) s 27R(2) provides that if the order is not cancelled within a two-year period, then the court must review the treatment and supervision part of the order to determine whether, notwithstanding any other provision of the Part, it should continue.<sup>204</sup> The *Sentencing Act 1997* (Tas) s 27R(4) provides that on the completion of the review, the court must cancel the treatment and supervision part of the order and either make an order activating some or all of the custodial part of the order or cancel the order and resentence the offender (other than by making a CMD order).<sup>205</sup> The interaction of these provisions is unclear and there is no universally accepted interpretation, with most magistrates interpreting the provisions to mean that, if an offender has not graduated, they must cancel the order at the second anniversary review. A small number of magistrates have interpreted the provisions to mean that there is power to continue the order and have adopted the approach that the review has not been finalised until the expiration of any extension of the order.<sup>206</sup>

### 6.1.2 CIRCUMSTANCES IN WHICH THE ORDER CAN BE MADE

In order for a CMD order to be made, an offender must be assessed as eligible and suitable for the order.

There are a number of eligibility requirements:

- a CMD order can be made where the court is satisfied on the balance of probabilities that the offender has a demonstrable history of illicit drug use and that illicit drug use contributed to the commission of the imprisonable offence or offences, or where the offender has other proceedings pending for such offences;<sup>207</sup>

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197 Department of Justice, Community Corrections, *Court Mandated Diversion*, <[http://www.justice.tas.gov.au/communitycorrections/court\\_mandated\\_diversion/intent\\_of\\_program](http://www.justice.tas.gov.au/communitycorrections/court_mandated_diversion/intent_of_program)>.

198 See *Sentencing Act 1997* (Tas) s 27J.

199 Ibid s 27K, 27L.

200 Bell, above n 193.

201 *Sentencing Act 1997* (Tas) s 27C.

202 Ibid s 27F.

203 Department of Justice, Community Correction Service, above n 197.

204 *Sentencing Act 1997* (Tas) s 27R.

205 Ibid s 27Q(2), 27R(4).

206 Email from Tristan Bell, Team Leader (South) — Court Mandated Diversion to Rebecca Bradfield, 19 May 2015.

207 *Sentencing Act 1997* (Tas) s 27B(1)(b), 27B(1)(e).

- it is not available in relation to sexual offences or offences involving the infliction of actual bodily harm that was not minor harm;<sup>208</sup>
- it is only available where the court would have sentenced the offender to actual imprisonment and would not have suspended the sentence, either fully or in part;<sup>209</sup> or
- the offender must not be subject to a sentencing order of the Supreme Court, a parole order under the *Corrections Act 1997* (Tas) or another CMD order.<sup>210</sup>

These requirements currently restrict the suitability of a CMD order as a replacement for suspended sentences.

The court must have received and considered a drug treatment order assessment report and must not make the order unless it is appropriate to do so in all the circumstances, the facilities likely to be used for treatment and supervision are reasonably accessible to the offender and the offender consents to the making of the order and compliance with the order.<sup>211</sup>

Matters to be considered in assessing an offender's suitability for the order include:

- the defendant's
  - age;
  - social history and background;
  - history of drug use;
  - medical, psychological and psychiatric history and condition, including details of any treatment for drug or alcohol dependence;
  - educational background;
  - employment history;
  - financial circumstances;
  - special needs;
  - the circumstances of any other offences, known to the court, of which the defendant has been found guilty;
  - the extent of the defendant's compliance with any sentence currently in force; and
- any other matters relevant as the court may direct.<sup>212</sup>

Other matters may include an assessment of pro-criminal or pro-social attitudes, motivation to change and an assessment of the offender's current position within the cycle of change.<sup>213</sup> In addition to making an assessment of an offender's suitability for the order, the assessment also makes recommendations in relation to the program conditions that should attach to the order.<sup>214</sup>

It is noted that in 2013–14, there were 68 CMD assessment reports completed and only 33 offenders assessed as being eligible and suitable for the order.<sup>215</sup> In total, in 2013–14, 41 offenders were sentenced in the Magistrates Court to a CMD order.<sup>216</sup>

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208 Ibid s 27B.

209 Ibid s 27B(1)(c).

210 Ibid s 27B(1)(e).

211 Ibid s 27B(1)(e).

212 Ibid s 27D(3), (4).

213 Bell and Goss, above n 195.

214 *Sentencing Act 1997* (Tas) s 27D(2).

215 Bell and Goss, above n 195.

216 Department of Justice, Tasmania, above n 194, 65.

### 6.1.3 CONDITIONS OF THE ORDER

There are core and program conditions that attach to a CMD order. The core conditions provide that an offender must:

- not, in Tasmania or elsewhere, commit another imprisonable offence;
- attend the court whenever it directs;
- report to a court diversion officer at a specified place within 2 clear working days after the order is made;
- undergo such treatment for the offender's illicit drug use problem as is specified in the order or from time to time as specified by the court;
- report to, and accept visits from case a manager or court diversion officers;
- give the offender's case manager at least 2 clear working days' notice before any change of address;
- not leave Tasmania except with the permission, granted either generally or in a particular case, of the court;
- comply with all lawful directions of the court; and
- comply with all reasonable directions of the offender's case manager and court diversion officers concerning the core conditions and program conditions of the order.<sup>217</sup>

There are additional conditions if the offence is a domestic violence offence, requiring that the offender: must not commit another family violence offence; must comply with any family violence order, interim family violence order or police family violence order; must attend and undergo assessment for, and treatment under, rehabilitation programs as directed by court diversion officers; if directed to undergo any rehabilitation programs, must attend and satisfactorily complete those programs and comply with the reasonable directions of the persons employed or engaged to conduct them.<sup>218</sup> These conditions apply while the treatment and supervision part of the order is operating.

In addition, the court must add at least one of the following program conditions to the treatment and supervision part of the order:

- submit to drug testing, as specified in the order;
- submit to detoxification or other treatment, whether or not residential in nature, as specified in the order;
- attend vocational, educational, employment, rehabilitation or other programs specified in the order;
- submit to medical, psychiatric or psychological treatment specified in the order;
- must not associate with persons or classes of persons specified in the order;
- must reside at such place, and for such period, as is specified in the order;
- must do or not do anything else that the court considers necessary or appropriate concerning the offender's illicit drug use or the personal factors that the court considers contributed to the offender's criminal behaviour.

The court must not attach more program conditions that it considers necessary to achieve the purposes of the order.

There are a range of service providers who may be involved in an offender's treatment and rehabilitation (depending on what is most suitable to address the criminogenic and other needs of the offender). These include the State Alcohol and Drug Service, Housing Tasmania, mental health services, an offender's general practitioner, and providers of counselling, and residential rehabilitation services.<sup>219</sup>

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217 *Sentencing Act 1997 (Tas)* s 27G(1).

218 *Ibid* s 27G(2).

219 Bell and Goss, above n 195.

#### 6.1.4 BREACH OF THE ORDER

The court has broad powers on breach of a CMD order, including requiring that the offender serve all or a portion of the unactivated sentence.

If a court is satisfied that an offender has failed to comply with a condition of a drug treatment order, other than by committing an offence punishable by a term of imprisonment exceeding 12 months, the court must take one of the following actions:

- confirm the treatment and supervision part of the drug treatment order;
- vary the treatment and supervision part of the drug treatment order;
- make an order requiring the offender to perform up to 20 hours of community work under the supervision of the offender's case manager;
- order that the custodial part of the drug treatment order is activated for a specified period, of not less than one day and not more than seven days, to be served in prison.<sup>220</sup>

If the offender commits an offence punishable by a term of imprisonment exceeding 12 months, the court must:

- take one of the actions under s 27M(1) as though the offender had failed to comply with any other condition of the order (see above); or
- cancel the treatment and supervision part of the order and, after taking into account the extent of the offender's compliance with that part, make an order activating some or all of the custodial part of the drug treatment order; or
- cancel the custodial part of the drug treatment order and, other than by making an order of imprisonment deal with the offender for each offence in respect of which the drug treatment order was made in any way in which it could deal with the offender had it just found the offender guilty of each such offence.<sup>221</sup>

#### 6.1.5 COST OF THE ORDER

In view of the nature of the interventions involved, the CMD order is a resource intensive order and this is reflected in the limit placed on the number of offenders who are able to be assessed for suitability or accepted for the program at any one time. In 2014–15, the funding provided for the program was \$1 540 000. This covers drug testing and case management for the offender but does not cover the costs of an offender accessing other services that may form part of the order.

#### 6.1.6 THE EFFECTIVENESS OF THE CMD ORDER

One measure of the effectiveness of the CMD order is the number of participants who successfully complete the order and graduate. This is the 'obvious and highest measure of success' and means that over an extended period of time there has been 'evidence of sustained compliance as monitored by regular contact with the court, Community Corrections staff and drug testing'.<sup>222</sup> In the period 2013–14, 24% of participants graduated from the order while in 2014–15, 50% of participants successfully graduated.<sup>223</sup> It is noted that statistics compiled by the Southern Prosecution Service for the 12 months to March 2015 showed that out of the 40 participants, 20% had graduated, 17% were still on the program, 10% were on warrant, and 55% were cancelled out of the program. Over the period from March 2014 to 16 November 2015, of the 64 participants, 12% had graduated, 44% were still on the program, 7% were on warrant, and 36% of participants were cancelled out the program.<sup>224</sup>

Outside the measure of graduation, it is difficult to assess the success of the CMD order and to focus only on graduation rates may be misleading in making an assessment of the effectiveness of the order. Offenders who do not formally graduate may still have made significant progress in their treatment and rehabilitation, including physical and mental health, gains in literacy, increased periods of abstinence, and no further reoffending or reduced/

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220 *Sentencing Act 1997 (Tas)* s 27M(1).

221 *Ibid.*

222 Bell, above n 193.

223 *Ibid.*

224 Email from Sergeant Gen Hickman, Southern Prosecution Services to Rebecca Bradfield, 18 November 2015.

less serious reoffending.<sup>225</sup> Many of these measures of success relate to the improved 'global functioning of the individual — reflected in factors such as employment, health, spending time with family, involvement of study, stable accommodation, management of debts and fines and other factors which suggest a non-using and non-offending lifestyle'.<sup>226</sup> For this reason, offenders who reach the two year review may have the order cancelled as a reward in recognition of the significant progress made or an offender may not have the order cancelled (as a reward), but not receive a sentence of imprisonment imposed on resentencing.<sup>227</sup> Anecdotally, in some cases where an offender has their CMD order cancelled, there has been significant progress towards becoming drug or crime free and addressing the issues that the offender faced at the commencement of the order.<sup>228</sup>

However, it would seem that there is mixed evidence of the success of the CMD program in Tasmania, at least in terms of offenders' completion of the program and reoffending.<sup>229</sup> In its submission, the DPEM indicated that it did not believe that the CMD program has been as successful as was portrayed in the *Consultation Paper*. Data provided by the DPEM indicated that, in the period March 2014 to 16 November 2015, one offender (out of the eight) had who graduated from the program had reoffended during the program and 20 offenders (out of the 23) cancelled out of the program had new offending during the course of the order.<sup>230</sup> However, the evidence does suggest that for those offenders who remain in the program and graduate, there is reduced recidivism after graduation. The DPEM data show that, of the eight offenders who graduated from the program from March 2014 to 16 November 2015, none had reoffended.<sup>231</sup> This is consistent with research evidence elsewhere that shows that drug courts are effective in reducing recidivism. As part of VSAC's consideration of replacements for suspended sentences, it highlighted evidence that suggests that treatment provided in the community provides the most positive outcomes in reducing reoffending for drug offenders, 'although positive outcomes have also been experienced with in-prison programs — particularly those with aftercare services'.<sup>232</sup> VSAC also referred to research that supported the cost-effectiveness of community-based programs for drug treatment. This research found that 'taking into account effects of reductions in recidivism and marginal program costs compared to the cost of the alternatives', the cost saving was US\$10 054 for participation in community programs aimed specifically at drug offenders compared to US\$7835 for drug treatment in prison (therapeutic communities or out-patient services) and US\$4767 for drug courts.<sup>233</sup> A more recent review of the Drug Court of Victoria (DCV) found that 'significant improvements in the rate and severity of offending by the DCV Cohort as compared to their counterparts in the mainstream system'.<sup>234</sup> Evaluations of the NSW Drug Court have also revealed that the drug court was more effective at reducing recidivism than prison.<sup>235</sup> In the Tasmanian context, it is noted that the DPEM data do not allow for the effectiveness of the order to be compared with other orders, as they do not provide for comparison with matched samples of offenders who did not receive a CMD order.

## 6.2 THE CONSULTATION PAPER PROPOSALS

In the *Consultation Paper*, the Council's preliminary view was that the CMD order should be expanded to include alcohol as well as illicit drugs. It was also the Council's view that the order should be available in the Supreme Court, as well as the Magistrates Court. In addition, the Council proposed a draft recommendation that would extend the order to all offences, except for sexual offences. This would mean that the order would be available where the harm caused was not minor. This was proposed on the basis that it was recommended that the order be expanded to apply in cases where a suspended sentence order was currently imposed (and not just cases where immediate imprisonment was appropriate). The Council proposed that the name of the order should be changed to the 'drug and alcohol treatment order'.

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225 Ibid.

226 Liz Moore, *Measures of Success: Capturing the Impact of Drug Courts* (Master of Criminology and Corrections Thesis, University of Tasmania, 2012) 83.

227 Bell and Goss, above n 195.

228 Bell, above n 193.

229 Ibid.

230 Hickman, above n 224.

231 Ibid.

232 VSAC, above n 15, [7.38] referring to Steve Aos, Marna Miller and Elizabeth Drake, *Evidence-Based Public Policy Options to Reduce Future Prison Constructions, Criminal Justice Costs, and Crime Rates* (Washington State Institute for Public Policy, 2006).

233 VSAC, above n 15, [7.38] referring to Acumen Alliance, *Benefits and Cost Analysis of the Drug Court Program* (2005).

234 KPMG, *Evaluation of the Drug Court of Victoria*, Final Report (2014) 4.

235 NSWLRC, above n 60, 324 [15.16]-[15.18].

### 6.3 SUBMISSIONS

The submissions received by the Council indicated support for the expansion of CMD order.

The DPEM indicated that it was supportive of the role of the CMD and acknowledged that there had been some successes, but (as noted) did not consider that the program has been as successful as it was portrayed in the *Consultation Paper*. However, the DPEM indicated that it supported the addition of alcohol to the CMD order and also its extension to the Supreme Court. In contrast, the DPEM expressed concerns about allowing offenders charged with violent crimes to be placed on an expanded CMD program, on the basis that 'persons who inflict injuries have moved to the next step of their offending and present a significant risk to the community'. The Synod raised concerns about the effectiveness of the CMD order, but offered cautious support for the expansion of the order as proposed by the Council.

PACCOA also supported the draft recommendations that would expand the operation of CMD to the Supreme Court, accommodate alcohol abuse (in addition to the abuse of illicit drugs) and extend the order to all offences except for sexual offences. PACCOA also supported the expanded operation of the current sentencing hierarchy to include a 'Driving While Intoxicated' list. PACCOA emphasised the importance of the need for additional funding to accompany the expansion of the order.

The ATDC supported the expansion of CMD to alcohol and also the Supreme Court. In its submission, the ATDC noted that '[e]xpanding CMD to include alcohol has the potential to assist people with severe relapsing alcohol dependence to access treatment who might otherwise be sentenced to a term of imprisonment without rehabilitation'. The ATDC stressed the need for decision-makers to be informed by contemporary evidence in relation to substance dependence and by the understanding that substance dependence is, in the first instance, a health condition that requires a health and therapeutic response. In addition, the ATDC expressed the view that when substance dependence is combined with offending:

it is essential that the balance between criminogenic risk assessment and the role of AOD (alcohol and other drug) use recognises the positive impact engagement in AOD treatment will have. Addressing the underlying causes of substance use can be fundamental to changing offending behaviour.

The ATDC expressed caution about 'the investment in drug testing as a prime order intervention' and stressed that random testing needed to be supported by a 'wrap-around framework of therapeutic intervention'. It highlighted evidence that shows that compliance monitoring is more likely to be successful if 'it was not only random but also the sanction for breaching an order is immediate, certain and proportional'.<sup>236</sup>

The Law Society expressed the view that the draft recommendation that the CMD order should be reserved for serious offending in circumstances where the principles of sentencing require a more severe penalty than a CCO (with treatment conditions attached) was unnecessary, on the basis that CMD orders are used where there should be an actual period of imprisonment.

As indicated earlier, the CLC Tas also supported the expansion of the CMD to both alcohol and the Supreme Court. The active involvement of judicial officers in the treatment and monitoring of offenders, the associated opportunity for rehabilitation, and the consequences of breaching the order were features of the CMD order that were seen to be particularly beneficial. The CLC Tas stated that '[d]espite the initial costs, participation in the Court Mandated Diversion program is likely to result in a saving to the community through decreased recidivism, with flow on effects for both the court and prison systems'. In its submission, the CLC Tas also commented on the name of the order and 'strongly recommend[ed] that the nomenclature around the drug treatment order be amended' on the basis that 'the "drug and alcohol treatment order" is suggestive of alcohol not being a drug or not being a drug that is as dangerous as illicit drugs'. The CLC Tas wrote that '[n]othing could be further from the truth'. Accordingly, it recommended 'that the proposed order be referred to either as the "Alcohol and Other Drug Treatment Order" or simply a "Drug Treatment Order" that includes reference to alcohol abuse'.

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236 Submission, 30 September 2015, 2 citing Beau Kilmer, N Nicosia, Paul Heaton and Greg Midgette, 'Efficacy of Frequent Monitoring With Swift, Certain, and Modest Sanctions for Violations: Insights from South Dakota's 24/7 Sobriety Project' (2013) 103 *American Journal of Public Health* e37.

## 6.4 THE COUNCIL'S VIEWS

As part of its consideration of sentencing options to replace suspended sentences, in view of the likely extent of drug and alcohol use among offenders who currently receive suspended sentences, the Council's view remains that the CMD should be expanded to accommodate offenders with a history of alcohol abuse and/or illicit drug use where that substance abuse contributed to the offender's criminal behaviour. It is also the Council's view that the order should be available in the Supreme Court as well as the Magistrates Court.<sup>237</sup> The extension of the order to the Supreme Court will resolve current difficulties that arise when an offender has matters to be heard in both the Supreme Court and the Magistrates Court. A pending Supreme Court matter automatically excludes an offender from eligibility for a CMD order. These expansions were supported in the submissions received.

The Council's view is that the CMD framework provides a 'wrap-around' structure of treatment and monitoring, coupled with rewards for compliance and penalties for non-compliance. The Council considers that the CMD is an onerous and rigorous order that should be reserved for serious offending in circumstances where the principles of sentencing require a more severe penalty than a CCO with treatment conditions attached. Despite the Law Society's view that such a recommendation is unnecessary, it is the Council's view that, given the proposed expansion of the CMD order beyond cases where actual imprisonment would have been imposed to cases where a suspended sentence may have been used, it is appropriate to highlight that the order is for more serious categories of offending. This provides protection against net-widening. Given its recommended expansion to cases where suspended sentences may have been imposed, it is also the Council's view that it is appropriate to expand the order to include cases of violence. The Council's view is that this does not pose an additional threat to public safety (as suggested by the DPEM submission), given that these offenders would have been serving their suspended sentences in community.

The Council's view is that the CMD order may also be an appropriate sanction for offenders who have previously been sentenced to a CCO with treatment conditions relating to drug and alcohol issues and who have reoffended or breached the order. The CMD provides a more severe penalty and the threat of imprisonment as an incentive for compliance. Used in this way, a CMD order provides judges and magistrates with another option to punish and facilitate the rehabilitation of such offenders before the use of actual imprisonment.

Offenders with alcohol and drug related issues are typically those with complex needs and, as evidenced by the profile of offender's currently participating in CMD, likely to have a significant history of offending. Research evidence has shown the effectiveness of drug courts in reducing recidivism and the literature also shows the limited effectiveness of traditional criminal justice interventions for offenders with complex needs.<sup>238</sup> The Council is similarly persuaded by the effectiveness and appropriateness of specific sentencing options for drug and alcohol-affected offenders that address the underlying causes of an offender's behaviour and allow an offender to be treated in the community. However, the Council considers that there needs to be regular monitoring and review of the Tasmanian CMD program to ensure that it operates according to best practice principles.<sup>239</sup>

In response to the discussion by CLC Tas on nomenclature, the Council has reconsidered the name of the order and its view is that the order should be the 'alcohol and drug treatment order'. It is noted that it is not the intention of the Council, in renaming the order, to suggest that alcohol is not a drug or to suggest that it was not as dangerous as illicit drugs. Rather, it is to signal the expanded operation of the order to include alcohol.

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237 This reflects (in part) the earlier recommendations of the TLRI, which recommended that drug treatment orders be available for offenders convicted in the Supreme Court: TLRI, above n 26, Recommendation 47. In its family violence reference, the Council has made the observation that the CMD order should be amended to include offenders who abuse legal substances, above n 186, Observation 10.

238 KPMG, above n 234, 38.

239 See *ibid*, 40-41 for an overview of current leading practice approaches. These include: smaller participant case loads; participants are sober at least 90 days in order to graduate; judges spend at least three minutes with each participant at hearings; treatment provider representatives attend drug court team meetings and court sessions; law enforcement representatives are a part of program team and attend court session; emphasising electronic data collection and analysis and use this evidence to modify program design; independent evaluation of program; and use of the analysis to modify program design.

Accordingly, the following changes would need to be made to the *Sentencing Act 1997* (Tas) Part 3A to expand its operation and allow it to function as a replacement (in appropriate cases) for a suspended sentence:

- allow the order to be made by the Supreme Court and the Magistrates Court;
- change the name of the order to the 'alcohol and drug treatment order';
- change the provisions to refer to alcohol in addition to illicit drug use (where appropriate);
- extend the order to all offences, except for sexual offences. This would mean that the order would be available where the harm caused was not minor;
- remove the reference in the *Sentencing Act 1997* (Tas) s 27B(c)(ii) to suspended sentences and insert a provision (akin to the *Sentencing Act 1991* (Vic) s 36(2)) to provide that without limiting when an alcohol or drug treatment order may be imposed, it may be an appropriate sentence where, before the ability of the court to impose a suspended sentence was abolished, the court may have imposed a sentence of imprisonment and then suspended that sentence of imprisonment.

In addition, the Council stresses that considerable resources will need to be allocated to support the order. This is a resource intensive order and, currently, resourcing issues mean that the number of offenders who can be supervised under the order is capped at 80.<sup>240</sup> There is currently no funding allocated for a specific community-based program that addresses the issue of alcohol abuse and there is no funding provided for alcohol testing.<sup>241</sup> If the CMD order is to be an effective replacement for a suspended sentence, the necessary funding will need to be provided for assessment, appropriate drug and alcohol treatment programs, other programs and services that address offender's criminogenic needs, as well as the monitoring of compliance with the conditions (such as drug and alcohol testing). The ATDC submission discussed the resource implications of the likely increased demand for treatment, following the proposed expansion of the order, and stated that:

The capacity of the AOD [Alcohol and Other Drugs] and Community Corrections workforce to respond to increased demand must be considered in two parts. Firstly, an increase in the number of people referred for treatment will require an increase in treatment places and staff to provide that treatment. Secondly, the ongoing development of the skills and capacity of workers to be effective in roles based upon therapeutic jurisprudence must be resourced. Workforce development within the AOD sector is a continuous process of improving the quality of care provided and the responsiveness of the service systems.

This was also recognised by PACCOA. The Council recognises these concerns and also acknowledges that the expansion of the CMD order will place additional demands on court resources arising from the increased need for judicial monitoring.

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240 Department of Justice, Tasmania, above n 194, 65.

241 Williams, above n 118.

## Recommendations

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### *Alcohol and drug treatment orders*

6. Court Mandated Diversion (CMD) should be expanded to accommodate offenders with a history of alcohol abuse and/or illicit drug use where that substance abuse contributed to an offender's criminal behaviour.
7. CMD orders should be available in the Supreme Court as well as the Magistrates Court.
8. CMD should be reserved for serious offending in circumstances where the principles of sentencing require a more severe penalty than a CCO with treatment conditions attached.
9. The following changes should be made to the *Sentencing Act 1997* (Tas) Part 3A to expand its operation and allow it to function as a replacement (in appropriate cases) for a suspended sentence:
  - allow the order to be made by the Supreme Court and the Magistrates Court;
  - change the name of the order to alcohol and drug treatment orders;
  - change the provisions to refer to alcohol in addition to illicit drug use (where appropriate);
  - extend the order to all offences, except for sexual offences. This would mean that the order would be available where the harm caused was not minor;
  - remove the reference in the *Sentencing Act 1997* (Tas) s 27B(c)(ii) to suspended sentences and insert a provision (akin to the *Sentencing Act 1991* (Vic) s 36(2)) to provide that without limiting when an alcohol and drug treatment order may be imposed, it may be an appropriate sentence where, before the ability of the court to impose a suspended sentence was abolished, the court may have imposed a sentence of imprisonment and then suspended that sentence of imprisonment.
10. Funding needs to be provided for the assessment of offenders, appropriate drug and alcohol treatment programs, other programs and services that address the criminogenic needs of the offenders, as well as the monitoring of compliance with the conditions (such as drug and alcohol testing) and judicial monitoring.
11. There needs to be regular monitoring and review of the CMD program to ensure that it operates according to best practice principles.

# 7.

## *Intermediate sentencing options to replace the fully suspended sentence*

### 7.1 INTRODUCTION

Term of Reference 4 requires the Council to investigate the range, adequacy and cost of alternative sentencing options such as, but not limited to, home detention, intensive correction or supervision, deferred sentencing, restorative and therapeutic options.

This chapter examines higher-level intermediate sentencing options that are available in other Australian jurisdictions, as well as in New Zealand. It also considers reforms that have been proposed in these jurisdictions to improve existing intermediate sanctions and/or create new sentencing options. The sentencing options that are considered are:

- periodic detention;
- home detention;
- community detention;
- intensive supervision/correction type orders; and
- CCOs.

In other jurisdictions, it is noted that these intermediate sanctions may operate alongside suspended sentences or they may have been introduced (or suggested) as replacements for FSSs.

In this chapter, the Council expresses its view in relation to the appropriateness of the introduction of these sanctions in Tasmania as part of the process of phasing out suspended sentences and its reasons for adopting the proposed hierarchy as set out in chapter 5.

The Council notes the degree of overlap that exists between the various sentencing options in relation to the conditions that can be attached (either as standard or optional requirements).<sup>242</sup> These conditions include:

- community work;
- home detention or curfew;
- treatment or rehabilitation requirements;
- supervision;
- alcohol and/or drug restrictions or testing;
- place and non-association requirements;
- residential restrictions; and
- provision for judicial monitoring.

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242 See Appendix B Table B-1.

The range of conditions available allows the court to tailor a sentence to meet the desired sentencing purpose(s) (punishment, deterrence, rehabilitation, and/or denunciation) and to address the particular needs of the individual offender. In this way, the sentencing options have the capability to fulfil therapeutic objectives by attempting to address the underlying causes of the offending behaviour. Further, the range of conditions in some jurisdictions also allows the court to pursue restorative objectives by allowing reparation or participation in other restorative justice activities.<sup>243</sup> Although there are difficulties in defining restorative justice, a widely accepted definition is that it is 'a process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future'.<sup>244</sup> It focuses on reparation of harm but can also achieve retribution by 'bringing offenders to account, denouncing their behaviour, providing public vindication for victims and setting reparation and sanctions'.<sup>245</sup>

In assessing the various sentencing options, as VSAC has recognised, the success of intermediate orders can be measured in different ways, including how effective they are:

- in achieving the intended purpose or purposes of sentencing (for example, to punish the offender, express denunciation and/or to deter the offender and others from committing similar offences in the future);
- in achieving compliance with the order, including lower rates of reoffending, when compared to imprisonment and other lower-level CBOs [community-based orders] during the period of the order and/or in the longer term (which also meets the sentencing purposes of rehabilitation and community protection); and
- in diverting offenders from prison, resulting in savings to the community.<sup>246</sup>

These considerations will inform the evaluation of the strengths and weaknesses of the various intermediate orders that are discussed below.

In developing any new intermediate orders in Tasmania, it will be necessary to decide whether or not the order should be substitutional or a sanction in its own right. A substitutional sanction is one where the court imposes a term of imprisonment and then orders it to be served in some other way (for example, on home detention). In contrast, intermediate sanctions can be imposed that are not dependent on an order of imprisonment being imposed and are instead sanctions in their own right.<sup>247</sup> In its consideration of suspended sentences, VSAC outlined the value of substitutional orders and objections to their use. Substitutional orders are seen to allow the court to acknowledge the seriousness of an offence by imposing a prison sentence but at the same time allow the court to:

substitute another option which does not require the offender to serve that time in prison. It is argued that the formal imposition of a prison sentence serves an important symbolic function in communicating to the offender and the community the seriousness of the offence, and in censuring his or her behaviour.<sup>248</sup>

This reflects the NSWLRC's view that it 'marks it out as a serious sentence with potentially significant consequences for breach, combined with a positive focus on achieving rehabilitation and addressing recidivism'.<sup>249</sup> Further, the NSWLRC considered that an advantage of a substitutional sanction was the deterrent effect of having the consequences of a breach known in advance, that is that the offender would be required to serve the remainder of the term in prison.<sup>250</sup> This is similar to the 'Sword of Damocles' effect attributed to suspended sentences.<sup>251</sup> Another concern that has been raised about severing the link between imprisonment and intermediate sanctions is that it may result in net-widening with the sanction not being used 'solely as a substitute for imprisonment' but 'when the [court] otherwise might have ordered a community-based order'.<sup>252</sup>

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243 See VSAC and New Zealand, Appendix B Table B–1.

244 Jacqueline Larsen, 'Restorative Justice in the Australian Criminal Justice System' (AIC Reports Research and Public Policy Series 127, 2014) 2 quoting Tony Marshall, 'The Evolution of Restorative Justice in Britain' (1996) 4 *European Journal on Criminal Policy and Research* 21, 37.

245 Tony Foley, 'Are Retributive Aims Achievable in a Restorative Justice Setting?' (2013) 22 *Journal of Judicial Administration* 130, 130.

246 VSAC, above n 15, [3.13].

247 See [2.4].

248 VSAC, above n 38, [2.44]; VSAC, above n 24, [7.7], [8.20]–[8.22].

249 NSWLRC, above n 60, [11.18].

250 Ibid [11.6]. See discussion of the NSW model at [7.4.2].

251 See Bartels, above n 62, 127–131.

252 VSAC, above n 15, [5.45] in relation to home detention. A similar point can be made in relation to community detention orders.

On the other hand, an objection to suspended sentences (and other substitutional sanctions) has been that they are a fiction (that is, the offender is sentenced to imprisonment and not imprisoned) and that this has contributed to a lack of community confidence in sentencing.<sup>253</sup> Substitutional sanctions are a 'form of "double speak" involving the legislative fiction that someone is in prison when quite plainly they are not'.<sup>254</sup> Further, relying on research in NSW that found that offenders given suspended sentences were no less likely to reoffend than those given supervised bonds, VSAC has questioned the specific deterrent capabilities of substitutional sanctions: 'we do not believe that sentences with known and specific breach consequences necessarily provide a more effective deterrent than other forms of sentence that allow for a more flexible response'.<sup>255</sup> VSAC has also pointed to research which suggests that greater flexibility in the administration of the orders facilitates successful completion of the orders and reduced recidivism.<sup>256</sup>

While the Law Society expressed the view that it did not appear possible to have an intermediate sentencing option that was not substitutional, the Council disagrees and considers that it is possible to have an intermediate order that is not dependent on the imposition of a term of imprisonment. Further, it is the Council's view that any replacement intermediate sanction should not be a substitutional order on the basis that removing the fiction that an offender is sentenced to imprisonment will increase the transparency of the order and is likely to improve public confidence in the sentencing process. The Synod supported this recommendation.

## Recommendation

### *Nature of intermediate sanction*

12. That any replacement intermediate sanction should be a sentencing option in its own right and should not be a substitutional order.

## 7.2 PERIODIC DETENTION

Periodic detention is a part-custodial sentencing order where an offender remains in custody for part of the sentence and lives in the community for the remainder of the time. It is the penultimate sanction before full-time imprisonment. Generally, the approach to periodic detention has been to require that an offender be detained in a correctional facility for two days of the week (often the weekend) and live at home for the remainder of the week.<sup>257</sup> Periodic detention was introduced as a sentencing option to cater for offenders where imprisonment was appropriate but to allow minimum disruption to the offender's employment and family connections.<sup>258</sup> It was able to fulfil punitive goals<sup>259</sup> and 'preserve the purpose of general deterrence as well as providing specific deterrence'.<sup>260</sup> In maintaining employment and connection with family, the order can be said to facilitate an offender's rehabilitation.<sup>261</sup> However, the rehabilitative effectiveness of the order has been questioned.<sup>262</sup>

253 VSAC, above n 38, [2.43].

254 *Taylor and Napatali* (1999) 106 A Crim R 578, [9] (McPherson JA).

255 VSAC, above n 15, [6.129].

256 *Ibid* [11.88].

257 Mackenzie and Stobbs, above n 47, 179.

258 Ivan Potas, Stephen Cumines and Ryan Takach, *A Critical Review of Periodic Detention in NSW*, (Judicial Commission of NSW, 1992) [2.1] <<https://www.ncjrs.gov/pdffiles1/Digitization/144387NCJRS.pdf>>.

259 *Ibid*.

260 Mackenzie and Stobbs, above n 47, 181 citing *R v Rivkin* (2003) 45 ACSR 366, [64].

261 Potas, Cumines and Takach, above n 258, [2.1].

262 See Clare Ringland and Don Weatherburn, 'The Impact of Intensive Correction Orders on Re-offending' (NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 176, 2013).

There has been a move away from periodic detention in many jurisdictions. While periodic detention previously existed in NSW and the ACT,<sup>263</sup> it now only is available in the ACT.<sup>264</sup> It will not be a sentencing option in any Australian jurisdiction following the abolition of periodic detention in the ACT by 2016–17.<sup>265</sup> It was rejected in Victoria as a replacement sanction for suspended sentences.<sup>266</sup> Periodic detention was previously available in New Zealand, until it was abolished by the *Sentencing Act 2002* (NZ).<sup>267</sup> Periodic detention (called intermittent custody) was created in England and Wales by the *Criminal Justice Act 2002* (UK) s 183 and was piloted and subsequently abandoned.<sup>268</sup> It was abolished in 2012.<sup>269</sup> Although there are benefits to periodic detention (for example, allowing an offender to maintain community ties), it has been thought there are other sentencing options available that are cheaper, more flexible and equitable, and better able to address the causes of offending behaviour.<sup>270</sup> The shift away from periodic detention reflects the need to allocate scarce resources efficiently. Periodic detention requires a major investment in resources to provide accommodation for offenders for only a few days a week.<sup>271</sup> Barriers to access including the need for transport and the lack of access for offenders living in rural and remote areas have been identified as weaknesses of periodic detention.<sup>272</sup> These factors were said to contribute to inconsistency and inequity in sentencing.<sup>273</sup> Further, periodic detention is limited in its ability to promote rehabilitation, given the limited access to intervention and treatment programs over a two-day period.<sup>274</sup> The Council's preliminary view was that periodic detention should not be introduced in Tasmania. There was no support expressed for periodic detention in the submissions received, and the Law Society, the Synod and PACCOA expressly agreed with the Council's draft recommendation that periodic detention not be introduced in Tasmania. Accordingly, drawing on the experience in other jurisdictions and the submissions, the Council's view remains that periodic detention is not a suitable replacement for the suspended sentence in Tasmania.

## Recommendation

### *Periodic detention*

13. Periodic detention should not be introduced in Tasmania.

## 7.3 HOME DETENTION

Home detention schemes vary between jurisdictions.<sup>275</sup> Home detention can take the form of 'front-end' detention, which is imposed as a sentence by a court, and 'back-end' detention, where it operates as a post-release option following a period of imprisonment.<sup>276</sup> In this report, the focus is on 'front-end' home detention. Home detention is an order that involves the detention of an offender in 'a specified residence during specified times for the duration

- 263 Period detention was abolished and intensive correction orders were introduced in October 2010 by the *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010* (NSW).
- 264 *Crimes (Sentencing) Act 2005* (ACT) s 11.
- 265 The *Crimes (Sentencing) Amendment Act 2014* (ACT) amended the *Crimes (Sentencing) Act 2005* (ACT) s 11(3) to provide that periodic detention orders must end before 1 July 2016. This is to facilitate the phasing out of periodic detention as soon as possible after 30 June 2016, see *Crimes (Sentencing) Amendment Act 2014* (ACT) *Explanatory Memorandum* <[http://www.legislation.act.gov.au/es/db\\_50768/20141030-59373/pdf/db\\_50768.pdf](http://www.legislation.act.gov.au/es/db_50768/20141030-59373/pdf/db_50768.pdf)>.
- 266 See VSAC, above n 15, [5.97]–[5.99]. See also Sentencing Council, NSW, above n 107, [9.2]–[9.4], NSWLRC, above n 60, [9.91].
- 267 VSAC, above n 15, [5.75].
- 268 See Clarissa Penfold, Gillian Hunter and Mike Hough, *The Intermittent Custody Pilot: A Descriptive Study*, Home Office, United Kingdom (2006).
- 269 *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK).
- 270 See Sentencing Council, NSW, above n 107, [9.2]–[9.4], NSWLRC, above n 60, [9.91]; VSAC, above n 15, [5.97]–[5.99].
- 271 See VSAC, above n 15, [5.99]; TLRI, above n 26, [3.5.9]; Penfold, Hunter and Hough, above n 268, 39.
- 272 Sentencing Council, NSW, above n 107, [6.71]; Standing Committee on Law and Justice, NSW, *Community-based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) [6.63]–[6.102] <[http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/B09BA359E47F0703CA25714100013DF1?open&refnavid=CO3\\_1](http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/B09BA359E47F0703CA25714100013DF1?open&refnavid=CO3_1)>.
- 273 See Sentencing Council, NSW, above n 107, [6.68]–[6.70]; Standing Committee on Law and Justice, NSW, above n 272, [6.55].
- 274 See VSAC, above n 15, [5.96]; Sentencing Council, NSW, *ibid* [6.48]–[6.59].
- 275 For a recent detailed examination of the various home detention schemes in Australia and the United States, see Marietta Martinovic, *The Evolution of Home Detention Based Sanctions Frameworks in the USA and Australia up to 2013: A Comparative Case Study*, (PhD Thesis, RMIT University, 2013). See also Appendix A Table A–1.
- 276 VSAC, above n 15, [5.3].

of the sentence under strict supervision and subject to conditions'.<sup>277</sup> The restrictions on the offender may vary from confinement in the home subject to limited authorised absences, to placing an offender under curfew for certain hours.<sup>278</sup> Home detention typically, but does not necessarily, involve the offender being electronically monitored to ensure compliance with the order.<sup>279</sup>

As a sentencing option, home detention may be as a means of serving a term of imprisonment imposed by the court (substitutional sanction). This is the position in NSW and the Northern Territory. Alternatively, it may be available as a stand-alone sanction independent of the imposition of imprisonment, which is the position in New Zealand and was the approach in Victoria before its abolition in 2012.<sup>280</sup> These home detention schemes are summarised in Table A–I in Appendix A. This table also includes information about models for reform of these orders. Home detention may also be imposed as a condition of another sanction, such as a suspended sentence, as is the position in South Australia and Canada.<sup>281</sup> Other jurisdictions that do not have a separate home detention sanction may nevertheless allow courts to impose a curfew as a condition of an intensive supervision or correction order.<sup>282</sup> This part focuses on stand-alone home detention.

### 7.3.1 CIRCUMSTANCES IN WHICH HOME DETENTION CAN BE IMPOSED

There are legislative restrictions in relation to the circumstances in which home detention can be imposed. Typically, an offender must be a suitable person for home detention, there must be suitable premises for the offender to reside in and the offender must consent to the making of the order.<sup>283</sup> In addition, co-residents must consent<sup>284</sup> or their views taken into account in determining an offender's suitability for home detention.<sup>285</sup>

#### Duration of the order

There are also restrictions on the maximum period for which home detention can be imposed (not more than a year in Victoria, Northern Territory, New Zealand, or up to 18 months in NSW).<sup>286</sup> This would suggest that a maximum period for home detention of either 12 or 18 months may be appropriate to accommodate a majority of offenders who currently receive FSSs in Tasmania. The Council notes that 88.5% of offenders who received a FSS in the Supreme Court had a term of less than 12 months and 97.9% of offenders received a term of less than 18 months. In the Magistrates Court, 98.4% of offenders in receipt of a FSS had a term of less than 12 months and 99.6% received a term of less than 18 months.

#### Offence exclusions

Restrictions also exist in some jurisdictions in relation to the type of offences and offenders for which home detention is available. In NSW, the legislation specifies that home detention is not available for a number of offences, including sexual offences, violent offences, drug offences, offences involving firearms, stalking or intimidation and for some domestic violence offences. In addition, offenders are excluded from eligibility for home detention if they have previous convictions for certain violent and sexual offences.<sup>287</sup> This was also the position in Victoria.<sup>288</sup>

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277 TLRI, above n 26, [3.4.1].

278 Ibid [3.4.1].

279 VSAC, above n 15, [5.2].

280 It is noted that the *Sentencing Act 1991 (Vic)* was amended by the *Justice Legislation Amendment Act 2010 (Vic)* to create an independent sanction (rather than a substitutional sanction). Before this, home detention was a substitutional sanction that required a prison sentence to be imposed before a home detention order could be made. See Parliamentary Library Research Service, Victoria, *Sentencing Legislation Amendment (Abolition of Home Detention) Bill 2011 (2011)* 4.

281 See TSAC, above n 4, Appendix A.

282 See [7.5.3]; Appendix A Table A–3.

283 *Sentencing Act (NT)* s 45(1); *Sentencing Act 1991 (Vic)* s 26Q; *Crimes (Sentencing Procedure) Act 1999 (NSW)* ss 78, 81(2); *Sentencing Act 2002 (NZ)* s 80A(2). Note that in New Zealand, there is provision for the court to grant the offender leave to apply for the substitution of a sanction of home detention where the court would have sentenced the offender to home detention if a suitable residence had been available: *Sentencing Act 2002 (NZ)* s 80L.

284 *Sentencing Act 1991 (Vic)* s 26P; *Crimes (Sentencing Procedure) Act 1999 (NSW)* s 78(1)(c).

285 *Sentencing Act (NT)* s 45(2).

286 See Appendix A Table A–I. Note that the NSWLRC recommended that if home detention is retained, the term should be increased to three years if the court sets a non-parole period and two years for the local court (unless multiple offences) and if no non-parole period is set: NSWLRC, above n 60, Recommendation 9.3.

287 See *Crimes (Sentencing Procedure) Act 1999 (NSW)* s 76.

288 Appendix A Table A–I.

In its consideration of home detention in NSW, the NSWLRC has expressed the view that the restrictions were too broad and unnecessary to ensure public safety and community confidence in sentencing.<sup>289</sup> However, the NSWLRC did support a more limited category of exemptions (murder and sexual offences where the victim was under the age of 16 years and the offence carries a maximum penalty of more than five years imprisonment).<sup>290</sup> It also considered that home detention should not be available for domestic violence offences where the victim of the offence was a co-resident or likely co-resident of the offender.<sup>291</sup>

In the Northern Territory, home detention orders cannot be made if mandatory minimum terms of imprisonment apply (Level 5, 4 and 3 violent offences) and in relation to Level 1 and 2 violent offences, aggravated property offences and sexual offences the court can partly (but not fully) suspend the sentence and impose home detention.<sup>292</sup>

In contrast, in New Zealand there are no offence specific exclusions. Instead, home detention is authorised if an enactment prescribing the offences expressly provides that home detention may be imposed on conviction and this is done by the *Crimes Act 1961* (NZ) s 13.<sup>293</sup> In addition, s 15A(1) of the *Sentencing Act 2002* (NZ) provides that the court can only impose a sentence of home detention if:

- (a) the court is satisfied that the purpose or purposes for which sentence is being imposed cannot be achieved by any less restrictive sentence or combination of sentences; and
- (b) the court would otherwise sentence the offender to a short-term sentence of imprisonment.

This means that home detention can only be imposed if the court would have imposed a sentence of two years or less.<sup>294</sup> In New Zealand, home detention has been imposed for a very small number of serious offences. Between 2007 and 2010, home detention was imposed for manslaughter (n=4), sexual offences (n=43) and drug offences (n=90).<sup>295</sup> Following a review of the operation of the home detention scheme, the Ministry of Justice expressed the view that '[t]here is no compelling case for a total prohibition on the use of this sentence for specific types of offences such as violent, sex and drug offences'.<sup>296</sup>

### 7.3.2 CONDITIONS OF HOME DETENTION

The statutory framework for home detention in each jurisdiction sets out the standard and optional conditions that can be imposed by the court. These are set out in Table A–I in Appendix A. Many of the core conditions of home detention are punitive and place considerable restrictions on the freedom of the offender.<sup>297</sup> These include conditions that require the offender to:

- reside and remain at specified premises for specified periods of time;
- submit to electronic monitoring if directed;
- submit to drug and alcohol testing;
- not consume alcohol or drugs;
- comply with directions of supervisor;
- undertake community work (which can also serve a restorative purpose);<sup>298</sup>

289 NSWLRC, above n 60, [9.38]–[9.41].

290 Ibid [9.4].

291 Ibid [9.43]. It is noted that the TLRI in its 2008 review of sentencing in Tasmania recommended that offence-based restrictions not be adopted but that offenders who posed significant risks in terms of committing a further offence should not be eligible for a community custody order: TLRI, above n 26, Recommendation 27.

292 *Sentencing Act* (NT) 78BA. The *Sentencing Act* (NT) s 78CA sets out the offences that are contained within each level, which include the offences of causing serious harm, causing harm and assault.

293 Section 13 provides that '[n]othing in this Act shall be construed to limit or affect in anyway any provision of any other Act conferring on any court any power to pass a sentence or impose a punishment or make an order in addition to or instead of a sentence or punishment prescribed by this Act, or otherwise to deal with any offender.'

294 *Sentencing Act 2002* (NZ) s 4; *Parole Act 2002* (NZ) s 4(1).

295 Ministry of Justice, New Zealand, *Home Detention: A Review of the Sentence of Home Detention 2007 – 2011*, (2011) 23 <<http://www.justice.govt.nz/publications/publications-archived/2011/home-detention-a-review-of-the-home-detention-sentence-2007-2011/review-of-the-sentence-of-home-detention-2007-2011>>.

296 Ibid 29.

297 Mackenzie and Stobbs, above n 47, 161.

298 Ibid.

- not associate with particular people or types of persons; and/or
- not take part in particular categories of employment.

In Australia and New Zealand, home detention has not only been a punitive sanction imposing onerous obligations on the offender and subjecting the offender to surveillance and monitoring, but has also focussed on rehabilitation by allowing the court to require the offender to take part in treatment and personal development activities or programs.<sup>299</sup> In addition, in all jurisdictions, the court has a residual discretion to impose any special conditions that it considers appropriate (Victoria (now repealed), NSW, Northern Territory) or any condition that the court thinks fit to reduce the likelihood of further offender (New Zealand).

In New Zealand, there are three features of the conditions that may be attached to a home detention that differ from the Australian jurisdictions. These are conditions that:

- allow the court to require the offender to submit to judicial monitoring as a condition of home detention.<sup>300</sup> Judicial monitoring was intended 'to enhance and maintain judicial confidence in community-based sentences and the new home detention scheme'.<sup>301</sup> It was 'particularly aimed at borderline cases, that is cases where the decision to impose either a community-based option or a sentence of imprisonment is finely balanced';<sup>302</sup>
- specifically acknowledge restorative justice activities within the home detention scheme as an offender may leave the premises to attend a restorative justice conference or to an undertaking arising out of a restorative justice conference;<sup>303</sup> and
- allow the court to impose post-detention conditions which include standard and special conditions similar to those imposed for home detention other than a condition for electronic monitoring.

### 7.3.3 ADVANTAGES OF HOME DETENTION

Home detention is commonly advocated on the grounds that it 'provides a cost-effective alternative to imprisonment that avoids many of the negative consequences of full-time custody'.<sup>304</sup>

#### Rehabilitative and reintegration benefits

Home detention allows the offender to remain in community, with the advantage that it allows the offender to retain significant connections in the community such as employment, family relationship and public housing.<sup>305</sup> This, it is argued, 'more effectively supports the reintegration and rehabilitation of offenders',<sup>306</sup> while allowing the offender to avoid the negative influences of prison. This benefits not only the individual offender but also the community more generally by reducing recidivism.

#### Satisfy multiple sentencing objectives

Home detention allows the court to satisfy multiple sentencing objectives, including punishment, restoration and rehabilitation.<sup>307</sup> Home detention allows a court to combine benefits to the community and possibly the victim (through community service work) with rehabilitation and an element of punishment.<sup>308</sup> Roberts has argued that

299 Martinovic, above n 275, 16–17.

300 It is noted that judicial monitoring can be a condition of a CCO in Victoria, see [7.6.4].

301 Geoffrey Hall, *Hall's Sentencing*, Looseleaf, [SA80Z].2] quoting from the Explanatory Note to the Justice Reform Bill.

302 Ibid. VSAC has expressed the view that judicial monitoring is a key feature of a 'problem solving court' approach: VSAC, above n 15, [1.38].

303 In New Zealand, restorative justice considerations are specifically recognised as a purpose of sentencing in the *Sentencing Act 2002* (NZ) s 7(1)(a) — to hold the offender accountable for harm done to the victim and the community by the offending, (b) to promote in the offender a sense of responsibility for, and an acknowledgement of, that harm or (c) to provide for the interests of the victim of the offence or (d) to provide reparation for harm done by the offending. The court in sentencing an offender is directed to have regard to whether any restorative justice processes have occurred or are likely to occur (ss 8(j), 10). See further Appendix A Table A–1.

304 VSAC, above n 15, [5.32] referring to Julian Roberts, *The Virtual Prison: Community Custody and the Evolution of Imprisonment*, (Cambridge Studies in Criminology, 2004).

305 NSWLRC, above n 60, [9.16], [9.17].

306 VSAC, above n 15, [5.32] citing New Zealand Parliament, *Criminal Justice Reform Bill, Explanatory Note* (2006).

307 TLRI, above n 26, [3.4.6] referring to Roberts, above n 304.

308 NSWLRC, above n 60, [9.17].

multidimensional orders (rather than orders that pursue only one sentencing objective) are more closely aligned with public expectation.<sup>309</sup> Accordingly, it could be argued that multidimensional orders have the potential to increase community satisfaction with sentencing.

### Successful completion rates

Evaluation of home detention programs has found high levels of success in terms of offenders completing home detention. The Productivity Commission's 2014 Report on Government Services found that 88.5% of home detention orders in NSW were successfully completed in 2012–13.<sup>310</sup> In contrast, only 76.9% of supervision orders were successfully completed. In Victoria, before the abolition of home detention, completion rates were 96.6% in 2011–12. In the Northern Territory, there was an 80% successful completion rate in 2012–13.<sup>311</sup> This was more positive than other community-based orders such as community work orders (72%), probation (59%), community custody orders (60%) and community-based orders (60%).<sup>312</sup>

Similar findings have been reported in New Zealand, where home detention is more successfully completed than all other community-based orders except community detention — with over 80% of offenders successfully completing home detention.<sup>313</sup> A review by the Ministry of Justice found that, between 2007 and 2010, 21% of those sentenced to home detention were convicted of an offence that was committed while subject to order. The Ministry of Justice observed that most of these offences related to the administration of the sentence (breach of conditions of the sentence) rather than other criminal offences and that the offences tended to be of low seriousness.<sup>314</sup> In its 2014–15 annual report, the New Zealand Department of Corrections observed that there had been 95% compliance with the directions and restrictions inherent in the home detention sentence in the financial year 2014–15.<sup>315</sup>

### Reducing offending behaviour

There has been limited research that has compared reoffending following the completion of an order of home detention with recidivism following the imposition of other sentencing orders. In Australia, there are no studies that directly compare recidivism rates for home detention with other sentencing options and none of the research has used matched offenders.

In her 2013 analysis of the use of home detention in Australia, Martinovic's summary of existing research indicated that since 2000, recidivism rates on home detention in Australia 'have ranged from between 2 and 12%'.<sup>316</sup> The evaluation of the pilot of the home detention scheme in Victoria conducted in 2006 found very low levels of recidivism with only one offender being sentenced to further imprisonment and one offender remanded in custody in relation to an alleged offence since the commencement of the pilot in 2004.<sup>317</sup> This was lower than the expected number of recidivists for the home detention pilot, which was 7.26, and yielded a recidivism rate of 1% (if the sentenced offender was counted) and 2% (if both offenders were counted).<sup>318</sup> This compared to 28% for all prison releasees and so, the 'rates of reoffending were ... found to be substantially lower than expected, even taking into account home detainees' lower risk levels'.<sup>319</sup>

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309 Julian Roberts, above n 304, 15.

310 Productivity Commission, Australia, *Report on Government Services* (2014), Chapter 8, Table 8A.19.

311 Northern Territory Government, *Correctional Services Annual Statistics 2012–13* (2013) 37 <<http://www.nt.gov.au/justice/policycoord/researchstats/documents/2012-13%20NTCS%20Annual%20Statistics.pdf>>.

312 Ibid.

313 Ministry of Justice, New Zealand, above n 295, 16.

314 Ibid 18.

315 Department of Corrections, New Zealand, *Annual Report 2014–15* (2015) 27, <[http://www.corrections.govt.nz/\\_\\_data/assets/pdf\\_file/0007/811546/Annual\\_Report\\_2014-15\\_full\\_report.pdf](http://www.corrections.govt.nz/__data/assets/pdf_file/0007/811546/Annual_Report_2014-15_full_report.pdf)>.

316 Martinovic, above n 275, 229.

317 Melbourne Centre for Criminological Research and Evaluation for Corrections Victoria, *Home Detention in Victoria: Final Evaluation Report* (2006) 66.

318 Ibid 66, 68.

319 VSAC, above n 15, [5.47] citing ibid 68.

In NSW, the Standing Committee on Law and Justice reported that 12% of offenders discharged from home detention between 2000 and 2002 were returned to custody.<sup>320</sup> Later research in NSW found higher recidivism rates with 36% of offenders who had completed home detention being convicted of an offence within two years.<sup>321</sup> The NSWLRC observed that this was 'significantly lower than the reoffending rate for offenders released from full-time custody ... [where] 61% were reconvicted within two years'.<sup>322</sup> As noted by the NSWLRC, these 'figures are not directly comparable due to the differences in index years (2004 compared to 2006–07) and in the characteristics of offenders who serve their sentence in full-time custody compared to those who serve them in home detention, as offenders at lower risk of reoffending are more likely to be suitable for home detention'.<sup>323</sup> However, the NSWLRC expressed the view that given 'large disparity in reoffending rates, as well as high home detention completion rates, [this] suggest that home detention may be an effective sentence'.<sup>324</sup>

VSAC also compared offenders who received home detention with offenders who received other community-based sentences.<sup>325</sup> It found that the rate of reoffending within two years for offenders discharged from community corrections orders during 2003–04 was 29% across all Australian jurisdictions.<sup>326</sup> In comparison to the rates of reoffending found in the evaluation of the pilot program in Victoria, this suggested that recidivism rates for home detention were lower than for other community orders. However, VSAC acknowledged that this comparison did not involve matched offenders and did not take account of potentially different offender profiles ('low-risk, non-violent offenders who are comparably better educated, more likely to be employed and have a stable lifestyle').<sup>327</sup>

In New Zealand, the Ministry of Justice compared reoffending by home detainees with offenders released from a short-term sentence of imprisonment or sentenced to other non-custodial sentence. It found that:

The proportion of offenders sentenced to home detention in 2007–2008 and 2009–2010 that was reconvicted in the next 12 months (21.5% and 23.0% respectively) was less than half that of those released from a short-term prison sentence in the same years (50.3% and 52.6%). Compared to other non-custodial sentences, reconviction rates after 12 months for those sentenced to home detention were lower than those for each of the four other non-custodial sentences [community work, supervision, intensive supervision and community detention].<sup>328</sup>

It found that after 24 months, reconviction rates remained the lowest for offenders sentenced to home detention when compared to any other sentencing order.<sup>329</sup> The review also examined the number of offenders who were imprisoned in next 12 months following discharge from the order, on the basis that imprisonment was an indication of reoffending seriousness.<sup>330</sup> It found that imprisonment rates after 12 months for those sentenced to home detention were less than imprisonment and intensive supervision and supervision but higher than for offenders who had received community work and community detention. In conclusion, the review found that home detention was a 'very successful sentence in terms of reducing the likelihood of reconviction and imprisonment'.<sup>331</sup> The 2014–15 annual report noted a decrease in reoffending over the period 2010–11 to 2014–15 for offenders sentenced to home detention.<sup>332</sup>

Research in Switzerland also supports the benefits of home detention for the rehabilitation of offenders and the reduction of reoffending when compared to other community-based sanctions.<sup>333</sup>

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320 Standing Committee on Law and Justice, NSW, above n 272, [7.47].

321 Audit Office of NSW, *NSW Auditor-General's Report: Home Detention*, Performance Audit Report (2010) 28.

322 NSWLRC, *Sentencing — Patterns and Statistics*, Report 139–A (2013) [4.17].

323 *Ibid.*

324 *Ibid.*

325 VSAC, above n 15, [5.48].

326 *Ibid.*

327 *Ibid.*

328 Ministry of Justice, New Zealand, above n 295, 20.

329 *Ibid.* 22.

330 *Ibid.* 21.

331 *Ibid.* 28.

332 Department of Corrections, New Zealand, *Annual Report 2014–15* (2015) 28, <[http://www.corrections.govt.nz/\\_\\_data/assets/pdf\\_file/0007/811546/Annual\\_Report\\_2014-15\\_full\\_report.pdf](http://www.corrections.govt.nz/__data/assets/pdf_file/0007/811546/Annual_Report_2014-15_full_report.pdf)>.

333 See Martin Killias, Gwladys Gillieron, Izumi Kissling and Patrice Villettaz, 'Community Service Versus Electronic Monitoring — What Works Better?' (2010) 50 *British Journal of Criminology* 1155.

## Cost benefits

Research in other jurisdictions shows that home detention is significantly less costly than imprisonment. The NSWLRC reported that in 2011–12, the total net operating expenditure and capital cost per NSW offender per day was \$292.51 compared to \$28.75 for an offender being supervised in the community by Corrective Services.<sup>334</sup> Relying on a study by the NSW Auditor-General, the NSWLRC reported that, while home detention was the most expensive and intensive community option, it was significantly cheaper than imprisonment, costing about one quarter of the amount per offender.<sup>335</sup> The Auditor-General reported that the net operating expenditure per prisoner per day on home detention was about \$47 compared to about \$187 for an offender in a minimum/medium security imprisonment.<sup>336</sup> The Auditor-General also identified 'unquantified savings' such as:

- home detainees who stay in employment and continue to contribute to their family's upkeep and stability;
- home detainees contributing to the costs of their rehabilitation treatment and other activities;
- unpaid community work that some home detainees complete as part of their sentence.<sup>337</sup>

It should be noted that in calculating the cost savings in Tasmania (where the net recurrent expenditure per prisoner per day in 2013–14 was \$332.36) it is unlikely that the introduction of home detention would necessarily reduce the costs of running the prison system and it is probable that the costs of the home detention scheme would be in addition to the prison budget. However, as identified by the NSW Auditor-General, there are other costs savings attributed to home detention.

A reduction in the cost of crime due to decreased recidivism following home detention is also a saving that has been attributed to home detention.<sup>338</sup> In an evaluation of the Victorian Home Detention Pilot Program, it was reported that for every dollar spent on home detention, \$1.80 was saved.<sup>339</sup> This included cost savings that resulted from diversion from imprisonment and the reduction in imprisonment due to reduced recidivism. However, the Victorian scheme was more expensive than the NSW model (\$48 000 vs \$20 000 per offender per year), with the disparity being attributed to several factors which included the higher costs of a pilot scheme in comparison to an operational scheme, the lower than expected caseloads in Victoria and the strong emphasis in Victoria on case management.<sup>340</sup> The cost of home detention in Victoria was still much lower than the cost of imprisonment (calculated at \$83 200 per prisoner per year).<sup>341</sup>

Critics of home detention have suggested that, in evaluating the cost of home detention, comparisons should be made with other community-based sanctions rather than the cost of imprisonment.<sup>342</sup> This has been done in New Zealand, where home detention was evaluated by the Ministry of Justice in 2012. It found that home detention was considerably cheaper than imprisonment but that it was the most expensive of the non-custodial sentences, partly because of external expenses associated with electronic monitoring.<sup>343</sup>

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334 NSWLRC, above n 60, [9.16] citing Productivity Commission, Australia, *Report on Government Services* (2013).

335 Ibid, citing Audit Office of NSW, above n 321, 25.

336 Audit Office of NSW, above n 321, 26.

337 Ibid.

338 Melbourne Centre for Criminological Research and Evaluation, above n 317, 5.

339 Ibid 77.

340 Martinovic, above n 275, 233.

341 Ibid 233.

342 Parliamentary Library Research Service, Victoria, above n 280, 7, referring to Amanda George, 'Women and Home Detention — Home is Where the Prison Is' (2006) 18 *Current Issues in Criminal Justice* 79, 88.

343 Ministry of Justice, New Zealand, above n 295, 9.

Table 7–1: Cost of administering sentences per offender: New Zealand<sup>344</sup>

Sentence	Daily cost (rounded to nearest dollar) NZ\$	Six month term NZ\$
Home detention	58	10 486
Community detention	17	3046
Intensive supervision	17	3116
Supervision	12	2243
Community work	7	1242
Imprisonment	249	45 500

In New Zealand, the total management cost for home detention is currently NZ \$77.22 per offender per day, with \$20.50 of that attributable to the electronic monitoring component.<sup>345</sup>

### 7.3.4 USE OF HOME DETENTION

Home detention is an infrequently used sanction in the Australian jurisdictions where it exists as an independent sentencing option. In 2013, the NSWLRC observed that the use of home detention in NSW had halved since 2005. In 2012, 161 offenders received home detention as their principal penalty compared to 384 offenders in 2005.<sup>346</sup> In 2013, home detention was the principal penalty for only 134 offenders (130 in the Local Court and four in the higher courts).<sup>347</sup> In the Northern Territory, home detention accounted for 1.4% of the caseload of community corrections as at 30 June 2013 (15 out of 1097 offenders).<sup>348</sup> In Victoria, before the abolition of home detention, very few offenders were sentenced to home detention with the use of the order declining since 2006–07. There were 42 orders made by the court in 2006–07 and 10 made by the court in 2009–10.<sup>349</sup> Of the 42 orders made in 2006–07, 40 were ordered by the Magistrates Court and two by the County Court.<sup>350</sup>

Factors identified to explain the limited use of home detention include:

- stringent screening process by Community Corrections limiting the number of offenders deemed 'suitable';<sup>351</sup>
- geographical restrictions, either because the order is only available in certain locations<sup>352</sup> or because of difficulties with electronic monitoring technology in remote areas preventing the imposition of home detention in some areas;<sup>353</sup>
- the requirement to impose a term of imprisonment before assessing an offender's suitability for home detention, which reduces the sentencing options for a court if an offender is found not suitable for home detention;<sup>354</sup>
- lack of clarity for sentencers about the intended target group for home detention;<sup>355</sup> and
- the substitutional nature of the order as a 'direct equivalent for imprisonment' did not align with the views of sentencers.<sup>356</sup>

344 This table is replicated from *ibid* Table 1.

345 Email to Rebecca Bradfield from Peter Johnston, Director Research and Analysis, Department of Corrections (NZ), 20 October 2015.

346 NSWLRC, above n 60, [9.19].

347 NSW Bureau of Crime Statistics and Research (BOSCAR), *NSW Criminal Courts Statistics 2013* (2014) Table 1.7 and 3.8.

348 Northern Territory Government, above n 311, 15.

349 Parliamentary Library Research Service, Victoria, above n 280, 5.

350 VSAC, above n 15, [5.39].

351 Martinovic, above n 275.

352 This was the position in Victoria, see VSAC, above n 15, [5.6].

353 NSWLRC, above n 60, [9.26].

354 VSAC, above n 15, [5.41].

355 *Ibid*.

356 *Ibid* [5.42].

In contrast, there appears to be greater judicial acceptance of home detention in New Zealand, where rates of use of home detention have doubled from 2.2% in 2007–08 to 4.8% in 2013–14.<sup>357</sup> In New Zealand, home detention is a sentencing option in its own right and there is no requirement for the sentencer to impose a term of imprisonment before ordering home detention. This may have encouraged greater use of the sanction in New Zealand because there is no conception of home detention as a direct equivalent to imprisonment<sup>358</sup> and there is no need to impose a term of imprisonment before assessing an offender's suitability for the order.<sup>359</sup> The availability of home detention as a real alternative to imprisonment was explained by the Court of Appeal in *R v Iosefa*,<sup>360</sup> where the court stressed that home detention 'carries with it in considerable measure, the principles of deterrence and denunciation. It is clear parliamentary policy that for short-term sentences, those of two years or less, the restriction on liberty through home detention can more appropriately be imposed by a sentence of home detention than by imprisonment'.<sup>361</sup> Since 2009–10, home detention has been used more frequently than supervision by community corrections and intensive supervision but less often than community detention and community work.<sup>362</sup>

In New Zealand, home detention has been imposed for a range of offences, including sexual offences (unlawful sexual connection with young persons under 16, having exploitative sexual connection with a person with significant impairment, sexual violation by sexual connection, indecent assault on a boy under 16, sexual connection with person aged under 13 years), drug offences (possession of cannabis oil for supply, cannabis possession and sale, possession of methamphetamine for supply), fraudulent production of immigration documents, offences against the person (wounding with reckless disregard, causing grievous bodily harm recklessly, wounding with intent to injure), perverting the course of justice, injuring with intent, driving while disqualified, causing death by dangerous driving and aggravated robbery.<sup>363</sup> The use of home detention for sexual offences against children has been considered by the Court of Appeal in several cases, where the approach has been taken that '[a]ll sentences that are potentially in the range for the particular offending should be considered on their merits, although it will be recognised that the likely sentencing outcome for sexual offending against children is imprisonment'.<sup>364</sup>

In New Zealand, legislative restriction does not exist in relation to the offences for which home detention can be imposed. However, the court can only impose a home detention order if it would impose a term of imprisonment of two years or less.<sup>365</sup> In New Zealand, home detention was most often imposed over the period 2007–10 for dangerous acts and traffic offences (26.4% of home detention orders) and property and environmental offences (25.2%). Violent offences made up 20.3% of home detention orders, with 13.6% imposed for drug offences and 8.4% for against justice offences. Home detention was not commonly imposed for sexual offences (3.1% of home detention orders).<sup>366</sup> Analysis of the cases where home detention was imposed for violent, sexual and drug offences revealed:

- of the cases where home detention was imposed for violence offences, most involved assault (72%) with 17% convicted of aggravated robbery and 5% threatening behaviour. Rarely, home detention was imposed for very serious offences — attempted murder and manslaughter;<sup>367</sup>
- of the cases where home detention was imposed for sexual offences, 46% of offenders were convicted of indecent assault or offences categories such as 'other sexual', while the remaining cases involved more serious offending such as sexual violation by rape, sexual violation by unlawful sexual connection and attempted sexual violation; and
- of the cases where home detention was imposed for drug offences, most were convicted of dealing or trafficking in illicit drugs (70%). Cultivating illicit drugs accounted for 16% of cases, with 5% convicted of manufacturing and 2% of importing illicit drugs.<sup>368</sup>

357 See Figure 4–1.

358 See VSAC, above n 15, [5.42].

359 Ibid [5.65].

360 [2008] NZCA 453.

361 Ibid [41] quoted in Hall, above n 301, [SA80A.2].

362 See Figure 4–1.

363 Hall, above n 301, [SA80A.4(b)].

364 Ibid [SA80A.2].

365 *Sentencing Act 2002* (NZ) s 4; *Parole Act 2002* (NZ) s 4(1).

366 Ministry of Justice, New Zealand, above n 295, 12.

367 It was imposed for one case of murder and four cases of manslaughter.

368 Ministry of Justice, New Zealand, above n 295, 13.

In contrast, given the extensive offence exclusions that exist in relation to home detention in NSW, and formerly in Victoria, home detention has generally been used for relatively low seriousness offences. In NSW, home detention was most frequently imposed on traffic offenders (41% of home detention orders made in 2012) and for 'offences against justice procedures' (23% of home detention orders made in 2012).<sup>369</sup>

In Victoria, home detention was also used predominantly for traffic offences. VSAC found that driving whilst disqualified was the most common offence for which home detention was imposed.<sup>370</sup> Home detention was also imposed in the Magistrates Court for drink driving offences and some minor drug trafficking offences.<sup>371</sup> In relation to the two cases imposed in the County Court in 2006–07, one was imposed for trafficking in a drug of dependence and the other for defrauding the Commonwealth.<sup>372</sup>

### 7.3.5 OTHER ISSUES

Other concerns raised in relation to home detention include concerns about the consequences of home detention for an offender's family, the perception of home detention as a 'soft punishment' and that the barriers to suitability for home detention operate in a discriminatory manner.

#### Impact for co-residents

Concerns have been raised by critics of home detention about negative consequences for families and others living with offenders. These concerns are summarised by the VSAC as follows:<sup>373</sup>

- home detention would compromise the safety of co-residents;
- relationships between offenders and family members would be adversely affected;
- there would be pressure on co-residents to ensure that the offender does not breach his or her order;
- home detention would turn homes into prisons and families into gaolers; and
- co-residents would be exposed to the intensive surveillance associated with home detention.

In Martinovic's analysis of home detention in Australia, she observed that research has 'overwhelmingly shown that [home detention has] ... inadvertent punitive effects on offenders' co-residing family members'.<sup>374</sup> However, the experience of family differs depending on the nature of the relationship with offender, the financial stability of the family and the nature and length of the home detention order.<sup>375</sup> It is possible that home detention (despite its difficulties for co-residents) can be positive for families if the offender starts leading a 'pro-social lifestyle' and there are improved family relationships.<sup>376</sup> Ultimately, Martinovic argued that the consequences for families should be acknowledged and that home detention policies need to provide co-residents with sufficient information about their role and function and facilitate contact (if necessary) with external support services and networks.<sup>377</sup>

#### Soft punishment

Media reports of home detention frequently portray home detention as a 'soft punishment'.<sup>378</sup> The perception that home detention is an easy option for offenders and not a true punishment led to the abolition of the penalty in Western Australia and Victoria as part of a 'tough on crime' political agenda.<sup>379</sup> However, the 'soft on crime' perception would appear at odds with the reality of home detention for many offenders, with the NSW Legislative Council Standing Committee on Law and Justice reporting that it had received much evidence that indicated that

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369 This category mostly includes offenders being sentenced to home detention after breaching another penalty (24 of 38 for breach of suspended sentence, 8 after revocation of community service order and 3 after revocation of good behaviour bond), NSWLRC, above n 322, [4.4].

370 VSAC, above n 15, [5.40]. VSAC considered that this might be explained by the mandatory minimum penalty for the offence of driving whilst disqualified. This provision has now been abolished, see Gelb, above n 126, 28.

371 VSAC, above n 15.

372 Ibid.

373 Ibid [5.33]. See also George, above n 342.

374 Martinovic, above n 275, 249.

375 Ibid 255.

376 Ibid.

377 Ibid 256.

378 Parliamentary Library Research Service, Victoria, above n 280, 6; *ibid* 263.

379 Martinovic, above n 275, 264.

home detention was 'considered substantially more punitive and intrusive than any other penalty short of full-time custody'.<sup>380</sup> Research examining offenders' perception of detention confirms that while many offenders would prefer home detention to imprisonment, it is 'not simply a "soft" alternative to imprisonment for those who experience it'.<sup>381</sup> Belgian research shows that 'the current assumption among the public and the media that EM [electronic monitoring] is merely a 'slap on the wrist', allowing offenders to enjoy all the benefits of being home in conditions similar to the free world, does not have an empirical basis'.<sup>382</sup> Certainly, the nature of the conditions that attach to home detention in Australia place considerable restrictions on the liberty of an offender and subject the offender to strict surveillance and monitoring. And, the onerous nature of home detention as a punishment has caused some commentators to argue that it is unduly severe for offenders who would 'previously have received some form of community order'.<sup>383</sup>

### Barriers to suitability

Criticism has also been directed at the suitability criteria for home detention on the basis that it operates to exclude offenders with substance dependency or mental health issues, homeless offenders or those with unstable housing.<sup>384</sup> The need for the consent of co-residents, to live in an area where home detention is available and the requirement to have an operating telephone in the house may create obstacles for some offenders.<sup>385</sup> While acknowledging that these criteria are 'in reality more easily met by persons with some level of financial security and stability',<sup>386</sup> Martinovic indicates that Australian jurisdictions have made 'specific attempts to reduce the inadvertent consideration of offender's economic status that result in discrimination during the selection process'.<sup>387</sup> In relation to offenders with substance abuse issues, the NSWLRC has recommended that (if home detention is retained) courts should be able to 'defer the requirement that the offender ... reside at home until he or she has completed a residential drug or alcohol treatment programs'.<sup>388</sup>

### 7.3.6 THE COUNCIL'S PRELIMINARY VIEWS

In the *Consultation Paper*, the Council expressed the preliminary view that home detention should be introduced as a sentencing option in Tasmania. The Council's proposal was that it should not be a substitutional sanction (that is, it should not be a way of serving a term of imprisonment), but should be a sentencing option in its own right. The Council indicated that home detention did not necessarily entail electronic monitoring and foreshadowed that other effective methods of supervising compliance should be explored with Community Corrections and Tasmania Police.

The Council suggested the following conditions attach to a home detention order:

The core conditions proposed are that the offender:

- must not, in Tasmania or elsewhere, commit another imprisonable offence;
- must live only at approved premises;
- must remain at approved premises for time specified in the order;
- accept visits;
- submit to searches of places or things;
- submit to electronic monitoring if directed;
- comply with any reasonable directions;
- not consume alcohol or drugs;

380 Standing Committee on Law and Justice, NSW, above n 272, 182.

381 Delphine Vanhaelemeesch, Tom Vander Beken and Stijn Vandevelder, 'Punishment at Home: Offenders' Experiences with Electronic Monitoring' (2013) 11 *European Journal of Criminology* 273; Jamie Martin, Kate Hanrahan and James Bowers, 'Offenders' Perceptions of House Arrest and Electronic Monitoring' (2009) 48 *Journal of Offender Rehabilitation* 547; Roberts, above n 304, Chapter 5.

382 Vanhaelemeesch, Vander Beken and Vandevelder, above n 381, 284. Although these observations are made in relation to electronic monitoring, similar comments could be made about home detention.

383 VSAC, above n 15, [5.51].

384 NSWLRC, above n 60, [9.71].

385 See Martinovic, above n 275, 240–242.

386 Ibid 242.

387 Ibid.

388 NSWLRC, above n 60, [9.82].

- submit to breath testing, urinalysis and other test procedures for detecting drug and alcohol use;
- accept reasonable directions in relation to employment; and
- engage in personal development activities or in counselling or treatment as directed.

In addition, it was recommended that the following special conditions be available:

- judicial monitoring;
- conditions in relation to finances or earnings;
- conditions in relation to taking prescription medicine; and
- any other condition that reduces the likelihood of reoffending.

### 7.3.7 SUBMISSIONS

There was general support expressed in a number of submissions in relation to the introduction of home detention as a sentencing option in Tasmania. Several submissions also made specific reference to particular draft recommendations in relation to home detention as set out in the *Consultation Paper*.

PACCOA supported the introduction of home detention as a sentencing option in Tasmania. Similarly, the Synod generally approved of the Council's draft recommendations in relation to home detention. The Synod commented on the reduction in recidivism and the cost-effectiveness of home detention compared to imprisonment. However, it also noted the critique of Amanda George (a prison activist and lawyer), who has argued that it is more appropriate to compare home detention with other community-based programs — rather than imprisonment — on the basis that if an offender is 'safe enough' to be in their home, they are safe enough to be in the community. The Synod expressed its reservations about the issue of consent by co-residents, given that co-residents (particularly women) may feel a sense of obligation to consent. The Synod also stated that the Council's draft recommendation in relation to the need for appropriate resourcing (Draft Recommendation 24) was very important. It believed 'that that recommendation is of critical importance, that the success of home detention for co-residents, offenders and community safety depends on adequate funding'.

The DPEM was also supportive of further consideration of home detention as a sentencing options, but made the following observation about responsibility for monitoring compliance:

Presently, once an offender is sentenced they become the responsibility of Corrective Services, unless they commit further offences that require a police response. Monitoring offenders will require a 24-hour response service and whilst supportive of the concept of home detention, DPEM would be opposed to any regime that placed the responsibility [for] monitoring upon Tasmania Police, during or after, business hours. Similar, before DPEM could fully support home detention, we would need more detail as to who would be expected to police breaches of detention orders and issues surrounding tampering of electronic devices.

Based on its experience of administering bail curfew checks, the DPEM also considered that electronic monitoring was necessary in order for home detention to be effective, as 'without constant monitoring there is nothing to prevent an offender ignoring a home detention order as soon as they have received their daily visit by the supervising agency'.

The Law Society agreed with the introduction of home detention in Tasmania, on the basis that it provides a cost-effective alternative to imprisonment and avoids many of negative consequences of imprisonment. The Law Society also agreed that home detention should not be a substitutional sanction, but should be a sanction in its own right. The Law Society acknowledged concerns about the potential for a home detention order to operate in discriminatory manner, given that 'there will be a direct correlation between a person's wealth and their ability to satisfy the prerequisites for a home detention order (such as whether they have a home to serve the detention)'. This was said to raise questions about whether this is consistent with the concept of parity in sentencing. However, the Law Society noted that this concern will be 'avoided if home detention is not considered an equivalent to imprisonment but a penalty on its own that is less severe than actual jail'.

Similar concerns were also raised by the DPP, who expressed reservations about the fairness of home detention orders. He wrote that:

[I]t would appear to me that such orders will favour persons who live in cities and are in stable relationships. In my view, judges will be very reluctant to make such orders where persons live in isolated areas or have no stable family background. Therefore, it seems to me that home detention orders will favour persons from wealthier backgrounds.

The Law Society agreed with the Council's draft recommendation in relation to the need to protect against net-widening (Draft Recommendation 13). The Law Society observed that this draft recommendation (which suggested that it be made clear that a home detention would be appropriate where a suspended sentence would previously have been imposed) would require a change to the way that the court deals with *Dinsdale*.

There was some disagreement in the submissions received in relation to the offence restrictions that should be created in respect of home detention. Draft Recommendation 15 proposed restrictions on the imposition of home detention for domestic violence orders or sexual offences where the victim was likely to be a co-resident, and drug cultivation offences in circumstances where the offence had taken place in the home in which the offender would serve any sentence of home detention. In addition, it was suggested that the court should not impose a home detention order on an offender who poses a significant risk in terms of committing a further violent offence. The Law Society wrote that this draft recommendation should be the subject of further discussion. It indicated that:

[I]t may be appropriate in some cases to impose restrictions as to whether home detention should be available as a sentencing option. On the other hand as a matter of principle a court's sentencing discretion should not be fettered. Arguably the kind of circumstances the consultation paper recommends ought to prohibit home detention order being made would in any event lead a court to a finding that home detention is not an appropriate sentence.

In contrast, the DPEM clearly supported restrictions on home detention for drug trafficking, and domestic violence or sexual assault in circumstances where the victim is likely to be a co-resident.

The Law Society also made comments in relation to the need for the consent of co-residents. It agreed with the Council that consent should be necessary, but considered that a 'co-resident' should be clearly defined as a person who has a legal right to occupy the property, and not a licensee. In contrast, the DPEM suggested an expansion of consent to encompass issues surrounding children in the home and immediate neighbours who may be affected.

The DPEM and the Law Society also commented on the conditions that should attach to a home detention order. The Law Society agreed with the core conditions suggested by the Council, subject to the need to specify that searches of places should only relate to the approved property (that is, the offender's home). The Law Society also agreed with the proposed special conditions, with the exception of the special condition in relation to finances and earnings. It considered that there was 'little justification in the *Consultation Paper* as to why the Court should have this type of power other than it might be good for a "problem solving approach"'. The Law Society cautioned that 'such a significant interference with property rights should be carefully considered'. The DPEM commented on the proposed core condition that an offender not commit an offence in Tasmania or elsewhere and indicated that it would not support a home detention condition that allowed an offender to leave the jurisdiction of the state.

### **7.3.8 THE COUNCIL'S RECOMMENDATIONS**

Based on its research and the submissions received, the Council's view remains that home detention should be introduced as a sentencing option in Tasmania. Home detention is an effective sentencing option in other jurisdictions with high completion rates and relatively low recidivism rates. It is able to address multiple aims of sentencing and provides an onerous sentencing order that both punishes an offender, deters the offender and others from committing offences, and assists in addressing the offender's rehabilitative needs. It allows the offender to maintain family and community connections and remain in employment. Conditions attached to the order also provide community protection by the supervision requirement and the restrictions placed on the movement and activities of the offender. It is important to note that the sentencing option recommended by the Council is intended to operate as a replacement for a suspended sentence in relation to a cohort of offenders who, typically, are currently unsupervised in the community for the period during which the sentence is suspended. In this way,

the purpose of the proposed sentencing order in Tasmania has close similarity with the legislative intent of the New Zealand model of home detention that was established with a view to addressing concerns about increasing prisoner numbers following the abolition of suspended sentences.<sup>389</sup>

### Nature of sanction

Analysis of the use of home detention and the types of cases where home detention is imposed by courts in Australia and New Zealand reveals that if the sentencing option is introduced in Tasmania as a credible and useful alternative to a FSS, few (if any) restrictions should be placed on the imposition of the order and that the sentence should not be dependent on the court imposing a term of imprisonment (as with New Zealand). It is the Council's view that home detention should not be a substitutional sanction and should be a sanction in its own right. This is intended to remove the disquiet felt by the judiciary in conceptualising home detention as an equivalent of imprisonment, contributing to a reluctance to use the sanction.<sup>390</sup> As indicated at [7.1], this also removes the fiction that an offender is sentenced to imprisonment and will increase the transparency of the order and may improve public confidence in the sentencing process. There was no opposition in the submissions to this approach, which was expressly supported in the submissions of the Law Society and the Synod.

In the Tasmanian context, home detention would not be a replacement for a sentence of imprisonment but for offenders who currently receive suspended sentences and who live in the community following sentence.<sup>391</sup> For these offenders, home detention is likely to be a more onerous sanction, as offenders who receive home detention do not 'walk free' but are subject to considerable restriction in the community. Accordingly, a home detention order would be suitable for more serious cases where a FSS is currently imposed given that it is considerably more onerous than an unconditional FSS. As a protection against net widening, the Council's view is that (as with the approach in s 15A(1) of the *Sentencing Act 2002* (NZ)), there should be a legislative direction that a home detention order is only permitted in circumstances where the court would otherwise have imposed a sentence of imprisonment and only where a less onerous or restrictive sanction would not satisfy the purposes for which the sentence is being imposed. The Council's view is that it should also be made clear that the order is appropriate where a suspended sentence would previously been imposed.<sup>392</sup> As discussed, the Law Society noted that this recommendation would require a change in the current approach to *Dinsdale*. Although not specifically explained in its submission, it would appear that this is on the basis that *Dinsdale* dictates that a court must engage in a two-step reasoning process in imposing a suspended sentence: (1) the decision to impose a sentence of imprisonment and (2) the decision to suspend the operation of the term of imprisonment.<sup>393</sup> In contrast, home detention (according to the Council's recommendation) is not a substituted sanction of imprisonment, but a sanction in its own right. However, the Council does not consider that this should cause undue difficulty, given that the proposed sentencing reforms represent a change to the current sentencing hierarchy and sentencing practice, and the recommendation serves the purpose of clarifying that the home detention order is intended to operate as a replacement for suspended sentences (as has been done in Victoria in relation to the CCO).<sup>394</sup> Further, as noted elsewhere, courts have not always strictly applied the *Dinsdale* approach and the evidence suggests that some sentencers use a suspended sentence as a form of intermediate sanction.<sup>395</sup> The Council's view remains that there should be a clear statement directed to limiting net-widening in order to ensure that home detention is only used in more serious cases where suspended sentences were previously imposed.

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389 See [4.2.3].

390 Martinovic, above n 275, 261–262.

391 It is noted that in New Zealand, home detention is only to be imposed if the court would have imposed a short sentence of imprisonment (two years or less), see *Sentencing Act 2002* (NZ) s 15A.

392 This is the approach in Victoria in relation to CCOs, see [7.6.11].

393 See [3.3.1].

394 See [7.6.11].

395 See [3.3.1].

## Offence restrictions

The use of offence exclusions to preclude an offender from eligibility from home detention (such as exist in NSW and the Northern Territory and as existed in Victoria)<sup>396</sup> would have a significant effect on the effectiveness of home detention as a replacement for suspended sentences in Tasmania, particularly in the Supreme Court. The top 10 offences attracting a FSS included deal or traffic in drugs — commercial quantity (14.6%), serious assault resulting in injury (9.8%), cultivate illicit drugs (6.0%) and aggravated sexual assault (4.3%). All these offences would be excluded from the imposition of a home detention order under the NSW and former Victorian models. This would particularly affect sentencing for drug offences as 67.7% of offenders convicted of cultivating illicit drugs and 65.8% of offenders convicted of dealing or trafficking in a commercial quantity of illicit drugs in the Supreme Court received a FSS. In the Magistrates Court, home detention would not be excluded as a sentencing option for a majority of offences where FSSs are imposed, as nine of the 10 top offences attracting a FSS would not fall within the serious offence exclusions.<sup>397</sup> However, excluding sexual offences from eligibility for home detention would affect the sentencing practice for some offences where an offender was most likely to receive a FSS, such as non-aggravated sexual assault, where 39.3% of offenders receive such a disposition. In contrast, adopting the New Zealand approach would allow the sentence to be used for a range of offences (including serious offences) where home detention is proportionate to the circumstances of the offence and the offender.<sup>398</sup>

It remains the Council's view that if home detention is to be effective as a replacement for suspended sentences, there should be very few offence restrictions. Instead, the court should have the discretion to impose a home detention order if such an order is proportionate to the circumstances of the offence and the offender. Restrictions should be that home detention should not be used for domestic violence offences or sexual offences when the victim is likely to be a co-resident although alternative community-based accommodation for home detention could be used provided that there were appropriate conditions to protect the victim.<sup>399</sup> In relation to drug cultivation offences, the court should not sentence an offender to home detention in the same home where the offender was cultivating drugs. The Council remains of the view that home detention should not be ordered in the offender's home where the victim is likely to be a co-resident. However, home detention could be ordered in alternative accommodation, provided there is sufficient protection for the victim. A person who has cultivated drugs could also be sentenced to home detention in premises other than the place where the drugs were cultivated. In view of the Council's recommendation that community-based accommodation (other than an offender's home) could be used for home detention,<sup>400</sup> the Council agrees with the Law Society that the meaning of co-resident should be restricted to a person who has the legal right to occupy the property and not a licensee. Although clearly, the court needs to take into account the effect of the order on other people who may also live at the premises when exercising its discretion to impose a home detention order.

In addition, as recommended by the TLRI, the Council's view is that a court should not impose a home detention order on an offender who poses a significant risk in terms of committing a further violent offence.<sup>401</sup> The Council considers that this approach addresses the concern of the DPEM in relation to children living in the home and neighbours who may be affected by the order, given that the court should not impose the order where there is a significant risk of the person committing a further violent offence. Accordingly, the Council does not support the expansion of consent as suggested by the DPEM.

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396 See Appendix A Table A-1.

397 These were theft from a person (excluding by force) — 13.2%, breach of bail — 9.7%, drive while licence disqualified, cancelled or suspended — 9.2%, exceed PCA — 9.1%, registration offences — 7.3%, unlawful entry with intent/burglary, break, enter — 6%, drive without a licence — 4.8%, common assault — 4.8%, possess illicit drug — 4.5%. The exception being breach of violence order, which accounted for 3.5% of FSSs imposed.

398 This reflects the recommendation of the TLRI. See TLRI, above n 26.

399 Ibid [3.4.18].

400 See Recommendation 18.

401 See TLRI, above n 26, Recommendation 27.

## Maximum term

Although concerns may be raised that setting a maximum term unduly limits the discretion of the court, unlike the TLRI recommendation, the Council's view remains that a maximum term should be specified in the legislation.<sup>402</sup> The Council considers this is necessary to ensure that unduly long home detention orders are not imposed which are likely to impose hardship and pressures on the families of offenders and make compliance increasingly difficult for offenders.<sup>403</sup> The Council's view is that 18 months should be the maximum term of home detention as this would address these concerns and would also accommodate the vast majority of offenders who currently receive FSSs in Tasmania. In Tasmania, for 97.9% of offenders the length of the term of imprisonment imposed with a FSS in the Supreme Court was less than 18 months. In the Magistrates Court, for 99.6% of offenders the length of the term of imprisonment imposed with a FSS was less than 18 months. The view of the Council is that there should also be scope for the progressive reduction of the hours that the offender is required to spend at approved premises after a specified portion of the sentence.<sup>404</sup> This would increase the flexibility of the order and may provide an incentive for compliance with the terms of the order. It also serves to integrate an offender completely back into the community by the end of the term of home detention.

## Conditions

The Council's view is that while there should be core conditions that attach to a home detention order, the court should have the discretion to tailor special conditions to address the criminogenic needs and the circumstances of the particular offender. In view of the submissions received and the Council's reconsideration of the issue, the Council's view is that the following core and special conditions should be available for a home detention order:

The core conditions should be that the offender:

- must not commit another imprisonable offence;
- must live only at approved premises;
- remain at approved premises for the time specified in the order except:
  - (a) to seek urgent medical or dental treatment;
  - (b) to avoid or minimise a serious risk of death or injury to the offender or any other person; or
  - (c) with the approval of a probation officer to comply with any special condition, to seek or engage in employment, to attend training or other rehabilitative or reintegrative activities or program and for any other purpose specifically approved by the probation officer;
- accept visits;
- submit to searches of approved premises or things;
- submit to electronic monitoring if directed;
- comply with any reasonable directions;
- not to consume alcohol or drugs;
- submit to breath testing, urinalysis and other test procedures for detecting drug and alcohol use;
- accept reasonable directions in relation to employment; and
- engage in personal development activities or in counselling or treatment as directed.

The Council has amended the wording of the condition in relation to imprisonable offences in response to the submission of the DPEM. The Council notes that this proposed core condition was not intended to signal that an offender could leave the state during home detention, but was intended to capture all potential offending behaviour against Tasmanian law or the law of other jurisdictions. Accordingly, the Council has re-worded the condition to refer to the requirement that the person 'not commit any imprisonable offence'.

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402 See *ibid* [3.4.16], [3.4.17].

403 See NSWLRC, above n 60, [9.49].

404 VSAC, above n 15, [5.68].

The Council has also amended the wording of the condition in relation to remaining in approved premises, in order to allow for the offender leaving the premises for specific reasons. This is based on the New Zealand provision and allows an offender to leave the premises where the probation officer has approved the absence and in emergency situations (without prior approval). In New Zealand, there are a number of distinct phases of home detention that begin with initially high levels of intervention and move to less restriction as the order progresses. This is explained as follows by Smith and Gibbs:

Each home detention order progresses in a series of phases, and offenders on phase one, for example, may have to see or be visited by a probation officer up to three times each week for up to half their sentence, which could mean many months. They will also have conditions to attend programmes for substance misuse, anger management, counselling, offending behaviour courses and possibly employment-related training. Offenders are very restricted in phase one as to what they can do; they are allowed to go grocery shopping, attend medical appointments, attend funerals, attend and observe religious activities, and attend employment or study. Otherwise they are required to remain at home, although probation officers do have some limited discretion to give permission to permit leave. ... In phase two, detainees might be allowed to attend one social function each month and some leisure time. Phases 3 and 4 progressively allow more social outings. The overall aims of home detention ... are reintegration and rehabilitation, and the intensive supervision and programmes are therefore viewed as the means to achieve these.<sup>405</sup>

The Council's view is that the legislative framework for home detention needs to allow for authorised absences and should have sufficient flexibility for Corrective Services to have a staged approach to managing offenders on home detention that results in them experiencing fewer restrictions on their freedom as they progress through the order.

The Council has also amended the wording of the core condition in relation to searches (based on the Law Society's submission) to refer to searches of *approved* premises.

As noted at [7.3.2], many of the core conditions are punitive and impose considerable supervision and restrictions on the offender. However, other conditions, such as the treatment and personal development requirements, focus on the rehabilitation of the offender.

The Council's view is that the following special conditions should be available:

- judicial monitoring;
- conditions in relation to taking prescription medicine;
- any other condition that may reduce the likelihood of reoffending.

The Law Society agreed with most of the special conditions, but raised a concern about the ability of a court to impose special conditions in relation to an offender's finances or earnings. This proposed provision was based on the New Zealand legislation that allows the court to impose such a condition if it would reduce the significant risk of reoffending by the rehabilitation and reintegration of the offender. The Council has not been able to locate any publicly available information in relation to the circumstances in which this condition has been used in New Zealand, and it has reconsidered inclusion of this special condition in light of the Law Society's concern that such a significant interference with property rights should be carefully considered. The Council's view is now that such a provision should not be introduced.

As with the New Zealand position, it is the Council's view that the imposition of any of the special conditions are required to reduce a significant risk of reoffending by the offender that could not be met by core conditions alone and that the imposition of the special condition(s) would be likely to reduce the likelihood of further reoffending by the rehabilitation and reintegration of the offender.<sup>406</sup> The range of conditions can be tailored to the needs of the particular offender and allows the court to address the desired sentencing purpose(s) (punishment, deterrence, rehabilitation and/or denunciation). Many of these conditions are familiar in the Tasmanian context, however judicial monitoring is not currently available in Tasmania (other than in the context of a drug treatment order).<sup>407</sup> Judicial monitoring is a key feature of a problem solving approach to sentencing and may facilitate judicial confidence in the sanction.<sup>408</sup>

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405 R Smith and A Gibbs, 'Extending the Electronic Net in Australia and New Zealand: Developments in Electronic Monitoring Down-Under' in M Nellis, K Beyens and D Kaminski (eds), *Electronically Monitored Punishment – International and Critical Perspectives* (Routledge, 2012) 82, 93.

406 See *Sentencing Act 2002* (NZ) s 80D.

407 See [6.1].

408 See [7.1].

## Powers on breach

It is the Council's view that, given the seriousness of offences for which an offender may receive a home detention order, there should be a presumption in favour of resentencing if an offender breaches the order by committing an offence punishable by imprisonment, unless exceptional circumstances exist. The court can also vary the order, confirm the order or cancel the order (and make no further order). If an offender is in breach of any of the other conditions, the court can vary the order, confirm the order, cancel the order and resentence or cancel the order (and make no further order). Further, it is not a separate offence to breach a home detention order but it is necessary to ensure that breaches are enforceable beyond the expiration of the order.

## Other issues

The Council is also mindful of the criticism of home detention in relation to the impact on co-resident and the barriers to suitability for some offenders. The Council considers that the consent of any co-resident should be a precondition to an offender's assessment of suitability for a home detention order. However, if consent is not provided, the sentence should be able to be served in some other community-based accommodation. The Council acknowledges the Synod's concern that co-residents may feel constrained to consent. However, the Council considers that this should not preclude the introduction of the sentencing option in Tasmania. The Council's view is that concerns about the needs of co-residents can be addressed by the provision of support and information about the nature of home detention, and for this reason considers that resources must be made available for these purposes. In addition, appropriate resources need to be available to support the rehabilitation of offenders. Other barriers to suitability that need to be addressed are homelessness and substance abuse. Resources will also be necessary to ensure that geographical barriers do not preclude home detention for offenders otherwise assessed as suitable. This may be the use of alternative accommodation in urban areas or alternative means of monitoring the order in places where electronic monitoring is not available. Martinovic has observed that in jurisdictions that use electronic monitoring of home detention there have been specific attempts to reduce discrimination resulting from economic status:

Offenders on HDBS with RF (home detention based scheme with radio frequency monitoring) in the remote areas of Australia usually have been supervised face-to-face without electronic monitoring, which was logistically impossible to operate in some terrain. Supervisors have been employed on a casual basis to impose surveillance on offenders within their local community. In cases when an offender wants/needs to leave their community they phone the Regional Community Corrections Office which then recruits another suitable casual supervision who monitors the offender travelling away from their community and ensures that surveillance is not compromised. Partnership arrangements are also arranged with local police agencies.<sup>409</sup>

Suggestions have also been made that 'in "deserving cases" jurisdictions should have provisions to absorb the cost of an offender's accommodation (and relocation if necessary)' and other costs associated with surveillance.<sup>410</sup>

The Council's intention is that the order will operate in a manner that limits its potential to operate unfairly and to ensure that home detention is not a sanction that is only available to offenders with means from a stable family background (concerns raised in the submissions of Law Society and the DPP).

Surveillance to ensure compliance is also essential to the credibility of the order for the judiciary and the community. While the Council's view is that additional resources will be required for the surveillance of home detainees, this does not necessarily mean electronic monitoring for all offenders or for the entire period of the order and other effective methods of supervising compliance should be explored with Community Corrections and Tasmania Police. This is necessary to ensure that geographical constraints do not cause the sentencing order to operate in a discriminatory manner (as discussed above). However, the Council recommends that the feasibility of a scheme for electronic monitoring of offenders be explored as part of the introduction of home detention in Tasmania. In making this recommendation, the Council is mindful of the concerns of the DPEM in relation to the resource implications of monitoring. The DPEM's submissions in relation to the need for rigorous monitoring to ensure the credibility of the order and the difficulties that currently exist in relation to monitoring offenders with curfew requirements as part of bail conditions are also a factor. It is noted that although electronic monitoring is not mandatory in New Zealand,

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409 Martinovic, above n 275, 242-243.

410 Ibid 244.

but is instead at the discretion of the probation officer, all offenders sentenced to home detention are electronically monitored. It is also noted that the actual monitoring requirement and compliance is operated by the Department of Corrections in conjunction with a private sector company that operates and monitors the electronic monitoring component of home detention.<sup>411</sup>

The Council is also aware of the perception that home detention is 'soft on crime'. The Council's view is that acceptance of home detention as an appropriate punishment by the media, the judiciary, politicians and the broader community is dependent on 'de-coupling' the concept of punishment and denunciation from imprisonment and its 're-coupling' to community-based sentences.<sup>412</sup> This will require an adjustment of 'our thinking that "prison = serious offence"<sup>413</sup> and will be the challenge for Tasmanian reforms that abolish suspended sentences. Further, as discussed, it must be remembered that if home detention is introduced in Tasmania, it will be as an alternative to a suspended sentence and so the appropriate comparison is between the conditions of a suspended sentence and home detention (rather than home detention and imprisonment).

## Recommendations

14. Home detention should be introduced as a sentencing option in Tasmania.
15. Home detention should not be a substitutional sanction and should be a sanction in its own right.
16. As a protection against net-widening, there should be a legislative direction that a home detention order is only permitted in circumstances where the court would otherwise have imposed a sentence of imprisonment (suspended or otherwise) and only where a less onerous or restrictive sanction would not satisfy the purposes for which the sentence is being imposed. It should also be made clear that the order is appropriate where a suspended sentence would previously been imposed.
17. There should be very few offence-based restrictions for home detention. Instead, the court should have the discretion to impose a home detention order if such an order is proportionate to the circumstances of the offence and the offender.
18. Restrictions that should be imposed are that home detention should not be used for domestic violence offences or sexual offences when the victim is likely to be a co-resident (although alternative community-based accommodation for home detention could be used provided that there were appropriate conditions to protect the victim). In relation to drug cultivation offences, the court should not sentence an offender to home detention in the same home where the offender was cultivating drugs. In addition, the court should not impose a home detention order on an offender who poses a significant risk in terms of committing a further violent offence.
19. A maximum term of 18 months for home detention should be specified in the legislation.

411 3M, 'Department of Corrections in New Zealand Selects 3M as Electronic Monitoring Supplier' (2014) <<http://news.3m.com/press-release/product-and-brand/departement-corrections-new-zealand-selects-3m-electronic-monitoring->>.

412 VSAC, above n 15, [3.17].

413 VSAC, above n 38, [2.52].

## Recommendations

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20. The following core conditions should attach to a home detention order:
  - must not commit another imprisonable offence;
  - must live only at approved premises;
  - remain at approved premises for the time specified in the order except:
    - (a) to seek urgent medical or dental treatment;
    - (b) to avoid or minimise a serious risk of death or injury to the offender or any other person; or
    - (c) with the approval of a probation officer to comply with any special condition, to seek or engage in employment, to attend training or other rehabilitative or reintegrative activities or program and for any other purpose specifically approved by the probation officer;
  - accept visits from Community Corrections;
  - submit to searches of approved premises or things;
  - submit to electronic monitoring if directed;
  - comply with any reasonable directions including in relation to employment;
  - not consume alcohol or drugs;
  - submit to breath testing, urinalysis and other test procedures for detecting drug and alcohol use; and
  - engage in personal development activities or in counselling or treatment as directed.
21. The following special conditions should be available in relation to a home detention order:
  - judicial monitoring;
  - conditions in relation to taking prescription medicine; and
  - any other condition that may reduce the likelihood of reoffending.
22. Legislative direction should be provided that the imposition of any of the special conditions are required to reduce a significant risk of reoffending by the offender that could not be met by core conditions alone and that the imposition of the special condition(s) may reduce the likelihood of further reoffending by the rehabilitation and reintegration of the offender.
23. There should be a presumption in favour of resentencing if an offender breaches the order by committing an offence punishable by imprisonment, unless exceptional circumstances exist. The court can also vary the order, confirm the order or cancel the order or make no further order if an offender breaches the order by committing an offence punishable by imprisonment.
24. If an offender is in breach of any of the other conditions, the court can vary the order, confirm the order, cancel the order and resentence the offender or cancel the order and make no further order.
25. It should not be a separate offence to breach a home detention order but it is necessary to ensure that breaches are enforceable beyond the expiration of the order.
26. The consent of any co-resident should be a precondition to an offender's assessment of suitability for a home detention order. A co-resident is defined as a person who has a legal right to occupy the property and is not a licensee. However, if consent is not provided, the sentence should be able to be served in some other community-based accommodation.
27. Resources must be made available to provide appropriate support and information to co-residents and also support to offenders.

## Recommendations

28. Other barriers to suitability that need to be addressed are homelessness and substance abuse. Resources will also be necessary to ensure that geographical barriers do not preclude home detention for offenders otherwise assessed as suitable.
29. While surveillance to ensure compliance is essential to the credibility of the order for the judiciary and the community, and additional resources will be required for the surveillance of home detainees, this does not necessarily mean electronic monitoring for all offenders or for the entire period of the order, and other effective methods of supervising compliance should be explored with Community Corrections and Tasmania Police. However, a feasibility study should be undertaken in relation to the introduction of electronic monitoring of offenders sentenced to home detention.

## 7.4 COMMUNITY DETENTION ORDER

A CDO is a relatively new sanction that is available in New Zealand (since 2007) and co-exists with home detention and intensive supervision. It was introduced to address the increase in prison numbers following the abolition of suspended sentences.<sup>414</sup> In NSW, a CDO was recommended by the NSWLRC in 2013. The NSW proposal is intended as a replacement for home detention, intensive correction orders and suspended sentences rather than as an additional intermediate sanction.<sup>415</sup> There are considerable differences between the New Zealand model and the NSW proposal in terms of the nature of the order. In NSW, a CDO would be a multi-dimensional order that could serve similar sentencing purposes to home detention orders and intensive correction orders, as it is proposed that the court could impose conditions relating to community work, treatment/rehabilitation, supervision and other restrictions on the offender, in addition to a home detention requirement.<sup>416</sup> In contrast, in New Zealand, the primary purpose of the order is to impose a curfew, supported by electronic monitoring. There are also differences in relation to the consequences of breaching the order.

### 7.4.1 NEW ZEALAND MODEL

In New Zealand, the CDO is essentially a curfew order. It was introduced (along with the intensive supervision order) to 'increase the credibility and availability of community-based sentences so that these sentences will be used more frequently and fewer offenders will be sentenced to imprisonment'.<sup>417</sup> The CDO was said to be 'particularly suitable for offenders whose offending has a pattern and tends to occur at particular times' while the intensive supervision order provided 'a larger and more complex set of special conditions than [are] currently available under the supervision sentence'.<sup>418</sup> The court can impose a CDO for no more than six months with a curfew of at least two hours per day and a total curfew for any week not more than 84 hours.<sup>419</sup> No offences are excluded from a community detention order.

In the Tasmanian context, a stand-alone CDO for a period of less than six months would not be suitable for many offences where FSSs are imposed in the Supreme Court as only 42.2% of offenders received a term of imprisonment less than six months. In contrast, 91.7% of offenders who received a FSS in the Magistrates Court had a term of imprisonment less than six months. It is also unclear whether offenders currently sentenced to a FSS in Tasmania are offenders who have a pattern of offending with offences tending to occur at particular times (so as to correspond with the offender targeted by the imposition of a CDO). This would appear to apply to offenders who break into houses or steal vehicles at night or engage in violence while out drinking, for example. Certainly some offenders who currently receive FSSs may conform to a pattern of offending, such as some of the offenders convicted of serious assault resulting in injury (9.8% of FSSs imposed in the Supreme Court) or those convicted of unlawful entry with intent/burglary, break, enter (6% of FSSs imposed in the Magistrates Court). However, the offence categories for the

414 See New Zealand Parliament, above n 306, 5.

415 NSWLRC, above n 60, Recommendation 11–1.

416 See *ibid* Chapter 11.

417 Parliament, New Zealand, above n 306, 5.

418 *Ibid*.

419 *Sentencing Act 2002* (NZ) s 69B.

most common offences attracting a suspended sentence in Tasmania suggest that community detention may not be appropriate for all of these offences (and offenders). For example, offenders sentenced for drug offences accounted for 29.5% of offenders sentenced to a FSS in the Supreme Court, while 30.4% of offenders sentenced to a FSS in the Magistrates Court were convicted of driving and registration offences.

The Council's preliminary view was that it was not appropriate to introduce a curfew order as a separate sanction. There was no support for a CDO in the submissions received and the Law Society opposed the creation of a curfew order, on the basis that it would 'create a criminal incentive, generate more charges and make it easier for youths in particular to be criminalised'. PACCOA also agreed with the Council's draft recommendation that a CDO not be introduced in Tasmania. Accordingly, the Council's view remains that, while a curfew order as part of a sanction is a useful addition to the sentencing regime in Tasmania, it is not appropriate to introduce it as a separate sanction. Instead, the Council's view is that a curfew condition should be available as part of the proposed CCO (see [7.6.9]).

## 7.4.2 NEW SOUTH WALES

In NSW, the NSWLRC has recommended the abolition of home detention, intensive correction orders and suspended sentences and the introduction of a new community custody order — the CDO. The NSWLRC expressed the view that the new sanction was preferable to the previous orders because it was simpler, more transparent and more flexible. It considered that most offenders who were sentenced to intensive correction orders generally had 'a low risk of re-offending and have only limited need of rehabilitative or intervention programs' as only these offenders could 'pass the suitability assessment barrier due to the mandatory and inflexible community work requirement'.<sup>420</sup> These were not the offenders who were originally intended as targets of the intensive correction order.<sup>421</sup> The proposed CDO reflects the views expressed to the NSWLRC that more flexible sentencing options were required and draws on the intensive supervision order in Western Australia, the CCO in Victoria and a proposal of Corrective Services NSW 'for a multi-agency intensive community order that would provide a rehabilitative option for offenders with complex needs'.<sup>422</sup>

The NSW model would be a substitutional sanction, which means that is 'as a way of serving a term of imprisonment in the community'.<sup>423</sup> Breaches of the sanction would be dealt with by the State Parole Authority (SPA), which deals with the administration of custodial sanctions served in the community in NSW. The consequence of breaching the CDO would be the revocation of the order and the offender committed to full-time custody for the remainder of the sentence, unless there were good reasons for the breach. The SPA could also refer the matter back to the court for variation of the original order.<sup>424</sup> On referral, the court could revoke the order (committing the offender to custody), vary the order or confirm it. If the order was revoked and the offender committed to full-time imprisonment, the offender would have the ability to apply for reinstatement after one month in custody.<sup>425</sup>

The Council's preliminary view was that it was not appropriate to introduce a CDO that was a substitutional sanction and there was no support for such an order in the submissions received. As indicated at [7.1], the Council's view remains that the replacement for suspended sentences should not be a substitutional sanction. Concerns about substitutional sanctions include the criticism that they are a legal fiction that negatively affect community perceptions of sentencing. It is also noted that this model has not been adopted as yet in NSW and it remains to be seen how the order would operate in practice. PACCOA also agreed with the Council's draft recommendation that a community detention order not be introduced in Tasmania. Accordingly, the Council's view remains that a community detention order based on the NSWLRC model should not be introduced in Tasmania.

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420 NSWLRC, above n 60, [11.7].

421 Ibid.

422 Ibid [11.23]. See Appendix A Table A-2.

423 NSWLRC, above n 60, Recommendation 11.2.

424 Ibid Recommendation 11.2, Recommendation 11.6.

425 Ibid Recommendation 11.6.

## Recommendation

### *Community detention orders*

30. A community detention order should not be introduced in Tasmania.

## 7.5 INTENSIVE CORRECTION/SUPERVISION TYPE ORDER

As part of the expansion of intermediate sanctions, many jurisdictions have introduced an order that allows the court to address the rehabilitative needs of the offender as well imposing punitive requirements. These orders are grouped under the heading of intensive correction or supervision due to similarities between the orders, but there is variety in the names given to the order.<sup>426</sup> This section will also consider the intensive correction order that previously existed in Victoria, as well as the proposal for a reformed intensive correction order and targeted intensive correction orders for offenders with drug and alcohol recommended by VSAC.<sup>427</sup>

In NSW, the intensive correction order was introduced in 2010 to replace periodic detention.<sup>428</sup> In 2013, the NSWLRC recommended the abolition of the intensive correction order and its replacement with the CDO. It also made recommendations for reforms to the intensive correction order if it was retained.<sup>429</sup> Queensland also has an intensive correction order, and Western Australia and New Zealand have an intensive supervision order.<sup>430</sup> In the Northern Territory, the community custody order was introduced in 2011, as a 'tougher sentencing order targeting offending behaviour', designed to assist in achieving reduced imprisonment and reoffending rates<sup>431</sup> and it shares many features with intensive supervision orders. Tasmania, South Australia and the ACT do not have an intensive supervision type order. However, it is noted that legislation for the creation of an intensive correction order was introduced in the ACT Legislative Assembly on 19 November 2015. This is intended to provide a replacement for periodic detention.<sup>432</sup> In Victoria, an omnibus order — the CCO — was introduced in January 2012 as a replacement for the intensive supervision order, combined custody and treatment orders, community-based orders and the suspended sentence. The CCO is not a rebranded version of the other community-based sanctions but a new sentencing option and for this reason it will be discussed separately at [7.6].

### 7.5.1 NATURE OF ORDER

Intensive supervision or correction orders are intended to be onerous for the offender, while allowing the court to have the flexibility to tailor the sentence to address the offender's needs. Accordingly, these intermediate sanctions may attempt to meet a number of sentencing objectives including 'the punitive objectives of deterrence and retribution' and the treatment of the offender (rehabilitation).<sup>433</sup> Despite the focus on rehabilitation of the order, it has been accepted in NSW that intensive correction orders can be imposed on an offender who does not have an identified need for rehabilitation or of whom it can be positively said that there is a risk of reoffending.<sup>434</sup>

426 See Appendix A Table A-3.

427 See VSAC, above n 15, Chapters 6, 7 and 10.

428 *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010* (NSW).

429 See NSWLRC, above n 60.

430 It is noted that the conditional sentence in Canada (which is akin to a conditional suspended sentence in Australia) also shares a number of similarities with intensive correction orders, see TSAC, above n 4, [2.4]; see also Appendix A.

431 *Justice (Corrections) and Other Legislation Amendment Bill 2011*, Second Reading Speech <[http://www.austlii.edu.au/au/legis/nt/bill\\_srs/jaolab2011508/srs.html](http://www.austlii.edu.au/au/legis/nt/bill_srs/jaolab2011508/srs.html)>.

432 See *Crimes (Sentencing and Restorative Justice) Amendment Bill 2015* (ACT). The bill is scheduled for debate in February 2016.

433 Bagaric and Edney, above n 31, [13.05]. See *R v Pogson* [2012] NSWCCA 225 [96] (McClennan CJ at CL, Johnson J).

434 *R v Pogson* [2012] NSWCCA 225.

In some jurisdictions, an intensive correction order is a substitutional sanction (NSW, Northern Territory, Queensland and Victoria (before its abolition)).<sup>435</sup> In contrast, in other jurisdictions, intensive correction/supervision orders operate independently and do not require the court to impose a period of imprisonment (New Zealand and Western Australia).<sup>436</sup> This was also the approach taken by VSAC,<sup>437</sup> but was not adopted in Victoria.

## 7.5.2 DURATION OF THE ORDER

The duration of an intensive correction order varies between jurisdictions,<sup>438</sup> with the former Victorian provision, the Queensland provision and the Northern Territory provision only allowing orders of up to 12 months. In NSW, the duration is an order of not more than two years. In Western Australia and New Zealand, an intensive correction order can be imposed for between six months and two years.

## 7.5.3 CONDITIONS

Intensive correction orders contain core or standard conditions that are mandatory as well as optional conditions, which may be imposed if appropriate in the circumstances of the case.<sup>439</sup> In some jurisdictions, intensive correction orders only have a limited number of standard and optional conditions. For example, the former provision in Victoria (aside from standard conditions about reporting and notifying of change of address) only allowed the court to impose community work and/or treatment as core conditions with a discretion to impose special conditions to attend prescribed programs if the program was designed to address the personal factors which contributed to the offender's criminal behaviour.<sup>440</sup> In contrast, in other jurisdictions there are broader ranges of conditions that are attached to an intensive correction order. For example, in NSW, the standard conditions include a requirement to:

- submit to electronic monitoring if directed;
- submit to a curfew or restricted movement if directed;
- refrain from using drugs;
- submit to searches and drug and alcohol testing;
- participate in rehabilitative activities if directed;
- undertake community service as directed.<sup>441</sup>

The court can also impose conditions in relation to employment, non-association and place restrictions, the consumption of alcohol and 'any other condition the court considers necessary or desirable for reducing the likelihood of re-offending'.<sup>442</sup> Other models allow the court a broader discretion to vary the conditions that may attach to an intensive correction order. This is the approach in Western Australia, where there are only a few standard conditions (including supervision by community corrections) and the court may include a program requirement and/or a community service requirement and/or a curfew requirement.<sup>443</sup>

## 7.5.4 USE OF INTENSIVE CORRECTIONS ORDER

In Australia and New Zealand, the use of intensive correction orders has remained relatively low. In NSW, in 2013 only 1% of offenders sentenced (by penalty for principal offence) received an intensive correction order.<sup>444</sup> This was 4.9% in higher courts and 0.9% in lower courts.<sup>445</sup> In its review, the NSWLRC observed that intensive correction

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435 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7(1); *Sentencing Act* (NT) s 48B; *Penalties and Sentences Act 1992* (Qld) s 113(1); *Sentencing Act 1991* (Vic) s 19(1).

436 See Appendix A Table A-3.

437 VSAC, above n 15, [6.127].

438 See Appendix A Table A-3.

439 See Appendix A Table A-3; Appendix B Table B-1.

440 See *ibid.*

441 It is noted that this requirement has been very problematic, information provided by Lorana Bartels.

442 See Appendix A Table A-3.

443 See *ibid.*

444 BOSCAR, above n 347, Tables 1.7 and 3.8.

445 *Ibid.*

orders were not being used as frequently as periodic detention (before its abolition)<sup>446</sup> and that the trend appeared to be towards a decline in the use of intensive correction orders in NSW, Western Australia and Queensland.<sup>447</sup> Similarly, in Victoria, before its abolition, the proportion of offenders who received an intensive correction order in the higher courts had declined from 3% in 2001–02 to 1.3% in 2010–11.<sup>448</sup> In the Magistrates Court, the proportion of intensive correction orders imposed had increased slightly from 1.7% in 2004–05 to 2.1% in 2010–11.<sup>449</sup> In contrast, in New Zealand, the use of the intensive correction order (while low) has remained relatively stable since its introduction in 2007 (increasing from 1.8% in 2007–08 to 2.1% in 2013–14).<sup>450</sup>

In an examination of the profile of offenders who received an intensive correction order in 2012, the NSWLRC found that the most common offences were traffic/regulatory offences or offences against justice procedures.<sup>451</sup> A NSW study that compared the characteristics of offenders who received suspended sentences with those who received an intensive correction order found that offenders receiving intensive correction orders 'were quite different from those who received supervised suspended sentences in terms of offender and offence characteristics, prior history and prior penalties received'.<sup>452</sup> This suggests that an intensive correction order is not likely to be a suitable replacement for a suspended sentence. Although it is acknowledged that intensive correction orders and suspended sentences co-exist in NSW.

### 7.5.5 BARRIERS TO USE OF INTENSIVE CORRECTION ORDERS

In view of the limited use of intensive correction orders, consideration has been given to the barriers to the use of such orders. These include legislative restrictions in relation to the offences that are excluded from the order,<sup>453</sup> the rigorous nature of the suitability criteria that exclude offenders with cognitive impairment, mental illness, substance dependency or homelessness or unstable housing,<sup>454</sup> the availability of intensive correction orders in rural and remote areas,<sup>455</sup> and the mandatory community service work requirement.<sup>456</sup> Other concerns have been the substitutional nature of the sanction and that there have been insufficient resources made available to support the sanction causing sentencers to lose confidence in it.<sup>457</sup>

### 7.5.6 POWERS ON BREACH

The powers on breach of the conditions of an intensive correction order or on conviction of an offence punishable by imprisonment differ between jurisdictions, with the discretion being limited in some jurisdictions. For example, in the Northern Territory, if an offender breaches the standard conditions by committing an imprisonable offence, there is a presumption that the court will revoke the order and sentence the offender to imprisonment for the unexpired portion of the order, unless this is unjust in the circumstances.<sup>458</sup> A similar position operated in Victoria. There was no presumption in favour of sentencing the offender to imprisonment for the unexpired portion if the offender breached any of the other conditions of the intensive correction order.<sup>459</sup>

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446 NSWLRC, above n 60, [9.19]. See also Ringland who observed that 'the number of offenders who received ICOs in the 12 months following their introduction was little more than half the number who received periodic detention in the preceding 12 months': Clare Ringland, 'Intensive Correction Orders vs Other Penalties: Offender Profiles' (NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 163, 2012) 9.

447 NSWLRC, above n 322, [4.36]–[4.27]. In relation to the decline in use of intensive corrections in Queensland, VSAC observed that this trend has been evident since the introduction of court ordered parole suggesting that 'court-ordered parole is being used for some offenders who may otherwise have received an ICO and served no time in prison, instead of being used solely to assist in the rehabilitation of offender who would otherwise have received an ICO and served no time in prison': VSAC, above n 15, [8.33].

448 Gelb, above n 126, 86 Table C2.

449 Ibid 87 Table C3.

450 Ministry of Justice, New Zealand, above n 295.

451 NSWLRC, above n 322, [4.22].

452 Ringland, above n 446, 8.

453 See NSWLRC, above n 60, [9.39]–[9.41], [9.72]. See also Appendix A Table A–3.

454 NSWLRC, above n 60, [9.72]. In a study by the NSW Bureau of Crime Statistics and Research, it was found that only 55% of intensive correction assessments resulted in an order being imposed, and that alcohol or other drug dependency was most frequently the reason for the negative suitability assessment: Ringland, above n 446, 4.

455 NSWLRC, above n 60, [9.24].

456 VSAC, above n 15, [6.144]–[6.145].

457 See TLRI, above n 26, [3.6.4].

458 See Appendix A Table A–3.

459 See *ibid*.

In other jurisdictions, there is no presumption in favour of revoking the order. In NSW, the decision is made by the SPA which can take no action, impose a formal warning and/or impose more stringent conditions, impose a period of up to seven days home detention or revoke the intensive correction order (with the effect that the offender serves the remainder of the term in prison) or order home detention (if the term is 18 months or less).<sup>460</sup> In Queensland, the court may revoke the order and commit the offender to prison for the remainder of the term, or resentence, fine or admonish and discharge the offender. In Western Australia, the court can confirm, amend or cancel the order and resentence the offender.<sup>461</sup> Similarly in New Zealand, the court may remit, suspend or vary any special condition or impose additional special conditions, cancel the sentence or cancel the sentence and resentence the offender.<sup>462</sup>

### 7.5.7 ADVANTAGES OF INTENSIVE CORRECTION ORDERS

In its review of sentencing, the NSWLRC identified several advantages of an intensive supervision order, including that:

- it is cheaper than imprisonment;
- it allows an offender to remain in employment and maintain contact with family;
- it avoids the potential contaminating effects of imprisonment, particularly for first time offenders;
- it allows offenders to retain housing.<sup>463</sup>

### 7.5.8 THE COUNCIL'S PRELIMINARY VIEW

In the *Consultation Paper*, the Council expressed the preliminary view that intensive correction orders should not be introduced in Tasmania.

### 7.5.9 SUBMISSIONS

There was no support for the introduction of an intensive correction order in the submissions received. In addition, PACCOA expressly agreed with the Council's draft recommendation that an intensive correction/supervision order not be introduced in Tasmania.

### 7.5.10 THE COUNCIL'S RECOMMENDATIONS

Although intensive correction orders have been introduced in other jurisdictions as a means to address rehabilitative and punitive elements of sentencing, more recently Victoria has abolished the sanction and recommendation has been made for its abolition in NSW. The sanction has not been widely accepted by sentencers and has been criticised on the basis that the intensive correction order is misleading, as it does not usually involve intensive correction. Accordingly, in view of its limitations, the Council's view remains (as with the view previously expressed by the TLRI) that the benefits of intensive correction orders can be addressed in a more effective manner.

<p><b>Recommendation</b></p> <hr/> <p><i>Intensive correction/supervision orders</i></p> <p>31. Intensive correction/supervision orders should not be introduced in Tasmania.</p>
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460 See *ibid.*  
461 See *ibid.*  
462 See *ibid.*  
463 NSWLRC, above n 60, [9.16]–[9.17].

## 7.6 COMMUNITY CORRECTION ORDER

CCOs were introduced in Victoria in January 2012 as part of the government's commitment to strengthening sentencing law and also in response to VSAC's report that suggested that suspended sentences were being overused because of, in part, a failing of intermediate sentencing orders.<sup>464</sup> The CCO is a single, flexible intermediate sanction that has replaced a number of intermediate sanctions in Victoria. Initially it replaced the combined custody and treatment order, the intensive correction order and the community-based order<sup>465</sup> and has now also replaced the suspended sentence. Its purpose was to 'deliver common-sense sentences targeted directly at both the offender and the offence'.<sup>466</sup> However, courts did not initially use CCOs in the way that was envisaged and this prompted legislative amendment with a view to facilitating greater use of the orders by 'highlighting their flexibility and suitability as a means of addressing offending in appropriate cases'.<sup>467</sup> Uncertainty about the nature of the order and the need for clarity and consistency also precipitated the Court of Appeal to provide guidance for the courts in sentencing an offender to a CCO in its decision in *Boulton v The Queen*<sup>468</sup> (the 'guideline judgment').<sup>469</sup> It appears that there is now greater acceptance of the CCO in both the Magistrates Court and in the higher courts.<sup>470</sup>

Despite problems that have arisen in Victoria with the introduction of CCOs, the Council's view is that many features of the order have promise and that many of the difficulties can be avoided by carefully structured and monitored transitional arrangements. As indicated in chapter 5, it is the Council's view that, in addition to the introduction of home detention, suspended sentences can be replaced by a new intermediate order (the CCO) that replaces suspended sentences, community service and probation. In taking this approach, the Council is encouraged by the innovative approach taken in relation to the order by the Court of Appeal in *Boulton v The Queen*<sup>471</sup> where the Court highlighted the unique and innovative nature of the new order:

the advent of the CCO calls for a re-consideration of the traditional conceptions of imprisonment as the only appropriate punishment for serious offences. This in turn will require a recognition of both the limitations of imprisonment and of the unique advantages which the CCO offers.<sup>472</sup>

The acceptance by the Court that the introduction of a new sentencing order can fundamentally challenge accepted sentencing practice shows promise for the future of a new intermediate order in Tasmania. It also resonates with the approach of the courts in Tasmania, as is evident in the use of suspended sentences, that serious offending can be dealt with other than with actual imprisonment.

### 7.6.1 NATURE OF THE ORDER

The purpose of the CCO is to 'provide a community-based sentence that may be used for a wide range of offending behaviour while having regard to and addressing the circumstances of the offender'.<sup>473</sup> This means that it covers a 'large sector of the sanction continuum'<sup>474</sup> and sits below imprisonment and drug treatment orders but above fines in the sentencing hierarchy.<sup>475</sup> It is a sanction that exists independently of imprisonment (that is, it is not a substitutional sanction) as was explained in the Second Reading Speech in the Victorian Parliament:

The CCO will also provide an alternative sentencing option for offenders who are at risk of being sent to jail. These offenders may not yet deserve a jail sentence but should be subject to significant restrictions and supervision if they are going to live with the rest of the community. The broad range of new powers under the CCO will allow courts wide flexibility to tailor their response to address the needs of offenders and set appropriate punishments.

Instead of using the fictions of imposing a term of imprisonment that is suspended or served at home, the courts

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464 Parliament of Victoria, *Sentencing Amendment (Community Correction Reform) Bill 2011*, (Research Paper) <<http://www.parliament.vic.gov.au/publications/research-papers/bills-backgrounders/2194-sentencing-amendment-community-correction-reform-bill-2011>>.

465 See Freiberg, above n 35, [11.10].

466 Victoria, *Parliamentary Debates*, House of Assembly, 15 September 2011, 3291 (Clark).

467 Victoria, *Parliamentary Debates*, Legislative Assembly, 26 June 2014, 2398 (Clark).

468 [2014] VSCA 342.

469 [2014] VSCA 342, [23]–[25]; Supreme Court of Victoria, *Court of Appeal Issues Victoria's First Guideline Judgment*, 29 December 2014, <<http://www.supremecourt.vic.gov.au/home/contact+us/news/court+of+appeal+issues+victoria's+first+guideline+judgment>>. See Appendix D for the guideline judgment.

470 See [7.7.6]. See also Bartels, n 17.

471 [2014] VSCA 342.

472 [2014] VSCA 342, [5].

473 *Sentencing Act 1991* (Vic) s 36(1).

474 Freiberg, above n 35, [11.15].

475 *Sentencing Act 1991* (Vic) s 5(6).

will now openly sentence offenders to jail, or where appropriate, use the CCO to openly sentence the offender to a community-based sentence. There is no legal fiction involved. The CCO can be combined with a jail sentence, but it will not pretend to be one. The CCO is a transparent sentence that can be understood by everyone in the community.<sup>476</sup>

The CCO was intended to provide 'a significant and proportionately punitive response to offences falling within the mid-range of seriousness'.<sup>477</sup> The changes it has brought about in judicial methodology are highlighted in the *Sentencing Act 1991* (Vic) s 5(4C), which provides that:

a court must not impose a sentence that involves the confinement of the offender unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a community correction order to which one or more of the conditions referred to in section 48F [non-association], 48G [residence restriction or exclusion], 48H [place or area exclusion], 48I [curfew] and 48J [alcohol exclusion] are attached.

This has been accepted by the Court of Appeal, where the court made clear that the CCO may be appropriate for relatively serious offences that would previously have attracted a medium term of imprisonment.<sup>478</sup>

In coming to this conclusion, the Court of Appeal addressed the relationship between imprisonment, the CCO and the purposes of punishment (just punishment, general deterrence, specific deterrence and rehabilitation). The Court considered that imprisonment was uniquely punitive because it involves the complete loss of physical freedom.<sup>479</sup> However, the Court also recognised the additional punitive features that make imprisonment a severe punishment: loss of personal autonomy and privacy, loss of control over choice of activities and associates, strict discipline, restriction of movement, forced association with other prisoners, confinement to a small cell (often with a cellmate not of the prisoner's choosing) and the exposure to risk associated with the confinement of large numbers of people in a small space — violence, bullying and intimidation.<sup>480</sup> As acknowledged in *Mainwaring v The Queen*,<sup>481</sup> 'public discussions about the need to deter crime by the application of heavier sentences are not always obviously, or at least apparently, informed by an appreciation of the significance of full-time incarceration upon men and women who receive such sentences'.<sup>482</sup> In such an environment, the Court stressed that opportunities and incentives for rehabilitation were very limited and imprisonment was often seriously detrimental for the prisoner and, as a consequence, the community.<sup>483</sup> In view of these adverse features of imprisonment, the conclusion 'that imprisonment is the only appropriate punishment amounts to a conclusion that the retributive and deterrent purposes of punishment must take precedence', 'even though the court is well aware that the time spent in prison is likely to be unproductive, or counter-productive for the offender and hence for the community'.<sup>484</sup> The Council endorses the view of the Court of Appeal.

The CCO, however, 'dramatically change[d] the sentencing landscape'.<sup>485</sup> The Court stated that 'the sentencing court can now choose a sentencing disposition which enables all of the purposes of punishment to be served simultaneously, in a coherent and balanced way, in preference to an option (imprisonment) which is skewed towards retribution and deterrence'.<sup>486</sup> While recognising that nothing is as punitive as prison, the Court considered that the new sanction required a reassessment of the view that imprisonment was the only sanction that was appropriate for offending of any real seriousness. It expressed the view that the CCO was also 'intrinsically punitive and, depending on the length of the order and the nature and extent of the conditions imposed, ... capable of being highly punitive'.<sup>487</sup> The order also offers things that imprisonment cannot offer — the demand for the offender to take personal responsibility for self-management and self-control, to undergo treatment and rehabilitation and to refrain from undesirable activities and associations (depending on the conditions). It also enables the offender to maintain contact with personal and family support.<sup>488</sup> The Court said that, 'in short, the CCO offers the sentencing court

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476 Parliament of Victoria, above n 466.

477 VSAC, *Community Correction Orders in the Higher Courts: Imposition, Duration, and Conditions* (2014), [2.3].

478 *Boulton v The Queen* [2014] VSCA 342, Appendix I, [25].

479 *Ibid* [104].

480 *Ibid* [105].

481 [2009] NSWCCA 207.

482 *Ibid* [72] quoted in *Boulton v The Queen* [2014] VSCA 342, [106].

483 *Boulton v The Queen*, *ibid* [107]–[108].

484 *Ibid* [112].

485 *Ibid* [113].

486 *Ibid*.

487 *Ibid* Appendix I, [14]. The nature of the conditions that can be imposed are discussed at [7.6.4].

488 *Ibid* [114].

the best opportunity to promote, simultaneously, the best interests of the community and the best interests of the offender and of those who are dependent on him/her'.<sup>489</sup> This means that, in response to a submission that a CCO may be appropriate, 'it is no answer for a prosecutor (or a judge) to say, "How could a CCO be appropriate given that an offence of this seriousness has always received imprisonment?"'<sup>490</sup>

It is the Council's hope that if the CCO is introduced in Tasmania, it will precipitate a rethinking of sentencing practice as has occurred in Victoria by requiring courts to consider imposing a community-based order where previously it would have used a substituted sentence of imprisonment — the suspended sentence.

## 7.6.2 IMPOSITION OF THE ORDER

The *Sentencing Act 1991* (Vic) provides that a court may impose a CCO if three prerequisites are satisfied:

- the offender is convicted or found guilty of an offence punishable by more than five penalty units;
- the court has received a pre-sentence report and has regard to that report;
- the offender consents to the order.

The overarching principles for the imposition of the CCO are proportionality and suitability.<sup>491</sup> A CCO can only be imposed if an offender is a suitable person for the order and the order is a proportionate response to the seriousness of the offence. The Court of Appeal specified that in deciding whether to impose a CCO:

the court should first assess the objective nature and gravity of the offence and the moral culpability of the offender.

The court should then consider whether:

- (a) the crime as so assessed is so serious that nothing short of a sentence wholly comprised of an immediate term of imprisonment will suffice to satisfy the requirements of just punishment; or
- (b) a CCO, either alone or in conjunction with a sentence of imprisonment, would satisfy the requirements of just punishment.<sup>492</sup>

In determining suitability, the Court discussed possible cases (such as those involving mental illness, drug addiction and/or homelessness) where there might be anticipated difficulties with compliance with conditions and stated that it was 'important that prison did not become the default option in such a case'.<sup>493</sup> The guidelines indicate that 'concerns about difficulties of compliance should not be viewed as precluding the imposition of a CCO'<sup>494</sup> and that if an offender had been assessed as suitable for treatment and rehabilitation conditions, 'the sentencing court should proceed on the assumption that — whatever difficulties of compliance there may be initially — they are likely to abate once the treatment process gets under way' (accepting that relapses are common occurrences during the beginning stages of treatment).<sup>495</sup> The Court of Appeal also indicated that the CCO was likely to be a particularly important sentencing option for young offenders, given its flexibility to allow a court to fashion an order that simultaneously achieves the purposes of rehabilitation and punishment.<sup>496</sup>

## 7.6.3 TERM OF THE ORDER

In the Supreme or County Court, the maximum duration for a CCO is not set, as the court may impose a order for the maximum term of imprisonment for the offence or two years — whichever is greater.<sup>497</sup> The Court of Appeal indicated that there was no necessary correlation between the term of the CCO and the term of imprisonment

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489 Ibid [115].

490 Ibid.

491 Ibid [63], Appendix 1, [5].

492 Ibid Appendix 1, [3]–[4].

493 Ibid [172].

494 Ibid Appendix 1, [48].

495 Ibid Appendix 1, [49]–[51].

496 Ibid Appendix 1, [9]–[10].

497 *Sentencing Act 1991* (Vic) s 38(1)(b).

that might otherwise have been imposed. The Court said that 'all that can be said is that, because imprisonment is more punitive than a CCO, where a CCO alone is imposed it is likely to be of longer duration than the term of imprisonment which might otherwise have been imposed'.<sup>498</sup>

It is unclear whether the Court of Appeal guidelines will result in an increase in the length of CCOs given its acceptance that the order could be used for serious offences and the function of the length of the order to allow the court to 'punish the offender to an extent and in a manner which is just in all the circumstances'.<sup>499</sup> However, prior to the judgment, research undertaken by VSAC found that in the first 18 months for which CCOs were available, the median length was two years, and only 15% of orders were imposed for a longer period.<sup>500</sup> The length of the order varied depending on the offence type, with justice procedure offences having the lowest median length at 12 months, assault, drug offences and abduction having a median of 18 months and non-rape sexual offences, aggravated burglary and deception having a median duration of 24 months.<sup>501</sup> In the Magistrates Court, the maximum term is two years in respect of one offence, four years in respect of two offences, and five years in respect of three or more offences.<sup>502</sup> The median duration was 12 months, and this was used for over two-thirds (68.7%) of orders. VSAC found that '[o]ne in five (20.2%) was longer than 12 months (the longest was 24 months), while one in 10 (11.0%) was under 12 months, clustering at six and seven months'.<sup>503</sup> In subsequent research, VSAC found that between July 2013 and December 2014, there had been no change to the median duration attached to CCOs.<sup>504</sup>

The court can also impose an intensive compliance period if it makes a CCO for a period of six months or longer.<sup>505</sup> An intensive compliance period can be for a lesser term than the length of the order. So for example, if the court makes a CCO for two years, the intensive compliance period could be eight months. This is the time during which the additional conditions attached to the order are to be completed,<sup>506</sup> after which only the core conditions apply. An intensive compliance period has only been used in the higher courts for six offenders, representing 1.3% of CCOs imposed.<sup>507</sup> Despite its infrequent use, an advantage of using an intensive compliance period is that it 'may reduce the risks of contravention associated with lengthy conditional orders by limiting the most onerous conditions to a shorter period'.<sup>508</sup>

## 7.6.4 CONDITIONS

CCOs have mandatory core conditions and optional conditions that may be imposed by the sentencer. In addition to the requirement not to commit an offence punishable by imprisonment, not to leave Victoria without permission and conditions that regulate the relationship with community corrections, the court must impose at least one of the following conditions:

- unpaid community work;
- treatment and rehabilitation;
- supervision;
- direction not to contact or associate with a person, or a class of people, specified in the order;
- direction to (or not to) reside in a specified area or place;
- direction to not enter, remain at, or consume alcohol at specified or unspecified licenced premises or a location of any major event;
- direction to pay a bond;
- monitoring by the court;

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498 *Boulton v The Queen* [2014] VSCA 342, Appendix 1, [32].

499 *Ibid* [152].

500 VSAC, above n 477, [3.9].

501 VSAC, above n 73, 38.

502 *Sentencing Act 1991* (Vic) s 38(1)(a).

503 VSAC, above n 73, 12.

504 VSAC, above n 76, 20.

505 *Sentencing Act 1991* (Vic) s 39(1).

506 *Ibid* s 39(2).

507 VSAC, above n 73, 39. Data was not available for the Magistrates Court: at 8.

508 Freiberg, above n 35, [11.25] referring to Judicial College of Victoria, *Overview of Sentencing Amendment (Community Correction Reform) Act 2011* (2012) 4.

- electronic monitoring;
- direction to participate in services specified in a justice plan prepared in accordance with the objections and principles of the *Disability Act 2006 (Vic)*;
- any other condition that the court thinks fit other than a condition about making restitution or the payment of compensation, costs or damages.<sup>509</sup>

As compared with other higher-level intermediate sanctions, this is the broadest range of potential conditions that can be imposed on an offender.<sup>510</sup>

The range of conditions that can be imposed means that the CCO can fulfil a number of sentencing purposes, including punishment, deterrence and rehabilitation.<sup>511</sup> It punishes an offender through the requirement to perform unpaid community work, the restrictions imposed on movement, association and leisure time, the reporting requirements and the requirement to comply with the order.<sup>512</sup> The length of the order may also meet the need for punishment. Similarly, a CCO can provide substantial general deterrence on the basis of the punitive effect of the order.<sup>513</sup> The requirements for an offender to participate in treatment programs and submit to judicial monitoring addresses specific deterrence as well as rehabilitation concerns. Specific deterrence can also be fulfilled by supervision, the restriction on liberty and the need to give up leisure time and the use of an intensive compliance period. The fact that a CCO is a real punishment and the consequences for breach of the order also act as a specific deterrent.<sup>514</sup> Rehabilitation can also be met through any of the conditions imposed to the extent that they address the factors that have contributed to offending. The onerous nature of the order (its length and conditions) fulfils the requirement for denunciation. Non-association, residence restrictions or exclusions, place or area exclusions, curfews and electronic monitoring incapacitate the offender as well as providing community protection. The community is also protected to the extent to which the assessment and treatment condition addresses the underlying causes of the offender's behaviour.<sup>515</sup>

Concerns may be raised about the number of possible conditions that may be imposed on an offender on the basis that it may result in an offender being burdened by an undue number of requirements leading to onerous sentences that are frequently breached. Although this is theoretically possible, '[in] practice, the principle of proportionality implies that no more conditions should be attached than are necessary'.<sup>516</sup> This is made clear in the *Sentencing Act 1991 (Vic)* s 48A, which provides guidance (and limits) on the approach taken by courts to the imposition of conditions. The court must attach conditions in accordance with:

- the principle of proportionality;
- the purposes of sentencing;
- the purpose of the CCO.<sup>517</sup>

The need for the conditions attached to be proportionate to the gravity of the offending was also affirmed by the Court of Appeal.<sup>518</sup> These constraints appear to be working as over-use of conditions does not appear to be a problem in practice. Research conducted by VSAC found that in the Magistrates Court, the median number of conditions imposed was two, with two-thirds (66%) of community corrections orders having either two or three conditions while over one-quarter (26.6%) had only one condition. VSAC found that very few (0.8%) had more than four conditions.<sup>519</sup>

Although the CCO can potentially be used to impose a unique sentencing combination, analysis of the conditions used and the combination of conditions imposed reveals that the sentencing order has not yet been used in this way. Research conducted by VSAC in 2014 found that the most common conditions imposed in the Magistrates

509 See Appendix B Table B-1. The court can impose a restitution order or a compensation order pursuant to the *Sentencing Act 1991 (Vic)* ss 84-86 but not as a condition of a CCO.

510 See Appendix B Table B-1.

511 Freiberg, above n 35, [11.15]; *Boulton v The Queen* [2014] VSCA 342, [85]-[98], Appendix 1, [14]-[24].

512 See *Boulton v The Queen*, *ibid* Appendix 1, [13]-[17].

513 *Ibid* Appendix 1, [18]-[19].

514 *Ibid* Appendix 1, [20]-[21].

515 VSAC, *Community Correction Orders — Structure for Possible Guidance* (2014).

516 Freiberg, above n 35, [11.30].

517 See *Boulton v The Queen* [2014] VSCA 342, Appendix 1, [6].

518 *Ibid* Appendix 1, [47].

519 VSAC, above n 73, 16.

Court were supervision, unpaid community work and assessment and treatment, which were used in nearly one-third of CCOs.<sup>520</sup> VSAC found that each of these conditions was often coupled with other conditions:

Of the 7,571 CCOs that included unpaid community work, over three-quarters (77%) had at least one other condition type, most commonly supervision (63.5%). A higher proportion of the 7,832 CCOs that included assessment and treatment also included other conditions (87.9%), most commonly unpaid community work (72.6%). Virtually all of the supervision conditions are coupled with at least one other conditions (99.5%), with the vast majority combined with assessment and treatment (97.3%) and nearly two-thirds (64.4%) combined with unpaid community work.<sup>521</sup>

This trend was also found in the higher courts where assessment and treatment, supervision, and unpaid community work were the most commonly imposed conditions.<sup>522</sup> In a subsequent analysis of conditions attached to CCOs in the Magistrates Court, VSAC found that the choice of conditions had changed: 'While the conditions of unpaid community work and assessment and treatment remained steady, supervision declined from 50.9% of cases to 31.7%'.<sup>523</sup> VSAC stated that the reason for this decline was unclear, but one reason may be that 'where magistrates imposed a CCO in place of a suspended sentence, which occurred with increasing frequency throughout the period, they maybe considered that the offender did not require supervision'.<sup>524</sup>

At all court levels, a reluctance to use many of the new conditions (non-contact, residence restriction, place restriction, curfew, alcohol restriction, bond or electronic monitoring) has been identified, with the exception being judicial monitoring.<sup>525</sup> In 2014, VSAC reported that magistrates rarely used 'new conditions of non-association (1.4%), alcohol exclusion (1.0%), place restriction (1.0%), curfew (0.5%), and residence restriction (0.4%)'.<sup>526</sup> In its 2015 analysis, VSAC reported that 'there continued to be very infrequent use of conditions that did not exist for the community-based order, such as alcohol exclusion and curfews'.<sup>527</sup> In the higher courts, according to VSAC, although more commonly used than in the Magistrates Court, there was limited use of the new conditions.<sup>528</sup> Of the 464 offenders sentenced, the non-association condition was imposed in respect of 4.3% of offenders; the residence restriction was imposed on 3.3% of offenders, place restriction was imposed on 1.1% of offenders, the curfew condition was imposed on 0.9% of offenders and the alcohol exclusion also imposed on 0.9% of offenders.<sup>529</sup> This issue has also been observed in other jurisdictions in relation to other sentencing orders, where the judicial reluctance to use new conditions has also been identified.<sup>530</sup>

## 7.6.5 CONSEQUENCES OF BREACH

If an offender contravenes the conditions of the order, the court may vary the order, confirm the order, cancel the order and resentence the offender and cancel the order and make no further order.<sup>531</sup> A breach of the order is also an offence punishable by a maximum of three months' imprisonment.<sup>532</sup> There is also power for the Secretary of the Department of Justice to deal administratively with a breach in relation to unpaid community work or a curfew condition, if the breach is not sufficiently serious to file a charge for the offence (but the breach is serious enough to

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520 Ibid.

521 Ibid.

522 Ibid 39.

523 VSAC, above n 76, 20.

524 Ibid 15.

525 VSAC, above n 477, [3.13]; *Boulton v The Queen* [2014] VSCA 342, [47]–[49].

526 VSAC, above n 73, 16.

527 VSAC, above n 76, 20.

528 Ibid 39.

529 Ibid Figure 33. See also VSAC, above n 477 for analysis of the characteristics of the offender and the offence that influence the imposition of a community work condition, a treatment and rehabilitation condition and a supervision condition.

530 George Mair and Helen Mills, *The Community Order and the Suspended Sentence Order: Three Years On*, (Centre for Crime and Justice Studies, 2009) 11. In the United Kingdom, several factors have been identified to explain the failure to use some options associated with culture and resources: lack of availability; lack of knowledge on the part of sentencers and probation staff; failure by probation staff to keep sentencers aware of what is available; a desire by probation staff to work within their 'comfort zone'; failure to think creatively and innovatively on the part of the sentencer and/or probation staff; probation staff not being able to make full offender assessment prior to sentence due to heavy workloads; confusion as a result of potential duplication or orders; uncertainty about how some requirements are monitored; the influence of local probation policy decisions; lack of resourcing leading to waiting lists; difficulty in gaining agreement of a registered practitioner to access mental health services for the mental health treatment requirement; and offender reluctance to acknowledge they have a mental health problem: at 11–12.

531 *Sentencing Act 1991* (Vic) s 83AS(1).

532 Ibid s 83AD(1).

warrant a direction being given). The compliance framework for CCOs was aimed at 'streamlin[ing] the enforcement process and provid[ing] appropriate powers to enforce community sentences'.<sup>533</sup>

## 7.6.6 USE OF COMMUNITY CORRECTION ORDERS

In Victoria, from January 2012 to June 2013, magistrates imposed CCOs on approximately 10 893 offenders.<sup>534</sup> In the higher courts, in the same period, CCOs were imposed on 464 offenders.<sup>535</sup> Subsequent analysis by VSAC has found an increase in the use of CCOs in both the Magistrates Court and higher courts. It noted that between the period January 2012-June 2013 (Period 1) and July 2013-December 2014 (Period 2), 'the number of CCOs imposed in the higher courts increased by 30.8%, while the number imposed in the Magistrates' Court increased by 17.4%'.<sup>536</sup> In the higher courts, CCOs were imposed on 608 offenders in Period 2, representing 22.4% of all offenders sentenced.<sup>537</sup> In the Magistrates Court, CCOs were imposed on 12 784 offenders in Period 2, representing 8% of offenders sentenced.<sup>538</sup>

Research undertaken by VSAC provides information about the offences for which CCOs are imposed. This shows that in the higher courts between January 2012 and June 2013, the percentage of principal CCO sentences by offence for the 20 most frequent offence types were:

- armed robbery (9.5%);
- sexual penetration of a child under 16 (7.6%);<sup>539</sup>
- intentionally causing serious injury (5.9%);
- common assault (6.5%);
- recklessly cause serious injury (5.6%);
- aggravated burglary (5.4%).<sup>540</sup>

An examination of broader offence categories shows that the five most common principal offence categories to be sentenced to a CCO were:

- assault (36.4%);
- non-rape sexual offences (18.5%);
- robbery (14.2%);
- aggravated burglary (7.1%);
- drugs (court mandated treatment) (4.1%).<sup>541</sup>

In the Magistrates Court, between January 2012 and June 2013, the percentage of principal CCO sentences by offence for the 20 most frequent offence types were:

- contravene a family violence intervention order (10.2%);
- other theft (8.7%);
- recklessly cause serious injury (8.4%);
- criminal damage (7.6%);
- drive while suspended (3.4%);
- drive while disqualified (3.4%).<sup>542</sup>

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533 Victoria, above n 464.

534 VSAC, above n 73, 11.

535 Ibid 33.

536 VSAC, above n 76, 20.

537 Ibid 7.

538 Ibid 13, 18.

539 VSAC has examined the offence of sexual penetration of a child under 16 and found that 'over a quarter of charges in the category of sexual penetration (10 to 16) involve relationships between young people who are close in age, and not predatory conduct of adults in relation to children': VSAC, above n 73, 34 fn 51 referring to VSAC, *Maximum Penalties for Sexual Penetration with a Child Under 16*, Report (2009) 61.

540 VSAC, above n 73, Figure 26.

541 Ibid Figure 27.

542 Ibid Figure 1.

In terms of broad offence categories, the five most common offences for which a CCO was imposed for the principal offence were:

- assault (20.3%);
- traffic (16.6%);
- theft (15.7%);
- justice procedures (13.3%);
- handling stolen goods (9.2%).<sup>543</sup>

CCOs have been imposed for serious offences where it is a suitable and proportionate response in the circumstances of the case. For example, in *R v Klinkermann*,<sup>544</sup> an elderly offender received a CCO for the attempted murder of his wife in circumstances where her health was deteriorating from dementia and Parkinson's disease. The court imposed a CCO of 18 months with special conditions for medical assessment and treatment and mental health assessment and treatment. The Court of Appeal affirmed the diversity of cases, including relatively serious offences, that may be appropriate cases for a CCO to be made (such as for example, aggravated burglary, intentionally causing serious injury, some forms of sexual offences involving minors, some kinds of rape, and, in some rare and exceptional circumstances, homicide).<sup>545</sup> The Court also declined to define any outer limits of any offences for which a CCO would be unsuitable, indicating that 'reconsideration of accepted views about imprisonment as the only option will take time and will be informed by experience'<sup>546</sup> and that:

Sentencing judges should proceed on the basis that there is now a very broad range of cases in which it will be appropriate to impose a suitably structured CCO, either alone or in conjunction with a shorter term of imprisonment, including cases where a sentence of imprisonment would formerly have been regarded as the only option.<sup>547</sup>

It remains to be seen how the scope provided in the guideline judgment influences the future use of CCOs. As noted above, VSAC is expected to report on this in early 2016.

## 7.6.7 RECIDIVISM

There have been no studies that have examined recidivism rates for offenders who have received a CCO. However, there has been examination of the relationship between the imposition of particular community-based order conditions (unpaid community work, assessment/treatment and supervision) and reoffending undertaken in 2014 by VSAC. This research is still relevant to the new sentencing regime because it is likely to provide an insight into the expected reoffending patterns for CCOs,<sup>548</sup> given that research indicates that courts are using CCOs in a very similar way to how community-based orders were previously used.

In its research, VSAC found that offenders who were supervised had a significantly higher reoffending rate than offenders in the 'no supervision' (community work and assessment/treatment) group (49.5% vs 36.9%).<sup>549</sup> However, VSAC stressed that:

[T]he results of this research must not be interpreted as meaning supervision is ineffective. Offenders who are placed on supervision orders are those with the most complex offending profiles. They are more likely to have been convicted of offences against the person for their index offence, more likely to have been sentenced previously, including to prior terms of imprisonment, and more likely to have prior convictions for property offences that are indicative of substance dependence. These offenders are likely to be the most difficult to deter from further offending. The findings that these offenders are most likely to attract a supervision conditions suggests that the most intensive community-based correctional interventions are being targeted to the group at highest risk of reoffending.<sup>550</sup>

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543 Ibid Figure 2.

544 [2013] VSC 65.

545 *Boulton v The Queen* [2014] VSCA 342, Appendix 1, [25].

546 Ibid Appendix 1, [29].

547 Ibid Appendix 1, [30].

548 Ibid [1.3].

549 Ibid [1.5].

550 Ibid [1.10].

In addition, it is noted that other research has found that offenders who receive a community-based sanction have lower rates of recidivism than those who receive a sentence of imprisonment.<sup>551</sup>

## 7.6.8 COST OF COMMUNITY CORRECTION ORDER

In Victoria, VSAC observed that:

[t]he introduction of the new order was accompanied by significant government investment in building the capacity of Community Correctional Services to administer CCOs, with the real net operating expenditure per offender per day increasing by 20% from 2010–11 to 2011–12.<sup>552</sup>

However, it would appear that this investment has not continued, as the 2014 Report on Government Services shows that the real net operating expenditure per offender per day increased 14.5% from 2010–11 to 2011–12 and only 4.5% from 2011–12 to 2012–13.<sup>553</sup> It remains to be seen whether the increase in expenditure is sufficient to enable Corrections Victoria to effectively supervise offenders in the community who receive CCOs, and it appears that this is now a major problem in Victoria.<sup>554</sup>

In the guideline judgment, the Court of Appeal identified support and resourcing of the CCO by Community Correctional Services (CCS) as a determining factor in the courts' willingness to use the order for serious offences: 'Proper resourcing is essential to enable courts to attach conditions — both punitive and rehabilitative — in the knowledge that compliance with the conditions is likely to produce meaningful results'.<sup>555</sup> Concerns have been raised about the ability of CCS and other service providers to cope with the increase in workload following the abolition of suspended sentences. Based on assumptions that between 90–95% of offenders who had formerly received wholly suspended sentences in higher courts would enter community corrections and all offenders sentenced in the Magistrates Court who would have received wholly suspended sentences would now receive CCOs, the abolition of suspended sentences would add between 5430 and 5450 additional offenders into community corrections each year.<sup>556</sup> This would be double the current number of offenders in the community corrections system.<sup>557</sup> Based on this assessment, Gelb has written that 'the key issue that has been identified ... is whether Corrections Victoria has the capacity to increase the scale of its community corrections work to meet the significant increase in the number of offenders that it supervises, monitors and treats'.<sup>558</sup> Gelb suggests that CCS may not have this capacity based on the number of community corrections officers employed compared to the increase in the number of offenders under community supervision. This, according to Gelb, therefore raised 'real doubt on the capacity of [CCS] to provide high-quality and effective rehabilitation and supervision to the people under its supervision' and so achieve the government's objective in reducing reoffending.<sup>559</sup> Very negative feedback has been received in Victoria in relation to the support received from CCS.<sup>560</sup>

## 7.6.9 THE COUNCIL'S PRELIMINARY VIEWS

In the *Consultation Paper*, the Council's preliminary view was that a CCO should be introduced in Tasmania to replace suspended sentences, community service and probation orders. It was proposed that the order should be a sanction in its own right, with a maximum term of three years. It was suggested that the CCO would have two components: (1) core conditions that must attach to the CCO (based on those currently attached to probation and CSOs under the *Sentencing Act 1997* (Tas)); and (2) optional conditions that a court may impose with a view to providing courts with the maximum flexibility to address the circumstances of the offender and the offence. The Council's draft recommendation was that a pre-sentence report should be a pre-condition of a CCO if the court is considering imposing special conditions on an offender, but that there should be no need for a report if the court only intends to impose core conditions.

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551 See TSAC, above n 4, [5.2.2].

552 VSAC, above n 73, 2 citing Steering Committee for the Review of Government Services, '8A Correctional Services — Attachment', *Report on Government Services 2013 Volume 1: Child Care, Education and Training; Justice, Emergency Management* (2013) Table 8A.11.

553 Steering Committee for the Review of Government Services, above n 552.

554 Information provided by Arie Freiberg.

555 *Boulton v The Queen* [2014] VSCA 342, [134].

556 Gelb, above n 126, 30.

557 *Ibid* 50.

558 *Ibid*.

559 *Ibid* 51.

560 Information provided by Arie Freiberg.

The Council also suggested that breach of a CCO should have serious consequences. It suggested that there needed to be a robust administrative procedure in place in relation to recording breaches (even if not actioned) and that there needed to be a clear process for making applications to the court in cases where an offender has committed an imprisonable offence or a serious breach (or multiple minor breaches) of other conditions of a CCO.

The Council's preliminary view was that greater use could be made of fines in combination with CCOs as a means increasing the punitive component of the sanction. In such circumstances, it was suggested that the court should be required to consider the offender's financial circumstances, whether this has the effect of increasing or decreasing the amount of a fine.

In the *Consultation Paper*, the Council also stressed the need for adequate funding to support the introduction of the CCO.

### 7.6.10 SUBMISSIONS

PACCOA supported the introduction of a CCO in Tasmania and made the following observations:

- it agreed with the Victorian guidelines indicating that 'concerns about difficulties of compliance should not be viewed as precluding the imposition of a CCO and accepting that relapses were common during the beginning stages of treatment';
- there may still be a need for a pre-sentence report if the court only intends to impose core conditions and that decision should be made by the court;
- caution was expressed about having some breaches dealt with administratively, based on that it represented a shift power from the judicial to the executive arm of government;
- the importance of ensuring that Community Corrections is adequately resourced to supervise the increased number of offenders was noted;
- it was agreed that it should be made clear that the CCO was an appropriate order where the offender would have received a suspended sentence of imprisonment and that it can be used for serious offences;
- the Council's emphasis on appropriate support being provided to offenders in the community to facilitate compliance with the conditions was endorsed;
- the need for adequate resources to be available to support compliance monitoring and treatment of offenders was necessary to avoid difficulties that have been experienced elsewhere in relation to lack of confidence in particular sanctions;
- it agreed that the Sober Driver Program should be expanded through the development of a formalised 'driving whilst intoxicated' list;
- it agreed with the Council's views about the seriousness and consequences of breaching a CCO; the establishment of an administrative body within Community Corrections to deal with breaches; and the use of open-ended judicial monitoring conditions. It also noted again the importance of adequate resourcing to enable these developments to be implemented effectively;
- it agreed that courts should be required to consider offenders' financial circumstances with respect to the imposition of financial penalties, in order to impose the same punishment (in effect) for the same offence on differently-circumstanced offenders;
- it endorsed the Council's observation about the need for appropriate resourcing for the success (or failure) of any sentencing reform.

The Law Society agreed with the Council's draft recommendation for the introduction of a CCO, but considered that a CCO would not have the same deterrent effect as a suspended sentence and that it would be better to have the more flexible option of the CCO, along with the possibility of imposing a suspended sentence.

The DPEM was supportive of the concept of the CCO, but expressed some reservations. The DPEM indicated that it was not in a position to support Corrective Services in dealing with the increased monitoring and breaches that would be expected to arise under such a regime. It also stressed the need for effective monitoring and enforcement of breaches of the CCO, as 'repeat breaches of CCOs with insufficient punitive sanctions are likely to erode

community confidence in the CCO program in the same manner that has occurred with suspended sentences'. In addition, the DPEM called for consideration to be given to the introduction of a core condition that would establish a payment plan for any accompanying court fines, with adherence to the payment plan to be required for the duration of the order.

The ATDC agreed that the CCO had the potential to provide an appropriate therapeutic response to people with alcohol and other drug problems, whilst meeting the community expectation that a sanction is imposed. It agreed with the Council's preliminary view that proportionality was key to the imposition of the order. As with other submissions, the ATDC also highlighted the resourcing issues that would arise from an increased demand for treatment services. The ATDC wrote that '[w]hilst it may be the final comment of this response, it is without doubt the most important. The ATDC concurs fully with the Sentencing Advisory Council's statement that any reform will only succeed if properly funded'.

The Synod generally approved of the draft recommendations and expressed particular agreement with the draft recommendation that the CCO should only contain the minimum number of conditions consistent with proportionality, the purposes of sentencing and the purposes of the CCO. It also strongly supported the draft recommendation in relation to the court being required to consider the offender's financial circumstances, whether this has the effect of increasing or decreasing the amount of a fine, as this 'seeks to make financial punishment fair and equitable and not at risk of disadvantaging offenders from a low socio-economic background who may have already experienced a range of social and economic disadvantages'.

### 7.6.11 THE COUNCIL'S RECOMMENDATIONS

As indicated, the Council's view remains that a new intermediate order should be introduced in Tasmania called the CCO. This order would replace suspended sentences, and incorporate aspects of the current community service and probation orders. While the model proposed by the Council has similarities with the CCO that exists in Victoria, it is not an identical order. The Council's approach has been to consider sentencing options that are suitable for the Tasmanian context and not simply to replicate approaches taken in other jurisdictions with different social, political and judicial contexts.

In Victoria, initially there was mixed evidence about the appropriateness of the CCO as a replacement for the suspended sentence. There were judicial statements that indicate the courts consider that a CCO is an onerous order and that it is not a 'soft' sentencing option<sup>561</sup> or a 'mere "slap on the wrist"'.<sup>562</sup> Yet, there appeared to be a reluctance to equate a CCO with the suspended sentence. In *DPP v Edwards*, Warren J stated that:

A CCO is a substantially less severe form of punishment than a suspended sentence. ... What makes a CCO less severe than a suspended sentence is the difference in the consequences of breach. ... [I]f a suspended sentence is breached, the court is also required to activate the sentence held in suspension unless there are exceptional circumstances. ... In contrast, with a CCO the court has a discretion to keep the CCO on foot, vary it, cancel it and resentence the offender or even cancel the CCO and make no further order with respect of the offence... It follows that, unlike a suspended sentence, a CCO does not carry with it a powerful threat of immediate imprisonment for a term known in advance.<sup>563</sup>

The absence of a presumption of activation (and the known consequence for the offender) has influenced the initial judicial perception of the equivalence of the CCO and the suspended sentence.<sup>564</sup> However, legislative intervention and the Court of Appeal's guideline judgment have affirmed the appropriateness of a CCO as a replacement for a suspended sentence as a significant punitive response. As discussed at [7.6.6], there appears to be increased acceptance of the CCO.

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561 *DPP v Edwards* [2012] VSCA 292, [135] (Warren CJ).

562 *Ibid* [242] (Weinberg JA and Williams AJA).

563 *Ibid* [123] (Warren CJ).

564 This sentiment is reflected the findings of research undertaken by VSAC, which found that a community correction order is not being widely used as a substitute for a suspended sentence, see VSAC, above n 73.

It is the Council's view that Tasmania can potentially avoid the uncertainty that initially arose in Victoria in relation to the use of CCOs by adopting Victoria's more recent amendments that make it clear that the CCO is an appropriate order where the offender would have received a suspended sentence of imprisonment and that the order can be used for serious offending.<sup>565</sup>

### Nature of the order

In Tasmania, the CCO would sit below imprisonment, alcohol and drug treatment orders and home detention, and above a fine. It would not be a substitutional sanction but would be a sanction in its own right and not an alternative means of serving a term of imprisonment. It would be an enhanced probation and community service order that allows the court to impose a range of conditions on an offender directed towards reducing the likelihood of reoffending, punishing the offender and protecting the community. A CCO is a punitive order as the core conditions materially infringe an offender's liberty and bind an offender for the entire duration of the order. Further, the special conditions are variously coercive, restrictive and/or prohibitive.<sup>566</sup> On this basis, it is envisaged that the order can be used for serious offences. Accordingly, as with the revised approach in Victoria, a statutory statement should be included that provides that without limiting when a CCO may be imposed, it may be an appropriate sentence where the court may have imposed a suspended sentence. This is consistent with public opinion, which suggests that the community is receptive to non-custodial sanctions and considers that prison is not appropriate for particular offenders, even those found guilty of serious offences.<sup>567</sup>

### Imposition of the order

As with the approach in Victoria, the overarching principles for the imposition of the CCO should be proportionality and suitability reflecting the views of the Court of Appeal that the court should first assess the objective nature and gravity of the offence and the moral culpability of the offender. The importance of proportionality was stressed in the submissions received from the Synod and the ATDC. In terms of proportionality, the court should then consider whether, in view of the seriousness as assessed, imprisonment is the only just punishment or whether a CCO, either alone or in conjunction with a sentence of imprisonment, would satisfy the requirements of just punishment. This is also consistent with the principle of parsimony. Proportionality also precludes imposing a longer sentence merely for the purpose of protecting society by ensuring the treatment for a mental illness or drug or alcohol addiction.<sup>568</sup> However, if appropriate in the circumstances of the case, the court could impose a CMD order where the treatment component of the order extends for two years (and this term often exceeds the length of imprisonment that remains unactivated).<sup>569</sup>

In terms of suitability, the court should ensure that the CCO is carefully tailored to the circumstances and particular needs of the offender.<sup>570</sup> The Council also considers that it should be made clear that mental illness, drug addiction and/or homelessness do not preclude an offender from consideration for a CCO.<sup>571</sup> In considering whether the imposition of a CCO is appropriate where there may be difficulties in an offender complying with the order and its conditions, the court should proceed on the assumption that any difficulties with compliance will abate once a treatment process is underway, although there may be cases where a community correction would not be appropriate where there is no realistic prospect of compliance.<sup>572</sup> PACCOA agreed with this approach.

A pre-sentence report should be a pre-condition of a CCO if the court is considering imposing special conditions on an offender.<sup>573</sup> However, there should be no need for a pre-sentence report if the court only intends to impose core conditions. This differs from the view of PACCOA.

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565 *Sentencing Act 1991* (Vic) s 36(2) was inserted by the *Sentencing Amendment (Emergency Workers) Act 2014* (Vic) and provides that 'without limiting when a community correction order may be imposed, it may be an appropriate sentence where, before the ability of the court to impose a suspended sentence was abolished, the court may have imposed a sentence of imprisonment and then suspended in whole that sentence of imprisonment'.

566 *Boulton v The Queen* [2014] VSCA 342.

567 See [2.3].

568 *Boulton v The Queen* [2014] VSCA 342.

569 See [6.1].

570 See *Boulton v The Queen* [2014] VSCA 342.

571 See [7.6.2]. However, an offender with drug and/or alcohol dependency issues associated with offending may also be considered suitable for an alcohol and drug treatment order, see Chapter 6.

572 *Boulton v The Queen* [2014] VSCA 342.

573 See below.

## Term of the order

The Council's view remains that the maximum term of a CCO should be three years. This corresponds with the operational periods for FSSs imposed in the Supreme Court as (for the 276 FSSs for which data were available) there were only three cases (1%) where the operational period was longer than three years. In 86 cases (31%), the operational period was three years. The figures were also the same for PSSs. In relation to the periods of imprisonment imposed in the Supreme Court, there were no FSSs imposed that exceeded three years and the median operational period of FSSs imposed in the Supreme was two years. This was also the most common period imposed.<sup>574</sup> The Council's view is that an intensive compliance period should be available in Tasmania if the CCO is introduced. In relation to the community service component (if ordered), the maximum period (as with CSOs currently) should be 240 hours.<sup>575</sup> The period of community service can be less than the total length of the CCO.

The term of the order proposed by the Council differs from the Victorian approach, where very long CCOs are available. In higher courts, the maximum for a CCO is not set, as the court may impose an order for the maximum term of imprisonment for the offence or two years — whichever is greater.<sup>576</sup> This creates the potential for a very long CCO (such as was the case in *Boulton*, where the CCOs at issue were 10, eight and five years).<sup>577</sup> In the Magistrates Court, the maximum term is two to five years depending on the number of offences in respect of which the order is made.<sup>578</sup> It is the Council's view that this should not be repeated in Tasmania. Moreover, for Supreme Court cases, the 21-year maximum sentence in Tasmania makes the Victorian approach an inappropriate model.<sup>579</sup>

## Conditions

Consistent with the Council's view that sentencers should have maximum flexibility to address the offender and the offence, the Council's view is that a wide range of conditions should be available under a CCO. However, it should be made clear that an order should only contain the minimum number of conditions consistent with proportionality, the purposes of sentencing and the purposes of a CCO.<sup>580</sup> It is crucial that, in imposing conditions, an offender is not set up to fail through unrealistic requirements.<sup>581</sup> It is also essential that appropriate support is provided to the offender in the community to facilitate compliance with the conditions.

The Council's view is that the following core conditions should be attached to a CCO, that the offender:

- not commit an offence punishable by imprisonment;
- report within one clear working day to a probation officer at the place specified in the order;
- report to a probation officer as required;
- not leave or stay outside Tasmania without the permission of a probation officer;
- comply with reasonable and lawful directions given by a probation officer;
- give notification to a probation officer of any change of address or employment before, or within two working days after, the change.

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574 See TSAC, above n 4, [3.1.3], [3.1.4].

575 *Sentencing Act 1997* (Tas) s 31.

576 *Sentencing Act 1991* (Vic) s 38(1)(b).

577 *Boulton v The Queen* [2014] VSCA 342.

578 *Sentencing Act 1991* (Vic) s 38(1)(a).

579 It is noted that there are limits to the sentence length that magistrates can impose for indictable offences, see Table 2–1.

580 For a possible model, see *Sentencing Act 1991* (Vic) s 48A.

581 VSAC, above n 15, [6.72].

These are generally based on the core conditions that currently attach to probation and CSOs under the *Sentencing Act 1997* (Tas).<sup>582</sup> It will be possible for the court to make an order that contains only core conditions, which would be akin to a suspended sentence with the only condition that the offender not commit an imprisonable offence. However, the CCO with core conditions is more onerous for an offender, given the restrictions and reporting requirements placed on an offender and addresses concerns that arose in relation to suspended sentences that the offender 'walks free' with no consequences unless the offender commits another offence. The Council does not consider that it is appropriate to mandate supervision, community service or a treatment condition as part of the CCO, as the Council's view is that this would unduly restrict its applicability to a range of offenders and limit the flexibility and utility of the order. This approach allows the order to be appropriate for offenders with complex rehabilitative and treatment needs, as well as those with limited rehabilitative needs. It allows the court to 'tailor orders more appropriately to the circumstances of offenders and respond to the underlying causes of offending'.<sup>583</sup> It also reflects the approach taken by the NSWLRC in its recommendations for the community detention order.<sup>584</sup> The Council does not agree with the suggestion of the DPEM that a payment plan for any accompanying fine imposed by the court should be a core condition of a CCO. A separate structure already exists in Tasmania for the recovery of fines<sup>585</sup> and it is the Council's view that such a condition should not exist for a CCO. This is consistent with the approach in other jurisdictions in relation to intensive correction orders/CCOs where no such condition exists and, further, it is noted that such a condition is expressly prohibited in New Zealand.<sup>586</sup>

In addition, the court should be able to attach any of the following special conditions to a CCO:

- the offender submit to the supervision of a probation officer;
- the offender attend educational and other programs as directed by the court or a probation officer;
- the offender undergo assessment and treatment for alcohol or drug dependency as directed by a probation officer;
- the offender submit to testing for alcohol or drug use as directed by a probation officer;
- the offender submit to medical, psychological or psychiatric assessment or treatment as directed by a probation officer;
- the offender undertake community service up to a maximum period of 240 hours;
- place and non-association conditions are imposed on the offender;
- the offender is subject to judicial monitoring;
- alcohol exclusion is imposed on the offender;
- a curfew is imposed on the offender; and
- such other special conditions as the court thinks necessary or expedient.

These conditions contain many of the conditions that can currently be attached to a probation order, a CSO, an area restriction order and/or a suspended sentence (or a combination of these orders).<sup>587</sup> The new conditions are the provisions for judicial monitoring, alcohol exclusion, curfew and non-association conditions. As indicated, the range of conditions means that the order can fulfil a number of sentencing purposes, including punishment, deterrence and rehabilitation. The challenge will be for the judiciary to feel confident in using the conditions attached to the order on the basis that offenders are effectively supervised, that drug and alcohol testing is available, that curfews and exclusions are monitored and that appropriate programs for treatment are available. This is a matter of resourcing and training for Community Corrections staff and the judiciary, and the failure to provide adequate resources to support compliance monitoring and treatment has been a factor identified elsewhere as leading to a lack of confidence in particular sanctions.<sup>588</sup>

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582 *Sentencing Act 1997* (Tas) ss 28, 37(1).

583 VSAC, above n 15, [6.148].

584 NSWLRC, above n 60, [11.27].

585 See *Monetary Penalties Enforcement Act 2005* (Tas).

586 See Appendix A Table A-3.

587 See *Sentencing Act 1997* (Tas) ss 24, 28(c), 28(g), 37(2), 70.

588 See [7.6.8]. See also Mair and Mills, above n 530, 11–12; TLRI, above n 26, [3.6.4].

Judicial acceptance of evidence based and effective treatment/educational programs is demonstrated by the uptake of referrals to the 'Sober Driver' Program, which was introduced into Community Corrections in July 2008. Based on the information provided in the Department of Justice annual report, it is an educational and skill based group program that targets adult offenders who are convicted of two or more drink driving offences within a five-year period. The program was developed in NSW and is delivered over a nine-week period, consisting of one two-hour session per week. It is conducted by two trained facilitators and addresses issues associated with drink-driving, including the consequences of drink-driving, the effects of alcohol on driving, managing drinking situations, alternatives to drink-driving and relapse prevention and stress management. A condensed version of the program has also been delivered.<sup>589</sup> The program can be imposed as a condition of a suspended sentence or as part of a probation or CSO.

Community Corrections has a high number of offender referrals from the Magistrates Court, and there is a high demand for the Sober Driver Program. Since its inception, 512 offenders have successfully completed one of the 57 programs that have been delivered in Tasmania, with a completion rate of 78% in 2013–14.<sup>590</sup> Evaluative studies conducted in NSW found that offenders who completed the program were over '40% less likely to re-offend in the 2 years following program completion, than offenders who received sanctions alone'.<sup>591</sup> The Council understands that this is a successful program in Tasmania that has the confidence of the judiciary and the Council's view is that the program should be expanded through the development of a formalised driving while intoxicated list. This was supported by PACCOA. Magistrates can require, as a special condition of a CCO, that the offender take part in the Sober Driver Program. This may address the needs of a proportion of offenders who currently receive suspended sentences, given that 9.1% of FSSs and 6.2% of PSSs imposed in the Magistrates Court are for driving while exceeding the prescribed concentration of alcohol.<sup>592</sup> Analysis of current sentencing patterns suggests that a fine may be a likely outcome for such offences, given that a fine is used more commonly for this offence than other offences and that the offence has a low use of other non-custodial sentencing options. However, if magistrates are currently combining FSSs with an education program, then it may be that they will be willing to impose a CCO with an education program condition. However, it is noted that the court would also need to impose a fine in such circumstances, as the court must impose a sentence of imprisonment or a fine.<sup>593</sup>

## Consequences of breach

The Council's view is that breach of a CCO should have serious consequences. The importance of monitoring and enforcement of breaches for the credibility of the order was stressed by the DPEM and PACCOA. The Council's view remains that there needs to be a robust administrative procedure in place in relation to recording breaches (even if not actioned). There needs to be a clear process for making applications to the court in cases where an offender has committed an imprisonable offence or a serious breach (or multiple minor breaches) of other conditions of a CCO. This could be achieved by the establishment of an administrative body within the Community Corrections framework to deal with breaches of conditions of a CCO.<sup>594</sup> This was supported by PACCOA. Alternatively, within the existing framework, a defined administrative process could be developed to record breaches and provide a graduated response to non-compliance to ensure that there is a level of consistency in dealing with breaches and that breaches are recorded and actioned.<sup>595</sup>

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589 Department of Justice, Tasmania, above n 194, 59.

590 Ibid.

591 Ibid.

592 See TSAC, above n 4.

593 See *Wilkie v Taylor* [2015] TASFC 7 (Blow CJ, Pearce J; Estcourt J dissenting).

594 This is the approach proposed in the ACT in relation to breaches of the intensive correction order, where a court deals with breaches by way of reoffending and a Sentence Administration Board deals with other breaches, see *Crimes (Sentencing and Restorative Justice) Amendment Bill 2015 (ACT)*.

595 See Arie Freiberg, above n 38, 112–114; VSAC, above n 15, [11.30].

Compliance with the CCO could also be facilitated by the use of an open ended judicial monitoring condition (such as one that requires an offender to appear before the court if and when required) as part of a CCO. Based on the experience in the Magistrates Court, judicial monitoring is a powerful tool that can be used to ensure that there are consequences for an offender on breach of an order. As with the procedure that is currently available for probation and CSOs, there should also be legislative authority for an authorised person to make an application to the court on breach of a CCO.<sup>596</sup> Failure to action breaches of suspended sentences has been a criticism that has been directed at the sentence in Tasmania<sup>597</sup> and, accordingly, there needs to be a formalised non-compliance regime to facilitate judicial and public confidence in the order and to make offenders aware that the breaches of the order are taken seriously. The Council also considers that there needs to be flexibility in order to respond to minor breaches and support provided to offenders with complex needs to facilitate compliance with the order.

It is the Council's view that the following powers should be available on breach

- confirm the order as originally made; or
- increase the period during which the order has effect; or
- vary the special conditions to which the order is subject; or
- cancel the order and deal with the offender for the offence or offences in respect of which the order was made in any manner in which the court could deal with the offender had it just found the offender guilty of that offence or those offences; or
- cancel the order and, if it considers it appropriate, any other order made by the court in respect of the offence in respect of which the CCO was made, and deal with the offender for that offence in any manner in which the court could deal with the offender had it just found the offender guilty of that offence.

The Council's view is that a breach of a CCO should not be a separate offence on the basis that it potentially creates a situation of triple jeopardy — where an offender is liable for resentencing for the original offence, for the new offence and for the breach offence. In addition, the proposed powers reflect the powers of the court that are currently available for breach of a probation or CSO.<sup>598</sup> However, the Council is aware of difficulties created in Tasmania by the absence of an offence of breaching a community-based order in terms of enforcement in circumstances where the breach is near the end of the sentence. Previously, a breach offence could be pursued after the expiration of the order whereas now court action can only proceed during the currency of the order. This has had significant implications for the practice of Community Corrections in relation to the enforcement of breaches, as offenders seek adjournments that extend past the expiration date of the order and so effectively in these cases there is nothing that can be done in relation to the breach.<sup>599</sup> This is an issue that requires resolution to ensure the accountability of offenders who breach the terms of a community-based order and it is the Council's view that it is necessary to ensure that breaches are enforceable beyond the expiration of the order.

## Combination orders

It is the Council's view that the CCO should be able to be combined with a rehabilitation program order for family violence offences, driving disqualification and/or a fine. The ability of the court to impose a CCO with a fine allows it to impose a sentence with an enhanced punitive effect and a 'core conditions' CCO combined with a fine may be an appropriate sentence for an offender found guilty of a serious offence with limited rehabilitative or treatment requirements. Fines are already combined with FSSs in 11% of cases in the Supreme Court (2011–14) and 3% of matters finalised in the Magistrates Court (1 July 2013 – 30 June 2014). It is the Council's view that greater use could be made of fines in combination with CCOs as a means to increase the punitive component of the sanction. This would be particularly appropriate if an offender was sentenced to a 'core conditions' only CCO. In expressing this view, the Council is mindful of the problem of unequal impact of fines. While the court can take into account an offender's inability to pay, there is currently no power to increase a fine on the grounds

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596 See *Sentencing Act 1997* (Tas) ss 36, 42.

597 See TSAC, above n 4, [5.1.1].

598 See *Sentencing Act 1997* (Tas) ss 36(6), 42(6). Prior to 1 January 2011, breach of a probation order and breach of a community service was a separate offence. Following recommendations of the TLRI, the offences of breach were abolished by the *Justice and Related Legislation (Further Miscellaneous Amendment) Act 2009* (Tas).

599 Email from Ms Georgette Chilcott, Senior Practice Consultant, Community Corrections to Rebecca Bradfield, 3 June 2015.

of the affluence of an offender and this means that the fine has unequal impact.<sup>600</sup> Accordingly, in line with the view of the TLRI that the English approach should be enacted (which requires courts to consider the offender's financial circumstances and whether this has the effect of increasing or reducing the amount of the fine), the Council's recommendation is that court should be required to consider the offender's financial circumstances and whether this has the effect of increasing or decreasing the amount of a fine.<sup>601</sup> As Warner has written, 'the criminal justice system should at least aim to ensure that financial penalties, which are easily adjustable, impose the same punishment on differently circumstanced offenders for the same offence'.<sup>602</sup> This was supported by the Synod and PAOCCA.

The CCO could also be combined with a term of imprisonment of two years or less (including pre-sentence detention on remand) as a replacement for a PSS. For example, the combination of two years' imprisonment plus a three-year CCO gives a total five years, which would be sufficiently severe to cover most suspended sentence cases. In the DPP's submission, concern was raised about limiting the term of imprisonment that could be combined with a CCO to two years. This is discussed further at [8.1].

### Resourcing and transitional arrangements

As indicated at [1.4], the Council is aware that the introduction of the CCO will have considerable resource implications, given that an unconditional suspended sentence is currently resource neutral. All offenders who receive a CCO will require supervision from Community Corrections, and in cases where special conditions are imposed, there will need to be appropriate resourcing for pre-sentence reports, judicial monitoring, programs, treatment, testing and monitoring of curfew and exclusion conditions. The DPP also noted the additional pressure that the new order would place on judicial, prosecutorial and defence counsel resources. It remains the Council's strongly held view that the success (or failure) of any sentencing reform will be dependent on any new sanction being properly funded. This view was supported in the submissions of the DPEM, ATDC, DPP and PACCOA.

The Council's view is also that there needs to be an appropriate transition period and stresses that there must be a long phase-in period during which time the CCO should operate in conjunction with the suspended sentence. As stated at [1.4], the Council's view is that the use, operation and resource implications of any new sanction needs to be carefully monitored, analysed and understood to allow any unintended consequences of the reforms to be identified and addressed. It will also allow time to plan the change process, to assess and develop the necessary infrastructure and services, and to obtain the necessary human and financial resources to ensure that the reforms can be successfully implemented.<sup>603</sup> A significant transition period is also necessary to allow courts, service providers, government agencies and the community to develop confidence in the new orders. The Council's view is that a transition period (where the new sanctions and suspended sentences operate side by side) of at least five years is appropriate for these purposes.

While the Council considers that suspended sentences should operate along side the CCO during the transition period, given that the CCO replicates many features of probation and the CSO, it is the Council's view that these orders should be replaced by the CCO from its introduction.

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600 See TLRI, above n 26, [3.9.14].

601 Ibid [3.9.20].

602 Kate Warner, 'Equality Before the Law and Equal Impact of Sanctions: Doing Justice to Differences in Wealth and Employment Status' in Lucia Zedner and Julian Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press, 2012) 225, 234.

603 These features have been identified as preconditions to the successful implementation of sentencing reform and to provide protection against unintended consequences: see VSAC, above n 15 [13.8] referring to the Halliday review, above n 15.

## Recommendations

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### *Community correction order (CCO)*

32. A new intermediate sanction called a CCO should be introduced in Tasmania with a maximum term of three years.
33. The CCO should not be a substitutional sanction but should be a sanction in its own right and not an alternative means of serving a term of imprisonment.
34. The CCO should sit below imprisonment, alcohol and drug treatment orders and home detention, and above a fine.
35. The current provisions for probation orders and community service orders contained in the *Sentencing Act 1997* (Tas) should be repealed following the introduction of the CCO.
36. The current provisions for suspended sentences of imprisonment contained in the *Sentencing Act 1997* (Tas) should be retained for at least five years following the introduction of the CCO.
37. Appropriate funding should be made available for the CCO.
38. There should be legislative direction that:
  - the CCO is an appropriate order where the court would have imposed a suspended sentence of imprisonment and that the order can be used for serious offending;
  - the overarching principles of the imposition of the CCO are proportionality and suitability;
  - the requirement of proportionality requires the court to first assess the objective nature and gravity of the offence and the moral culpability of the offender. The court should then consider whether, in view of the seriousness as assessed, imprisonment is the only just punishment or whether a CCO, either alone or in conjunction with a sentence of imprisonment, would satisfy the requirements of just punishment. Proportionality also precludes imposing a longer sentence merely for the purpose of protecting society by ensuring the treatment for a mental illness or drug or alcohol addiction;
  - suitability requires that the court should ensure that the CCO is carefully tailored to the circumstances and particular needs of the offender;
  - mental illness, drug addition and/or homelessness do not preclude an offender from consideration for a CCO. In considering whether the imposition of a CCO is appropriate where there may be difficulties in an offender complying with the order and its conditions, the court should proceed on the assumption that any difficulties with compliance will abate once a treatment process is underway, although there may be cases where a CCO will not be appropriate as there is no realistic prospect of compliance;
  - a pre-sentence report should be a pre-condition of a CCO if the court is considering imposing special conditions on an offender; however, there should be no need for a pre-sentence report if the court only intends to impose core conditions;
  - the maximum term of a CCO should be three years;
  - an order should only contain the minimum number of conditions consistent with proportionality, the purposes of sentencing and the purposes of a CCO.

## Recommendations

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### *Community correction order (CCO) continued*

39. The following core conditions should be attached to a CCO:
- not commit an offence punishable by imprisonment;
  - report within one clear working day to a probation officer at the place specified in the order;
  - report to a probation officer as required;
  - not leave or stay outside Tasmania without the permission of a probation officer;
  - comply with reasonable and lawful directions given by a probation officer;
  - give notification to a probation officer of any change of address or employment before, or within two working days after, the change.
40. In addition to the core conditions, the court should be able to attach any of the following special conditions:
- submit to the supervision of a probation officer;
  - the offender attend educational and other programs as directed by the court or a probation officer;
  - the offender undergo assessment and treatment for alcohol or drug dependency as directed by a probation officer;
  - the offender submit to testing for alcohol or drug use as directed by a probation officer;
  - the offender submit to medical, psychological or psychiatric assessment or treatment as directed by a probation officer;
  - the offender undertake community service up to a maximum period of 240 hours;
  - place and non-association conditions are imposed on the offender;
  - the offender is subject to judicial monitoring;
  - alcohol exclusion is imposed on the offender;
  - a curfew is imposed on the offender; and
  - such other special conditions as the court thinks necessary or expedient.
41. A breach of a CCO should have serious consequences. There needs to be a robust administrative procedure in place in relation to recording breaches (even if not actioned) and there should be a clear process for making an application to the court in cases where an offender has committed an imprisonable offence or a serious breach (or multiple minor breaches) of other conditions of a CCO.
42. The following powers should be available on breach:
- confirm the order as originally made;
  - increase the period during which the order has effect;
  - vary the special conditions to which the order is subject;
  - cancel the order and deal with the offender for the offence or offences in respect of which the order was made in any manner in which the court could deal with the offender had it just found the offender guilty of that offence or those offences; or
  - cancel the order and, if it considers it appropriate, any other order made by the court in respect of the offence in respect of which the CCO order was made, and deal with the offender for that offence in any manner in which the court could deal with the offender had it just found the offender guilty of that offence.

## Recommendations

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### *Community correction order (CCO) continued*

43. A breach of a CCO should not be a separate offence but it is necessary to ensure that breaches are enforceable beyond the expiration of the order.
44. The CCO should be able to be combined with a rehabilitation program order for family violence offences, driving disqualification and/or a fine.
45. In imposing a fine, the court should be required to consider the offender's financial circumstances, whether this has the effect of increasing or decreasing the amount of the fine.
46. The CCO should be able to be combined with a term of imprisonment of up to two years or less (including pre-sentence detention).

# 8.

## *Intermediate sanctions as replacements for partly suspended sentences*

Currently in Tasmania, a court can fully or partly suspend a sentence of imprisonment. As indicated, 944 offenders received a PSS between 2011 and 2014 (195 in the Supreme Court and 749 in the Magistrates Court).<sup>604</sup> PSSs involve a period of imprisonment followed by release into the community, with or without supervision. An advantage of PSSs is that they allow the court to impose an immediate term of imprisonment where warranted by the seriousness of the offence as well as allowing for a period of supervision following release from prison.<sup>605</sup> This is clearly a useful feature of PSSs, but this outcome can be achieved by other semi-custodial sanctions, either operating as a discrete sanction or by combining two or more different sentencing orders.<sup>606</sup> This chapter considers combination sentences and parole as alternatives to PSSs in Tasmania.

### **8.1 COMBINATION SENTENCES**

A combination sentence is one that uses two or more different sentencing orders. In Victoria, the 'shandy' sentence or combined imprisonment and CCO is increasingly being used as a replacement for the PSSs,<sup>607</sup> and it is the Council's view that imprisonment combined with a CCO would serve as an effective replacement for PSSs in Tasmania. This was supported in the submissions of PACCOA and the Synod.

The use of combination orders has the potential to operate as an effective replacement for the PSSs, given that combination sentences and PSSs share the following features:

- the release date is determined by the court (and therefore becomes a form of court-ordered parole);
- the court tailors the conditions of the CCO and its length;
- the court retains control on contravention of the CCO.<sup>608</sup>

It is the Council's view that a term of immediate imprisonment of two years or less followed by a CCO of up to three years would allow the court to impose a period of supervision on release from prison, as well as requiring the offender to take part in activities directed toward addressing the underlying factors that contributed to his or her offending behaviour. Such a sentence would be appropriate where a short term of imprisonment is required (consistent with the principle of parsimony), with the CCO being able to assist an offender's rehabilitation and reintegration.<sup>609</sup> Consistent with current sentencing practice in relation to suspended sentences, this approach also allows the court to decide that an offender's pre-trial period in prison is sufficient punishment and so backdate the sentence to take account of time served and then release an offender on a CCO.

It is also capable of creating a severe punishment covering most cases where a PSS has been imposed. In Tasmania, there were only 9.2% of PSSs (n=7) in the Supreme Court and no PSSs in the Magistrates Court where the unsuspended portion of the sentence exceeded two years.<sup>610</sup> As recognised by the Victorian Court of Appeal in its

604 See TSAC, above n 4, [3.1.1], [4.1.1].

605 VSAC, above n 15 [8.58].

606 Ibid [8.1].

607 Information provided by Arie Freiberg.

608 These features of the community correction order were taken from Victoria Legal Aid, *Further Submissions on Behalf of VLA* (2014) [15].

609 See *Boulton v The Queen* [2014] VSCA 342, [142]–[145].

610 See TSAC, above n 4, [3.1.3], [4.1.3].

guideline judgment, the ability to combine imprisonment with a CCO allows the court, even in cases of objectively grave criminal conduct, to:

conclude that some or all of the punitive, deterrent and denunciatory purposes of sentencing can be sufficiently achieved by a short term of imprisonment of up to two years if coupled with a CCO of lengthy duration, with conditions tailored to the offender's circumstances and the causes of the offending, directed at rehabilitative purposes.<sup>611</sup>

The use of combination sentences has been the approach adopted in Victoria to the abolition of the PSSs and the combined custody and treatment order.<sup>612</sup> In Victoria, it is possible to combine a CCO with a term of imprisonment.<sup>613</sup> Between January 2012 and June 2013, 6.2% of CCOs imposed in the Magistrates Court were combined with imprisonment, as were 10.3% of orders imposed in the higher courts.<sup>614</sup> Recent research conducted by VSAC has found there has been a substantial increase in the use of the combined imprisonment and CCO order between the September quarter of 2014 and the December quarter of 2014 — combined sentences increased 62.3% in the Magistrates Court and 238.9% in the higher courts.<sup>615</sup>

Initially, the term of imprisonment was limited to three months, but now the CCO can be combined with a term of imprisonment not exceeding two years, with the exception of arson offences, where the order can be combined with a sentence of imprisonment of any length.<sup>616</sup> The purpose of increasing the term of imprisonment was to provide courts with greater flexibility,<sup>617</sup> and it has increased the options available to the sentencer. The combination order has the effect that the CCO commences once the offender is released from prison and any period served on parole has expired.<sup>618</sup> This is a most significant change and there has been an increase in 'shandy' sentences of up to two years imprisonment with a CCO, which is effectively court ordered parole. In Victoria, the Parole Board has been conservative in its decision-making, so courts now have the power to order release following a long period of imprisonment (for example, two years) without the intervention of the Parole Board.<sup>619</sup>

In the DPP's submission, concern was raised about limiting the period of imprisonment that could be combined with a CCO to two years. The DPP wrote that a CCO 'is a very wide order and the recommendation is not just in place of a suspended sentence but the report also recommends the abolishment of a probation order'. As a result, the DPP argued:

Generally speaking, when an accused person is given a lengthy sentence for a significant period of the sentence parole is available and therefore an accused person upon serving the non-parole period of imprisonment is subject to significant supervision upon his return to the community, eg parole conditions that contain residential conditions, reporting conditions, non-alcohol conditions, etc. However, this is not always the case. If a person has a particularly bad record he may not receive parole or only a small period of parole. In those circumstances, a person who has had numerous prior convictions and has served a lengthy sentence of imprisonment would be released in to the community without any supervision whatsoever. At present, in those circumstances, to overcome this situation, the court will not provide parole but will make a probation order on his release from prison.

Therefore, I would suggest that if probation orders are to be abolished (and I accept there is no good reason for them if there is a wide-based community correction order) then for sentences greater than two years' imprisonment judges should be given the power, particularly where they do not apply parole periods, to make an order so a person has some supervision when he is released from prison.

The Council did not consider this scenario in making its preliminary recommendation and, based on the concern raised by the DPP, has investigated the issue further. The concern of the DPP focused on the need for supervision in cases where an offender was sentenced to a lengthy sentence with no or limited parole and, in the period 1 July 2011 to 31 December 2014, the Council identified only one case where an offender was sentenced to a lengthy

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611 *Boulton v The Queen* [2014] VSCA 342, Appendix 1, [27].

612 See VSAC, above n 15, [7.5]–[7.7], [7.50]–[7.79] for discussion of combined custody and treatment order.

613 *Sentencing Act 1991* (Vic) s 44.

614 VSAC, above n 73, 15, 38.

615 *Ibid* 20.

616 *Sentencing Act 1991* (Vic) s 44(1), (1A), as amended by the *Sentencing Amendment (Emergency Workers) Act 2014* (Vic).

617 Victoria, above n 467.

618 *Ibid*.

619 Information provided by Arie Freiberg. See also Gelb, above n 126, 62–64; Bartels, above n 154, 364–365. There has been considerable criticism directed at the Parole Board in Victoria, see Ian Callinan, *Review of the Parole System in Victoria* (2013) <<http://assets.justice.vic.gov.au/corrections/resources/11ee85a1-67c5-4493-9d81-1ce49941cce5/reviewadultparoleboardv1.pdf>>. See also VSAC, *Review of the Victorian Adult Parole System* (2012).

term of imprisonment with no or limited parole followed by a probation order.<sup>620</sup> The Council also examined the use of a combination imprisonment/probation order in the Supreme Court more generally to ascertain other cases where the court had combined a probation order with a term of imprisonment, in particular where the term of imprisonment was greater than two years. While the Council identified an additional 30 cases where a combination imprisonment/probation order was made in relation to an adult offender, there were only two cases where the term of imprisonment imposed was greater than two years in the period 1 July 2011 to 31 December 2014.<sup>621</sup> It is also noted that in both cases identified where the offender had a combined imprisonment/probation order with a term of imprisonment greater than two years, the offender was eligible to apply for parole after serving half of their sentence. If the offender applied for and was granted parole, the parole system would provide supervision in the community. The Council's analysis suggests in the vast majority of cases the court will be able to use a combined imprisonment/CCO in the same way as it previously used an imprisonment/probation order. Consequently, the restriction of the combination imprisonment/CCO order to terms of imprisonment of two years and less (based on current sentencing practice) will not generally present a difficulty.

However, the Council, in its discussions, has identified concerns in relation to offenders who are released without supervision after serving prison sentences, either because the offender was not eligible for parole or, if eligible, did not apply for parole or was not granted parole. Research has consistently shown that 'imprisonment has, at best, no effect on the rate of reoffending and is often criminogenic, resulting in a greater rate of recidivism by imprisoned offenders compared with offenders who received a different sentencing outcome'.<sup>622</sup> In Tasmania, 39.3% of prisoners released during 2011-12 were returned to prison within two years of release and 49.4% returned to prison or community corrections.<sup>623</sup> However, research has shown that levels of supervision and support following release from prison have an effect on reoffending.<sup>624</sup> Offenders are vulnerable on release and may require support into housing, employment, training and substance abuse programs to facilitate re-integration into the community and as protective measures against reoffending. One option may be to allow the court to impose a CCO with a sentence of imprisonment longer than two years to provide for supervision in the appropriate case. However, it is not clear that the CCO is necessarily the most appropriate mechanism given issues in relation to proportionality, the relationship between parole and the CCO and the purposes of the CCO. There is a risk of conflating the issues of what sanctions should be available to a court at the time of imposing a sentence with the disposition of an offender at the conclusion of a long term of imprisonment. Matters that would need to be considered include the nature and timing of the risk assessment process, the appropriate body to make the determination as to the nature and length of the supervision period, the appropriate supervising agency and the relationship of a supervisory order to parole. These issues require further consideration beyond the scope of this report.

In addition, the concerns of the Council raise broader issues about the need to support offenders on release from prison and the limitations of the prison system from the perspective of rehabilitation. The Council's view is that the question of post-release options raise a number of separate and complex issues relating to the use of parole and any different form of supervision that should be imposed as part of, or in addition to, a sentence of imprisonment, especially where the offender presents an unacceptable risk to the community.<sup>625</sup> This is complex and the Council will give further consideration to this matter.

In Victoria, additional difficulties have arisen when the length of imprisonment imposed allows the court to set a non-parole period. There are challenges if the court imposes both a non-parole order and a CCO given that the two orders operate under different systems with their own planning, monitoring and breach requirements.<sup>626</sup> This raises conceptual and theoretical difficulties including the likely divergence in the nature, scope and intensity of

620 *Devine*, 1 November 2013, Comments on Passing Sentence, Blow CJ. This case involved a sentence of seven years' imprisonment with no parole, followed by two-year probation order. There was an unsuccessful appeal against sentence but it did not consider the use of probation at the end of a lengthy period of imprisonment, see *Devine v Tasmania* [2015] TASCRA 19.

621 *Riley*, 29 October 2013, Comments on Passing Sentence, Wood J; *Blake*, 26 August 2011, Comments on Passing Sentence, Crawford CJ.

622 VSAC, 'Does Imprisonment Deter? A Review of the Evidence' (2011) 23. See also Judy Trevena and Don Weatherburn, 'Does the First Prison Sentence Reduce the Risk of Further Offending?' (New South Wales Bureau of Statistics and Research, Contemporary Issues in Crime and Justice 187, 2015) where it was found that there is no particular deterrent effect in receiving a prison sentence for people who had not previously been sentenced to prison: at 11.

623 Australian Productivity Commission, *Report on Government Services* (2015) C21.

624 See Wai-Yin Wan, Suzanne Poynton and Don Weatherburn, 'Does Parole Supervision Reduce the Risk of Re-offending?' (2015) *Australian and New Zealand Journal of Criminology*, first published online on 21 May 2015.

625 The Council has previously recommended the introduction of a form of extended supervision order. This was the recommendation of the TSAC, see *Sex Offence Sentencing*, Final Report 4 (2015) Recommendations 13 and 14.

626 VSAC, above n 515, [86].

conditions and the difficulties arising on breach of the non-parole period, which may lead to disruptions in relation to the commencement and continuity of CCO programs.<sup>627</sup> In view of these challenges, VSAC has suggested that parole orders and CCOs should only be used by courts as alternative community supervision orders.<sup>628</sup> In the guideline judgment, the Court of Appeal agreed that there were 'significant conceptual and practical difficulties' with a combination of parole and a CCO. Similarly, in Tasmania, the Council's recommendation is that parole orders and CCOs should only be used in the alternative. This recommendation was supported by the Synod.

## Recommendations

### *Combined imprisonment and CCOs as a replacement for partly suspended sentences*

47. PSSs should be replaced by the use of a combination sentencing order of imprisonment of a term of two years or less and a CCO of up to a maximum term of three years.
48. There should be a legislative direction that if the court imposes a combined sentence of imprisonment and a CCO, then the court must not impose a non-parole period.

## 8.2 PAROLE

An alternative model for the replacement of PSSs would be the use of parole. Parole 'is a system of early, supervised release'.<sup>629</sup> In Tasmania, there is a discretionary parole system, where the court sets the non-parole period and a parole board makes the decision whether the offender should be released at the expiry of the non-parole period.<sup>630</sup> Under the *Sentencing Act 1997* (Tas), the court can make an order that an offender is not eligible for parole before serving the period specified in the order, which must be not less than one-half of the period of the sentence.<sup>631</sup> However, there are several key differences that make parole an imperfect substitute for PSSs:

- parole is not automatic at the expiration of the non-parole period and, instead, is determined by the Parole Board whereas an offender sentenced to a PSS is automatically released.
- an offender cannot be released on parole until the expiration of the non-parole period (which is at least half of the sentence) or six months, whichever is greater, unless there are exceptional circumstances. This makes it an unsuitable replacement for most of the offenders who currently receive PSSs as they would not be eligible for parole. In the Supreme Court, between 2011 and 2013–14, PSSs typically involved short sentences of imprisonment with the unsuspended portion of the PSSs being less than 9 months for 80.5% of offenders (n=170).

While there could be changes to the time limits that apply to parole to accommodate offenders who would have received PSSs, it is the Council's view that the parole system is not the most suitable vehicle to replace PSSs in Tasmania. This recommendation was supported by the Synod and PACCOA.

## Recommendation

### *Parole as a replacement for partly suspended sentences*

49. The parole system should not be used as the replacement for PSSs.

627 Victoria Legal Aid, above n 608, [27].

628 VSAC, above n 515, [86].

629 TLRI, above n 26, [5.1.2].

630 See NSWLRC, *Question Paper 1: Design and Objectives of the Parole System*, (2013) [1.53]; Bartels, above n 154 for a discussion of the different models of parole in Australia.

631 *Sentencing Act 1997* (Tas) s 17(2)(b), (3).

# 9.

## *Deferral of sentencing*

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Deferral of sentence is available for adult offenders in a number of jurisdictions including NSW, Victoria, South Australia, Western Australia, the ACT, and England and Wales.<sup>632</sup> In Victoria, this power is limited to the Magistrates Court and the County Court; however, in other jurisdictions the power can be exercised by all courts.<sup>633</sup> It is not an option in Tasmania for adult offenders. However, the power to defer the imposition of sentence was recently introduced for youth offenders.<sup>634</sup> As indicated in chapter 5, the Council's preliminary view is that deferral of sentencing should be introduced in Tasmania for all offenders.

Deferral of sentencing is a power that allows the court to postpone the sentencing of an offender for a specified time, generally to allow the offender to address the underlying causes of their offending behaviour, to facilitate the offender's rehabilitation or to allow the offender to take part in activities aimed at addressing the impact of the offending behaviour on the victim.<sup>635</sup> This is not a sentencing disposition but a pre-sentencing option that 'has the potential to allow the courts to deal with a wide range of less serious cases where the court needs time to consider the outcome or public or private treatment or other interventions, or the outcome of restorative justice conferences'.<sup>636</sup>

Deferred sentencing has been identified as a replacement for FSSs in some circumstances. Stakeholders in Victoria have expressed the view that deferred sentencing may operate in the same way as a FSS at the 'low end of the "suspended sentence market"'.<sup>637</sup> In particular, the view has been expressed that deferred sentencing might function in the same way as FSSs for offenders who participate in treatment programs prior to sentencing (demonstrating their capacity for rehabilitation) and subsequently receive a suspended sentence to allow them to continue with their treatment.<sup>638</sup> Yet, others were not so optimistic and expressed doubts about the political viability of the deferred sentence operating as a replacement for suspended sentences. It was said that 'in the risk-adverse environment, deferred sentencing might only be viable for low-risk offenders, who might be unlikely to risk serving a term of imprisonment anyway'.<sup>639</sup> In addition, the court still needs to impose a sentence on the offender at the expiration of the period of deferral and, if the offender provides evidence of rehabilitation (and so the period of deferral is successful), the court may impose a minimal sentence. This may result in criticism of the court on the basis of perceived leniency or weakness.<sup>640</sup>

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632 See Appendix C Table C-1.

633 This followed recommendations by VSAC, above n 15, [12.83].

634 *Youth Justice Act 1997 (Tas) Part 4 Div 7A* inserted by *Youth Justice (Miscellaneous Amendments) Act 2013 (Tas)* commenced 1 March 2014.

635 See Appendix C Table C-1.

636 Freiberg, above n 35, [2.275].

637 Gelb, above n 126, 53.

638 Ibid.

639 Ibid 55.

640 Arie Freiberg and Neil Morgan, 'Between Bail and Sentence: the Conflation of Dispositional Options' (2004) 15 *Current Issues in Criminal Justice* 220, 230.

## 9.1 PURPOSE OF DEFERRAL

In all jurisdictions, there is a legislative statement that sets out the purpose of a deferral to guide the use of the power.<sup>641</sup> It is considered desirable that a purpose is included as it 'assist[s] the courts in using this option only when it will be of most benefit and also help[s] to ensure that the deferral is not used by defendants as a means of unnecessarily prolonging proceedings'.<sup>642</sup> Typically, the purposes of deferral include reference to the need to allow an offender to address the causes of his or her offending behaviour and rehabilitation. However, in some jurisdictions, there is also reference to restorative justice in the deferral of sentence provisions. In Victoria, the statement of the purpose of the deferral of sentencing also expressly extends to restorative purposes. The *Sentencing Act 1991* (Vic) s 83(1A) provides that deferral is for the purpose of:

- allowing the offender's capacity for and prospects of rehabilitation to be assessed;
- allowing the offender to demonstrate that rehabilitation has taken place;
- allowing the offender to participate in a program or programs aimed at addressing the underlying causes of the offending;
- allowing the offender to participate in a program or programs aimed at addressing the impact of the offending on the victim;
- for any other purpose that the court considers appropriate having regard to the offender and the circumstances of the case.<sup>643</sup>

In England and Wales, the purpose of the option is more generally expressed as allowing the court to have regard in dealing with the offender to their conduct after conviction, including the making of reparation, and any change in circumstances.<sup>644</sup> However, amendments in 2013 specifically included participation in restorative justice activities as a requirement that the court can impose on the offender during the period of deferral.<sup>645</sup>

In NSW and South Australia, in addition to rehabilitative purposes, the court may defer sentencing to allow an offender to be assessed for, and then participate in, an intervention program.<sup>646</sup> In the ACT, the court can defer sentencing 'if the court considers the offender should be given an opportunity to address his or her criminal behaviour, and anything that has contributed to the behaviour, before the court sentences the offender for the offence'.<sup>647</sup> Similarly, in Western Australia, the court can make a pre-sentence order (as it is known) if it considers that it 'would allow the offender to address his or her criminal behaviour and any factors which contributed to the behaviour'.<sup>648</sup> Similarly, under the *Youth Justice Act 1997* (Tas) s 56A, the court may defer sentencing for the purposes of rehabilitation, an intervention plan and for any other purpose that the court thinks is appropriate in the circumstances.

## 9.2 BENEFITS OF DEFERRAL

The benefits of deferral of sentencing have been identified by VSAC as follows:

- it allows the courts more time to assess the appropriate sentence for an offender including, in the case of conditional orders, the best mix of conditions;
- it gives offenders an opportunity to demonstrate their rehabilitation and/or the genuineness of their commitment to rehabilitation;

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641 See Appendix C Table C-1.

642 VSAC, above n 15, [12.80].

643 This followed recommendations by VSAC, above n 15, Recommendation 13-3. VSAC considered that 'deferral of sentencing could provide a useful means by which the court could encourage participation in [restorative justice] programs. From a victim's perspective, the use of restorative justice could result in greater satisfaction with the process, while for the offender it may lead to a better understanding of the impact of his or her offending behaviour on that those directly affected by it': at [12.86].

644 *Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 1.

645 *Ibid* ss 1(3), 1Z.

646 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11(2A); *Criminal Law (Sentencing) Act 1988* (SA) s 19B(1). In NSW, there are three legislatively based intervention programs: (1) Traffic Offenders' Intervention Program; (2) Forum Sentencing (based on restorative justice principles); and (3) Circle Sentencing (Adult Aboriginal and Torres Strait Islander offenders), see NSWLRC, above n 60, [16.63]-[16.99].

647 *Crimes (Sentencing) Act 2005* (ACT) s 27(1)(d).

648 *Sentencing Act 1995* (WA) s 33B(3)(b).

- it allows time for the offender's condition to be stabilised if an offender has other issues, such as a mental illness;
- it provides for alternative processes to take place, such as restorative justice conferences, and where appropriate, to take these into account in sentencing.<sup>649</sup>

Deferred sentencing is a:

useful tool in assisting the court to be better informed about an offender's circumstances and prospects for rehabilitation prior to sentencing. It provides the offender with an opportunity to establish with the court his or her rehabilitative potential in real terms, rather than relying entirely on reports.<sup>650</sup>

This has been recognised by the NSW Court of Criminal Appeal in *R v Trindall*,<sup>651</sup> where Smart AJ stated that:

[I]t is so much better for the court to have evidence of what has actually taken place than to have to base its decision on the options of experts, assertion by the offender and what has happened over a short period of time, that is, since the commission of the offence or the offender's arrest.<sup>652</sup>

There is also a belief that deferral of sentencing may encourage an offender to enter a plea of guilty earlier in the criminal justice process, rather than delaying to 'buy themselves additional time to demonstrate their rehabilitation'.<sup>653</sup> It may also facilitate rehabilitation given that it operates pre-sentence when 'offenders are particularly motivated to demonstrate that they have addressed their offending behaviour'.<sup>654</sup>

### 9.3 MAXIMUM PERIOD OF DEFERRAL

The maximum period of deferral varies between jurisdictions with deferral being allowed for six months in England and Wales, 12 months in NSW, Victoria, South Australia (subject to a discretion to adjourn for longer where the offender is participating in an invention program), and the ACT and two years in Western Australia.<sup>655</sup>

In setting the period of deferral, there are conflicting views about the appropriate length. A concern raised in relation to longer deferral periods is that young offenders, offenders with a mental impairment or intellectual disability, offenders with drug and alcohol issues and other special needs/high risk offenders 'may be set up to fail'.<sup>656</sup> Further, there is a concern that the sentencing process is delayed and that this may disadvantage victims.<sup>657</sup> On the other hand, the period of deferral needs to be sufficient to allow the offender to take advantage of the opportunity to demonstrate rehabilitation.

### 9.4 CONDITIONS OF DEFERRAL

In Australia, except in Western Australia and the ACT, in cases where an offender's sentence is deferred, the offender is released on bail.<sup>658</sup> In the ACT, the court can impose bail or the court can impose conditions on the deferral of sentencing.<sup>659</sup> In Western Australia and in England and Wales, the court can impose conditions on an offender rather than use bail conditions. In England and Wales, the court can only defer a sentence if the 'offender undertakes to comply with any requirement as to his conduct during the period of the deferment that the court considers it appropriate to impose'<sup>660</sup> and this can include a requirement to participate in restorative justice activities.<sup>661</sup> In Western Australia, the standard obligations of a pre-sentence order are reporting obligations to community corrections officers and the court can also impose a supervision requirement, a program requirement and a curfew requirement.<sup>662</sup>

649 VSAC, above n 15, [12.58].

650 Ibid [12.77].

651 (2002) 133 A Crim R 119.

652 Ibid [60].

653 VSAC, above n 15, [12.82].

654 NSWLRC, above n 60, [16.57].

655 See Appendix C Table C-1.

656 VSAC, above n 15, [12.64] quoting Youthlaw's submission.

657 Ibid [12.66] referring to Victoria Police.

658 See Appendix C Table C-1.

659 See *ibid*. See also VSAC, above n 15, [12.19].

660 *Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 1(3).

661 Ibid s 1Z.

662 *Sentencing Act 1995* (WA) ss 33D, 33E.

The imposition of onerous conditions as part of a deferral of sentence has been criticised on the basis that, in principle, such conditions should only 'be part of a formal sentence' of the court and not as a condition of a deferral of sentence, which is a 'conditional non-sentence'.<sup>663</sup> Otherwise, it is said that the appropriate boundaries between guilt, conviction and sentence are blurred as such an order has 'all the hallmarks of a sentence'.<sup>664</sup> Accordingly, VSAC took the view that if the conditions required CCS to be involved, then these conditions should be part of the formal sentence of the court and not a condition of deferral (which is not a sentence).<sup>665</sup> VSAC argued that this would mean that:

an appropriate distinction is maintained between conditional sentences ... that quite legitimately may require the involvement of CCS, and deferral, which is intended to give offenders the opportunity to address issues that have contributed to their offending by accessing counselling and other services in the community on their own initiative.<sup>666</sup>

Another criticism of deferral of sentencing is that its success tends to depend on the availability of resources to the offender and, 'while deferral tends to work well with offenders with many resources at their disposal, it can put those who do not at a disadvantage'.<sup>667</sup> This was reflected in the submissions to the NSWLRC that identified the need to provide appropriate resources to support vulnerable offenders (for example, offenders with intellectual disabilities, cognitive and mental health issue and Aboriginal and Torres Strait Islander offenders) to access and comply with rehabilitation programs.<sup>668</sup> One of the issues that has arisen in Victoria in relation to the CCO and deferred sentences is that offenders are required to pay for many of the services that are required under the order. This means that offenders without means cannot fulfil the conditions of the order, or get the services that they need, even if they have signed the consent form necessary to undergo the order.<sup>669</sup>

## 9.5 REVIEW POWERS

In Victoria, Western Australia and the ACT, there is provision for the court to review the progress of an offender during the time that sentencing is deferred.<sup>670</sup>

There are opposing views as to whether or not a review power is appropriate. VSAC recommended that the court should have an 'explicit power of review to ensure that the purpose for which the sentence was deferred is being fulfilled'.<sup>671</sup> On this view, judicial monitoring is a powerful tool. An alternative view is that it is not the role of courts to manage offenders' sentences or to be 'rehabilitative agents',<sup>672</sup> and that imposing this obligation on courts will increase delays in the criminal justice system.

## 9.6 SENTENCING FOLLOWING DEFERRAL

In Victoria and Western Australia, the court is required to have regard to the offender's behaviour during the period of deferral when ultimately imposing sentence. However, in other jurisdictions, there is no legislative imperative to do this.<sup>673</sup> In the ACT, the court is required to give an indication of the sentence that the offender might receive at the time of entering the order, but there is no requirement to take the offender's behaviour into account when sentencing.<sup>674</sup>

Some concerns have been raised about the use of deferral of sentencing in circumstances where it is likely that, regardless of what the offender does during the period of deferral, the offender will be sentenced to a term of imprisonment.<sup>675</sup> This is said to create 'unrealistic expectations on the part of offenders as to the sentence they will receive if they undertake the activities suggested during the deferral period'.<sup>676</sup> This issue has been addressed by the

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663 Freiberg and Morgan, above n 640, 230. See also VSAC, above n 15, [12.60].

664 Freiberg and Morgan, above n 640, 230.

665 VSAC, above n 15, [12.60].

666 Ibid.

667 Ibid [12.54].

668 NSWLRC, above n 60, [16.58]–[16.59].

669 Information provided by Arie Freiberg.

670 See Appendix C Table C–1.

671 VSAC, above n 15, [12.81].

672 Ibid [12.57].

673 See Appendix C Table C–1.

674 See *ibid*.

675 VSAC, above n 15, [12.55].

676 Ibid.

NSW Court of Criminal Appeal, where it was held that the court can order a deferral, even if a full-time sentence of imprisonment will be ordered.<sup>677</sup> The offender's conduct during the period of deferral may be useful for the court in determining the length of the sentence and/or non-parole period.<sup>678</sup>

A more restrictive approach has been adopted in South Australia, where the approach of the court to ordering the deferral of sentence should be to ask:

- whether the appropriate penalty, on the assumption that the defendant has the capacity to reform and demonstrates such capacity and commitment and taking into account all other relevant factors, is a bond or a suspended sentence; and
- whether a deferred sentence would afford the defendant the opportunity to pursue the possibility of reform, so as to provide the court with evidence of capacity and prospects for reform that will then allow the court to fashion an order that will best protect the community and serve the purposes of punishment where it otherwise is not in a position to do so.<sup>679</sup>

In Western Australia, it appears that a pre-sentence order is not appropriate if no other sentence than a term of imprisonment would be appropriate, regardless of the behaviour of the offender during the period of deferral. The *Sentencing Act 1995 (WA)* s 33A(3) provides that the court may make a pre-sentence order if 'the seriousness of the imprisonable offence or offences warrants the imposition of a term of imprisonment' and that 'if the offender were to comply with a pre-sentence order, the court might not impose a term of imprisonment for the offence or offences'. This limits its operation to borderline cases rather than cases where imprisonment is inevitable.<sup>680</sup>

## 9.7 THE COUNCIL'S PRELIMINARY VIEW

In the *Consultation Paper*, the Council's draft recommendation was that deferral of sentencing should be extended to adult offenders with a maximum deferral period of 12 months.

## 9.8 SUBMISSIONS

The Synod supported the Council's draft recommendations in relation to deferral of sentencing.

PACCOA endorsed the Council's recommendations regarding deferral of sentencing and encouraged adoption of the provisions of the Victorian legislation. PACCOA considered that this would 'have the effect of giving legislative authority to the Mental Health Diversion List, currently managed by way of bail orders'.<sup>681</sup> PACCOA supported the 'opportunity for offenders to provide sentencing courts with evidence with respect to their rehabilitation as well as for restorative processes to be undertaken', and noted 'the considerable value of judicial oversight in this regard'. PACCOA also noted that the deferral mechanism was relatively low-cost (as it relies on offenders accessing community services on their own initiative), but cautioned that this may 'create an additional demand on relevant non-government services across the sector'.

The Law Society's submission suggested that the maximum period of deferral be two years, rather than the 12 months period suggested by the Council. The Law Society was concerned that there was:

a danger that there will be a judicial reluctance to defer a sentence for which it appears a sentence of imprisonment is the only appropriate sentence, unless there is a great flexibility in the time during the pre-sentence period [where] the offender [can] address the purposes for which the sentence is deferred. A period of compliance for 2 years is considerably of greater weight than 12 months. Further many of the programmes that may be of assistance will no doubt be difficult to access or difficult to assess the success or otherwise of the programmes on behaviour over the 12 month time frame. In serious matters, and the Society includes recidivism of less serious matters in this category, the court may need the succour of a longer period. For these reasons the Society discounts the arguments advanced concerning a shorter period.

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677 *R v Brown* (2009) 193 A Crim R 574; *R v Rayment* (2010) 200 A Crim R 48; *R v Farrell* [2014] NSWCCA 30.

678 VSAC, above n 15, [12.55]; *R v Farrell* [2014] NSWCCA 30, [62] (R A Hulme J, Hoeben CJ at CL and Adams J agreeing).

679 Freiberg, above n 35, [2.275] summarising *R v Thompson* [2012] SASFC 149, [33].

680 *Western Australia v Palmear* [2013] WASCA 291, [25] (Mazza JA).

681 For more detail about the mental health diversion list, see <[http://www.magistratescourt.tas.gov.au/divisions/criminal\\_\\_and\\_\\_general/mental\\_health\\_diversion](http://www.magistratescourt.tas.gov.au/divisions/criminal__and__general/mental_health_diversion)>.

## 9.9 THE COUNCIL'S RECOMMENDATIONS

Based on the experience in other jurisdictions that deferral is seen as a useful sentencing tool, the advantages outlined for the deferral of sentencing and the submissions received, the Council's recommendation is that deferral of sentencing be extended to adult offenders. The Council's view remains that Tasmania requires a range of flexible sentencing options to allow the court to respond to offenders<sup>682</sup> and, accordingly, a power to defer should be available for all offenders. The potential for a deferral of sentencing to allow an offender to address the causes of offending and/or participate in restorative justice programs allows the courts to be better positioned to assess the offender's likely rehabilitation.<sup>683</sup> In order to provide time for such progress to be demonstrated, based on the approach in NSW, Victoria, South Australia and the ACT, the Council's recommendation is that the maximum period for deferral should generally be 12 months. This is on the basis that the Council is concerned to prevent unduly long periods of deferral being imposed. This is also consistent with the provisions under the *Youth Justice Act 1997* (Tas).<sup>684</sup> However, the Council has also given consideration to the concern expressed by the Law Society that flexibility is required to allow a longer period of deferral in cases of serious offending to demonstrate rehabilitation. The Council is persuaded by the merits of the Law Society's argument and for this reason recommends (as with the South Australian provision)<sup>685</sup> that there be a discretion to adjourn for a longer period where the offender is or will be participating in a program aimed at addressing the underlying causes of offending and the court is satisfied that —

- the defendant has, by participating in, or agreeing to participate in, the program, demonstrated a commitment to addressing the problems out of which his or her offending arose; and
- if the proceedings were not adjourned for such a period (i) the defendant would be prevented from completing, or participating in, the program; and (ii) the defendant's rehabilitation would be prejudiced.

The Council also considers that the court should have the power to review an offender's progress during the term of the deferral as a means of ensuring the credibility of the order by allowing the court to monitor for compliance.

The Council notes the concerns expressed in other jurisdictions that deferral should not be used if imprisonment is inevitable. However, the Council's view is that deferral should also be available even in these circumstances. This is because of the Council's view that the power to defer should be available in both the Magistrates Court and Supreme Court and given that the CCO will mean that offenders who previously received a sentence of imprisonment (fully or partly suspended) may now receive a non-custodial sanction. Further, as is the position in NSW, deferral may be relevant to the length of the sentence that the court imposes.

The Council's view is that the purposes for a deferral of sentence should be specified in the legislation. These should include the following:

- allowing the offender's capacity for and prospects of rehabilitation to be assessed;
- allowing the offender to demonstrate that rehabilitation has taken place;
- allowing the offender to participate in a program or programs aimed at addressing the underlying causes of the offending;
- allowing the offender to participate in a program or programs aimed at addressing the impact of the offending on the victim; or
- for any other purpose that the court considers appropriate having regard to the offender and the circumstances of the case.

The Council is also mindful of concerns raised in relation to the potential for disadvantaged offenders to be further marginalised as a result of a lack of resources to access rehabilitation services and its recommendation is that appropriate supports and services be made available for offenders who require financial assistance to access such services. There is also the potential to develop restorative justice programs for adult offenders in Tasmania.

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682 This was the view of VSAC, above n 38, [6.14].

683 See VSAC, above n 15, [12.77].

684 *Youth Justice Act 1997* (Tas) s 47(1A).

685 See *Criminal Law (Sentencing) Act 1988* (SA) s 19B.

It is the Council's view that the court should not be able to impose formal conditions on an offender as part of the deferral of sentence and that bail conditions should instead be used. This is the approach in NSW, Victoria, and South Australia. In coming to this view, the Council was persuaded by argument advanced by VSAC that the court should not impose formal conditions on an offender, as to allow otherwise blurs the distinction between deferral (which is not a formal sentence) and the imposition of sentence. If a court considers it necessary to impose conditions (other than bail conditions), then the court should proceed to impose sentence and not defer the sentence. In addition, it is also consistent with the provisions under the *Youth Justice Act 1997* (Tas), which provides that the court may adjourn the proceedings, grant bail under the *Bail Act 1997* (Tas) and defer sentencing.<sup>686</sup>

## Recommendations

### *Deferred sentencing*

50. Deferred sentencing should be available for offenders sentenced under the *Sentencing Act 1997* (Tas) as well as offenders sentenced under the *Youth Justice Act 1997* (Tas).
51. The maximum period of deferral should be 12 months with a discretion to adjourn for a longer period where the offender is or will be participating in a program aimed at addressing the underlying causes of offending and the court is satisfied that —
  - (a) the defendant has, by participating in, or agreeing to participate in, the program, demonstrated a commitment to addressing the problems out of which his or her offending arose; and
  - (b) if the proceedings were not adjourned for such a period
    - (i) the defendant would be prevented from completing, or participating in, the program; and
    - (ii) the defendant's rehabilitation would be prejudiced.
52. Deferral should be available even if the court is intending to impose a term of imprisonment.
53. The Council's view is that the purposes for a deferral of sentence should be specified in the legislation. These should include the following:
  - allowing the offender's capacity for and prospects of rehabilitation to be assessed;
  - allowing the offender to demonstrate that rehabilitation has taken place;
  - allowing the offender to participate in a program or programs aimed at addressing the underlying causes of the offending;
  - allowing the offender to participate in a program or programs aimed at addressing the impact of the offending on the victim; or
  - for any other purpose that the court considers appropriate having regard to the offender and the circumstances of the case.
54. Appropriate support and services should be made available to offenders who require financial assistance to access rehabilitation services.
55. The court should not be able to impose formal conditions on an offender as part of the deferral of sentence. Instead, the court should be able to adjourn the proceedings, grant the offender bail under the *Bail Act 1994* (Tas) and defer sentencing until the date specified in the order.

686 *Youth Justice Act 1997* (Tas) s 47(1)(j).

# Appendix A – Overview of intermediate sanctions

**TABLE A–I: HOME DETENTION**

Jurisdiction		Custodial	Sub-stitutional	Term	Standard conditions	Optional conditions	Restrictions on offences/offenders	Consequences of breach
<b>Victoria</b>	Before repealed <sup>687</sup>	Yes.	No.	Not more than year.	<p>Be of good behaviour and not commit offence.</p> <p>Reside at specified premises.</p> <p>Remain at premises, unless authorised to leave, or it is unsafe or consent of co-resident withdrawn.</p> <p>Offender must accept visit by Secretary of Department of Justice.</p> <p>Submit to searches of places or things under immediate control.</p> <p>Submit to electronic monitoring.</p> <p>Comply with reasonable directions in relation to non-association.</p> <p>Not consume alcohol or use prohibited drugs.</p> <p>Submit to breath testing, urine analysis or other tests relating to detecting drugs or alcohol.</p> <p>Engage in personal development activities or in counselling or treatment programs as directed.</p> <p>Engage in community work.</p> <p>Not possess firearm of prohibited weapon.</p>	Any special conditions that court considers appropriate.	<p>Not available for those found guilty of:</p> <ul style="list-style-type: none"> <li>a sexual offence, violent offence, serious violent offence or drug offence (as defined in Schedule 1 of the <i>Sentencing Act 1991</i> (Vic))</li> <li>offence committed in circumstances which involved behaviour of sexual nature</li> <li>offence involves use of firearm or prohibited weapon</li> <li>a breach of an intervention order</li> <li>stalking.</li> </ul> <p>Criteria in relation to prior convictions.</p>	<p>Discretion to bring breach proceedings for contravention without reasonable excuse but <b>MUST</b> bring breach proceedings if the contravention is constituted by offender committing another offence punishable by imprisonment during the period of the order.</p> <p>If court finds that contravened home detention order, must either:</p> <ul style="list-style-type: none"> <li>vary the home detention order</li> <li>confirm the order</li> <li>cancel the order and commit the offender to prison for unexpired term at date of contravention.</li> </ul> <p>Presumption of activation unless exceptional circumstances which have arisen.</p> <p>If contravention is not serious (as defined in <i>Sentencing Act 1991</i> (Vic) s 26ZN), the court may give a formal warning.</p>

687 Home detention was abolished by the *Sentencing Legislation Amendment (Abolition of Home Detention Act 2011)* (Vic) from 16 January 2012.

Jurisdiction		Custodial	Sub-stitutional	Term	Standard conditions	Optional conditions	Restrictions on offences/offenders	Consequences of breach
Victoria	VSAC	Yes.	No.	No more than a year. Allow for a reduction in hours (supported by statutory guidance).				<p>If breach by further offending of an offence punishable by imprisonment, there is a presumption in favour of court cancelling the order and resentencing for original offence, unless exceptional circumstances.</p> <p>Court can also:</p> <ul style="list-style-type: none"> <li>• vary the order</li> <li>• confirm the order or</li> <li>• cancel the order (and make no further order).</li> </ul> <p>If breach of other conditions, court can:</p> <ul style="list-style-type: none"> <li>• vary the order</li> <li>• confirm the order or</li> <li>• cancel the order and resentence</li> <li>• cancel the order (and make no further order).</li> </ul>

Jurisdiction		Custodial	Sub-stitutional	Term	Standard conditions	Optional conditions	Restrictions on offences/offenders	Consequences of breach
NSW <sup>688</sup>	Current law	Yes.	Yes.	Up to 18 months.	<p>Be of good behaviour and not commit an offence.</p> <p>Remain in home except when authorised.</p> <p>Obey the supervisor's reasonable directions.</p> <p>Not consume alcohol or prohibited drugs.</p> <p>Submit to electronic monitoring.</p> <p>Not tamper with electronic monitoring equipment.</p> <p>Submit to searches of places and things under immediate control and drug testing.</p> <p>Engage in personal development activities or treatment programs if directed by supervisor.</p> <p>Accept direction in relation to maintaining or obtaining employment.</p> <p>Comply with directions in relation to association with specified person.</p> <p>Undertake community service work of up to 20 hours per week if directed by supervisor.</p>	Any such conditions as the court considers appropriate, other than condition requiring the person to make any payment.	<p>Not available for certain offences:</p> <ul style="list-style-type: none"> <li>murder, attempted murder, manslaughter or assault causing death</li> <li>sexual assault and sexual offences involving children</li> <li>armed robbery</li> <li>offences involving use of firearm</li> <li>assault occasioning actual bodily harm or more serious assault</li> <li>domestic violence offence if likely offender would reside or continue relationship if order made</li> <li>stalking or intimidation</li> <li>specified drug offences.</li> </ul> <p>Criteria in relation to prior convictions.</p>	<p>Supervised by Corrective Services NSW and serious breaches referred to State Parole Authority (SPA).</p> <p>Provision for formal warning or a supervisor may impose more rigorous application of conditions of home detention order (eg reduction in previously permitted out of residence activities).</p> <p>If an order is breached, SPA can revoke it or impose additional conditions or vary any conditions.</p>
	NSWLRC	Yes.	Yes.	<p>Maximum 3 years with a maximum non-parole period of 2 years.</p> <p>Local court 2 years or 3 years if multiple offences.</p>			<p>Only excluded for domestic violence offences against a likely co-resident, murder and sexual offences where the victim is under 16 years and the maximum penalty is more than 5 years imprisonment.</p>	

688 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 6; *Crimes (Administration of Sentences) Act 1999* (NSW) ss 162–168A.

Jurisdiction	Custodial	Substitutional	Term	Standard conditions	Optional conditions	Restrictions on offences/offenders	Consequences of breach
NT <sup>689</sup>	Yes.	Yes.	Any period of imprisonment but maximum period of home detention is 12 months.	Note behaviour that constitutes breach.	Such terms and conditions as court thinks fit including: <ul style="list-style-type: none"> <li>remain at premises unless permitted to leave</li> <li>submit to monitoring</li> <li>obey reasonable directions.</li> </ul>	Offender suitable and consents. Not available if mandatory minimum terms of imprisonment apply (Level 5, 4 and 3 violent offences). <sup>690</sup> For level 1 and 2 violence offences, aggravated property offences, and sexual offences the court can partially (but not wholly) suspend and impose home detention. <sup>691</sup>	Offender breaches: <ul style="list-style-type: none"> <li>if fails to reside at premises</li> <li>fails to comply with a term or condition of order</li> <li>damages or removes monitoring device</li> <li>fails to undergo breath test, breath analysis or blood or urine test</li> <li>disturbs or interferes with other person residing in premises</li> <li>assaults, threatens, insults or uses abusive language to probation and parole office</li> <li>commits a breach of Regulations</li> <li>commits an offence.</li> </ul> If court satisfied offender has breached home detention order, court must revoke the order and offender must be imprisoned for the term suspended if the breach is committing an offence that is not a regulatory offence or is punishable by imprisonment. If breach is committing an offence that is a regulatory offence or offence not imprisonable, then court may vary the terms and may vary the conditions of order including term of order. In relation to other breaches, the court may vary order if it is appropriate having regard to the circumstances of the offender or the breach.

689 Sentencing Act 1995 (NT) s 44.

690 Sentencing Act 1995 (NT) s 78DH.

691 Sentencing Act 1995 (NT) s 78DG.

Jurisdiction	Custodial	Sub-stitutional	Term	Standard conditions	Optional conditions	Restrictions on offences/offenders	Consequences of breach
New Zealand <sup>692</sup>	No.	No.	Up to 12 months but can also impose post-detention conditions for up to a further 12 months.	<p>Supervision of probation officer and must co-operate and comply with directions.</p> <p>Must not leave home (subject to exceptions in relation to health, employment, training, attend restorative justice conference or undertaking arising out of restorative justice).</p> <p>Submit to electronic monitoring.</p> <p>Not engage in employment or occupation that directed by probation officer not to.</p> <p>Non-association requirements.</p> <p>Take part in rehabilitative and reintegrative needs assessment.</p>	<p>Condition in relation to finances or earnings.</p> <p>Required to take prescription medication.</p> <p>Conditions relating to a program.</p> <p>Conditions requiring offender to comply with requirement of judicial monitoring as directed by probation officer or sentencing judge.</p> <p>Any condition that court thinks fit to reduce the likelihood of further offending.</p> <p>The court may (if sentence less 6 months) and must (if sentence greater than 6 months) set conditions of post-detention conditions, which include standard and special conditions similar to home detention. Post-detention conditions are not electronically monitored.<sup>693</sup></p>	No	<p>Breach of detention conditions or post-detention conditions is an offence.</p> <p>If an offender fails to comply with conditions, probation officer will investigate the circumstances of non-compliance and take appropriate action.</p> <p>Action on non-compliance includes an internal sanction, laying charge for breach conditions or apply to court to vary or cancel the sentence.</p> <p>On application to cancel the sentence, the court may:</p> <ul style="list-style-type: none"> <li>• remit, suspend or vary any special condition imposed by court or impose additional special conditions or</li> <li>• vary the home detention residence or</li> <li>• cancel the sentence</li> <li>• cancel the sentence and substitute any other sentence that could have been imposed at time of sentence.</li> </ul>

692 Sentencing Act 2002 (NZ) ss 15A, 80A–80Z1.

693 Ministry of Justice, New Zealand, above n 295, 6.

**TABLE A-2: COMMUNITY DETENTION ORDERS**

Jurisdiction	Name of order	Custodial	Substititutional	Term	Standard conditions	Optional conditions	Restrictions on offences/offenders	Consequences of breach
<b>NSW (recommendation of NSWLRC)</b> <sup>694</sup>	Community Detention Order. <sup>695</sup>	Yes.	Yes.	3 years. 2 years on Local Court unless multiple offences and then 3 years.	Not commit an offence. Submit to supervision if required. Report to Corrective Services NSW as directed. Reside at approved premises. Obey the supervisor's reasonable directions. Submit to electronic monitoring. Submit to searches and alcohol and drug testing. Accept home visits.	Home detention requirement. Work and intervention requirement. Attach additional conditions considered necessary to reduce likelihood of further offending: alcohol and drug abstinence, place and non-association restrictions, curfews or any other matter, except payment of a fine or other monetary sum. Should not be able to be combined with any other sentence except a fine.	Exclude murder and certain sexual offences, domestic violence offences where victim is a co-resident or likely co-resident.	SPA deal with breaches and has power to: <ul style="list-style-type: none"> <li>revoke the order (and commit offender to full-time custody)</li> <li>not revoke the order where good reasons exist for excusing the breach</li> <li>refer back to court for variation.</li> </ul>
<b>New Zealand</b>	Community Detention. <sup>696</sup>	No.	No.	No more than 6 months with curfew at least 2 hours per day and total curfew for any week not more than 84 hours.	Not leave curfew address during curfew period (subject to limited exception for medical or other emergency, with permission for purpose of employment, training or other rehabilitative and reintegrative activities program, attend restorative justice conference or undertaking arising from restorative justice conference or for humanitarian reasons). Report to probation officer and notify of change of address or occupation. Submit to electronic monitoring.	n/a	No	A breach is a punishable offence. If an offender fails to comply or convicted of an offence punishable by imprisonment, a court may: <ul style="list-style-type: none"> <li>suspend or vary the curfew period</li> <li>vary the curfew address</li> <li>cancel the sentence and resentence.</li> </ul>

694 NSWLRC, above n 60.

695 To replace home detention, intensive correction order and suspended sentences.

696 Sentencing Act 2002 (NZ) s 69B.

**TABLE A–3: INTENSIVE CORRECTION ORDERS AND INTENSIVE SUPERVISION ORDERS**

Jurisdiction		Name of order	Custodial	Term	Standard conditions	Optional conditions	Restrictions on use for offences	Consequences of breach
Vic	Current law	CCO. <sup>697</sup>	No.	<p>In Magistrates Court, must not exceed:</p> <ul style="list-style-type: none"> <li>• 2 years for one offence</li> <li>• 4 years for two offences</li> <li>• 5 years for three or more offences.</li> </ul> <p>In the County or Supreme Court the period can be up to the maximum penalty for an offence or 2 years (whichever is greater).</p>	<p>Must not commit offence punishable by imprisonment.</p> <p>Must comply with any obligation and requirement prescribed by the regulations.</p> <p>Must report to community corrections within 2 days of order.</p> <p>Must report to and receive visits from the Secretary.</p> <p>Must notify Secretary of change of address or employment.</p> <p>Must not leave Victoria without permission.</p> <p>Must abide by any order of direction of the Secretary.</p>	<p>At least one optional condition MUST be attached</p> <ul style="list-style-type: none"> <li>• unpaid community work for up to 600 hours</li> <li>• treatment and rehabilitation including assessment and treatment for drug/alcohol abuse or dependency, including at a residential facility for withdrawal, medical treatment, mental health assessment and treatment, any program that addresses factors related to offending behaviour or any other treatment and rehabilitation considered necessary including employment, educational, cultural and person development</li> <li>• supervision</li> <li>• non-association with a specific person or a class of person</li> <li>• residence restriction or exclusion which may direct that the offender reside at a specified place or not reside at a specified place</li> <li>• place or area exclusion which directs that offender must not enter or remain at specified place or area</li> </ul>	<p>Cannot be imposed for an offence punishable by 5 penalty units or less.</p>	<p>Contravention of CCO is a separate offence.</p> <p>A court may (following a contravention):</p> <ul style="list-style-type: none"> <li>• vary the order</li> <li>• confirm the order</li> <li>• cancel the order and resentence the offender</li> <li>• cancel the order and make no further order.</li> </ul>

697 Sentencing Act 1991 (Vic) ss 36–48Q, 80, 83AS, 83AD, 83AE, 83AS.

Jurisdiction		Name of order	Custodial	Term	Standard conditions	Optional conditions	Restrictions on use for offences	Consequences of breach
Vic	Continued					<ul style="list-style-type: none"> <li>• curfew which requires the offender to remain at a specified place for specified hours of each day (must not be less than 2 hours and must not exceed 12 hours of a day and order must not be more than 6 months)</li> <li>• alcohol exclusion which directs that offender not enter licenced premises, the location of any major event, not consume liquor in licenced premises</li> <li>• bond condition which requires the offender to pay a bond</li> <li>• judicial monitoring which allows the court to monitor an offender</li> <li>• justice plan for offenders with an intellectual disability</li> <li>• electronic monitoring which can be imposed by higher courts</li> <li>• residual condition to impose any other condition that the court thinks fit but cannot include a condition about making restitution or the payment of compensation, costs or damages.</li> </ul> <p>Can impose an intensive compliance period if court is making an order of 6 months or longer.</p>		

Jurisdiction		Name of order	Custodial	Term	Standard conditions	Optional conditions	Restrictions on use for offences	Consequences of breach
Vic <i>Continued</i>	Former law <sup>698</sup>	Intensive Correction Order.	Yes.	Up to 12 months.	<p>Not commit offence punishable by imprisonment.</p> <p>Report to specified community corrections centre within 2 days of order.</p> <p>Report to and receive visits from community corrections at least twice per week for the period of order or a shorter period.</p> <p>Attend specific community corrections centre for 12 hours during each week or shorter period specified in the order to perform unpaid community work of at least 8 hours and the balance undergoing counselling or treatment for a specified psychological, psychiatric, drug or alcohol problem as directed during period specified.</p> <p>Notify of change of address/employment.</p> <p>Not leave Victoria without permission.</p> <p>Obey directions of community corrections officers.</p>	<p>Attendance at one or more than one specified prescribed program during period of order or shorter period.</p> <p>This may be residential or community-based and must be designed to address the personal factors which contribute to the offender's criminal behaviour.</p> <p>Prescribed programs are:</p> <ul style="list-style-type: none"> <li>• alcohol and other drug treatment program</li> <li>• drink drivers programs</li> <li>• young offenders training program.</li> </ul>	<p>Cannot make the order if the sentence of imprisonment would by itself not have been considered an appropriate punishment.</p>	<p>Breach is a punishable offence. On breach of the conditions of an order a court must:</p> <ul style="list-style-type: none"> <li>• vary the order</li> <li>• confirm the order originally made or</li> <li>• cancel the order and commit the offender to prison for the portion of sentence unexpired at the date of the breach.</li> </ul> <p>If breach was by committing another offence punishable by imprisonment, the court must commit the offender to prison for the unexpired portion of the sentence unless the court is of the opinion that it would be unjust to do so in view of the exceptional circumstances that have arisen since the order was made.</p>

698 Sentencing Act 1991 (Vic) ss 19–26 (now repealed).

Jurisdiction		Name of order	Custodial	Term	Standard conditions	Optional conditions	Restrictions on use for offences	Consequences of breach
<b>Vic</b> <i>Continued</i>	VSAC	Intensive Correction Order (recommendation).	No.	2 years.	<p>Not commit offence punishable by imprisonment.</p> <p>Report to specified community corrections centre within 2 days of order.</p> <p>Report to and receive visits from community corrections at least one a week during first 3 months and thereafter at least once every 28 days and/or as otherwise ordered by Regional Manager or Community Correctional Service.</p> <p>Notify of change of address/employment.</p> <p>Not leave Victoria without permission.</p> <p>Obey directions of community corrections officers.</p> <p>Perform unpaid community work up to 400 hours or participate in services specified in justice plan (intellectual disability).</p>	<p>Court can impose one or more program conditions:</p> <ul style="list-style-type: none"> <li>assessment and treatment for alcohol or drug addiction</li> <li>medical, psychological or psychiatric assessment and treatment</li> <li>attend educational, vocational, cultural, rehabilitative, reintegration or personal development programs</li> <li>live in specified place for a specified period</li> <li>submit to testing for drug or alcohol use as specified in the order or as directed</li> <li>any other condition court considers necessary or desirable but cannot include a condition about making restitution or the payment of compensation, costs or damages.</li> </ul> <p>Can impose special conditions:</p> <ul style="list-style-type: none"> <li>not associate with specified person or person of a specified class</li> <li>not enter a place specified in order</li> <li>not live at address that directed not to live at.</li> </ul>	<p>Only if convicted of an offence punishable by imprisonment and court might otherwise have considered sentencing offender to imprisonment.</p>	<p>If a breach by further offending, there is presumption in favour of the court: cancelling the order and resentencing the offender unless it would be unjust to do so having regard to circumstances that have arisen since the order was made.</p> <p>In addition, court have the power to:</p> <ul style="list-style-type: none"> <li>vary the ICO</li> <li>confirm the order</li> <li>cancel the order (and make no further order)</li> </ul> <p>If a breach of other condition, a court should be permitted to:</p> <ul style="list-style-type: none"> <li>vary the ICO</li> <li>confirm the order</li> <li>cancel the order and resentence the offender</li> <li>cancel the order (and make no further order).</li> </ul>

Jurisdiction		Name of order	Custodial	Term	Standard conditions	Optional conditions	Restrictions on use for offences	Consequences of breach
Vic <i>Continued</i>	VSAC	Intensive Correction Order (Drug and Alcohol).	No.	2 years. If court makes an order of 6 months or longer, court can specify a 'supervision period' during which time the offender be supervised and complete the program conditions attached to order.	As with ICO but without community work as a core condition.	Order should have at least one program condition attached. Court can impose one or more program conditions: <ul style="list-style-type: none"> <li>• assessment and treatment for alcohol or drug addiction</li> <li>• medical, psychological or psychiatric assessment and treatment</li> <li>• submit to testing for drug or alcohol use as specified in the order or as directed</li> <li>• attend vocational, educational, employment or other program as directed</li> <li>• perform unpaid community work</li> <li>• any other condition considered necessary relating to offender's drug or alcohol dependency.</li> </ul> Can impose special conditions: <ul style="list-style-type: none"> <li>• not associate with specified person or person of a specified class</li> <li>• not enter a place specified in order</li> <li>• not live at address that directed not to live at</li> <li>• comply with judicial monitoring.</li> </ul>	As with ICO (above).	As with ICO (above).

Jurisdiction		Name of order	Custodial	Term	Standard conditions	Optional conditions	Restrictions on use for offences	Consequences of breach
NSW	Current law	Intensive Correction Order. <sup>699</sup>	Yes – substitutional.	Not more than 2 years.	<p>Be of good behaviour and not commit an offence.</p> <p>Report to Corrective Services.</p> <p>Reside at approved premises and receive visits.</p> <p>Not leave NSW without permission.</p> <p>Obey the supervisor's reasonable directions.</p> <p>Authorise medical practitioner, therapist or counsellor to provide supervisor information about offender.</p> <p>Submit to surveillance and electronic monitoring if directed.</p> <p>Submit to curfew or restricted movement if directed.</p> <p>Prohibited from using drugs.</p> <p>Submit to searches and drug and alcohol testing.</p> <p>Prohibited from having firearm.</p> <p>Participate in rehabilitative activities if directed.</p> <p>Undertake minimum 32 hours of community service per month, as directed.</p> <p>Submit to medical examination in relation to capacity of undertake community service work or otherwise comply with the order.</p>	<p>Accept direction of supervisor in relation to maintaining or finding employment.</p> <p>Authorise contact between any employer and supervisor.</p> <p>Comply with direction of supervisor that offender in relation to kinds of occupation or employment can or cannot engage with.</p> <p>Comply with direction of supervisor that offender not associate with specified persons or persons of a specified description.</p> <p>Prohibited from consuming alcohol.</p> <p>Not go to specified places or districts or places or districts of a specified kind.</p> <p>Any other condition court considers necessary or desirable for reducing likelihood of reoffending.</p>	<p>Not available for certain sexual offences (victim under 16 or offence involves sexual penetration).</p>	<p>A breach is a failure to comply with any obligation under ICO.</p> <p>On a breach, the Commissioner can take no action or impose a formal warning and/or impose more stringent conditions.</p> <p>If a serious breach, can refer to SPA.</p> <p>SPA can deal with a breach:</p> <ul style="list-style-type: none"> <li>impose a sanction that Commissioner could impose</li> <li>impose a period of up to 7 days' home detention by imposing a requirement that offender remain in residence</li> <li>revoke ICO.</li> </ul> <p>If ICO is revoked, if the remainder of the term is 18 months or less, then can order home detention.</p>

699 Crimes (Sentencing Procedure) Act 1999 (NSW) ss 7, 64–73A; Crimes (Administration of Sentences) Act 1999 (NSW) ss 80–90, 162–165C; Crimes (Administration of Sentences) Regulations 2014 (NSW) regs 185–189.

Jurisdiction		Name of order	Custodial	Term	Standard conditions	Optional conditions	Restrictions on use for offences	Consequences of breach
NSW	NSWLRC <sup>700</sup>	Intensive Correction Order (if retained).		Up to 3 years and court should be able to set non-parole period. Maximum non-parole period of 2 years and if no non-parole period set then maximum order 2 years.	Community service work should be able to be satisfied by range of activities including engaging in literacy, numeracy, work-ready, educational or other programs.		Only excluded for domestic violence offences against a likely co-resident, murder and sexual offences where the victim is under 16 years and the maximum penalty is more than 5 years imprisonment.	
Qld		Intensive Correction Order. <sup>701</sup>	Yes – substitutional.	1 year or less.	Not commit offence. Report to authorised corrective services officer. Report to and receive visits from authorised corrective services officer at least twice a week. Take part in counselling and satisfactorily attend other programs as directed by court or authorised corrective services officer. Satisfactory performance of community service that an authorised corrective services officer directs. Notify of change of address/employment. Not leave Queensland without permission. Obey directions of authorised corrective services officer.	Submit to medical, psychiatric or psychological treatment. Comply with conditions that court considers necessary to: <ul style="list-style-type: none"> <li>• cause offender to behave in way that is acceptable to the community</li> <li>• stop offender from committing the same type of offence</li> <li>• stop the offender from committing other offences.</li> </ul> Note that the court has separate power to make non-contact orders to prevent the offender from contacting the victim or someone who was with the victim when the offence took place <sup>702</sup> and banning orders which prevent the offender from entry to licensed premises. <sup>703</sup>	No.	Breach is a punishable offence. If offender contravenes order, a court may: <ul style="list-style-type: none"> <li>• revoke the order and commit offender to prison for portion of imprisonment still to serve</li> <li>• resentence the offender</li> <li>• fine the offender</li> <li>• admonish and discharge</li> </ul>

700 NSWLRC, above n 60, Chapter 9.

701 *Penalties and Sentences Act 1992* (Qld) ss 111–120, 121–132.

702 *Penalties and Sentences Act 1992* (Qld) ss 43A–43F.

703 *Penalties and Sentences Act 1992* (Qld) ss 43G–43O.

Jurisdiction	Name of order	Custodial	Term	Standard conditions	Optional conditions	Restrictions on use for offences	Consequences of breach
WA	Intensive Supervision Order. <sup>704</sup>	No.	Between 6 and 24 months.	<p>Not commit another offence.</p> <p>Report to authorised corrective services officer.</p> <p>Notify of change of address/ employment.</p> <p>Not leave Western Australia without permission.</p> <p>Comply with the <i>Sentence Administration Act 2003 (WA)</i> s 76.</p> <p>Supervision requirement requires offender to contact a community correction officer or receive visits as ordered by the officer.</p>	<p>May contain any one or more of the following:</p> <ul style="list-style-type: none"> <li>• program requirement</li> <li>• community service requirement</li> <li>• a curfew requirement.</li> </ul>	No.	<p>Breach is a punishable offence and can be fined.</p> <p>If offender contravenes order or is convicted of an offence a court may:</p> <ul style="list-style-type: none"> <li>• confirm the order</li> <li>• amend the order</li> <li>• cancel the order and resentence the offender.</li> </ul>

704 Sentencing Act 1995 (WA), ss 68–75, Pt 18 Div 3 - 4.

Jurisdiction	Name of order	Custodial	Term	Standard conditions	Optional conditions	Restrictions on use for offences	Consequences of breach
NT	Community Custody Order. <sup>705</sup>	Yes.	For period of imprisonment but no longer than 12 months.	<p>Not commit another offence punishable by imprisonment.</p> <p>Community work and program condition.</p> <p>Report to a probation and parole officer at a specified place.</p> <p>Report to, and receive visits from, a probation and parole officer at least twice during each week the order is in force or the shorter period specified in the order.</p> <p>Advise of any change of address or employment.</p> <p>Must not leave the Territory except with permission.</p> <p>Must give a sample of the offender's voice for use with an approved monitoring device for the period specified in the order and must comply with the reasonable directions of a probation and parole officer in the use of the device for the effective monitoring of the offender's activities.</p> <p>Must comply with regulations made and all lawful directions of the Commissioner and probation and parole officers including direction to reside in specific place and wear monitoring device.</p>	<p>May impose either or both of the following conditions on the order:</p> <ul style="list-style-type: none"> <li>offender must undertake specified prescribed programs</li> <li>offender must not consume or purchase alcohol or a drug (other than as prescribed by a medical practitioner or other health practitioner).</li> </ul> <p>In addition, the court may impose the following conditions:</p> <ul style="list-style-type: none"> <li>must reside at a specified place</li> <li>must wear or have attached an approved monitoring device for the period the order is in force or the lesser period ordered by the court</li> <li>must allow the placing or installation in, and retrieval from, a specified place of anything necessary for the effective operation of the monitoring device.</li> </ul> <p>Also, a prescribed program may be residential or community-based.</p>	<p>Not available for sexual offences, violent offences, common assault in circumstances of aggravation and other prescribed offences.</p> <p>Not impose if imprisoned for longer than 12 months.</p>	<p>If breach of the condition not to commit an offence, there is a presumption that the court will revoke the order and sentence the offender to imprisonment for the unexpired term of imprisonment under the order at the date of the breach of the condition unless unjust in the circumstances.</p> <p>If the court is satisfied that unjust, the court can confirm the order or vary it. If the order is not in force, the court can confirm the order is discharged and take no further action.</p> <p>If breach of other conditions, the court may:</p> <ul style="list-style-type: none"> <li>confirm the order</li> <li>vary the order</li> <li>revoke the order and sentence the offender to imprisonment for the unexpired term of imprisonment under the order at the date of the breach of the condition.</li> </ul>

705 Sentencing Act (NT) ss 48A–48Q.

Jurisdiction	Name of order	Custodial	Term	Standard conditions	Optional conditions	Restrictions on use for offences	Consequences of breach
ACT	Intensive Correction Order (proposed).	Yes.	Not more than 2 years except in exceptional circumstances when it can be for no more than 4 years.	<p>Not commit an offence punishable by imprisonment.</p> <p>Notify of change of contact details not later than 1 day after change.</p> <p>Comply with directions.</p> <p>Comply with probation condition.</p> <p>Not have positive test for alcohol or drug.</p> <p>Not use or obtain drug.</p> <p>Not leave ACT without permission.</p> <p>Comply with any direction given to live at any premises; or undertake any program; or report to a corrections officer; or allow a corrections officer to visit the place where the offender lives at any reasonable time.</p> <p>Comply with any notice made under s 63 to attend a hearing of the board.</p> <p>Comply with any condition prescribed by regulation that applies to the offender.</p>	<p>May impose any of the following:</p> <ul style="list-style-type: none"> <li>community service condition</li> <li>rehabilitation program condition</li> <li>condition to comply with reparation, non-association or place restriction order</li> <li>a condition prescribed by regulation</li> <li>any other condition that the court considers appropriate (this might include a condition to undertake medical treatment or supervision, supply samples for testing, attend educational, vocational, psychological, psychiatric or other programs or counselling, not to drive a motor vehicle or consume alcohol or non-prescription drugs or mediation, regularly attend alcohol or drug management programs</li> <li>curfew condition.</li> </ul>	No.	<p>If breach of condition not to commit an imprisonable offence, this is dealt with by the Court. There is a presumption of cancellation and the offender serve the term in prison (in full or part) unless it is not in the interest of justice.</p> <p>If it is a breach of any other condition, the offender is dealt with by the Sentence Administration Board which may:</p> <ul style="list-style-type: none"> <li>issue a warning (but not more than 3 warnings in a 12 month period)</li> <li>suspend the order for 3 or 7 days (during which time the offender is in full-time custody)</li> <li>cancel the order</li> <li>in limited circumstances, refer to sentencing court.</li> </ul>

Jurisdiction	Name of order	Custodial	Term	Standard conditions	Optional conditions	Restrictions on use for offences	Consequences of breach
NZ	Intensive Supervision. <sup>706</sup>	No.	Between 6 and 24 months.	<p>Report to probation officer.</p> <p>Report at least once in each week during first 3 months of sentence and at least once in each month during remainder of sentence.</p> <p>Notify of change of address or employment.</p> <p>Not move to an address in a different probation area without consent.</p> <p>Not reside at address directed not to reside at.</p> <p>Not engage in employment which directed not to engage in.</p> <p>Not associate with persons that directed not to associate.</p> <p>Take part in rehabilitative and reintegrative needs assessment if directed to do so by probation officer.</p>	<p>Can impose special conditions in relation to programs (residential or non-residential) which include:</p> <ul style="list-style-type: none"> <li>psychiatric or other counselling or assessment</li> <li>attendance at any medical, psychological, social, therapeutic, cultural, educational, employment-related, rehabilitative or reintegrative program.</li> </ul> <p>Any other special conditions in relation to:</p> <ul style="list-style-type: none"> <li>offender's place of residence (which may include a condition that the offender not move residence), finances or earnings</li> <li>take prescription medication</li> <li>training in basic work and living skills</li> <li>judicial monitoring</li> <li>any other condition to reduce the likelihood of further reoffending.<sup>707</sup></li> </ul>	No.	<p>A breach is a punishable offence.</p> <p>On breach of a condition or if commit an imprisonable offence a court may:</p> <ul style="list-style-type: none"> <li>remit, suspend or vary any special conditions or impose additional special conditions</li> <li>cancel the sentence</li> <li>cancel the sentence and resentence the offender.</li> </ul>

706 Sentencing Act 2002 (NZ) ss 54B–54L, 70A.

707 However, the court cannot impose a condition requiring an offender to pay a fine, reparation or other sum ordered to be paid on conviction, to perform any service that could have been required to perform if sentenced to community work or submit to electronic monitoring, Sentencing Act 2002 (NZ) s 54(4).

# *Appendix B – Conditions attached to intermediate sanctions*

**TABLE B-1: CONDITIONS THAT CAN BE ATTACHED TO SELECTED INTERMEDIATE SANCTIONS**

S = Standard; O = Optional

Jurisdiction	Order	Community work	Home detention/curfew	Treatment/rehabilitation	Supervision	Alcohol/drug restrictions or testing	Place and non-association restrictions	Residential restriction/exclusion	Judicial monitoring	Generic conditions	Other conditions
Vic	Home Detention (now abolished)	S	S (include electronic monitoring)	S	S	S	S	S	–	O	Not possess firearms
	CCO	O	O (include electronic monitoring)	O	O	O	O	O	O	O	Justice Plan (O) Bond condition (O) Residential condition (O) Directions in relation to employment (O)
	Intensive Correction Order (now abolished)	S	–	S	S	–	–	–	–	–	Prescribed program designed to address the personal factors that have contributed to offender's criminal behaviour (O)
	Intensive Correction Order (as recommended by VSAC)	S – But can be performed by undertaking approved activities (such as activities whose purpose is reparation and educational and life skills)	O	S	S	O	O	O	–	O	Program conditions (O)

Jurisdiction	Order	Community work	Home detention/ curfew	Treatment/ rehabilitation	Supervision	Alcohol/drug restrictions or testing	Place and non-association restrictions	Residential restriction/ exclusion	Judicial monitoring	Generic conditions	Other conditions
<b>Vic</b>	Intensive Correction Order (Drugs and Alcohol) (as recommended by VSAC)	O	–	O	S	O	–	O	O	O	Program conditions (O) including residential drug treatment
<b>NSW</b>	Home Detention	S	S	S	S	S	–	S	–	O	Directions in relation to employment (S) Not possess firearms (S)
	Intensive Correction Order	S	S	S	S	S	O	S	–	O	Electronic monitoring if directed (S) Not possess firearms (S)
	Community Detention Order (as recommended by NSWLRC)	O	O	O	S	S	O	S	–	O	Electronic monitoring if directed (S)
<b>NT</b>	Home Detention	–	S (can include electronic monitoring)	O	S	S	S	–	–	O	–
	Community Custody Order	S	No but can include electronic monitoring	S	S	O	–	O	–	–	Can include residence requirement
<b>Qld</b>	Intensive Correction Order	S	–	S	S	–	Court can make a separate non contact order	–	–	O	Reside at community residential facilities
<b>WA</b>	Intensive Supervision Order	O	O	O (can include electronic monitoring)	S	–	–	–	–	–	–

Jurisdiction	Order	Community work	Home detention/ curfew	Treatment/ rehabilitation	Supervision	Alcohol/drug restrictions or testing	Place and non-association restrictions	Residential restriction/ exclusion	Judicial monitoring	Generic conditions	Other conditions
<b>ACT</b>	Intensive Correction Order (proposed)	○	○	○	S	○	○	Must comply with any direction given by corrections officer to live at any premises	–	○	–
<b>NZ</b>	Home Detention	Can be combined with community work	S (including electronic monitoring)	S (assessment)	S	–	S	–	○	○	Directions in relation to employment (S) Relating to finances and earnings (O) Requirement to take prescription medication (O) Requirements relating to a program (O)
	Intensive Correction Order	Can be combined with community work	Can be combined with community detention	S (assessment)	S	–	S	S	○	○	Directions in relation to employment (S) Relating to finances and earnings (O) Requirement to take prescription medication (O) Training in basic work and living skills (O) Not impose a condition of electronic monitoring
	Community Detention	Can be combined with community work	S (including electronic monitoring)	Can be combined with Intensive Correction Order	S	–	Can be combined with Intensive Correction Order	Can be combined with Intensive Correction Order	Can be combined with Intensive Correction Order	○	–

# Appendix C – Deferred Sentence provisions

**TABLE C–I: DEFERRED SENTENCE PROVISIONS**

Jurisdiction	Legislation	Purposes of deferral	Maximum period	Conditions	Review Powers	Sentencing Powers
<b>Victoria</b>	Deferral of sentencing: <i>Sentencing Act 1991</i> (Vic) s 83A. Only in Magistrates Court and County Court.	Deferral is for the purpose of: <ul style="list-style-type: none"> <li>allowing the offender's capacity for and prospects of rehabilitation to be assessed</li> <li>allowing the offender to demonstrate that rehabilitation has taken place</li> <li>allowing the offender to participate in a program or programs aimed at addressing the underlying causes of the offending</li> <li>allowing the offender to participate in a program or programs aimed at addressing the impact of the offending on the victim</li> <li>for any other purpose that the court considers appropriate having regard to the offender and the circumstances of the case.</li> </ul>	12 months.	May release the offender on his or her undertaking to attend before the court on the date fixed for sentence or release the offender on bail or extend his or her bail to that date.	Power to review with ability to: <ul style="list-style-type: none"> <li>take no further action</li> <li>cancel the deferred sentence and sentence the offender.</li> </ul>	Court has regard to behaviour during period of deferral.
<b>ACT</b>	<i>Crimes (Sentencing) Act 2005</i> (ACT) s 27, Chapter 8.	Court can make an order if the court considers the offender should be given an opportunity to address his or her criminal behaviour, and anything that has contributed to the behaviour, before the court sentences the offender for the offence. The court must not make a deferred sentence order for the offender unless it considers that: <ul style="list-style-type: none"> <li>releasing the offender on bail would allow the offender to address his or her criminal behaviour and anything that has contributed to the behaviour and</li> <li>if the offender were to comply with the order, and any bail conditions, the court might not impose as severe a sentence for the offence.</li> </ul>	12 months.	Any condition as well as requirement to impose bail (which can be imposed with conditions).	Power to review with ability to: <ul style="list-style-type: none"> <li>take no further action</li> <li>give the offender a warning about need to comply with obligations and conditions</li> <li>amend any conditions</li> <li>cancel the deferred sentence (if offender requests or on breach) and sentence the offender.</li> </ul>	Court needs to give indication of sentence offender might receive at time of entering order but no requirement to take into account when sentencing.

Jurisdiction	Legislation	Purposes of deferral	Maximum period	Conditions	Review Powers	Sentencing Powers
<b>NSW</b>	Deferral of sentence: <i>Crimes (Sentencing Procedure) Act 1999</i> (NSW) s 11.	Deferral for the purpose of: <ul style="list-style-type: none"> <li>• assessing the offender's capacity and prospects for rehabilitation</li> <li>• allowing the offender to demonstrate that rehabilitation has taken place</li> <li>• assessing the offender's capacity and prospects for participation in an intervention program</li> <li>• allowing the offender to participate in an intervention program</li> <li>• any other purpose the court considers appropriate in the circumstances.</li> </ul>	Up to 12 months.	Can impose bail conditions. <sup>708</sup>	–	–
<b>South Australia</b>	Deferral of sentence: <i>Criminal Law (Sentencing) Act 1988</i> (SA) s 19B.	Deferral for the purpose of: <ul style="list-style-type: none"> <li>• assessing the offender's capacity and prospects for rehabilitation</li> <li>• allowing the offender to demonstrate that rehabilitation has taken place</li> <li>• assessing the offender's capacity and prospects for participation in an intervention program</li> <li>• allowing the offender to participate in an intervention program</li> <li>• any other purpose the court considers appropriate in the circumstances.</li> </ul>	Up to 12 months with discretion to adjourn for a longer period where the offender is participating in an intervention program.	Can impose bail conditions.	–	–
<b>Western Australia</b>	Pre-sentence order (PSO): <i>Sentencing Act 1995</i> (WA) ss 33A–33Q. Available for imprisonable offence unless the offence has mandatory imprisonment as the penalty or an offence under <i>Prisons Act 1981</i> (WA), s 79 (aggravated prison offence).	Court may make a PSO in respect of the offender if it considers that: <ul style="list-style-type: none"> <li>• the seriousness of the imprisonable offence or offences warrants the imposition of a term of imprisonment</li> <li>• a PSO would allow the offender to address his or her criminal behaviour and any factors which contributed to the behaviour</li> <li>• if the offender were to comply with a PSO the court might not impose a term of imprisonment for the offence or offences.</li> </ul>	2 years.	Standard obligations of a PSO are that the offender must: <ul style="list-style-type: none"> <li>• report to a community corrections centre notify a CCO of any change of address or place of employment must not leave Western Australia except with, and in accordance with, the permission</li> <li>• comply with s 76 of the <i>Sentence Administration Act 2003</i> (WA).</li> </ul> Court must impose at least one primary requirements: <ul style="list-style-type: none"> <li>• a supervision requirement</li> <li>• a program requirement</li> <li>• a curfew requirement .</li> </ul>	Provisions in relation to performance reports during period of order.	Must take account of behaviour while subject to PSO.

708 See Judicial Commission of NSW, *Sentencing Bench Book*, [5–410] <[http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/deferral\\_for\\_rehabilitation.html](http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/deferral_for_rehabilitation.html)>.

Jurisdiction	Legislation	Purposes of deferral	Maximum period	Conditions	Review Powers	Sentencing Powers
<b>United Kingdom</b>	Deferred sentence: <i>Powers of Criminal Courts (Sentencing) Act 2000 (UK)</i> ss 1–1D.	<p>Court may defer sentence for purpose of enabling the court, or any other court to which it falls to deal with him, to have regard in dealing with him to:</p> <ul style="list-style-type: none"> <li>• conduct after conviction (including, where appropriate, the making of reparation for the offence)</li> <li>• any change in circumstances.</li> </ul>	6 months.	<p>Any requirements that the court considers it appropriate to impose.</p> <p>This can include restorative justice requirements.</p> <p>May appoint a supervisor to monitor compliance with the requirements and to provide court with information about offender's compliance.</p>	–	–

# Appendix D – Guideline judgment in *Boulton v The Queen* [2014] VSCA 342

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## APPENDIX I

### COMMUNITY CORRECTION ORDERS: GUIDELINES FOR SENTENCING COURTS

NOTE: These guidelines reflect the views expressed in the guideline judgment delivered by the Court of Appeal on 22 December 2014, and should be read and understood in that context. They are intended, however, to be in a form suitable for use by sentencing courts without the need to refer to the full judgment.

#### Part 1: General principles

- 1 A CCO is a new and flexible sentencing option which can be for a term of up to the maximum term of imprisonment prescribed for the offence in question. It serves a different purpose from community-based orders or suspended sentences, which have now been abolished.
- 2 In some cases, it will be appropriate to impose a CCO (with or without an added sentence of imprisonment) for relatively serious offences which would previously have attracted quite substantial terms of imprisonment.
- 3 In determining whether to sentence an offender to a CCO, the court should first assess the objective nature and gravity of the offence and the moral culpability of the offender.
- 4 The court should then consider whether:
  - (a) the crime as so assessed is so serious that nothing short of a sentence wholly comprised of an immediate term of imprisonment will suffice to satisfy the requirements of just punishment; or
  - (b) a CCO, either alone or in conjunction with a sentence of imprisonment, would satisfy the requirements of just punishment.

#### Proportionality and suitability

- 5 Proportionality and suitability are the governing principles for deciding whether to impose a CCO and (if so) of what length and with what conditions attached.
- 6 Section 48A of the *Sentencing Act 1991* ('the Act') provides that the attachment of conditions to a CCO must be effected in accordance with:
  - (a) the principle of proportionality; and
  - (b) the purposes for which a sentence may be imposed as set out in s 5; and
  - (c) the purpose of a community correction order set out in s 36.
- 7 The principle of proportionality requires that the sentence imposed not exceed what is appropriate or proportionate to the gravity of the crime, considered in the light of its objective circumstances.

- 8 Section 36 of the Act requires the court to consider the offender's suitability for a CCO, and to ensure that the terms of the order suit the offender's particular circumstances.

### **Young offenders**

- 9 A CCO is likely to be a particularly important sentencing option in the case of a young offender, where there may be a perceived conflict between the need to punish the offender and the importance — both to the community and to the offender — of rehabilitating the offender.
- 10 Since the CCO can be used to rehabilitate and punish simultaneously, the conflict is likely to be reduced. Instead of needing to give less weight to denunciation or specific or general deterrence, in order to promote the young offender's rehabilitation, the court will be able to fashion a CCO which adequately achieves all of those purposes at once.

### **Part 2: Imprisonment or CCO?**

- 11 Subsection 5(4C) of the Act prohibits the imposition of a sentence of imprisonment unless the sentencing court concludes that the purposes of the sentence cannot be achieved by a CCO to which specified conditions are attached.
- 12 The court must therefore pay careful attention to:
- (a) the purposes for which sentence is to be imposed on the offender; and
  - (b) whether those purposes can be achieved by a CCO to which one or more of the specified (onerous) conditions is attached.

### **Just punishment**

- 13 Axiomatically, nothing is as punitive as prison. At the same time, the opportunities for rehabilitation in prison are severely limited, and imprisonment can be seriously detrimental for the offender. In practice, therefore, a conclusion that imprisonment is the only appropriate punishment is a conclusion that the retributive and deterrent purposes of punishment must take precedence.
- 14 A CCO is also intrinsically punitive and, depending on the length of the order and the nature and extent of the conditions imposed, is capable of being highly punitive.
- 15 The mandatory conditions, attached to each CCO by force of s 45(1), affect an offender's liberty and autonomy. During the period of the order, the offender:
- must report to and receive visits from the Secretary;
  - must notify the Secretary of any change of address or employment;
  - must not leave Victoria without the Secretary's permission; and
  - must comply with any direction given by the Secretary to ensure compliance.
- 16 The conditions which may be attached to a CCO are variously coercive, restrictive and/or prohibitive. When a condition of that kind is attached to a CCO, the offender's life will be regulated — for the duration of the order — by the obligation to comply with the condition (subject to any contrary order).
- 17 Contravention of any condition attached to a CCO (except for a contravention of a direction by the Secretary) is itself an offence, punishable by three months' imprisonment. Contravention of a CCO also carries with it the prospect that the offender will be resentenced on the original offence.

### **General deterrence**

- 18 Until now, a sentence of imprisonment has been conceived of as providing the greatest degree of general deterrence. A CCO can, however, provide substantial general deterrence, on account of the punitive effect described above.
- 19 If a CCO is to operate as an effective general deterrent, it is essential that the sentencing court sufficiently explain its reasons for concluding that the CCO will be sufficient punishment of the offender for the offence.

### **Specific deterrence**

- 20 A sentence of imprisonment may operate as a specific deterrent. But a CCO can also provide very substantial specific deterrence. First, it will be a real punishment and therefore should deter repeat offending.
- 21 Secondly, there is also the mandatory condition attached to every CCO, prohibiting the commission of an offence punishable by imprisonment. The commission of such a breaching offence will potentially lead to the imposition of three separate penalties, as follows:
  - (a) a penalty for the offence itself;
  - (b) a penalty for the contravention of the CCO condition; and
  - (c) a resentencing for the original offence in respect of which the CCO was first imposed.
- 22 Thirdly, the focus of the conditions attached to the CCO will be to minimise the risk of re-offending — by ensuring appropriate treatment to address the causes of the offending and/or by prohibiting the offender from visiting places or associating with persons which might lead to criminal activity. In that way, a CCO can serve the purpose of protecting the community (which is the object of specific deterrence).

### **Rehabilitation**

- 23 A CCO demands of the offender that he/she take personal responsibility for self-management and self-control and (depending on the conditions) that he/she pursue treatment and rehabilitation, refrain from undesirable activities and associations and/or avoid undesirable persons and places.

### **Serving the purposes of punishment**

- 24 In many cases, therefore, a CCO will enable all of the purposes of punishment to be served simultaneously, in a coherent and balanced way.
- 25 Even in cases of relatively serious offences - which would previously have attracted a medium term of imprisonment (such as, for example, aggravated burglary, intentionally causing serious injury, some forms of sexual offences involving minors, some kinds of rape and, in some rare and exceptional circumstances, homicide) - the sentencing court may find that a properly-conditioned CCO of lengthy duration is capable of satisfying the requirements of proportionality, parsimony and just punishment, while affording the best prospects for rehabilitation.

### **Combining a CCO with a sentence of imprisonment**

- 26 A CCO can be combined with other sentencing options, including a fine and/or a term of imprisonment of up to two years. The availability of that kind of combination adds to the flexibility of the CCO regime.
- 27 Consequently, even in cases of objectively grave criminal conduct, the court may conclude that some or all of the punitive, deterrent and denunciatory purposes of sentencing can be sufficiently achieved by a short term of imprisonment of up to two years if coupled with a CCO of lengthy duration, with conditions tailored to the offender's circumstances and the causes of the offending, directed at rehabilitative purposes.
- 28 Whether an additional sentence of that kind is warranted must be decided consistently with the governing principles of proportionality and suitability.

### **Are there any offences for which a CCO would ordinarily be unsuitable?**

- 29 At this stage, it is neither necessary nor desirable to seek to define any outer limits on the suitability of a CCO as a sentencing option. Reconsideration of accepted views about imprisonment as the only option will take time and will be informed by experience.
- 30 Sentencing judges should proceed on the basis that there is now a very broad range of cases in which it will be appropriate to impose a suitably structured CCO, either alone or in conjunction with a shorter term of imprisonment, including cases where a sentence of imprisonment would formerly have been regarded as the only option.

### **Part 3: Determining the length of a CCO**

- 31 A CCO is punitive in nature and will operate punitively for every day of its duration. The sentencing court can, for the purposes of punishment, impose a CCO for a duration extending beyond the period assessed as necessary to achieve the rehabilitative purposes of the order.

#### **No correlation between length of CCO and length of prison term**

- 32 There is no necessary correlation between the term of a CCO and the term of imprisonment which might otherwise have been imposed. All that can be said is that, because imprisonment is more punitive than a CCO, where a CCO alone is imposed it is likely to be of longer duration than the term of imprisonment which might otherwise have been imposed.

#### **The power to vary or cancel a CCO**

- 33 Section 48M(2) of the Act confers on the court a range of powers enabling it to vary or cancel a CCO (or one or more of the conditions attached to the order).
- 34 The court may consider cancelling a CCO if the offender is either unwilling or unable to comply with the order, or one or more of its conditions (for example because of very severe illness). It may also do so if the offender's rehabilitation makes further compliance with conditions unnecessary.
- 35 When asked to exercise these powers, the court should consider whether the continuation of the CCO, or of particular conditions, is:
- advancing the rehabilitation and reintegration of the offender;
  - in the interests of the community; and/or
  - in the interests of the offender.
- 36 Over the period of a sentence, an offender's circumstances, health, disposition and maturity — and, accordingly, the risk which the offender presents to society — are likely to change. Changes of that kind are all the more likely to occur in the case of a community-based disposition, given the opportunity it creates for the offender — and the responsibility which it imposes on him/her — to address the causes of the offending and to work actively towards his/her rehabilitation and reintegration.
- 37 Sentencing judges should, however, exercise the power to impose a CCO on the assumption that the offender will have to comply with the order for every day of its duration.

#### **Determining the appropriate period**

- 38 In considering the period over which an offender's rehabilitation would be facilitated by a CCO, a sentencing court will be assisted by:
- (a) an estimate of the period of time which is likely to be required for the offender to benefit substantially from any treatment, monitoring or other condition that is to be imposed; and
  - (b) any material bearing on the period over which an offender's risk of reoffending should be managed by the deterrent effect of a CCO.

### Pre-sentence reports

- 39 Under s 8A(2) of the Act, a court considering the making of a CCO must order a pre-sentence report:
- (a) to establish the offender's suitability for the order;
  - (b) to establish that any necessary facilities exist; and
  - (c) to gain advice concerning the most appropriate condition or conditions to be attached to the order.
- 40 A report of that kind is not required if the court is considering a CCO with a single condition attached, being an unpaid community work condition of up to a maximum of 300 hours.
- 41 The pre-sentence report should also inform the court of any material which sheds light on the period of time over which the offender is likely to need support in achieving rehabilitation, and is likely to need a form of monitoring or otherwise be deterred from committing further offences. That may include information, based on empirical research or experience, concerning the periods of time required to overcome or at least manage substance abuse problems.

### The offender's consent

- 42 A CCO cannot be imposed unless the offender consents. This must be an informed consent. Hence, before imposing a CCO, the sentencing court must satisfy itself that the offender has consented and that, before the consent was given:
- (a) the offender was made aware of the proposed length of the order and of the proposed conditions; and
  - (b) those representing the offender had had a reasonable opportunity to explain to him/her the nature and effect of the proposed conditions and what compliance with them would be likely to involve, together with the serious consequences of non-compliance.

## Part 4: Determining the conditions to be attached to a CCO

### Treatment and rehabilitation condition

- 43 By introducing the CCO regime, Parliament has equipped sentencing courts with an unprecedented capacity to fashion a sentencing order which will 'address the underlying causes of the offending' (s 48D(2)(a)).
- 44 Under s 48D of the Act, the court may attach a condition to a CCO 'that requires the offender to undergo treatment and rehabilitation specified by the court'. Under s 48D(3) of the Act, the court may specify:
- assessment and treatment for drug or alcohol abuse or dependency;
  - medical assessment and treatment; and
  - mental health assessment or treatment (defined to include psychological, neuropsychological and psychiatric treatment).
- 45 A treatment and rehabilitation condition may provide for involvement in programs which address factors relating to the offending behaviour, or other treatment or rehabilitation which the court considers necessary. They may include employment, educational, cultural and personal development programs consistent with the purpose of the treatment condition.
- 46 For a CCO to be effective, the sentencing court must be made aware of the offender's personal circumstances, including factors which may have contributed to the offending behaviour or which might otherwise affect the offender's prospects of rehabilitation.
- 47 Treatment and rehabilitation conditions are imposed for the protection of the community, as well as for the benefit of the offender. But sentencing courts must still bear in mind that it is impermissible to impose for the purposes of treatment a CCO of longer duration, or with more onerous treatment and rehabilitation conditions attached, if the resulting order would be disproportionate to the gravity of the offending.

### Anticipated difficulties of compliance

- 48 Concern about difficulties of compliance should not be viewed as precluding the imposition of a CCO. Ordinarily, the court should assume — as the legislation itself does — that such conditions are likely to be effective.
- 49 Where an offender has been assessed as suitable for treatment and rehabilitation conditions, the sentencing court should proceed on the assumption that — whatever difficulties of compliance there may be initially — they are likely to abate once the treatment process gets under way.
- 50 Relapse into addiction during treatment is a common occurrence. The court should not come too quickly to a pessimistic conclusion about future compliance, however, when the very purpose of requiring the offender to commence treatment would be to address the problems which would otherwise create the risk of non-compliance.
- 51 There is ample capacity for the terms of the order to be revisited at any time, should the problem of non-compliance prove to be insoluble. That would be an obvious case for an application for cancellation (or variation) of the order under s 48M.

### Judicial monitoring condition

- 52 Section 48K of the Act permits the imposition of a condition directing that the offender be monitored by the court, if the court is satisfied that it is necessary to do so to review the offender's compliance with the order. A judicial monitoring condition may specify the times at which the offender must reappear before the court for a review and any information, report or test that must be provided. Section 48L sets out the powers of the court in reviewing the offender's compliance with the order under a judicial monitoring condition.
- 53 Judicial monitoring conditions may impose a heavy burden on courts which are not well equipped or funded to supervise offenders.
- 54 Nevertheless, research to date suggests that careful use of judicial monitoring conditions has the potential to enhance the rehabilitation of young offenders and of those who offend because they are drug-addicted, and is likely to encourage compliance with court orders such as the requirement to abstain from alcohol use.

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