



sentencing
ADVISORY
COUNCIL

Phasing out of Suspended Sentences

Consultation Paper

August 2015

About this Consultation Paper

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.

This paper sets 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 has also prepared a companion document, *Phasing out of Suspended Sentences: Background Report* to inform the phasing out of suspended sentences and the development of sentencing options to replace them.

This Consultation Paper and Background Paper are available on the Sentencing Advisory Council's website at www.sentencingcouncil.tas.gov.au or can be sent to you by email if you contact the Council by email at sac@justice.tas.gov.au

The Council invites submissions on the package of sentencing reform it has tentatively suggested and welcomes feedback on its proposals, including any negative consequences or difficulties that may arise from the draft recommendations. The draft recommendations are summarised at the beginning of the paper and are also contained in the relevant parts of the paper so that the options can be understood in context.

You may choose to address some or all of the draft recommendations and your answers may be referred to or quoted in the final report. If you do not wish your response to be published or if you wish to remain anonymous please indicate this in your response. After considering all responses, it is intended the final report will contain recommendations and advice to the Attorney-General and will be published.

Responses should be made in writing by close of business **Friday, 2 October 2015**.

If possible they should be sent by email to sac@justice.tas.gov.au, otherwise they can be mailed to the Sentencing Advisory Council, GPO Box 825 Hobart 7001 or faxed to (03) 6173 0210.

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.

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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

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 offender’s ‘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 has reviewed the current operation of suspended sentences in Tasmania and has prepared a companion document, *Phasing out of Suspended Sentences: Background Report* to inform the phasing out of suspended sentences and the development of sentencing options to replace them. The *Background Report* contains detailed information about the use of suspended sentences in Tasmania and other comparable jurisdictions and this information is used to inform the development of the Council’s draft recommendations contained in this paper.

This paper sets out 52 draft recommendations and the Council invites submissions on the package of sentencing reforms it has tentatively suggested and welcomes feedback on its preliminary views and proposals, including any negative consequences or difficulties that may arise from the draft recommendations contained in this paper.

Tasmania’s current use of suspended sentences

Term of Reference One 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 Three of this paper and in a more detailed manner in the *Background Report*.

The Council’s analysis found that Tasmania’s use of suspended sentences is higher than in all other Australian jurisdictions. In the Supreme Court in 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 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 then 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 offences¹ (23.3%), drug offences (7.2%) and offences against the person (6.2%).

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

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. Conversely, nearly two-thirds of offenders (66%) of offenders 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 Two 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 Five requested that the Council discuss the possible effect of the phase out of suspended sentences on imprisonment numbers. These issues are addressed in Chapters Three and Four of this paper and in Chapters Three and Four 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 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 disqualification² 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 and 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 to 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. However, in the period 1 January 2011 to 30 June 2014, more than twice as many offenders received FSSs as full-time prison sentences (4352 vs 1589). Even if PSSs are added, only 2338 offenders received prison sentences. A similar number received CSOs

¹ 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, *Phasing Out Suspended Sentences: Background Paper* (2015), Appendix I and J.

² 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.

(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. If instead, it could be hypothetically 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. The resolution of this issue also has implications for Community Corrections given that, as at 1 December 2014, there were 1998 offenders under supervision.

The Council has arranged for further modelling to be undertaken in relation to the possible effect of the use of different sentencing options following the abolition of suspended sentences.

Suspended sentences in other jurisdictions

Term of Reference Three asked the Council to 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. These matters are addressed in Chapters Three and Four of this paper and Chapters Three and Four of the *Background Paper*.

The Council's analysis of the experience of reforming suspended sentences in other jurisdictions showed the influence of the particular legal and political context on the sentencing practices in the jurisdiction in which the reforms take 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 Four 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 community correction orders (CCOs) in Chapter Seven.

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 consider 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 Six) 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 Seven).

The Council has also considered possible replacements for PSSs (see Chapter Eight) and examines deferred sentencing (see Chapter Nine).

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

In Chapters Five to Nine, the Council sets out its preliminary approach to a new sentencing model for Tasmania to accompany the phasing out of suspended sentences in Tasmania. Under the changes, under the *Sentencing Act 1997* (Tas), a court would have the following sentencing options available:

- imprisonment (with or without parole);
- imprisonment (of up to two years) without parole combined with a CCO (of up to three years);
- a drug and alcohol treatment order with a two year review period;
- home detention of up to three years;
- 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.

It is the Council's preliminary 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 preliminary 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 preliminary view that the order should be available in the Supreme Court as well as the Magistrates Court. 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.

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

The Council's preliminary 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 addresses the offender's rehabilitative needs.

As indicated, the Council also makes draft 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 tentatively 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 with a different social, political and judicial context. In Tasmania, the CCO would sit below imprisonment, drug and alcohol 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 preliminary view that sentencers should have maximum flexibility to address the offender and the offence, the Council's preliminary view is that a wide range of conditions should be available under a 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 that the offender not commit an imprisonable offence. However, the CCO with core conditions is more onerous for an offender given the supervision 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 preliminary view is that breach of a CCO should have serious consequences and that there needs to be a robust administrative procedure in place in relation to recording breaches (even if not actioned) and making 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.

In addition, it is the Council's preliminary 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 preliminary view, the Council is mindful of the problem of 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 draft recommendation is that 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 draft 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 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 resourcing 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.

Transitional arrangements and funding

Term of Reference Five 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 paper will have considerable resource implications, given that an unconditional suspended sentence is currently resource neutral.

If the proposed drug and alcohol 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.

Similarly, all offenders who receive a CCO will require supervision from Community Corrections and in cases where special conditions are imposed, there will be need to be appropriate resourcing for pre-sentence reports, judicial monitoring, programs, treatment, testing and monitoring of curfew and exclusion conditions.

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 is in the process of examining the possible resource implications of the draft recommendations outlined in this paper.

The Council aims to develop new sanctions that from their introduction are accepted by the courts as substitutes for the suspended sentence, and makes draft recommendations in relation to the implementation (and monitoring) of these sanctions to ensure that this is the case. Accordingly, the Council's draft 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 paper, during which time any new sentencing option introduced should operate in conjunction with the suspended sentence. The Council's preliminary 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 preliminary 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 the phase-in period, the Council considers that no substantive changes are required the current provisions in the *Sentencing Act 1997* (Tas) in relation 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 preliminary view that these orders should be replaced by the CCO from its introduction.

Draft recommendations

Draft recommendations 1 and 2 (see [1.3])

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.

Draft recommendation 3 (see [3.3.1])

Transitional arrangements

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

Draft recommendations 4 – 8 (see [6.2])

Drug and alcohol treatment orders

4. 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.
5. CMD orders should be available in the Supreme Court as well as the Magistrates Court.
6. 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.
7. 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 drug and alcohol 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 a drug and alcohol 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.
8. 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).

Draft recommendation 9 (see [7.1])

Nature of intermediate sanction

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

Draft recommendation 10 (see [7.2])

Periodic detention

Periodic detention should not be introduced in Tasmania.

Draft recommendations 11 – 26 (see [7.3.6])

Home detention

11. Home detention should be introduced as a sentencing option in Tasmania.

12. Home detention should not be a substitutional sanction and should be a sanction in its own right.

13. 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.

14. 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.

15. 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.

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

17. The following core conditions should attach to a home detention order:

- must not, in Tasmania or elsewhere, commit another imprisonable offence;
- must live only at approved premises;
- remain at approved premises for the time specified in the order;
- accept visits from Community Corrections;
- submit to searches of places 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.

18. The following special conditions should be available in relation to a home detention order:

- 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.

19. 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.

20. 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.

21. 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.

22. 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.

23. 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.

24. Resources must be made available to provide appropriate support and information to co-residents and also support to offenders.

25. 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.

26. 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.

Draft recommendation 27 (see [7.4])

Community detention orders

A community detention order should not be introduced in Tasmania.

Draft recommendation 28 (see [7.5.8])

Intensive correction/supervision orders

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

Draft recommendations 29 – 43 (see [7.6.9])

Community correction order (CCO)

29. A new intermediate sanction called a CCO should be introduced in Tasmania with a maximum term of three years.

30. 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.

31. The CCO should sit below imprisonment, drug and alcohol treatment orders and home detention, and above a fine.

32. The current provisions for probation orders and community service contained in the *Sentencing Act 1997* (Tas) should be repealed following the introduction of the CCO.

33. 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.

34. Appropriate funding should be made available for the CCO.

35. 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 would abate once a treatment process is underway, although there may be cases where a CCO would 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.

36. 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;
- submit to the supervision of a probation officer;
- 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.

37. In addition to the core conditions, the court should be able to attach any of the following special conditions:

- 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.

38. A breach of a CCO should have serious consequences and there needs to be a robust administrative procedure in place in relation to recording breaches (even if not actioned) and making 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.

39. 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.

40. 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.

41. The CCO should be able to be combined with a rehabilitation program order for family violence offences, driving disqualification and/or a fine.

42. 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 a fine.

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

Draft recommendations 44 and 45 (see [8.1])

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

44. 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.

45. 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.

Draft recommendation 46 (see 8.2])

Parole as a replacement for partly suspended sentences (PSS)

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

Draft recommendations 47 – 52 (see [9.7])

Deferred sentencing

47. 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).

48. The maximum period of deferral should be 12 months.

49. Deferral should be available even if the court is intending to impose a term of imprisonment.

50. The Council's preliminary view is 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.

51. Appropriate support and services should be made available to offenders who require financial assistance to access rehabilitation services.

52. 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

1.1 Background to this paper

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’.³ 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’.⁴ 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.

1.2 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;
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

³ Tasmanian Liberals, *Abolishing Suspended Sentences*, (nd), 2
<<https://www.tas.liberal.org.au/sites/default/files/policy/Abolishing%20suspended%20sentences.pdf>>.

⁴ Ibid.

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 approach of the Council

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. In this endeavour, the Council has drawn encouragement from the recent decision of the Victorian Court of Appeal in *Boulton v The Queen*⁵ that has challenged the notion that imprisonment is the only response to serious offending and has accepted that a non-custodial sanction (the community correction order (CCO) can serve the purposes of punishment in a more balanced and coherent way.⁶

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'.⁷ 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 fully suspended sentence (FSS) will be required to serve time in prison.

As part of its review, the Council has reviewed the current operation of suspended sentences in Tasmania and has prepared a companion document, *Phasing out of Suspended Sentences: Background Report*⁸ to inform the phasing out of suspended sentences and the development of sentencing options to replace them. The *Background Report* contains detailed information about the use of suspended sentences in Tasmania and other comparable jurisdictions and this information is used to inform the Council's draft recommendations in this paper.

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 new intermediate sanction (home detention), the draft 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.

⁵ [2014] VSCA 342.

⁶ See further discussion at [7.6].

⁷ Lorana Bartels, 'Sword or Feather': *The Use and Utility of Suspended Sentences in Tasmania*, (PhD Thesis, University of Tasmania, 2008) 109.

⁸ Sentencing Advisory Council, Tasmania, above n 2.

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. In view of this, the Council is in the process of examining the possible resource implications of the draft recommendations outlined in this paper.

The Council's draft 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 paper, 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 preliminary 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 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.⁹ 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 preliminary 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.¹⁰

Draft 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.

The Council invites submissions on the package of sentencing reforms it has tentatively suggested and welcomes feedback on its preliminary views and proposals, including any negative consequences or difficulties that may arise from the draft recommendations contained in this paper.

1.4 Scope of this paper

Chapter Two 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 Three 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

⁹ 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)).

¹⁰ See [4.2.1].

comparison with the law in other Australian jurisdictions, as well as the position in Canada and the United Kingdom. This chapter is a summary of the more detailed consideration contained in the *Background Report* and is intended to provide brief background information about the current legal landscape to inform the development of sentencing options to replace suspended sentences.

Chapter Four 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 Five sets out its preliminary approach to a new sentencing model for Tasmania to accompany the phasing out of suspended sentences in Tasmania.

Chapter Six 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 draft 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 Seven 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 preliminary view in relation to sentencing orders that may be appropriate to replace a FSS. These are home detention and CCO orders. The Council also considers the use of combination sentences and its preliminary view is that a CCO order used in combination with a fine provides a sanction with a significant punitive component.

Chapter Eight considers alternatives to (partly suspended sentences) PSSs that exist or have been proposed in other jurisdictions, and how they might operate in the Tasmanian context. The Council's draft 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 appropriate sentencing option in cases of serious offending where a FSS was previously used.

Chapter Nine considers the power of the court to defer the sentencing of an offender and makes a draft 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 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,¹¹ 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).¹²

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 2–1.¹³

Table 2–1: *Sentencing Orders in Tasmania under the Sentencing Act 1997* (Tas)¹⁴

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.¹⁵</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.¹⁶ 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.¹⁷</p> <p>The court must record a conviction.</p>
Drug treatment order (ss 27A–27Y <i>Sentencing Act 1997</i> (Tas)) [Magistrates Court only]	<p>There are two parts to a drug treatment order:</p> <p>(1) a term of imprisonment that is not immediately activated; and (2) a treatment and supervision component.</p> <p>An offender must agree to the making of the order and to comply with the treatment and supervision part of the order.</p> <p>The court must record a conviction.</p>

¹¹ *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.

¹² *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).

¹³ The *Sentencing Act 1997* (Tas) also provides the court with power to order a driver disqualification order, orders for restitution, compensation, 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).

¹⁴ This is adapted from the VSAC, *Suspended Sentences*, Discussion Paper (2005) [1.6].

¹⁵ *Criminal Code* (Tas) s 389 (general sentence), s 158 (murder), s 56 (treason).

¹⁶ Tasmania Law Reform Institute (TLRI), *Sentencing*, Final Report No 11 (2008) [3.2.1].

¹⁷ *Sentencing Act 1997* (Tas) s 13.

<p>Suspended sentence of imprisonment (ss 24–27 <i>Sentencing Act 1997</i> (Tas))</p>	<p>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.</p> <p>The court must record a conviction.</p>
<p>Community service order (ss 28–36A <i>Sentencing Act 1997</i> (Tas))</p>	<p>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.</p> <p>The offence must be punishable by imprisonment.</p> <p>The court must record a conviction.</p>
<p>Probation order (ss 37–42A <i>Sentencing Act 1997</i> (Tas))</p>	<p>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.</p> <p>The maximum term of the order is three years.</p> <p>This order can be imposed with or without a recorded conviction.</p>
<p>Fine (ss 43–53 <i>Sentencing Act 1997</i> (Tas))</p>	<p>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.</p> <p>The court must record a conviction.¹⁸</p>
<p>Rehabilitation program order (s 54A <i>Sentencing Act 1997</i> (Tas)) [family violence offences]</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 re-offending.</p> <p>This order can be imposed with or without a recorded conviction.</p>
<p>An adjournment with an undertaking (s 7(f) order) (ss 58–64 <i>Sentencing Act 1997</i> (Tas))</p>	<p>Release (unsupervised) with conditions relating to good behaviour.</p> <p>The term cannot exceed 60 months.</p>
<p>Conviction only (ss 58, 64 <i>Sentencing Act 1997</i> (Tas))</p>	<p>The court can record a conviction and order the discharge of the offender.</p>
<p>Dismissal without conviction (ss 58, 63–64 <i>Sentencing Act 1997</i> (Tas))</p>	<p>The court cannot record a conviction and dismisses the charge for the offence.</p>

¹⁸ The Sentencing Advisory Council, Tasmania, 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,¹⁹ the *Sentencing Act 1997* (Tas) does not expressly create a hierarchy of sentencing orders that sets out the relative severity of sentences.²⁰ Section 7 does, however, set out the sentencing orders in descending order of severity from imprisonment to discharge.²¹ A suspended sentence is the penultimate sanction — sitting below actual imprisonment and above a CSO in the sentencing hierarchy.²²

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.²³ However, parsimony and restraint in the use of imprisonment remain principles of common law relevant to the exercise of the sentencing discretion.²⁴ The Council’s view is that imprisonment should continue to be a sanction of last resort and that the reforms to

¹⁹ See for example, *Sentencing Act 1991* (Vic) s 5(3), (4), (4B), (4C), (5), (6), (7).

²⁰ Bartels, above n 7, 7.

²¹ Mirko Bagaric and Richard Edney, *Sentencing in Australia*, (Thomson Reuters, 2nd ed, 2014) fn 12. The hierarchy is recognised by the TLRI, above n 16, [3.7.1], [3.8.1], [3.9.1], [3.10.1].

²² Lorana Bartels, ‘The Use of Suspended Sentences in Australia: Unsheathing the Sword of Damocles’ (2007) *Criminal Law Journal* 113, 114.

²³ The TLRI has recommended that the principle of restraint in the use of imprisonment should be enacted: TLRI, above n 16, 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 21, [12.10].

²⁴ Kate Warner, *Sentencing in Tasmania* (Federation Press, 2nd ed, 2002) [3.301]–[3.301], [9.118]–[9.119]; TLRI, above n 16, [3.2.15]–[3.2.18].

sentencing in Tasmania should be guided by the principle that imprisonment should only be used when no other sanction is appropriate.

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 Sentencing Advisory Council, Victoria (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.²⁵ However, formally, a suspended sentence is a sentence of imprisonment.²⁶ 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’.²⁷ 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.²⁸ 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.²⁹

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’.³⁰ 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

²⁵ VSAC, above n 14, [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, 3rd ed, 2014) [12.05].

²⁶ *Sentencing Act 1997* (Tas), s 25(1). See also Bartels, above n 22.

²⁷ Kate Warner and Caroline Spiranovic, ‘Jurors’ Views of Suspended Sentences’ (2014) 47 *Australian and New Zealand Journal of Criminology* 141, 142.

²⁸ 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.

²⁹ VSAC, above n 14, [7.4]. For example, Cameron Whiteley, ‘Man Escapes Jail for Attack’ *The Advocate*, February 15 2013; David Killick, ‘Football Player Avoids Jail Time’ *The Mercury*, April 25 2013; Cameron Whiteley, ‘Victim Dismayed at Culprit’s “Slap on Wrist” for Burning Car’, *The Advocate*, Friday, April 26 2013; Michelle Paine, ‘Underage Sex man Avoids Prison’, *The Mercury*, Wednesday, May 29 2013; Patrick Billings, ‘Let-off for Rip-off Merchant’, *The Examiner*, Tuesday, November 12 2013; Caroline Tang, ‘Another Suspended Sentence after Breach’, *The Examiner*, Friday, August 1 2014; Michelle Paine, ‘Pregnant Mum Avoids Jail for Knife Attack’ *The Mercury*, Friday, August 15 2014; Caroline Tang, ‘Another “Last Chance” for Community Service’, *The Examiner* Saturday, October 11 2014. These articles were located using the Newsbank Database. See also Freiberg, above n 28, 120.

³⁰ Warner and Spiranovic, above n 27, 155.

where the offender had prior convictions ... and in a family violence case'.³¹ 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'.³² 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'.³³ 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'.³⁴ The Council shares the view that any new intermediate sanction should not be a 'prison' sentence that does not involve serving time in prison.

2.5 Intermediate sanctions

Suspended sentences are a form of intermediate sanction. Although the precise scope of 'intermediate sanction' is uncertain,³⁵ the VSAC states that such sanctions 'can generally be understood to be those sentencing orders that fall between immediate imprisonment and dismissals, discharges and adjournments'.³⁶ 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.³⁷

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.³⁸ 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'.³⁹ Further details about these sentencing options are provided in Chapters five to nine, which provide an overview of possible models for alternative intermediate sanctions to replace the fully and partly suspended sentences in Tasmania.

³¹ Ibid.

³² Ibid 157.

³³ Ibid 156.

³⁴ Ibid 157.

³⁵ Arie Freiberg and Stuart Ross, *Sentencing Reform and Penal Change: The Victorian Experience* (Federation Press, 1999) 107.

³⁶ VSAC, above n 9, [3.6].

³⁷ Ibid [3.7] referring to Freiberg and Ross, above n 35, 108. See Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) 171.

³⁸ VSAC, above n 9, [3.11]; Mackenzie and Stobbs, above n 37, 161.

³⁹ VSAC above n 9.

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 Report* 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').⁴⁰

Conditions may be attached to a suspended sentence.⁴¹ 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.⁴² 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.⁴³

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.⁴⁴

In Tasmania, suspended sentences were considered by the Tasmania Law Reform Institute (TLRI) in its 2008 sentencing report⁴⁵ and by Bartels in her comprehensive analysis of the use and utility of suspended sentences in Tasmania.⁴⁶ 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.

⁴⁰ VSAC, *Suspended Sentences*, Final Report Part 1 (2006).

⁴¹ *Sentencing Act 1997* (Tas). See [3.3.6]; Sentencing Advisory Council, Tasmania, above n 2, [2.4.4].

⁴² Bartels, above n 7, 4.

⁴³ *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.

⁴⁴ See Sentencing Advisory Council, Tasmania, above n 2, [2.2.2], [2.4.1].

⁴⁵ TLRI, above n 16.

⁴⁶ Bartels, above n 7.

3.2 The purpose of suspended sentences

Suspended sentences are linked to principles of specific deterrence, denunciation and rehabilitation.⁴⁷ 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’.⁴⁸ These sentiments are evident in the views of Tasmania 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.⁴⁹ Suspended sentences are viewed as a ‘last chance’ for the offender to avoid an immediate custodial sentence.⁵⁰

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’;⁵¹
- 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’;⁵²
- 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 sentences use a more severe sentencing option in lieu of appropriate more lenient alternatives’.⁵³
- they violate the proportionality principle.

⁴⁷ VSAC, *Suspended Sentences in Victoria: A Preliminary Information Paper* (2005) 3–4. See *Director of Public Prosecutions v Broadby* (2010) 20 Tas R 399.

⁴⁸ VSAC, above n 14, [8.19].

⁴⁹ Bartels, above n 7, 109–110.

⁵⁰ NSW Law Reform Commission (NSWLRC), *Sentencing*, Report 139 (2013) [10.24]. See Bartels, *ibid* 122, 235–236.

⁵¹ VSAC, above n 14, [8.20].

⁵² Lorana Bartels, ‘An Examination of the Arguments For and Against the Use of Suspended Sentences’ (2010) 12 *Flinders Law Journal* 119, 132. See Sentencing Advisory Council, Tasmania, above n 2, Chapter 5 for the discussion of recidivism rates and suspended sentences.

⁵³ Bartels, above n 52, 160.

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. The Council 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.

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 Report*.

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'.⁵⁴ 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 decision is the High Court decision in *Dinsdale v The Queen*,⁵⁵ 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.⁵⁶

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'.⁵⁷ 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.⁵⁸ 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*'.⁵⁹ This has implications for the likely approach to

⁵⁴ *Sentencing Act 1997* (Tas) s 7(b).

⁵⁵ (2000) 202 CLR 321.

⁵⁶ VSAC, above n 14, [4.5].

⁵⁷ Warner, above n 24, [9.205].

⁵⁸ Sentencing Advisory Council, Tasmania, above n 2, [2.4.1].

⁵⁹ 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 16, [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.

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.⁶⁰ 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;
- 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 re-offending.⁶¹

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'.⁶²

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 appears 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'.⁶³ This has led to an increase in the use of imprisonment as a sanction and a consequent substantial increase in the prison population.⁶⁴ 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.⁶⁵ The Court of Appeal has also set out guidelines for the

⁶⁰ *Dinsdale v R* [79]–[8] per Kirby J confirmed in *Langridge v The Queen* (2004) 12 Tas R 470.

⁶¹ 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.

⁶² *Ibid* 28.

⁶³ VSAC, *Community Correction Orders: Monitoring Report* (2014) 57.

⁶⁴ See [4.2.1].

⁶⁵ *Sentencing Act 1991* (Vic) s 36(2). See further discussion at [7.6].

courts in relation to the use of the CCO to facilitate its use in the manner intended by Parliament.⁶⁶

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,⁶⁷ 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.⁶⁸ 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 commonly enlivened where a suspended sentence is imposed in cases of sexual assault or violent incidents.⁶⁹ 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. To an extent, however, this supports the TLRI's recommendation against introducing offence-based restrictions on the use of suspended sentences.⁷⁰

In addition, the Council recognises the complexity of the sentencing process and the need for the court 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 suspended sentences can be imposed.

Draft Recommendation 3

Transitional arrangements

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%.⁷¹ 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%).⁷²

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

⁶⁶ *Boulton v The Queen* [2014] VSCA 342, [25]. See [7.6].

⁶⁷ See Sentencing Advisory Council, Tasmania, above n 2, Appendix A Table A–1.

⁶⁸ See TLRI, above n 16, [3.3.28]; Sentencing Advisory Council, Tasmania *ibid* [2.4.1].

⁶⁹ VSAC, above n 40, 4.

⁷⁰ TLRI, above n 16, Recommendation 10.

⁷¹ Sentencing Advisory Council, Tasmania, above n 2, [3.2].

⁷² *Ibid* [4.2].

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.⁷³ In the Magistrates Court, in the same period, there were 114 195 offences for which sentences were imposed in respect of 54 576 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, 30 308 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%).⁷⁴

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 in 2011–14. 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 (discussed further at [4.1.1]).

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

⁷³ See Sentencing Advisory Council, Tasmania, above n 2, for more detail about the findings and methodology.

⁷⁴ See *ibid.*

Offences for which offenders most likely to receive a suspended sentence

Excluding offences where there were fewer than 20 sentences imposed,⁷⁵ 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, PSS 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’ 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.

⁷⁵ 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).

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

	Offence	N (FSS)	N (Total)	% of offences
1	Other illicit drug offences, nec ⁷⁶	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.

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%

⁷⁶ Nec means not elsewhere classified and refers to minor matters such as possessing drug-related paraphernalia.

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 FSS 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%).⁷⁷ 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.⁷⁸ 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.⁷⁹

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.⁸⁰ The operational period for PSSs ranged from 12 months to 36 months, with a median of 24 months.

⁷⁷ See Sentencing Advisory Council, Tasmania, above n 2, [3.1.3].

⁷⁸ For discussion, see Bartels, above n 52, 119.

⁷⁹ See TLRI, above n 16, [3.3.27], Recommendation 10.

⁸⁰ See Sentencing Advisory Council, Tasmania, above n 2, [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.⁸¹ 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.⁸² In relation to FSSs, suspended sentences were most commonly combined with compensation (in 21% of cases) or community service (20% of cases).⁸³ 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%).⁸⁴ 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.⁸⁵ 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'.⁸⁶

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).⁸⁷

⁸¹ *Sentencing Act 1997* (Tas) s 8(1). Sentencing Advisory Council, Tasmania, above n 2, [2.2], [2.4.4].

⁸² Bartels, above n 7, 176.

⁸³ Ibid 177.

⁸⁴ Ibid. The data from the Magistrates Court did not disclose the number of compensation orders imposed in combination with suspended sentences.

⁸⁵ *Sentencing Act 1997* (Tas) s 24(1). See [3.1]; Sentencing Advisory Council, Tasmania, above n 2, [2.4.4].

⁸⁶ *Sentencing Act 1997* (Tas) s 24(3).

⁸⁷ Sentencing Advisory Council, Tasmania, above n 2, [2.4.4].

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.⁸⁸ 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.⁸⁹

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’.⁹⁰ If the court does not activate the sentence, the court must state the reasons for its decision.⁹¹

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.⁹²

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.⁹³ This represents a decrease from 41% in Bartels’ study, but remains higher than in Victoria (28%)⁹⁴ and NSW (22%).⁹⁵ Conversely, 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%).⁹⁶ 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.⁹⁷

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

⁸⁸ *Sentencing Act 1997* (Tas) s 27.

⁸⁹ *Tanner v Brown* [2011] TASSC 59, [94] (Wood J).

⁹⁰ *Ibid* [96] (Wood J).

⁹¹ *Sentencing Act 1997* (Tas) s 27(4D).

⁹² *Ibid* s 27(4E).

⁹³ Sentencing Advisory Council, Tasmania, above n 2, [5.1.1].

⁹⁴ VSAC, above n 9, 37.

⁹⁵ Sentencing Council, NSW, *Suspended Sentences: Report* (2011) 23.

⁹⁶ Sentencing Advisory Council, Tasmania, above n 2, [5.1.1].

⁹⁷ *Ibid*.

reducing the rate of imprisonment, suspended sentences have increased it'.⁹⁸ 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.

⁹⁸ Patricia Menendez 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 Two requires the Council consider the effect on the use of other sentencing options on the abolition of suspended sentences and Term of Reference Five asks the Council to discuss the effect of the abolition of suspended sentences on imprisonment numbers. Term of Reference Three 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. 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.

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),⁹⁹ logically all offenders who would previously have received a suspended sentence will be sentenced to immediate imprisonment following the abolition of suspended sentences. If this were the case, this would have a dramatic effect on prisoner numbers in Tasmania given that in the last financial year an additional 1207 offenders who would not have served time in prison would be sentenced to immediate imprisonment and 285 offenders who would have served a reduced time in prison would now be required to serve a longer sentence of imprisonment. In the period 2011 to 2013–14, 3975 offenders in the Magistrates Court received FSSs of less than six months, compared with 1283 prison sentences and 438 PSSs. If all of these FSSs were to be converted to sentences of imprisonment, it would mean over three times as many offenders would be admitted to custody, albeit for relatively short periods (ie, 5696 sentences of up to six months, instead of the 1721 admitted in 2011–14 on prison sentences and PSSs combined). However, the fact that so many of these sentences are very short may suggest that, in the absence of FSSs as a sentencing option, magistrates might instead choose to impose a NCO in some cases (although this will in turn have implications for community corrections). Nevertheless, even if only FSSs of at least six months were converted to prison sentences, this would have meant 359 additional prison admissions over the period.

An increase in the numbers of offenders who are sentenced to imprisonment would have significant implications for the Tasmania Prison Service, which has an operational capacity of 601 prisoners (across all sections of the prison). This figure excludes specialist units that are

⁹⁹ See [3.1].

reserved for offenders with health issues, prisoners at significant risk of suicide and self-harm or to provide a period of separation from other prisoners as a disciplinary sanction.¹⁰⁰ The Risdon Complex has an operational capacity of 265 prisoners (97 maximum security and 168 medium security), Ron Barwick Minimum Security has an operational capacity of 231 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.¹⁰¹ As at 23 December 2014, Tasmania had a prison population of 461 prisoners. There were 83 prisoners who were unconvicted awaiting court hearing or trial, one prisoner under sentence awaiting appeal and 367 under sentence with no current appeal. There were 68 male maximum security prisoners, 150 male medium security prisoners, 162 male minimum security prisoners and 26 female prisoners.¹⁰²

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. The budget allocation for the prison service in the 2014–15 budget was \$61 000 000.¹⁰³ Tasmania's net recurrent expenditure per prisoner per day in 2013–14 was \$332.36.¹⁰⁴ However, it is not correct to calculate that each additional prisoner added to prison will cost an additional \$332 per day. There are fixed costs of operating a prison system and most of the costs of running a prison are set and do not change with changes in prisoner numbers. The biggest cost is staffing and these costs do not move up and down in line with fluctuations in the prison population.¹⁰⁵ 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.¹⁰⁶

An increase in the number of short sentences of imprisonment would also raise concerns about exposing offenders to the deleterious effect of imprisonment without any benefits.¹⁰⁷ Concerns can also be raised 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.¹⁰⁸

Determining the likely effect of prisoner numbers following the abolition of suspended sentences, however, is not as straightforward as applying *Dinsdale*. Instead, 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.¹⁰⁹ A trend towards more punitive sentencing practices, judicial practice regarding the imposition of suspended sentences, and judicial acceptance of any new sentencing options

¹⁰⁰ Interview with Robert Williams, then Deputy Secretary, Department of Justice, Tasmania.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Parliament of Tasmania, *Government Services Budget Paper No 2: Volume 1*, 5.7, <[http://www.treasury.tas.gov.au/domino/df/df.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/df/df.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)>.

¹⁰⁴ Williams, above n 100.

¹⁰⁵ Ibid.

¹⁰⁶ See Karen Gelb, *The Perfect Storm: The Impacts of Abolishing Suspended Sentences in Victoria* (2013) 18–20. See also [4.2].

¹⁰⁷ See above n 16, [3.2.7].

¹⁰⁸ See Sentencing Advisory Council, Tasmania, above n 2, [5.2.2].

¹⁰⁹ Bartels makes this point in relation to the introduction of suspended sentences, above n 52. Bartels observes that the question of whether suspended sentences actually lower prison numbers is a complex question 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.

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,¹¹⁰ and on the other, the concern that suspended sentences cause net-widening.¹¹¹

Clearly, 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.¹¹²

As at 1 December 2014, there were 1998 offenders (444 females and 1554 males) under supervision of Community Corrections in Tasmania in relation to 3281 orders.¹¹³ Of these orders, 15.8% (517 orders) related to suspended sentences in combination with another community order (probation or community service).¹¹⁴ The budget allocation for Community Corrective Services in the 2014–15 budget was \$9 477 000¹¹⁵ and the net recurrent expenditure per community-based offender per day in 2013–14 was \$11.77.¹¹⁶ 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.¹¹⁷ There has been significant restructure 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.¹¹⁸ This is positive 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.¹¹⁹ 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.

An examination of sentencing practices for key offences in the Supreme Court and the Magistrates Court allows some projections to be made of the possible approach of the courts following the abolition of suspended sentences. It shows that it is likely that the effect of abolishing suspended sentences will not be consistent across offence categories and, based on current practice, it appears that for some offences a sentence of imprisonment would be likely and for other offences the court may impose a non-custodial sentence.

4.1.1 Key offences in the Supreme Court

In relation to the Supreme Court, the following discussion focuses on six offences appearing in the Table 3–3 (offences for which FSSs were most commonly imposed rather than some

¹¹⁰ See [3.2.2].

¹¹¹ Bartels, above n 52, 160; see [3.2.1].

¹¹² 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 100.

¹¹³ Email from Robert Williams, then Deputy Secretary, Department of Justice to Rebecca Bradfield, 8 January 2015.

¹¹⁴ Ibid. It is noted that the statistics provided by Community Correction relate to order types and not offender numbers.

¹¹⁵ Parliament of Tasmania, above n 103.

¹¹⁶ Williams, above n 113.

¹¹⁷ Williams, above n 100.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

other sentencing option). Together, these offences accounted for 51.4% of offences attracting FSSs between 2011 and 2013–14. It is therefore instructive to consider what are the other commonly imposed penalties for these offences, as a means of hypothesising about possible sentencing practices in the absence of FSSs as a sentencing option. This is set out in Table 4–1.¹²⁰

Table 4–1: Sentencing outcomes for key offences for which FSSs imposed

	Proportion of all offences resulting in FSS	Proportion of sentences for offence			
		Prison	PSS	FSS	NCO
Deal or traffic in illicit drugs — commercial quantity (n=234)	14.6%	18.4%	12.8%	65.8%	3.0%
Serious assault resulting in injury (n=419)	9.8%	47.5%	21.0%	24.6%	6.9%
Obtain benefit by deception (n=504)	9.0%	61.9%	17.0%	18.8%	2.2%
Arson (n=209)	7.2%	31.1%	26.3%	36.3%	6.2%
Cultivate illicit drugs (n=93)	6.0%	0.0%	12.9%	67.7%	19.4%
Possess illicit drugs (n=89)	4.8%	15.7%	5.6%	56.2%	22.5%
All offences (n=1052)	N/A	50.1%	17.6%	26.0%	5.6%

As set out in Tables 3–1 and 3–3 and as discussed at [3.1.2] in the *Background Paper*,¹²¹ dealing or trafficking in illicit drugs was both the offence for which FSSs were commonly imposed and an offence for which an offender was likely to receive such an outcome. By contrast, prison and PSSs (ie, a form of imprisonment) were used at lower rates than usual. This was especially the case for prison, which was only imposed in respect of 18.4% of offences, compared with 50.1% overall. Interestingly, NCOs were also a comparatively rare outcome (3% vs 5.6%). This suggests that the Supreme Court currently does not have what it considers a suitable alternative to FSSs, and significant consideration will therefore need to be given to establishing an appropriate intermediate sentencing outcome to take the place of FSSs for drug trafficking offences.

Sentencing practices for assault resulting in serious injury are quite similar to the overall distribution of sentencing outcomes. This suggests that most of these offences would, in the absence of FSSs, result in a prison sentence, as occurred in respect of 68.5% of offences examined here (ie, prison and PSSs combined). However, the fact that 6.9% of offences resulted in NCOs (fractionally higher than the overall average) suggests that, in the absence of FSSs as a sentencing option, some offenders with strong mitigating factors may receive NCOs instead of an actual prison sentence.

The offence of obtaining a benefit by deception (a fraud offence) accounted for 9% of offences resulting in FSSs, but was an offence for which offenders were particularly likely to receive an actual prison term (imposed in respect of 61.9% of offences, compared with an average of 50.1%), with a further 17% of offences resulting in PSSs. By contrast, only 2.2% of these offences resulted in NCOs. These findings would suggest that this offence type will generally result in a prison term in the future (in the absence of an appropriate intermediate alternative).

The most common outcome for arson was a FSS (36.3% of offences), followed by prison (31.1%). This offence was more likely than usual to result in PSSs (26.3% vs 17.6%), suggesting courts may wish to provide some measure of leniency (rather than imposing an unsuspended prison term). NCOs were also a slightly more common outcome than average (6.2% vs 5.6%).

¹²⁰ It is noted that the number for each offence signifies the total number of such charges, not the number of FSSs imposed.

¹²¹ Sentencing Advisory Council, Tasmania, above n 2.

As discussed at [3.3.3], the offence of cultivating illicit drugs was particularly likely to result in FSSs (67.7%). Unusually, none of the 93 cases resulted in a prison sentence, while PSSs were also a less likely outcome than average (12.9% vs 17.6%). Conversely, NCOs were imposed at a much higher rate than usual (19.4% vs 5.6%). This suggests that most offenders in receipt of FSSs for this offence would in the future be quite likely to receive a less severe disposition. A somewhat similar pattern was observed for the offence of possessing illicit drugs — 56.2% of these offences attracted FSSs, while 22.5% resulted in NCOs. By contrast, this offence was much less likely than usual to result in prison (15.7%) or PSSs (5.6%). Again, this suggests that future sentencing practices are likely to tend towards NCOs than imprisonment.

4.1.2 Key offences in the Magistrates Court

In the Magistrates Court, the top offences for which FSSs were imposed are set out in Table 3–4. The offences for which an offender was most likely to receive such a sentence are set out in Table 3–6. The top six offences for which an FSSs was most commonly imposed represented nearly 54.5% of all offences attracting FSSs in 2011–14 and many of these offences were also offences for which an offender was disproportionately likely to receive such a penalty. It is therefore instructive to consider what are the other commonly imposed penalties for these offences, as a means of hypothesising about possible sentencing practices in the absence of FSSs as a sentencing option. This is set out in Table 4–2.

Table 4–2: Sentences for key offences for which FSSs imposed

	Theft from a person	Breach of bail	Drive disq.	Exceed PCA	Regn offences	Burglary
	Number					
Prison	1555	1255	584	341	304	697
PSS	1064	798	421	410	327	517
FSS	2422	1771	1679	1661	1325	1092
CSO	965	945	664	572	675	334
Probation	335	284	102	137	338	43
Fine	710	1411	3289	8820	5039	61
Other monetary order	170	665	170	68	334	18
GBB	1259	433	80	8	63	141
Licence disqualification	1	14	276	58	503	0
Nominal penalty	138	1446	221	64	1103	24
Total	8619	9022	7486	12139	10011	2927
	Percentage					
Prison	18.0%	13.9%	7.8%	2.8%	3.0%	23.8%
PSS	12.3%	8.8%	5.6%	3.4%	3.3%	17.7%
FSS	28.1%	19.6%	22.4%	13.7%	13.2%	37.3%
CSO	11.2%	10.5%	8.9%	4.7%	6.7%	11.4%
Probation	3.9%	3.1%	1.4%	1.1%	3.4%	1.5%
Fine	8.2%	15.6%	43.9%	72.7%	50.3%	2.1%
Other monetary order	2.0%	7.4%	2.3%	0.6%	3.3%	0.6%
GBB	14.6%	4.8%	1.1%	0.1%	0.6%	4.8%
Licence disqualification	0.0%	0.2%	3.7%	0.5%	5.0%	0.0%
Nominal penalty	1.6%	16.0%	3.0%	0.5%	11.0%	0.8%
Total	99.9%	99.9%	100.1%	100.1%	99.8%	100.0%

As set out in Table 4–2, 28.1% of instances of theft from a person resulted in FSSs (accounting for 13.1% of all offences for which FSSs were imposed). However, this offence was also disproportionately likely to result in a prison sentence (18.0%, compared with an average overall of 8.2%) or PSSs (12.3%, compared with an overall average of 5.8%). This offence was also comparatively more likely to result in a CSO (11.2%, compared with an overall average of 8.0%) or GBB (14.6% vs 9.3%). Conversely, this offence was unlikely to result in a fine (8.2%, compared with an overall average of 40.6%). These data suggest that new sentencing practices for theft from a person are likely to place considerable additional

pressure on prison numbers, as this is an offence for which the tariff appears to set quite high, with 30.3% of offences resulting in an immediate custodial sentence.

As set out at [3.3.3], breach of bail accounted for 9.7% of offences resulting in FSSs. This was also the most common penalty, accounting for 19.6% of cases. Interestingly, however, the second most commonly imposed penalty was a nominal penalty (16%, compared with an overall average of 5%), followed shortly thereafter by a fine (15.6%). Although offenders were disproportionately likely to receive prison (13.9% vs 8.2%) or PSSs (8.8% vs 5.8%), this occurred to a lesser extent than for theft from a person. These data suggest that a significant number of offenders who breach their bail may in future receive a minor penalty, rather than an actual prison term.

Driving while disqualified appeared third on the list of offences for which FSSs were most commonly imposed, and offenders were disproportionately likely to receive such a sentence. On the other hand, they were slightly less likely than average to receive prison (7.8% vs 8.2%) or PSSs (5.6% vs 5.8%). The most commonly imposed penalty for this offence was a fine, and offenders were slightly more likely than average to receive this option (43.9% vs 40.6%). It may therefore be the case that offenders sentenced for this offence would in future receive a fine instead.

The data for exceed PCA suggest that, in the future, offenders would be particularly likely to receive a fine instead of FSSs — fines were imposed in 72.7% of cases (vs 40.6% overall). Conversely, prison and PSSs were less likely to be imposed for this offence than generally (2.8% vs 8.2% and 3.4% vs 5.8%). This offence also had low use of other sentencing options (eg, 0.1% of offences resulting in a GBB, compared with an overall average of 9.3%).

Registration offences showed a somewhat similar pattern: just over half of all offences resulted in a fine (50.3%), while prison and PSSs were comparatively unlikely to be imposed (3% and 3.3% respectively). However, this offence was more likely than usual to result in nominal penalty (11% vs 5%), which may also suggest that magistrates would in the future seek non-custodial alternatives.

Finally, over a third of burglary offences resulted in FSSs (37.3%). A further 23.8% resulted in a prison sentence, with PSSs accounting for 17.7% of offences. This offence was also more likely to receive a CSO (11.4% vs 8%). Conversely, other penalties were unlikely, especially fines (2.1% vs 40.6%). This suggests that a high proportion of offenders sentenced for burglary would, in the absence of FSSs as a sentencing option, instead receive an actual prison sentence, although some may receive CSOs if they have strong mitigating factors.

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’)¹²² 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.

4.2.1 Victoria

In Victoria, suspended sentences were initially abolished in 1958 and were reintroduced in 1986. In 2004, the VSAC commenced a project to examine the use of suspended sentences and provide advice on whether there was a need for reform.¹²³ In its Final Report — Part 1,

¹²² VSAC, above n 9, [3.87].

¹²³ Ibid xxi.

released in 2006, the 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 4–3:¹²⁴

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 2012.¹²⁵

While acknowledging that the removal of suspended sentences could cause prison numbers to increase,¹²⁶ the initial prediction of the 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.¹²⁷

The 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 [the 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’.¹²⁸ 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, the 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.¹²⁹

¹²⁴ Information obtained from Gelb, above n 106, 6–7.

¹²⁵ See [7.6].

¹²⁶ VSAC, above n 40, [3.59], [3.86].

¹²⁷ 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 106, 26, 30.

¹²⁸ VSAC, above n 40, [3.73].

¹²⁹ Ibid [2.107].

The VSAC reiterated this recommendation in its 2010 report monitoring the use of suspended sentences, and again stressed the need for credible alternative to suspended sentences.¹³⁰ 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 October 2014 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 two years, between 2012 and 2014, the prison population had grown by more than 25%.¹³¹ The prison population increased from 4,350 in June 2009 to 6,140 at 8 October 2014, with a future projection of 7,169 prisoners by 30 June 2015.¹³² The prison population was 6450 as at 11 December 2014.¹³³ It reached 6506 in January 2015 and stood at 6239 in mid-May 2014.¹³⁴ The Ombudsman identified two reforms — changes to the parole system following a 2013 review and the phasing out of suspended sentences as having 'had a profound impact on the increase in the prison population and indirectly, upon delivery of rehabilitation programs.'¹³⁵ 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 2012.¹³⁶

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 this is compounding the problem of rising prison numbers.

Earlier research conducted by the 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.¹³⁷ This trend continued in the later data.¹³⁸ 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 viewed as a 'credible alternative to suspended sentences for some offenders'.¹³⁹ 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 make 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 evidence in 2012, which saw over half of suspended sentences being replaced by CCOs, is extrapolated into the future, more than half of suspended

¹³⁰ VSAC, *Suspended Sentences in Victoria: Monitoring Report* (2010) [5.14]–[5.17].

¹³¹ Ombudsman, Victoria, *Investigation Into the Rehabilitation and Reintegration of Prisoners in Victoria*, Discussion Paper (2014) [14].

¹³² *Ibid* [15].

¹³³ Information provided by Arie Freiberg.

¹³⁴ Information provided by Arie Freiberg.

¹³⁵ Ombudsman, Victoria, above n 131, [9]. See also Gelb, above n 106; Lorana Bartels, 'Parole and Parole Authorities in Australia: A System in Crisis' (2013) 37 *Criminal Law Journal* 357.

¹³⁶ Ombudsman, Victoria, above n 131, [21].

¹³⁷ See VSAC, above n 130.

¹³⁸ See VSAC, above n 63.

¹³⁹ *Ibid* 33.

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.¹⁴⁰

In contrast, in the Magistrates Court, while there has been a decline in the use of suspended sentences, there has not been a corresponding increase in the use of imprisonment as a sanction.¹⁴¹ There has also not been a move to use CCOs instead of suspended sentences. The VSAC found that there was ‘little evidence of any shift away from suspended sentences towards CCOs in the Magistrates’ Court’.¹⁴² It noted that there had not been an increased trend in the 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.¹⁴³ The consequences of the abolition of suspended sentences in the Magistrates Court from 1 September 2014 are yet to be determined.¹⁴⁴ However, there have been several developments in Victoria that suggest an expanded operation of the CCO. As a result of an apparent judicial reluctance to use CCOs, legislative amendments were introduced that aimed to increase the use of the order with amendments made in 2014 that made it clear that the CCO is an appropriate sentencing option in circumstances that may have 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)).¹⁴⁵ In addition, the Victorian Court of Appeal, in its landmark decision in *Boulton*, establish 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.¹⁴⁶ These changes may have had some effect as prison numbers appear to have peaked and are now declining.

4.2.2 NSW

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.¹⁴⁷ 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.¹⁴⁸ 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].¹⁴⁹

¹⁴⁰ Ibid 56.

¹⁴¹ See *ibid* 28.

¹⁴² Ibid 11.

¹⁴³ Ibid 28.

¹⁴⁴ The VSAC observes that the impact of abolishing suspended 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.

¹⁴⁵ See discussion further at [7.6.6].

¹⁴⁶ See [7.6].

¹⁴⁷ NSWLRC, above n 50, Recommendation 11.1. See [7.4.2].

¹⁴⁸ Ibid [10.35]–[10.39].

¹⁴⁹ 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), and 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.¹⁵⁰ 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’.¹⁵¹

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.¹⁵²

Following concerns over the increase in prison numbers, 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).¹⁵³ 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)).¹⁵⁴ Optimism was expressed that the decline in the number of people sentenced to imprisonment was set to continue.¹⁵⁵ 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 the rate for imprisonment for 2013–14 is essentially unchanged from the rate for 2002–03 (11.6% vs 11.5%).

¹⁵⁰ 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>. 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).

¹⁵¹ Ministry of Justice, New Zealand, *ibid*.

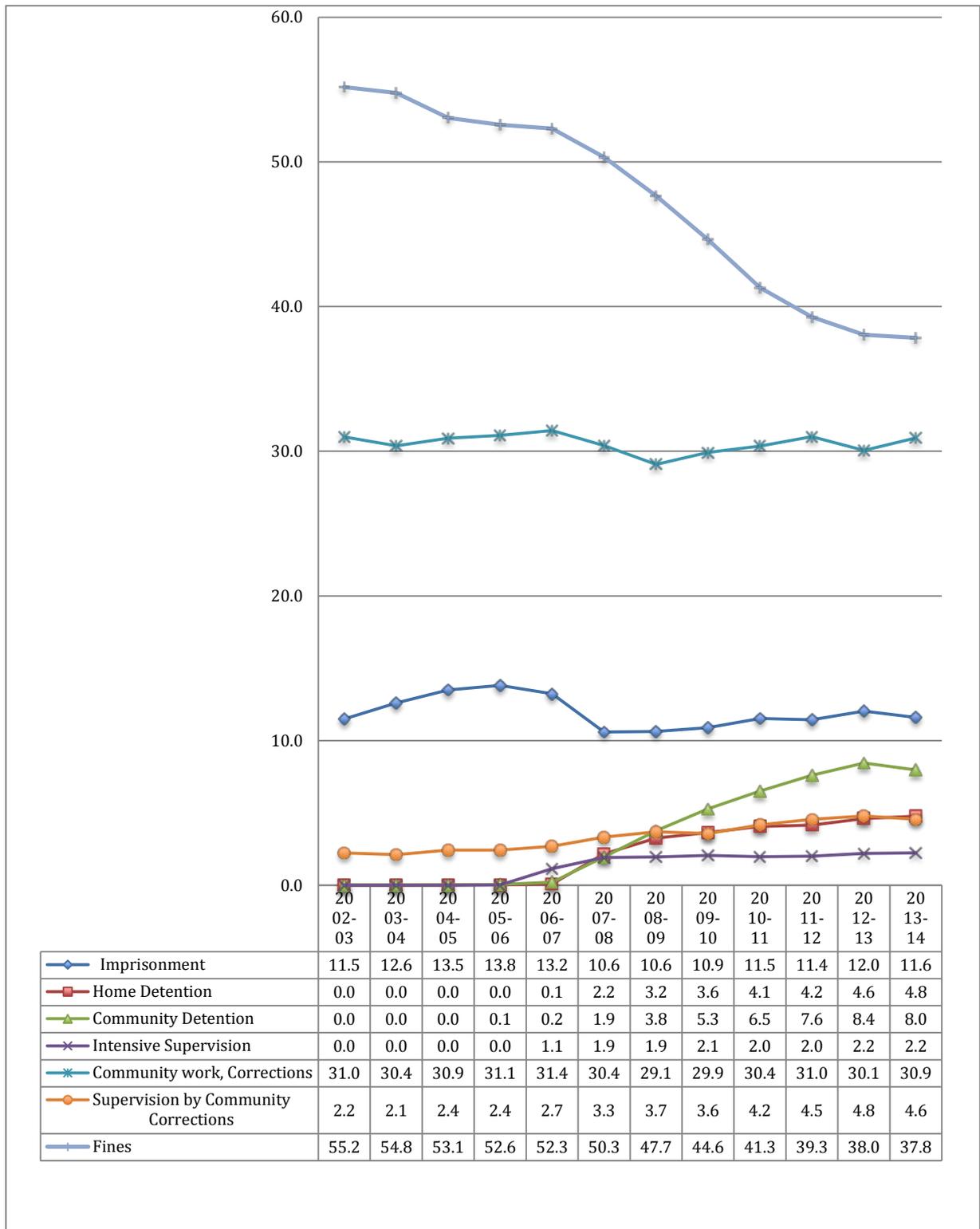
¹⁵² Philip Spier and Barb Lash, *Conviction and Sentencing of Offenders in New Zealand: 1994 to 2003* (Ministry of Justice, 2004) 104.

¹⁵³ VSAC, above n 9, [2.33].

¹⁵⁴ 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>>.

¹⁵⁵ *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 2013-14¹⁵⁶



¹⁵⁶ 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.¹⁵⁷

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 added in, 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 461.¹⁵⁸ If it could instead be hypothetically 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. The Council has arranged for further modelling to be undertaken in relation to the possible effect of the use of different sentencing options following the abolition of suspended sentences.

¹⁵⁷ Andrew Ashworth, *Sentencing and Criminal Justice* (Oxford University Press, 5th ed, 2010) 299.

¹⁵⁸ Williams, above n 100.

5 A new sentencing model — Overview

In Chapters Five to Nine, the Council sets out its preliminary approach to a new sentencing model for Tasmania to accompany the phasing out of suspended sentences in Tasmania. Guided by the approach of the VSAC,¹⁵⁹ 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;¹⁶⁰
- intermediate sentencing orders should generally not be substituted sanctions, that is they should exist as sentences in their own right rather than 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 the resourcing 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 preliminary structure is set out in Figure 5–1. Under the changes, under the *Sentencing Act 1997* (Tas) a court would have the following sentencing options available:

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

¹⁵⁹ See VSAC, above n 28, [3.1].

¹⁶⁰ This was the recommendation of the TLRI, above n 16.

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

CURRENT HIERARCHY		REVISED HIERARCHY
<p>Imprisonment</p>	<p>No Change →</p>	<p>Imprisonment</p>
<p>Drug treatment order (Magistrates Court only)</p> <p>Term: 2 year review period</p> <ul style="list-style-type: none"> (1) treatment and supervision. (2) sentence of imprisonment. <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 use 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><u>Core conditions</u></p> <ul style="list-style-type: none"> • must not, in Tasmania or elsewhere, commit another imprisonable offence; • must attend the court whenever it directs; • must report to a court diversion officer at a specified place within 2 clear working days after the order is made; • 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; • must report to, and accept visits from case manager or court diversion officers; • give the offender’s case manager at least two clear working days’ notice before any change of address; • must not leave Tasmania except with the permission, granted either generally or in a particular case, of the court; • must comply with all lawful directions of the court; • must comply with all reasonable directions of the offender’s case manager and court diversion officers concerning the core conditions and program 	<p>Expanded Operation →</p>	<p>Drug and alcohol treatment order (all courts)</p> <p>Term: 2 year review period</p> <ul style="list-style-type: none"> (1) treatment and supervision. (2) sentence of imprisonment. <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 a drug and alcohol 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><u>Core conditions</u></p> <p>As with current order expanded to include alcohol as well as drugs.</p> <p><u>Program conditions</u></p> <p>As with current order expanded to include alcohol as well as drugs.</p> <p><u>Consequence of breach</u></p> <p>As with current order expanded to include alcohol as well as drugs.</p>

CURRENT HIERARCHY		REVISED HIERARCHY
<p>conditions of the order.</p> <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><u>Program conditions</u></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"> • 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. <p><u>Consequences of breach</u></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"> • 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 		

CURRENT HIERARCHY		REVISED HIERARCHY
<p>work under the supervision of the offender’s case manager;</p> <ul style="list-style-type: none"> 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)). <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"> 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 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. 		
<p>Suspended sentence</p> <p>Max Term: not specified</p> <p>Term of imprisonment held fully or partly in suspense for period of order. Court may attach conditions or combine with other order.</p> <p>Substitutional sanction.</p> <p>No offence exclusions.</p> <p><u>Core conditions:</u></p> <p>Not commit offence punishable by imprisonment.</p> <p><u>Special conditions:</u></p> <ul style="list-style-type: none"> perform community service; supervision of a probation officer; undertake a rehabilitation program; any other condition as the court considers necessary or expedient. <p>Can also be combined with CSO and probation</p>	<p>FSSs replaced with HD and CCO (remodelled probation and CSO - see below)</p> <p style="text-align: center;">➔</p> <p>PSSs replaced with prison and CCO (remodelled probation and CSO - see below)</p>	<p>Home detention</p> <p>Max Term: 18 months (this would capture 97.9% of FSSs in Supreme Court and 99.6% in Magistrates Court).</p> <p>Nature of sanction: Not substitutional.</p> <p>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.</p> <p>This order is only likely to be used for a small proportion of offenders.</p> <p><u>Core conditions:</u></p> <ul style="list-style-type: none"> not commit another imprisonable offence; live only at approved premises; remain at approved premises for time specified in the order;

CURRENT HIERARCHY		REVISED HIERARCHY
<p><u>Consequence of breach:</u></p> <p>Guilty of new offence: 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"> • activate part of the sentence that is held in suspense and order the offender to serve it; or • order that a sentence take effect in place of the suspended sentence; or • 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 • make no order in respect of the suspended sentence. <p>Other breach:</p> <ul style="list-style-type: none"> • activate part of the sentence that is held in suspense and order the offender to serve it; or • order that a sentence take effect in place of the suspended sentence; or • 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 • make no order in respect of the suspended sentence. 		<ul style="list-style-type: none"> • accept visits; • submit to searches of places or things; • submit to electronic monitoring; • 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 reasonably directions in relation to employment; • engage in personal development activities or in counselling or treatment as directed. <p><u>Special conditions: (NZ)</u></p> <ul style="list-style-type: none"> • judicial monitoring; • conditions in relation to finances or earnings; • conditions in relation to taking prescription medicine; • any other condition to reduce likelihood of reoffending. <p><u>Consequences of breach</u></p> <ul style="list-style-type: none"> • 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). • 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). <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>Community service order</p> <p>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>Expanded operation to replace suspended sentences</p> <p>➔</p>	<p>Community correction order</p> <p>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</p>

CURRENT HIERARCHY		REVISED HIERARCHY
<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><u>Core conditions:</u></p> <ul style="list-style-type: none"> • report within one clear working day to a probation officer or supervisor, at the place specified in the order; • satisfactorily perform community service, as directed by a probation officer or supervisor, for the number of hours specified in the order; • comply with the reasonable directions of a probation officer or supervisor; • give notification to a probation officer of any change of address or employment before, or within 2 clear working days after, the change; • not leave or stay outside Tasmania without the permission of a probation officer; • attend educational and other programs as directed by a probation officer. <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><u>Consequence of breach:</u></p> <ul style="list-style-type: none"> • confirm the order as originally made; or • increase the number of hours of community service that the offender is required to perform under the order; or • 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 • 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. <p>Can be combined with probation, a fine, rehabilitation program order and driving disqualification order</p>		<p>is 240 hours.</p> <p>Non-substitutional sanction.</p> <p><u>Core conditions:</u></p> <ul style="list-style-type: none"> • not commit an offence punishable by imprisonment; • report within one clear working day to a probation officer at the place specified in the order; • submit to the supervision of a probation officer as required by that probation officer; • 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 2 working days after, the change. <p><u>Special conditions:</u></p> <ul style="list-style-type: none"> • attend educational and other programs as directed by the court or a probation officer; • undergo assessment and treatment for alcohol or drug dependency as directed by a probation officer; • submit to testing for alcohol or drug use as directed by a probation officer; • submit to medical, psychological or psychiatric assessment or treatment as directed by a probation officer; • undertake community work up to a maximum period of 240 hours; • place and non-association conditions; • judicial monitoring; • alcohol exclusion; • curfew; and • such other special conditions as the court thinks necessary or expedient. <p>The court can make an order that only contains core conditions (akin to a</p>

CURRENT HIERARCHY		REVISED HIERARCHY
		<p>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> <p>Can be combined with rehabilitation program order, driving disqualification order and a fine. It could also be combined with a term of imprisonment of two 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><u>Consequences of breach</u></p> <ul style="list-style-type: none"> • 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 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. <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 making 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>
<p>Probation order</p> <p>Max Term: 3 years.</p> <p>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.</p>	<p>Expanded operation to replace suspended sentences</p> <p>↗</p>	

CURRENT HIERARCHY		REVISED HIERARCHY
<p>Not a substitutional sanction.</p> <p><u>Core conditions:</u></p> <ul style="list-style-type: none"> • not commit an offence punishable by imprisonment; • report within one clear working day to a probation officer at the place specified in the order; • submit to the supervision of a probation officer as required by that probation officer; • report to a probation officer as required by that probation officer; • 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 2 working days after, the change. <p><u>Special conditions:</u></p> <ul style="list-style-type: none"> • attend educational and other programs as directed by the court or a probation officer; • undergo assessment and treatment for alcohol or drug dependency as directed by a probation officer; • must submit to testing for alcohol or drug use as directed by a probation officer; • must submit to medical, psychological or psychiatric assessment or treatment as directed by a probation officer; • such other special conditions as the court thinks necessary or expedient. <p>Can be combined with a CSO, fine, rehabilitation program order and driving disqualification order.</p> <p><u>Consequences of breach</u></p> <ul style="list-style-type: none"> • 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 		

CURRENT HIERARCHY		REVISED HIERARCHY
<p>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</p> <ul style="list-style-type: none"> 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. <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, Sex Offender Treatment (in final stages of completion).</p>		
<p>Rehabilitation program order (family violence offences)</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 re-offending.</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</i> (Tas) s7(ea).</p> <p><u>Consequences of breach</u></p> <ul style="list-style-type: none"> order the offender to resume undertaking the program; or 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. 	<p>Expanded Operation</p> <p>→</p>	<p>Possible changes to the rehabilitation program order are being considered as part of family violence reference currently undertaken by the Council. Suggestions for change include changing the eligibility criteria to include a larger group of offenders.</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>N/A but currently ‘Sober Driver’ 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 programs which targets adult offender who are convicted of two or more drink driving offences in the last five years.</p>	<p>Expanded Operation</p> <p>→</p>	<p>Driving while intoxicated list</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)</p>

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

6 Offenders who are alcohol or drug dependent: the drug and alcohol 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.¹⁶¹ 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.¹⁶² 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.¹⁶³ 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%).¹⁶⁴ 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%¹⁶⁵ 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’.¹⁶⁶ For these reasons, the Council’s preliminary view is that 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

¹⁶¹ Daniel Nagin, David Farrington and Terrie Moffitt, ‘Life-course Trajectories of Different Types of Offenders’ (1995) 33 *Criminology* 111.

¹⁶² 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).

¹⁶³ 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).

¹⁶⁴ 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).

¹⁶⁵ Jenny Stafford and Lucinda Burns, ‘Australian Drug Trends 2012: Findings from the Illicit Drugs Reporting System (IDRS)’ (Australian Drug Trends Series No 91, National Drug and Alcohol Research Centre, 2013).

¹⁶⁶ 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.

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.¹⁶⁷

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 order¹⁶⁸ 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.¹⁶⁹ 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.¹⁷⁰ There were 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 oxycodone each for one offender.

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'.¹⁷¹ 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.¹⁷² The court may reward an offender for compliance by varying or cancelling the order.¹⁷³ 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.¹⁷⁴

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.¹⁷⁵

¹⁶⁷ Email from Tristan Bell, Team Leader (South) — Court Mandated Diversion to Rebecca Bradfield, 18 May 2015.

¹⁶⁸ Department of Justice, Tasmania, *Annual Report 2013–14* (2014) 65.

¹⁶⁹ Interview with Tristan Bell, Team Leader (South) — Court Mandated Diversion and Daniel Goss, Team Leader — Court Mandated Diversion (N/NW), 18 May 2015.

¹⁷⁰ Email from Tristan Bell, Team Leader (South) — Court Mandated Diversion to Rebecca Bradfield, 21 May 2015.

¹⁷¹ Department of Justice, Community Corrections, *Court Mandated Diversion*, <http://www.justice.tas.gov.au/communitycorrections/court_mandated_diversion/intent_of_program>.

¹⁷² See *Sentencing Act 1997* (Tas) s 27J.

¹⁷³ *Ibid* s 27K, 27L.

¹⁷⁴ Bell, above n 167.

¹⁷⁵ *Sentencing Act 1991* (Tas) s 27C

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.¹⁷⁶ 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.¹⁷⁷ 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.¹⁷⁸ 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).¹⁷⁹ 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.¹⁸⁰

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;¹⁸¹
- it is not available in relation to sexual offences or offences involving the infliction of actual bodily harm that was not minor harm;¹⁸²
- 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;¹⁸³ 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.¹⁸⁴

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

¹⁷⁶ Ibid s 27F.

¹⁷⁷ Department of Justice, Community Correction Service, above n 171.

¹⁷⁸ *Sentencing Act 1997* (Tas) s 27R.

¹⁷⁹ Ibid s 27Q(2), 27R(4).

¹⁸⁰ Email from Tristan Bell, Team Leader (South) — Court Mandated Diversion to Rebecca Bradfield, 19 May 2015.

¹⁸¹ *Sentencing Act 1997* (Tas) s 27B(1)(b), 27B(1)(e).

¹⁸² Ibid s 27B.

¹⁸³ Ibid s 27B(1)(c).

¹⁸⁴ Ibid s 27B(1)(e).

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.¹⁸⁵

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; and
 - 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.¹⁸⁶

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.¹⁸⁷ 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.¹⁸⁸

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.¹⁸⁹ In total, in 2013–14, 41 offenders were sentenced in the Magistrates Court to a CMD order.¹⁹⁰

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 specified by the court;
- report to, and accept visits from case manager or court diversion officers;

¹⁸⁵ *Ibid* s 27B(1)(e).

¹⁸⁶ *Ibid* s 27D(3), (4).

¹⁸⁷ Bell and Goss, above n 169.

¹⁸⁸ *Sentencing Act 1997 (Tas)* s 27D(2).

¹⁸⁹ Bell and Goss, above n 169.

¹⁹⁰ Department of Justice, Tasmania, above n 168, 65.

- 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.¹⁹¹

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.¹⁹² 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.¹⁹³

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.

¹⁹¹ *Sentencing Act 1997* (Tas) s 27G(1).

¹⁹² *Ibid* s 27G(2).

¹⁹³ Bell and Goss, above n 169.

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.¹⁹⁴

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.¹⁹⁵

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'.¹⁹⁶ In the period 2013–14, 24% of participants graduated from the order while in 2014–15, 50% of participants successfully graduated.¹⁹⁷ However, outside the measure of graduation, it is difficult to assess the success of the CMD order and to focus only 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/less serious reoffending.¹⁹⁸ 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

¹⁹⁴ *Sentencing Act 1997* (Tas) s 27M(1).

¹⁹⁵ *Ibid.*

¹⁹⁶ Bell, above n 167.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

cancelled (as a reward), but not receive a sentence of imprisonment imposed on resentencing.¹⁹⁹ Anecdotally, in many cases where an offender has the CMD order cancelled, there has been significant progress towards becoming drug or crime free and in addressing the issues that the offender faced at the commencement of the order.²⁰⁰

6.2 The Council's preliminary 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 preliminary view is that 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 preliminary view that the order should be available in the Supreme Court as well as the Magistrates Court.²⁰¹ 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. 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. It may also be the appropriate sanction for offenders who have previously been sentenced to a CCO with treatment conditions relating to drug and alcohol issues and who have re-offended 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.

As part of the VSAC's consideration of the replacement for suspended sentences, it highlighted evidence that suggests that treatment provided in the community provides the most positive outcomes in reducing re-offending for drug offenders, 'although positive outcomes have also been experienced with in-prison programs — particularly those with aftercare services'.²⁰² The 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 for drug offenders compared to US\$7835 for drug treatment in prison (therapeutic communities or out-patient services) and US\$4767 for drug courts.²⁰³ 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.

If this view is accepted, 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 Drug and Alcohol Treatment Orders;

¹⁹⁹ Bell and Goss, above n 169.

²⁰⁰ Bell, above n 167.

²⁰¹ 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 16, Recommendation 47.

²⁰² VSAC, above n 9, [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).

²⁰³ VSAC, above n 9, [7.38] referring to Acumen Alliance, *Benefits and Cost Analysis of the Drug Court Program* (2005).

- 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 a 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 80.²⁰⁴ 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.²⁰⁵ 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).

²⁰⁴ Department of Justice, Tasmania, above n 168, 65.

²⁰⁵ Williams, above n 100.

Draft recommendations

Drug and alcohol treatment orders

4. 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.
5. CMD orders should be available in the Supreme Court as well as the Magistrates Court.
6. 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.
7. 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 drug and alcohol 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 a drug and alcohol 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.
8. 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).

7 Intermediate sentencing options to replace the fully suspended sentence

7.1 Introduction

Term of Reference Four 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 preliminary 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 Five.

A preliminary observation is 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).²⁰⁶ 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.

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.²⁰⁷ Although there are difficulties in defining restorative

²⁰⁶ See Appendix B Table B-1.

²⁰⁷ See VSAC and New Zealand, Appendix B Table B-1.

justice, a widely accepted definition is that 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’.²⁰⁸ 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’.²⁰⁹

In assessing the various sentencing options, as the 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.²¹⁰

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. In its consideration of suspended sentences, the 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.²¹¹

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’.²¹² 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.²¹³ This is similar to the ‘Sword of Damocles’ effect attributed to suspended sentences.²¹⁴ 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’.²¹⁵

²⁰⁸ 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.

²⁰⁹ Tony Foley, ‘Are Retributive Aims Achievable in a Restorative Justice Setting?’ (2013) 22 *Journal of Judicial Administration* 130, 130.

²¹⁰ VSAC, above n 9, [3.13].

²¹¹ VSAC, above n 28, [2.44]; VSAC, above n 14, [7.7], [8.20]–[8.22].

²¹² NSWLRC, above n 50, [11.18].

²¹³ Ibid [11.6]. See discussion of the NSW model at [7.4.2].

²¹⁴ See Bartels, above n 52, 127–131.

²¹⁵ VSAC, above n 9, [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.²¹⁶ Substitutional sanctions are a ‘form of “double speak” involving the legislative fiction that someone is in prison when quite plainly they are not’.²¹⁷ Further, relying on research in NSW that found that offenders given suspended sentences were no less likely to reoffend than those given supervised bonds, the 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’.²¹⁸ The 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.²¹⁹

It is the Council’s preliminary 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.

Draft recommendation 9

Nature of intermediate sanction

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.²²⁰ 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.²²¹ It was able to fulfil punitive goals²²² and ‘preserve the purpose of general deterrence as well as providing specific deterrence’.²²³ In maintaining employment and connection with family, the order can be said to facilitate an offender’s rehabilitation.²²⁴ However, the rehabilitative effectiveness of the order has been questioned.²²⁵

There has been a move away from periodic detention in many jurisdictions. While periodic detention previously existed in NSW and the ACT,²²⁶ it now only is available in the ACT.²²⁷

²¹⁶ VSAC, above n 28, [2.43].

²¹⁷ *Taylor and Napatali* (1999) 106 A Crim R 578, [9] (McPherson JA).

²¹⁸ VSAC, above n 9, [6.129].

²¹⁹ *Ibid* [11.88].

²²⁰ Mackenzie and Stobbs, above n 37, 179.

²²¹ 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>>.

²²² *Ibid*.

²²³ Mackenzie and Stobbs, above n 37, 181 citing *R v Rivkin* (2003) 45 ACSR 366, [64].

²²⁴ Potas, Cumines and Takach, above n 221, [2.1].

²²⁵ 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).

²²⁶ 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).

²²⁷ *Crimes (Sentencing) Act 2005* (ACT) s 11.

It will not be a sentencing option in any Australian jurisdiction following the abolition of periodic detention in the ACT by 2016–17.²²⁸ It was rejected in Victoria as a replacement sanction for suspended sentences.²²⁹ Periodic detention was previously available in New Zealand, until it was abolished by the *Sentencing Act 2002* (NZ).²³⁰ 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.²³¹ It was abolished in 2012.²³² 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.²³³ 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.²³⁴ 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.²³⁵ These factors were said to contribute to inconsistency and inequity in sentencing.²³⁶ 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.²³⁷ Accordingly, drawing on the experience in other jurisdictions, it is the preliminary view of the Council that periodic detention is not a suitable replacement for the suspended sentence in Tasmania.

Draft recommendation 10

Periodic detention

Periodic detention should not be introduced in Tasmania.

7.3 Home detention

Home detention schemes vary between jurisdictions.²³⁸ 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.²³⁹ In this report, the focus is on ‘front-end’ home detention. Home detention is a custodial order that

²²⁸ 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>.

²²⁹ See VSAC, above n 9, [5.97]–[5.99]. See also Sentencing Council, NSW, above n 95, [9.2]–[9.4], NSWLRC, above n 50, [9.91].

²³⁰ VSAC, above n 9, [5.75].

²³¹ See Clarissa Penfold, Gillian Hunter and Mike Hough, *The Intermittent Custody Pilot: A Descriptive Study*, Home Office, United Kingdom (2006).

²³² *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK).

²³³ See Sentencing Council, NSW, above n 95, [9.2]–[9.4], NSWLRC, above n 50, [9.91]; VSAC, above n 9, [5.97]–[5.99].

²³⁴ See VSAC, above n 9, [5.99]; TLRI, above n 16, [3.5.9]; Penfold, Hunter and Hough, above n 231, 39.

²³⁵ Sentencing Council, NSW, above n 95, [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/parlament/committee.nsf/0/B09BA359E47F0703CA25714100013DF1?open&refnavid=CO3_1>..

²³⁶ See Sentencing Council, NSW, above n 95, [6.68]–[6.70]; Standing Committee on Law and Justice, NSW, above n 235, [6.55].

²³⁷ See VSAC, above n 9, [5.96]; Sentencing Council, NSW, *ibid* [6.48]–[6.59].

²³⁸ 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.

²³⁹ VSAC, above n 9, [5.3].

involves the detention of an offender in ‘a specified residence during specified times for the duration of the sentence under strict supervision and subject to conditions’.²⁴⁰ 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.²⁴¹ Home detention typically, but does not necessarily, involve the offender being electronically monitored to ensure compliance with the order.²⁴²

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 2012.²⁴³ These home detention schemes are summarised in Table A–1 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.²⁴⁴ 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.²⁴⁵ This part focuses on stand-alone home detention.

7.3.1 Circumstances in which home detention can be imposed

There are legislative restrictions imposed 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.²⁴⁶ In addition, co-residents must consent²⁴⁷ or their views taken into account in determining an offender’s suitability for home detention.²⁴⁸

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).²⁴⁹ This would suggest that a maximum period for home detention of either 12 months or 18 months may be appropriate to accommodate a majority of offenders who currently received FSSs in Tasmania. In Tasmania, 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, for 98.4% in receipt of FSS had a term less than 12 months and 99.6% of offenders received a term of less than 18 months.

²⁴⁰ TLRI, above n 16, [3.4.1].

²⁴¹ Ibid [3.4.1].

²⁴² VSAC, above n 9, [5.2].

²⁴³ 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.

²⁴⁴ See Sentencing Advisory Council, Tasmania, above n 2, Appendix A.

²⁴⁵ See [7.5.3]; Appendix A Table A–3.

²⁴⁶ *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 80I.

²⁴⁷ *Sentencing Act 1991* (Vic) s 26P; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 78(1)(c).

²⁴⁸ *Sentencing Act* (NT) s 45(2).

²⁴⁹ See Appendix A Table A–1. 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 50, Recommendation 9.3.

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 or 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.²⁵⁰ This was also the position in Victoria.²⁵¹ 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.²⁵² 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 5 years imprisonment).²⁵³ 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.²⁵⁴

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.²⁵⁵

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 13.²⁵⁶ 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.²⁵⁷ 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).²⁵⁸ Following a review of the operation of the home detention scheme, the Ministry of Justice expressed the view that

²⁵⁰ See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 76.

²⁵¹ Appendix A Table A-1.

²⁵² NSWLRC, above n 50, [9.38]–[9.41].

²⁵³ *Ibid* [9.4].

²⁵⁴ *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 16, Recommendation 27.

²⁵⁵ *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.

²⁵⁶ 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.

²⁵⁷ *Sentencing Act 2002* (NZ) s 4; *Parole Act 2002* (NZ) s 4(1).

²⁵⁸ Ministry of Justice, *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>>.

'[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'.²⁵⁹

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–1 in Appendix A. Many of the core conditions of home detention are punitive and place considerable restrictions on the freedom of the offender.²⁶⁰ These include conditions that require the offender to:

- reside and remain at specified premises for specified periods of time;
- submit to electronic monitoring;
- 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);²⁶¹
- 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.²⁶² 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.²⁶³ Judicial monitoring was intended 'to enhance and maintain judicial confidence in community-based sentences and the new home detention scheme'.²⁶⁴ 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';²⁶⁵
- 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;²⁶⁶ and

²⁵⁹ Ibid 29.

²⁶⁰ Mackenzie and Stobbs, above n 37, 161.

²⁶¹ Ibid.

²⁶² Martinovic, above n 238, 16–17.

²⁶³ It is noted that judicial monitoring can be a condition of a CCO in Victoria, see [7.6.4].

²⁶⁴ Geoffrey Hall, *Hall's Sentencing*, Looseleaf, [SA80ZJ.2] quoting from the Explanatory Note to the Justice Reform Bill.

²⁶⁵ Ibid. VSAC has expressed the view that judicial monitoring is a key feature of a 'problem solving court' approach: VSAC, above n 9, [11.38].

²⁶⁶ 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

- 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 ground that it ‘provides a cost-effective alternative to imprisonment that avoids many of the negative consequences of full-time custody’.²⁶⁷

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.²⁶⁸ This, it is argued, ‘more effectively supports the reintegration and rehabilitation of offenders’,²⁶⁹ 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.²⁷⁰ 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.²⁷¹ Roberts has argued that multidimensional orders (rather than orders that pursue only one sentencing objective) are more closely aligned with public expectation.²⁷² 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 2012–13.²⁷³ 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 2012–13.²⁷⁴ 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%).²⁷⁵

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.

²⁶⁷ VSAC, above n 9, [5.32] referring to Julian Roberts, *The Virtual Prison: Community Custody and the Evolution of Imprisonment*, (Cambridge Studies in Criminology, 2004).

²⁶⁸ NSWLRC, above n 50, [9.16], [9.17].

²⁶⁹ VSAC, above n 9, [5.32] citing New Zealand Parliament, *Criminal Justice Reform Bill, Explanatory Note* (2006).

²⁷⁰ TLRI, above n 16, [3.4.6] referring to Roberts, above n 267.

²⁷¹ NSWLRC, above n 50, [9.17].

²⁷² Julian Roberts, above n 267, 15.

²⁷³ Productivity Commission, Australia, *Report on Government Services* (2014), Chapter 8, Table 8A.19.

²⁷⁴ 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>>.

²⁷⁵ Ibid.

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.²⁷⁶ 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.²⁷⁷

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%'.²⁷⁸ 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 2004.²⁷⁹ 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).²⁸⁰ 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'.²⁸¹

In NSW, the NSW Standing Committee on Law and Justice reported that 12% of offenders discharged from home detention between 2000 and 2002 were returned to custody.²⁸² 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.²⁸³ 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'.²⁸⁴ 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'.²⁸⁵ 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'.²⁸⁶

The VSAC also compared offenders who received home detention with offenders who received other community-based sentences.²⁸⁷ It found that the rate of reoffending within two

²⁷⁶ Ministry of Justice, New Zealand, above n 258, 16.

²⁷⁷ Ibid 18.

²⁷⁸ Martinovic, above n 238, 229.

²⁷⁹ Melbourne Centre for Criminological Research and Evaluation for Corrections Victoria, *Home Detention in Victoria: Final Evaluation Report* (2006) 66.

²⁸⁰ Ibid 66, 68.

²⁸¹ VSAC, above n 9, [5.47] citing *ibid* 68.

²⁸² Standing Committee on Law and Justice, NSW, above n 235, [7.47].

²⁸³ Audit Office of NSW, *NSW Auditor-General's Report: Home Detention*, Performance Audit Report (2010) 28.

²⁸⁴ NSWLRC, *Sentencing — Patterns and Statistics*, Report 139–A (2013) [4.17].

²⁸⁵ Ibid.

²⁸⁶ Ibid.

²⁸⁷ VSAC, above n 9, [5.48].

years for offenders discharged from community corrections orders during 2003–04 was 29% across all Australian jurisdictions.²⁸⁸ 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, the 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').²⁸⁹

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].²⁹⁰

It found that after 24 months, reconviction rates remained the lowest for offenders sentenced to home detention when compared to any other sentencing order.²⁹¹ 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.²⁹² 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'.²⁹³

Research in Switzerland also supports the benefits of home detention for the rehabilitation of offenders and the reduction of re-offending when compared to other community-based sanctions.²⁹⁴

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.²⁹⁵ 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.²⁹⁶ The Auditor-General reported that the net operating expenditure per prisoner per day on home detention was about \$47 compared to

²⁸⁸ Ibid.

²⁸⁹ Ibid.

²⁹⁰ Ministry of Justice, New Zealand, above n 258, 20.

²⁹¹ Ibid 22.

²⁹² Ibid 21.

²⁹³ Ibid 28.

²⁹⁴ 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.

²⁹⁵ NSWLRC, above n 50, [9.16] citing Productivity Commission, Australia, *Report on Government Services* (2013).

²⁹⁶ Ibid citing Audit Office of NSW, above n 283, 25.

about \$187 for an offender in a minimum/medium security imprisonment.²⁹⁷ 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.²⁹⁸

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.²⁹⁹ 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.³⁰⁰ 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.³⁰¹ The cost of home detention in Victoria was still much lower than the cost of imprisonment (calculated at \$83 200 per prisoner per year).³⁰²

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.³⁰³ This has been done in New Zealand, where the 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.³⁰⁴

Table 7–1: Cost of administering sentences per offender: New Zealand³⁰⁵

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

²⁹⁷ Audit Office of NSW, above n 283, 26.

²⁹⁸ Ibid.

²⁹⁹ Melbourne Centre for Criminological Research and Evaluation, above n 279, 5.

³⁰⁰ Ibid 77.

³⁰¹ Martinovic, above n 238, 233.

³⁰² Ibid 233.

³⁰³ Parliamentary Library Research Service, Victoria, above n 243, 7, referring to Amanda George, ‘Women and Home Detention — Home is Where the Prison Is’ (2006) 18 *Current Issues in Criminal Justice* 79, 88.

³⁰⁴ Ministry of Justice, New Zealand, above n 258, 9.

³⁰⁵ This table is replicated from *ibid* Table 1.

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 2005.³⁰⁶ In 2013, home detention was the principal penalty for only 134 offenders (130 in the Local Court and four in the higher courts).³⁰⁷ 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).³⁰⁸ 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 2009–10.³⁰⁹ Of the 42 orders made in 2006–07, 40 were ordered by the Magistrates Court and two by the County Court.³¹⁰

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

- stringent screening process by Community Corrections limiting the number of offenders deemed ‘suitable’;³¹¹
- geographical restrictions, either because the order is only available in certain locations³¹² or because of difficulties with electronic monitoring technology in remote areas preventing the imposition of home detention in some areas;³¹³
- 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;³¹⁴
- lack of clarity for sentencers about the intended target group for home detention;³¹⁵ and
- the substitutional nature of the order as a ‘direct equivalent for imprisonment’ did not align with the views of sentencers.³¹⁶

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 2013–14.³¹⁷ 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 imprisonment³¹⁸ and there is no need to impose a term of imprisonment before assessing an offender’s suitability for the order.³¹⁹ The availability of home detention as a real alternative to imprisonment was explained by the Court of Appeal in *R v Iosefa*,³²⁰ where the court stressed that home detention ‘carries with it in considerable measure, the principles of deterrence and

³⁰⁶ NSWLRC, above n 50, [9.19].

³⁰⁷ NSW Bureau of Crime Statistics and Research (BOSCAR), *NSW Criminal Courts Statistics 2013* (2014) Table 1.7 and 3.8.

³⁰⁸ Northern Territory Government, above n 274, 15.

³⁰⁹ Parliamentary Library Research Service, Victoria, above n 243, 5.

³¹⁰ VSAC, above n 9, [5.39].

³¹¹ Martinovic, above n 238.

³¹² This was the position in Victoria, see VSAC, above n 9, [5.6].

³¹³ NSWLRC, above n 50, [9.26].

³¹⁴ VSAC, above n 9, [5.41].

³¹⁵ Ibid.

³¹⁶ Ibid [5.42].

³¹⁷ See Figure 4–1.

³¹⁸ See VSAC, above n 9, [5.42].

³¹⁹ Ibid [5.65].

³²⁰ [2008] NZCA 453.

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.³²¹ 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.³²²

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.³²³ 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'.³²⁴

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.³²⁵ 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 made, 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).³²⁶ 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;³²⁷
- of the cases where home detention was imposed for sexual offences, 46% of offenders were convicted of indecent assault or offences categories 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.³²⁸

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

³²¹ [41] quoted in Hall, above n 264, [SA80A.2].

³²² See Figure 4–1.

³²³ Hall, above n 264, [SA80A.4(b)].

³²⁴ Ibid [SA80A.2].

³²⁵ *Sentencing Act 2002* (NZ) s 4; *Parole Act 2002* (NZ) s 4(1).

³²⁶ Ministry of Justice, New Zealand, above n 258, 12.

³²⁷ It was imposed for one case of murder and four cases of manslaughter.

³²⁸ Ministry of Justice, New Zealand, above n 258, 13.

offenders (41% of home detention orders made in 2012) and for ‘offences against justice procedures’ (23% of home detention orders made in 2012).³²⁹

In Victoria, home detention was also used predominantly for traffic offences. The VSAC found that driving whilst disqualified was the most common offence for which home detention was imposed.³³⁰ Home detention was also imposed in the Magistrates Court for drink driving offences and some minor drug trafficking offences.³³¹ 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.³³²

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:³³³

- 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’.³³⁴ 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.³³⁵ 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.³³⁶ Ultimately, Martinovic argued that the consequences for families need to 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.³³⁷

³²⁹ 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 284, [4.4].

³³⁰ VSAC, above n 9, [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 106, 28.

³³¹ VSAC, above n 9.

³³² Ibid.

³³³ Ibid [5.33]. See also George, above n 303.

³³⁴ Martinovic, above n 238, 249.

³³⁵ Ibid 255.

³³⁶ Ibid.

³³⁷ Ibid 256.

Soft punishment

Media reports of home detention frequently portray home detention as a ‘soft punishment’.³³⁸ 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.³³⁹ 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 home detention was ‘considered substantially more punitive and intrusive than any other penalty short of full-time custody’.³⁴⁰ 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’.³⁴¹ 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’.³⁴² 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’.³⁴³

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.³⁴⁴ 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.³⁴⁵ While acknowledging that these criteria are ‘in reality more easily met by persons with some level of financial security and stability’,³⁴⁶ 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’.³⁴⁷ 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’.³⁴⁸

7.3.6 The Council’s preliminary views and recommendations

The Council’s preliminary view is 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

³³⁸ Parliamentary Library Research Service, Victoria, above n 243, 6; *ibid* 263.

³³⁹ Martinovic, above n 238, 264.

³⁴⁰ Standing Committee on Law and Justice, NSW, above n 235, 182.

³⁴¹ 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 267, Chapter 5.

³⁴² Vanhaelemeesch, Vander Beken and Vandevelder, above n 342, 284. Although these observations are made in relation to electronic monitoring, similar comments could be made about home detention.

³⁴³ VSAC, above n 9, [5.51].

³⁴⁴ NSWLRC, above n 50, [9.71].

³⁴⁵ See Martinovic, above n 238, 240–242.

³⁴⁶ *Ibid* 242.

³⁴⁷ *Ibid*.

³⁴⁸ NSWLRC, above n 50, [9.82].

aims of sentencing and provides an onerous sentencing order that both punishes an offender, deters the offender and others from committing offences, and addresses 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.

Nature of sanction

Analysis of the use of home detention and the types of cases where home detention is imposed by the court 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 preliminary 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.³⁴⁹ 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. 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. 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 preliminary 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 preliminary view is that it should also be made clear that the order is appropriate where a suspended sentence would previously been imposed.³⁵⁰

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)³⁵¹ 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.³⁵² However,

³⁴⁹ Martinovic, above n 238, 261–262.

³⁵⁰ This is the approach in Victoria in relation to CCOs, see [7.6.9].

³⁵¹ See Appendix A Table A–1.

³⁵² 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%,

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.³⁵³

It is 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.³⁵⁴ 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, as recommended by the TLRI, 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.³⁵⁵

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 preliminary view is that a maximum term should be specified in the legislation.³⁵⁶ 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.³⁵⁷ The Council's preliminary 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 preliminary 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 the approved premises after a specified portion of the sentence.³⁵⁸ 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 preliminary 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. Accordingly the Council's preliminary view is that following core and special conditions should be available for a home detention order:

possess illicit drug — 4.5%. The exception being breach of violence order, which accounted for 3.5% of FSSs imposed.

³⁵³ This reflects the recommendation of the TLRI. See TLRI, above n 16.

³⁵⁴ Ibid [3.4.18].

³⁵⁵ Ibid Recommendation 27.

³⁵⁶ See ibid [3.4.16], [3.4.17].

³⁵⁷ See NSWLRC, above n 50, [9.49].

³⁵⁸ VSAC, above n 9, [5.68].

Core conditions:

- must not, in Tasmania or elsewhere, commit another imprisonable offence;
- must live only at approved premises;
- 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 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;
- engage in personal development activities or in counselling or treatment as directed.

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.

Special conditions:

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

As with the New Zealand position, it is the Council's preliminary 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 reduced the likelihood of further reoffending by the rehabilitation and reintegration of the offender.³⁵⁹ The range of conditions can be tailored to the needs of the particular offender and allow 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).³⁶⁰ Judicial monitoring is a key feature of a problem solving approach to sentencing and may facilitate judicial confidence in the sanction.³⁶¹

Powers on breach

It is the Council's preliminary 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

³⁵⁹ See *Sentencing Act 2002* (NZ) s 80D.

³⁶⁰ See [6.1].

³⁶¹ See [7.1].

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 also considers that resources must be made available to provide appropriate support and information to co-residents and also 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.

In addition, the Council is aware of the perception that home detention is 'soft on crime'. The Council's preliminary 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.³⁶² This will require an adjustment of 'our thinking that "prison = serious offence"' ³⁶³ 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).

Draft recommendations

11. Home detention should be introduced as a sentencing option in Tasmania.
12. Home detention should not be a substitutional sanction and should be a sanction in its own right.
13. 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.
14. 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.
15. 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

³⁶² VSAC, above n 9, [3.17].

³⁶³ VSAC, above n 28, [2.52].

home detention order on an offender who poses a significant risk in terms of committing a further violent offence.

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

17. The following core conditions should attach to a home detention order:

- must not, in Tasmania or elsewhere, commit another imprisonable offence;
- must live only at approved premises;
- remain at approved premises for the time specified in the order;
- accept visits from Community Corrections;
- submit to searches of places 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

18. The following special conditions should be available in relation to a home detention order:

- 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.

19. 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.

20. 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.

21. 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.

22. 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.

23. 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.

24. Resources must be made available to provide appropriate support and information to co-residents and also support to offenders.

25. 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.

26. 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.

7.4 Community detention order

A community detention order (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.³⁶⁴ 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.³⁶⁵ 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.³⁶⁶ 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'.³⁶⁷ 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'.³⁶⁸ 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.³⁶⁹ No offences are excluded from a community detention order.

In the Tasmanian context, a stand 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 6 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

³⁶⁴ See New Zealand Parliament, above n 269, 5.

³⁶⁵ NSWLRC, above n 50, Recommendation 11–1.

³⁶⁶ See *ibid* Chapter 11.

³⁶⁷ Parliament, New Zealand, above n 269, 5.

³⁶⁸ *Ibid*.

³⁶⁹ *Sentencing Act 2002* (NZ) s 69B.

convicted of unlawful entry with intent/burglary, break, enter (6% of FSSs imposed in the Magistrates Court). However, the offence categories for the 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 is 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 preliminary view is that a curfew condition should be available as part of the proposed CCO (see [7.6.9]).

7.4.2 NSW

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'.³⁷⁰ These were not the offenders who were originally intended as targets of the intensive correction order.³⁷¹ 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'.³⁷²

The NSW model would be a substitutional sanction, which means that is 'as a way of serving a term of imprisonment in the community'.³⁷³ 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.³⁷⁴ 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.³⁷⁵

As indicated at [7.1], the Council's preliminary view is that the replacement for suspended sentences should not be a substitutional sanction. Concerns about substitutional sanctions include the criticism that it is a legal fiction, which negatively affects 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. Accordingly, it is the Council's preliminary view that a community detention order based on the NSWLRC model should not be introduced in Tasmania.

³⁷⁰ NSWLRC, above n 50, [11.7].

³⁷¹ Ibid

³⁷² Ibid [11.23]. See Appendix A Table A-2.

³⁷³ NSWLRC, above n 50, Recommendation 11.2.

³⁷⁴ Ibid Recommendation 11.2, Recommendation 11.6.

³⁷⁵ Ibid Recommendation 11.6.

Draft Recommendation 27

Community detention orders

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.³⁷⁶ 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 the VSAC.³⁷⁷

In NSW, the intensive correction order was introduced in 2010 to replace periodic detention.³⁷⁸ 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.³⁷⁹ Queensland also has an intensive correction order, and Western Australia and New Zealand have an intensive supervision order.³⁸⁰ 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 re-offending rates³⁸¹ and it shares many features with intensive supervision orders. Tasmania, South Australia and the ACT do not have an intensive supervision type order.³⁸² 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).³⁸³ 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

³⁷⁶ See Appendix A Table A–3.

³⁷⁷ See VSAC, above n 9, Chapters 6, 7 and 10.

³⁷⁸ *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010* (NSW).

³⁷⁹ See NSWLRC, above n 50.

³⁸⁰ 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 Sentencing Advisory Council, Tasmania, above n 2, [2.4]; Appendix A.

³⁸¹ *Justice (Corrections) and Other Legislation Amendment Bill 2011*, Second Reading Speech <http://www.austlii.edu.au/au/legis/nt/bill_srs/jaolab2011508/srs.html>.

³⁸² It is noted that the ACT is considering the introduction of an intensive correction order as a replacement for periodic detention, see ACT Government, *Justice Reform Strategy: First Stage Report* (2015) <https://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/JACS_JRStrat1.3_.pdf>.

³⁸³ Bagaric and Edney, above n 21, [13.05]. See *R v Pogson* [2012] NSWCCA 225 [96] (McClennan CJ at CL, Johnson J).

not have an identified need for rehabilitation or of whom it can be positively said that there is a risk of reoffending.³⁸⁴

In some jurisdictions, an intensive correction order is a substitutional sanction (NSW, Northern Territory, Queensland and the position in Victoria before its abolition).³⁸⁵ In contrast, in other jurisdictions, intensive corrections/supervision orders operate independently and do not require the court to impose a period of imprisonment (New Zealand and Western Australia).³⁸⁶ This was also the approach taken by the VSAC,³⁸⁷ but was not adopted in Victoria.

7.5.2 Duration of the order

The duration of an intensive correction order varies between jurisdictions,³⁸⁸ 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 up to 18 months. 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.³⁸⁹ 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 it was designed to address the personal factors which contributed to the offender's criminal behaviour.³⁹⁰ In contrast, in other jurisdictions there are broader ranges of conditions that are attached to an intensive corrections 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.³⁹¹

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'.³⁹² Other models allow the court a broader discretion to 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

³⁸⁴ *R v Pogson* [2012] NSWCCA 225.

³⁸⁵ *Crimes (Sentencing Procedure) Act 1999* (NSW) s7(1); *Sentencing Act* (NT) s 48B; *Penalties and Sentences Act 1992* (Qld) s 113(1); *Sentencing Act 1991* (Vic) s 19(1).

³⁸⁶ See Appendix A Table A-3.

³⁸⁷ VSAC, above n 9, [6.127].

³⁸⁸ See Appendix A Table A-3.

³⁸⁹ See Appendix A Table A-3; Appendix B Table B-1.

³⁹⁰ See *ibid*.

³⁹¹ It is noted that this requirement has been very problematic, information provided by Lorana Bartels.

³⁹² See Appendix A Table A-3.

(including supervision by community corrections) and the court may include a program requirement and/or a community service requirement and/or a curfew requirement.³⁹³

7.5.4 Use of intensive corrections order

In Australia and New Zealand, the use of intensive corrections orders has remained relatively low. In NSW, in 2013 only 1% of offenders sentenced (by penalty for principal offence) received an intensive correction order.³⁹⁴ This was 4.9% in higher courts and 0.9% in lower courts.³⁹⁵ In its review, the NSWLRC observed that intensive correction orders were not being used as frequently as periodic detention (before its abolition)³⁹⁶ and that the trend appeared to be a decline in the use of intensive correction orders in NSW, Western Australia and Queensland.³⁹⁷ 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 2010–11.³⁹⁸ In the Magistrates Court, the proportion of intensive correction orders imposed had increased slightly from 1.7% in 2004–05 to 2.1% in 2010–11.³⁹⁹ 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).⁴⁰⁰

In an examination of the profile of offenders who received an intensive corrections order in 2012, the NSWLRC found that the most common offences were traffic/regulatory offences or offences against justice procedures.⁴⁰¹ A NSW study that compared the characteristics of offenders who received suspended sentences with those who received an intensive corrections 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’.⁴⁰² 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,⁴⁰³ the rigorous nature of the suitability criteria that exclude offenders with cognitive impairment, mental illness, substance dependency or homelessness or unstable housing,⁴⁰⁴ the availability of intensive correction orders in rural

³⁹³ See *ibid.*

³⁹⁴ BOSCAR, above n 307, Tables 1.7 and 3.8.

³⁹⁵ *Ibid.*

³⁹⁶ NSWLRC, above n 50, [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 period 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.

³⁹⁷ NSWLRC, above n 284, [4.36]–[4.27]. In relation to the decline in use of intensive corrections in Queensland, the 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 9, [8.33].

³⁹⁸ Gelb, above n 106, 86 Table C2.

³⁹⁹ *Ibid* 87 Table C3.

⁴⁰⁰ Ministry of Justice, New Zealand, above n 258.

⁴⁰¹ NSWLRC, above n 284, [4.22].

⁴⁰² Ringland, above n 396, 8.

⁴⁰³ See NSWLRC, above n 50, [9.39]–[9.41], [9.72]. See also Appendix A Table A–3.

⁴⁰⁴ NSWLRC, above n 50, [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

and remote areas,⁴⁰⁵ and the mandatory community service work requirement.⁴⁰⁶ 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.⁴⁰⁷

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, 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 was unjust in the circumstances.⁴⁰⁸ A similar position operated in Victoria, but only if the offender committed an offence punishable by imprisonment. 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 corrections order.⁴⁰⁹

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 corrections 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).⁴¹⁰ 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.⁴¹¹ 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.⁴¹²

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.⁴¹³

drug dependency was most frequently the reason for the negative suitability assessment: Ringland, above n 396, 4.

⁴⁰⁵ NSWLRC, above n 50, [9.24].

⁴⁰⁶ VSAC, above n 9, [6.144]–[6.145].

⁴⁰⁷ See TLRI, above n 16, [3.6.4].

⁴⁰⁸ See Appendix A Table A–3.

⁴⁰⁹ See *ibid.*

⁴¹⁰ See *ibid.*

⁴¹¹ See *ibid.*

⁴¹² See *ibid.*

⁴¹³ NSWLRC, above n 50, [9.16]–[9.17].

7.5.8 The Council's preliminary view

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 the 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 preliminary view (as with the view previously expressed by the TLRI) is that the benefits of intensive correction orders can be addressed in a more effective manner.

Draft Recommendation 28

Intensive correction/supervision orders

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

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 the VSAC's report that suggested that suspended sentences were being overused because of, in part, a failing of intermediate sentencing orders.⁴¹⁴ The CCO is a single, flexible intermediate sanction that has replaced a number of intermediate sanctions in Victoria, initially the combined custody and treatment order, the intensive correction order and the community-based order⁴¹⁵ and now also the suspended sentence. Its purpose was to 'deliver common-sense sentences targeted directly at both the offender and the offence'.⁴¹⁶ 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'.⁴¹⁷ Uncertainty about the nature of the order and the need for clarity and consistency also underpinned the decision of the Court of Appeal in *Boulton v The Queen*⁴¹⁸ (the 'guideline judgment') to issue a guideline judgment that provides guidance for the courts in sentencing an offender to a CCO.⁴¹⁹

Despite problems that have arisen in Victoria with the introduction of CCOs, the Council's preliminary 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 Five, it is the Council's preliminary 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*⁴²⁰ where the Court highlighted the unique and radical 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

⁴¹⁴ 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>>.

⁴¹⁵ See Freiberg, above n 25, [11.10].

⁴¹⁶ Victoria, *Parliamentary Debates*, House of Assembly, 15 September 2011, 3291 (Clark).

⁴¹⁷ Victoria, *Parliamentary Debates*, Legislative Assembly, 26 June 2014, 2398 (Clark).

⁴¹⁸ [2014] VSCA 342.

⁴¹⁹ [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+victorias+first+guideline+judgment>>.

⁴²⁰ [2014] VSCA 342.

turn will require a recognition of both the limitations of imprisonment and of the unique advantages which the CCO offers.⁴²¹

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 time in prison.

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’.⁴²² This means that it covers a ‘large sector of the sanction continuum’⁴²³ and sits below imprisonment and drug treatment orders but above fines in the sentencing hierarchy.⁴²⁴ 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:

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 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.⁴²⁵

The CCO was intended to provide ‘a significant and proportionately punitive response to offences falling within the mid-range of seriousness’.⁴²⁶ 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.⁴²⁷

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

⁴²¹ [2014] VSCA 342, [5].

⁴²² *Sentencing Act 1991* (Vic) s 36(1).

⁴²³ Freiberg, above n 25, [11.15].

⁴²⁴ *Sentencing Act 1991* (Vic) s 5(6).

⁴²⁵ Victoria, above n 416.

⁴²⁶ VSAC, *Community Correction Orders in the Higher Courts: Imposition, Duration, and Conditions* (2014), [2.3].

⁴²⁷ *Boulton v The Queen* [2014] VSCA 342, Appendix 1, [25].

punitive because it involves the complete loss of physical freedom.⁴²⁸ 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 and confinement to a small cell (often with a cellmate not of the prisoner’s choosing), the exposure to risk associated with the confinement of large numbers of people in a small space — violence, bullying and intimidation.⁴²⁹ As acknowledged in *Mainwaring v The Queen*,⁴³⁰ ‘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’.⁴³¹ 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.⁴³² 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’.⁴³³ The Council endorses the view of the Court of Appeal.

The CCO, however, ‘dramatically change[d] the sentencing landscape’.⁴³⁴ 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’.⁴³⁵ 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’.⁴³⁶ 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.⁴³⁷ The Court said that ‘in short, the CCO offers the sentencing court 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’.⁴³⁸ 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?”’.⁴³⁹

It is the Council’s aspiration that if the CCO is introduced in Tasmania, it will precipitate such a rethink 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.

⁴²⁸ Ibid [104].

⁴²⁹ Ibid [105].

⁴³⁰ [2009] NSWCCA 207.

⁴³¹ Ibid [72] quoted in *Boulton v The Queen* [2014] VSCA 342, [106].

⁴³² *Boulton v The Queen*, ibid [107]–[108].

⁴³³ Ibid [112].

⁴³⁴ Ibid [113].

⁴³⁵ Ibid.

⁴³⁶ Ibid Appendix 1, [14]. The nature of the conditions that can be imposed are discussed at [7.6.4].

⁴³⁷ Ibid [114].

⁴³⁸ Ibid [115].

⁴³⁹ Ibid.

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.⁴⁴⁰ 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.⁴⁴¹

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’.⁴⁴² The guidelines indicate that ‘concerns about difficulties of compliance should not be viewed as precluding the imposition of a CCO’⁴⁴³ 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).⁴⁴⁴ 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.⁴⁴⁵

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.⁴⁴⁶ The Court of Appeal indicated that there was no necessary correlation between the term of the CCO and the term of imprisonment that might otherwise have been imposed. The court said that ‘all that can be said is that, because imprisonment is more

⁴⁴⁰ Ibid [63], Appendix 1, [5].

⁴⁴¹ Ibid Appendix 1, [3]–[4].

⁴⁴² Ibid [172].

⁴⁴³ Ibid Appendix 1, [48].

⁴⁴⁴ Ibid Appendix 1, [49]–[51].

⁴⁴⁵ Ibid Appendix 1, [9]–[10].

⁴⁴⁶ *Sentencing Act 1991* (Vic) s 38(1)(b).

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'.⁴⁴⁷

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'.⁴⁴⁸ However, prior to the judgment, research undertaken by the 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.⁴⁴⁹ 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.⁴⁵⁰ 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.⁴⁵¹ The median duration was 12 months, and this was used for over two-thirds (68.7%) of orders. The 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'.⁴⁵²

The court can also impose an intensive compliance period if it makes a CCO for a period of six months or longer.⁴⁵³ 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,⁴⁵⁴ 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.⁴⁵⁵ 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'.⁴⁵⁶

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;

⁴⁴⁷ *Boulton v The Queen* [2014] VSCA 342, Appendix 1, [32].

⁴⁴⁸ *Ibid* [152].

⁴⁴⁹ VSAC, above n 426, [3.9].

⁴⁵⁰ VSAC, above n 63, 38.

⁴⁵¹ *Sentencing Act 1991* (Vic) s 38(1)(a).

⁴⁵² VSAC, above n 63, 12.

⁴⁵³ *Sentencing Act 1991* (Vic) s 39(1).

⁴⁵⁴ *Ibid* s 39(2).

⁴⁵⁵ VSAC, above n 63, 39. Data was not available for the Magistrates Court, 8.

⁴⁵⁶ Freiberg, above n 25, [11.25] referring to Judicial College of Victoria, *Overview of Sentencing Amendment (Community Correction Reform) Act 2011* (2012) 4.

- 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;
- 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.⁴⁵⁷

As compared with other higher-level intermediate sanctions, this is the broadest range of potential conditions that can be imposed on an offender.⁴⁵⁸

The range of conditions that can be imposed means that the CCO can fulfil a number of sentencing purposes, including punishment, deterrence and rehabilitation.⁴⁵⁹ 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.⁴⁶⁰ 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.⁴⁶¹ The requirement for an offender to participate in treatment programs and submit to judicial monitoring address 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.⁴⁶² 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.⁴⁶³

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 theoretically, this is possible, '[in] practice, the principle of proportionality implies that no more conditions should be attached than are necessary'.⁴⁶⁴ 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;

⁴⁵⁷ 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.

⁴⁵⁸ See Appendix B Table B-1.

⁴⁵⁹ Freiberg, above n 25, [11.15]; *Boulton v The Queen* [85]-[98], Appendix 1, [14]-[24].

⁴⁶⁰ See *Boulton v The Queen*, *ibid* Appendix 1, [13]-[17].

⁴⁶¹ *Ibid* Appendix 1, [18]-[19].

⁴⁶² *Ibid* Appendix 1, [20]-[21].

⁴⁶³ *VSAC Community Correction Orders — Structure for Possible Guidance* (2014).

⁴⁶⁴ Freiberg, above n 25, [11.30].

- the purposes of sentencing;
- the purpose of the CCO.⁴⁶⁵

The need for the conditions attached to be proportionate to the gravity of the offending was also affirmed by the Court of Appeal.⁴⁶⁶ These constraints appear to be working as over-use of conditions does not appear to be a problem in practice. Research conducted by the 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. The VSAC found that very few (0.8%) had more than four conditions.⁴⁶⁷

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. In the Magistrates Court, the most common conditions imposed were supervision, unpaid community work and assessment and treatment, which were used in nearly one-third of CCOs.⁴⁶⁸ The 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.⁴⁶⁹

This trend was also found in the higher courts where assessment and treatment, supervision, and unpaid community work were the most commonly imposed conditions.⁴⁷⁰

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.⁴⁷¹ The 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%)’.⁴⁷² In the higher courts, according to the VSAC, although more commonly used than in the Magistrates Court, there was limited use of the new conditions.⁴⁷³ 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.⁴⁷⁴ 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.⁴⁷⁵

⁴⁶⁵ See *Boulton v The Queen* [2014] VSCA 342, Appendix 1, [6].

⁴⁶⁶ *Ibid* Appendix 1, [47].

⁴⁶⁷ VSAC, above n 63, 16.

⁴⁶⁸ *Ibid*.

⁴⁶⁹ *Ibid*.

⁴⁷⁰ *Ibid* 39.

⁴⁷¹ VSAC, above n 449, [3.13]; *Boulton v The Queen* [2014] VSCA 342, [47]–[49].

⁴⁷² VSAC, above n 63, 16.

⁴⁷³ *Ibid* 39.

⁴⁷⁴ *Ibid* Figure 33. See also VSAC, above n 449 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.

⁴⁷⁵ 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

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.⁴⁷⁶ A breach of the order is also an offence punishable by a maximum of three months' imprisonment.⁴⁷⁷ 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 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'.⁴⁷⁸

7.6.6 Use of community correction orders

In Victoria, from January 2012 to June 2013, magistrates imposed CCOs on approximately 10% of all offenders (10 893 offenders).⁴⁷⁹ In the higher courts, in the same period, CCOs were imposed on 464 offenders.⁴⁸⁰

Research undertaken by the 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%);⁴⁸¹
- intentionally causing serious injury (5.9%);
- common assault (6.5%);
- recklessly cause serious injury (5.6%);
- aggravated burglary (5.4%).⁴⁸²

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%);

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.

⁴⁷⁶ *Sentencing Act 1991* (Vic) s 83AS(1).

⁴⁷⁷ *Ibid* s 83AD(1).

⁴⁷⁸ Victoria, above n 414.

⁴⁷⁹ VSAC, above n 63, 11.

⁴⁸⁰ *Ibid* 33.

⁴⁸¹ 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 63, 34 fn 51 referring to VSAC, *Maximum Penalties for Sexual Penetration with a Child Under 16*, Report (2009) 61.

⁴⁸² VSAC, above n 63, Figure 26.

- aggravated burglary (7.1%);
- drugs (court mandated treatment) (4.1%).⁴⁸³

In the Magistrates Court, between January 2012 and June 2013, 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%);
- reckless cause serious injury (8.4%);
- criminal damage (7.6%);
- drive while suspended (3.4%);
- drive while disqualified (3.4%).⁴⁸⁴

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%).⁴⁸⁵

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*,⁴⁸⁶ 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 offence, 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).⁴⁸⁷ 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'⁴⁸⁸ 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.⁴⁸⁹

It remains to be seen how the scope provided in the guideline judgment influences the future use of CCOs.

⁴⁸³ Ibid Figure 27.

⁴⁸⁴ Ibid Figure 1.

⁴⁸⁵ Ibid Figure 2.

⁴⁸⁶ [2013] VSC 65.

⁴⁸⁷ *Boulton v The Queen* [2014] VSCA 342, Appendix 1, [25].

⁴⁸⁸ Ibid Appendix 1, [29].

⁴⁸⁹ Ibid Appendix 1, [30].

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 the 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,⁴⁹⁰ 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, the 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%).⁴⁹¹ However, the 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.⁴⁹²

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.⁴⁹³

7.6.8 Cost of community correction order

In Victoria, the 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 2011–12.⁴⁹⁴

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 2012–13.⁴⁹⁵ 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.⁴⁹⁶

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

⁴⁹⁰ Ibid [1.3].

⁴⁹¹ Ibid [1.5].

⁴⁹² Ibid [1.10].

⁴⁹³ See Sentencing Advisory Council, Tasmania, above n 2, [5.2.2].

⁴⁹⁴ VSAC, above n 63, 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.

⁴⁹⁵ Steering Committee for the Review of Government Services, *ibid*.

⁴⁹⁶ Information provided by Arie Freiberg.

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’.⁴⁹⁷ 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.⁴⁹⁸ This would be double the current number of offenders in the community corrections system.⁴⁹⁹ Based on this assessment, Gelb has written that ‘the key issue that has been identified in this report 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 offender that it supervises, monitors and treats’.⁵⁰⁰ 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, 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.⁵⁰¹ Feedback received in Victoria in relation to the support received from CCS is very negative.⁵⁰²

7.6.9 The Council’s preliminary views

As indicated, the Council’s preliminary view is 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 tentatively 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, there has been mixed evidence about the appropriateness of the CCO as a replacement for the suspended sentence. There have been judicial statements that indicate the courts consider that a CCO is an onerous order and that it is not a ‘soft’ sentencing option⁵⁰³ or a ‘mere “slap on the wrist”’.⁵⁰⁴ 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.⁵⁰⁵

⁴⁹⁷ *Boulton v The Queen* [2014] VSCA 342, [134].

⁴⁹⁸ Gelb, above n 106, 30.

⁴⁹⁹ *Ibid* 50.

⁵⁰⁰ *Ibid*.

⁵⁰¹ *Ibid* 51.

⁵⁰² Information provided by Arie Freiberg.

⁵⁰³ *DPP v Edwards* [2012] VSCA 292, [135] (Warren CJ).

⁵⁰⁴ *Ibid* [242] (Weinberg JA and Williams AJA).

⁵⁰⁵ *Ibid* [123] (Warren CJ).

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.⁵⁰⁶ However, legislative intervention and the Court of Appeal's guideline judgments have affirmed the appropriateness of a CCO as a replacement for a suspended sentence.

It is the Council's view that Tasmania can potentially avoid the uncertainty that 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.⁵⁰⁷

Nature of the order

In Tasmania, the CCO would sit below imprisonment, drug and alcohol 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.⁵⁰⁸ 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.⁵⁰⁹

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. 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.⁵¹⁰ 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).⁵¹¹

In terms of suitability, the court should ensure that the CCO is carefully tailored to the circumstances and particular needs of the offender.⁵¹² The Council also considers that it

⁵⁰⁶ This sentiment is reflected in 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 63.

⁵⁰⁷ *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'.

⁵⁰⁸ *Boulton v The Queen* [2014] VSCA 342.

⁵⁰⁹ See [2.4].

⁵¹⁰ *Boulton v The Queen* [2014] VSCA 342.

⁵¹¹ See [6.1].

⁵¹² See *Boulton v The Queen* [2014] VSCA 342.

should be made clear that mental illness, drug addition and/or homelessness do not preclude an offender from consideration for a CCO.⁵¹³ 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.⁵¹⁴

A pre-sentence report should be a pre-condition of a CCO if the court is considering imposing special conditions on an offender,⁵¹⁵ however, there should be no need for a pre-sentence report if the court only intends to impose core conditions.

Term of the order

The Council's preliminary view is 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.⁵¹⁶ The Council's preliminary 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) is 240 hours.⁵¹⁷ 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.⁵¹⁸ 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).⁵¹⁹ 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.⁵²⁰ It is the Council's preliminary view that this should not be repeated in Tasmania. Moreover, for Supreme Court cases, the 21-year maximum in Tasmania makes the Victorian approach an inappropriate model.⁵²¹

Conditions

Consistent with the Council's preliminary view that sentencers should have maximum flexibility to address the offender and the offence, the Council's preliminary 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.⁵²² It is crucial that, in

⁵¹³ See [7.6.2]. However, an offender with drug and/or alcohol dependency issues associated with offending may also be considered suitable for a drug and alcohol treatment order, see Chapter 6.

⁵¹⁴ *Boulton v The Queen* [2014] VSCA 342.

⁵¹⁵ See below.

⁵¹⁶ See Sentencing Advisory Council, Tasmania, above n 2, [3.1.3], [3.1.4].

⁵¹⁷ *Sentencing Act 1997* (Tas) s 31.

⁵¹⁸ *Sentencing Act 1991* (Vic) s 38(1)(b).

⁵¹⁹ *Boulton v The Queen* [2014] VSCA 342.

⁵²⁰ *Sentencing Act 1991* (Vic) s 38(1)(a).

⁵²¹ It is noted that there are limits to the sentence length that magistrates can impose for indictable offences, see Table 2-1.

⁵²² For a possible model, see *Sentencing Act 1991* (Vic) s 48A.

imposing conditions, an offender is not set up to fail through unrealistic requirements.⁵²³ It is also essential that appropriate support is provided to the offender in the community to facilitate compliance with the conditions.

The Council's preliminary view is that 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;
- submit to the supervision of a probation officer as required by that probation officer;
- 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.

These are based on the core conditions that currently attach to probation and CSOs under the *Sentencing Act 1997* (Tas).⁵²⁴ 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 supervision requirements 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 community service or a treatment condition as part of the CCO, as the Council's preliminary 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'.⁵²⁵ It also reflects the approach taken by the NSWLRC in its recommendations for the community detention order.⁵²⁶

In addition, the court should be able to attach any of the following special conditions to a CCO:

- 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;

⁵²³ VSAC, above n 9, [6.72].

⁵²⁴ *Sentencing Act 1997* (Tas) ss 28, 37(1).

⁵²⁵ VSAC, above n 9, [6.148].

⁵²⁶ NSWLRC, above n 50, [11.27].

- 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).⁵²⁷ 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 offender's 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.⁵²⁸

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 managements. A condensed version of the program has also been delivered.⁵²⁹ 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 2013–14.⁵³⁰ 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'.⁵³¹ The Council understands that this is a successful program in Tasmania that has the confidence of the judiciary and the Council's preliminary view is that the program should be expanded though the development of a formalised driving while intoxicated list. 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.⁵³² Analysis of current sentencing patterns suggest 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.

⁵²⁷ See *Sentencing Act 1997* (Tas) ss 24, 28(c), 28(g), 37(2), 70.

⁵²⁸ See [7.6.8]. See also Mair and Mills, above n 475, 11–12; TLRI, above n 16, [3.6.4].

⁵²⁹ Department of Justice, Tasmania, above n 168, 59.

⁵³⁰ Ibid.

⁵³¹ Ibid.

⁵³² See Sentencing Advisory Council, Tasmania, above n 2.

Consequences of breach

The Council's preliminary view is that breach of a CCO should have serious consequences and that there needs to be a robust administrative procedure in place in relation to recording breaches (even if not actioned) and making 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. 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. 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.⁵³³ 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 application to the court on breach of a CCO.⁵³⁴ Failure to action breaches of suspended sentences has been a criticism that has been directed at the sentence in Tasmania⁵³⁵ 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 to respond to minor breaches and support provided to offenders with complex needs to facilitate compliance with the order.

It is the Council's preliminary 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 preliminary 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.⁵³⁶ 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

⁵³³ See Arie Freiberg, above n 28, 112–114; VSAC, above n 9, [11.30].

⁵³⁴ See *Sentencing Act 1997* (Tas) ss 36, 42.

⁵³⁵ See Sentencing Advisory Council, Tasmania, above n 2, [5.1.1].

⁵³⁶ 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).

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.⁵³⁷ 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 preliminary 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 preliminary 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 preliminary 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 of the affluence of an offender and this means that the fine has unequal impact.⁵³⁸ 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),¹ the Council's preliminary 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.⁵³⁹ 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'.⁵⁴⁰

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 sentences cases.

Resourcing and transitional arrangements

As indicated at [1.3], 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. 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.

⁵³⁷ Email from Ms Georgette Chilcott, Senior Practice Consultant, Community Corrections to Rebecca Bradfield, 3 June 2015.

⁵³⁸ See TLRI, above n 16, [3.9.14].

⁵³⁹ Ibid [3.9.20].

⁵⁴⁰ 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.

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 [1.3], the Council's preliminary view is that the use, operation and resource implications of any new sanction needs to be carefully monitored, analysed and understood to allow 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.⁵⁴¹ 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 preliminary 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 preliminary view that these orders should be replaced by the CCO from its introduction.

Draft recommendations

Community correction order (CCO)

29. A new intermediate sanction called a CCO should be introduced in Tasmania with a maximum term of three years.

30. 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.

31. The CCO should sit below imprisonment, drug and alcohol treatment orders and home detention, and above a fine.

32. The current provisions for probation orders and community service contained in the *Sentencing Act 1997* (Tas) should be repealed following the introduction of the CCO.

33. 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.

34. Appropriate funding should be made available for the CCO.

35. 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;

⁵⁴¹ 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 9 [13.8] referring to the Halliday review, above n 9.

- 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 would abate once a treatment process is underway, although there may be cases where a CCO would 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.

36. 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;
- submit to the supervision of a probation officer;
- 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.

37. In addition to the core conditions, the court should be able to attach any of the following special conditions:

- 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.

38. A breach of a CCO should have serious consequences and there needs to be a robust administrative procedure in place in relation to recording breaches (even if not actioned) and making 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.

39. 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.

40. 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.

41. The CCO should be able to be combined with a rehabilitation program order for family violence offences, driving disqualification and/or a fine.

42. 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 a fine.

43. The CCO should also be able to be combined with a term of imprisonment of 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).⁵⁴² 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 that is warranted by the seriousness of the offence as well as allowing for a period of supervision following release from prison.⁵⁴³ 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.⁵⁴⁴ 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,⁵⁴⁵ and it is the Council’s preliminary view that imprisonment combined with a CCO would serve as an effective replacement for PSSs in Tasmania. 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.⁵⁴⁶

It is the Council’s preliminary 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.⁵⁴⁷ 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 capable of 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.⁵⁴⁸ As recognised by the Victorian Court of Appeal in its guideline judgment, the ability to combine imprisonment with a CCO allows the court, even in cases of objectively grave criminal conduct, to:

⁵⁴² See Sentencing Advisory Council, Tasmania, above n 2, [3.1.1], [4.1.1].

⁵⁴³ VSAC, above n 9 [8.58].

⁵⁴⁴ Ibid [8.1].

⁵⁴⁵ Information provided by Arie Freiberg (official analysis available at later date).

⁵⁴⁶ These features of the community correction order were taken from Victoria Legal Aid, *Further Submissions on Behalf of VLA* (2014) [15].

⁵⁴⁷ See *Boulton v The Queen* [2014] VSCA 342, [142]–[145].

⁵⁴⁸ See Sentencing Advisory Council, Tasmania, above n 2, [3.1.3], [4.1.3].

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.⁵⁴⁹

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.⁵⁵⁰ In Victoria, it is possible to combine a CCO with a term of imprisonment.⁵⁵¹ 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.⁵⁵²

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.⁵⁵³ The purpose of increasing the term of imprisonment was to provide courts with greater flexibility,⁵⁵⁴ 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.⁵⁵⁵ 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.⁵⁵⁶

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.⁵⁵⁷ This raises conceptual and theoretical difficulties including, the likely divergence in the nature, scope and intensity of 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.⁵⁵⁸ In view of the challenges, the VSAC has suggested that parole orders and CCOs should only be used by courts as alternative community supervision orders.⁵⁵⁹ 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 preliminary recommendation is that parole orders and CCOs should only be used in the alternative.

⁵⁴⁹ *Boulton v The Queen* [2014] VSCA 342, Appendix 1, [27].

⁵⁵⁰ See VSAC, above n 9, [7.5]–[7.7], [7.50]–[7.79] for discussion of combined custody and treatment order.

⁵⁵¹ *Sentencing Act 1991* (Vic) s 44.

⁵⁵² VSAC, above n 63, 15, 38.

⁵⁵³ *Sentencing Act 1991* (Vic) s 44(1), (1A), as amended by the *Sentencing Amendment (Emergency Workers) Act 2014* (Vic).

⁵⁵⁴ Victoria, above n 417.

⁵⁵⁵ *Ibid.*

⁵⁵⁶ Information provided by Arie Freiberg. See also Gelb, above n 106, 62–64; Bartels, above n 135, 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).

⁵⁵⁷ VSAC, above n 463, [86].

⁵⁵⁸ Victoria Legal Aid, above n 546, [27].

⁵⁵⁹ VSAC, above n 463, [86].

Draft recommendations

Combined imprisonment and CCOs as a replacement for partly suspended sentences

44. 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.

45. 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’.⁵⁶⁰ 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.⁵⁶¹ 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.⁵⁶² 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 and, instead, is determined by the Parole Board whereas an offender sentence to a PSS is automatically released.
- parole is not available for offenders serving sentences of less than twelve months as 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 less than 12 months for 87.2% 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 preliminary view that the parole system is not the most suitable vehicle to replace PSSs in Tasmania.

Draft recommendation 46

Parole as a replacement for partly suspended sentences

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

⁵⁶⁰ TLRI, above n 16, [5.1.2].

⁵⁶¹ See NSWLRC, *Question Paper 1: Design and Objectives of the Parole System*, (2013) [1.53]; Bartels, above n 135 for a discussion of the different models of parole in Australia.

⁵⁶² *Sentencing Act 1997* (Tas) s 17(2)(b), (3).

9 Deferral of sentencing

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.⁵⁶³ 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.⁵⁶⁴ 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.⁵⁶⁵ As indicated in Chapter Five, 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 their offender's rehabilitation or to allow them to take part in activities aimed at addressing the impact of the offending behaviour on the victim.⁵⁶⁶ 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'.⁵⁶⁷

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"'.⁵⁶⁸ 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.⁵⁶⁹ 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'.⁵⁷⁰ 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.⁵⁷¹

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.⁵⁷² 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'.⁵⁷³ Typically, the purposes of deferral include reference to the need to allow an

⁵⁶³ See Appendix C Table C-1.

⁵⁶⁴ This followed recommendations by VSAC, above n 9, [12.83].

⁵⁶⁵ *Youth Justice Act 1997* (Tas) Part 4 Div 7A inserted by *Youth Justice (Miscellaneous Amendments) Act 2013* (Tas) commenced 1 March 2014.

⁵⁶⁶ See Appendix C Table C-1.

⁵⁶⁷ Freiberg, above n 25, [2.275].

⁵⁶⁸ Gelb, above n 106, 53.

⁵⁶⁹ Ibid.

⁵⁷⁰ Ibid 55.

⁵⁷¹ Arie Freiberg and Neil Morgan, 'Between Bail and Sentence: the Conflation of Dispositional Options' (2004) 15 *Current Issues in Criminal Justice* 220, 230.

⁵⁷² See Appendix C Table C-1.

⁵⁷³ VSAC, above n 9, [12.80].

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.⁵⁷⁴

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.⁵⁷⁵ 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.⁵⁷⁶

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.⁵⁷⁷ 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'.⁵⁷⁸ 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'.⁵⁷⁹ 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 the 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;

⁵⁷⁴ This followed recommendations by VSAC, above n 9, 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 from 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].

⁵⁷⁵ *Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 1.

⁵⁷⁶ *Ibid* ss 1(3), 1Z.

⁵⁷⁷ *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 50, [16.63]–[16.99].

⁵⁷⁸ *Crimes (Sentencing) Act 2005* (ACT) s 27(1)(d).

⁵⁷⁹ *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.⁵⁸⁰

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.⁵⁸¹

This has been recognised by the NSW Court of Criminal Appeal in *R v Trindall*,⁵⁸² 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.⁵⁸³

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'.⁵⁸⁴ 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'.⁵⁸⁵

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.⁵⁸⁶

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 intellectually disability, offenders with drug and alcohol issues and other special needs/high risk offenders 'may be set up to fail'.⁵⁸⁷ Further, there is a concern that the sentencing process is delayed and that this may disadvantage victims.⁵⁸⁸ 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 Western Australia and the ACT, in cases where an offender's sentence is deferred, the offender is released on bail.⁵⁸⁹ In the ACT, the court can impose bail or the court can impose conditions on the deferral of sentencing.⁵⁹⁰ In Western Australia and in England

⁵⁸⁰ VSAC, above n 9, [12.58].

⁵⁸¹ Ibid [12.77].

⁵⁸² (2002) 133 A Crim R 119.

⁵⁸³ Ibid [60].

⁵⁸⁴ VSAC, above n 9, [12.82].

⁵⁸⁵ NSWLRC, above n 50, [16.57].

⁵⁸⁶ See Appendix C Table C-1.

⁵⁸⁷ VSAC, above n 9, [12.64] quoting Youthlaw's submission.

⁵⁸⁸ Ibid [12.66] referring to Victoria Police.

⁵⁸⁹ See Appendix C Table C-1.

⁵⁹⁰ See *ibid*. See also VSAC, above n 9, [12.19].

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’⁵⁹¹ and this can include a requirement to participate in restorative justice activities.⁵⁹² 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 programme requirement and a curfew requirement.⁵⁹³

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’.⁵⁹⁴ 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’.⁵⁹⁵ Accordingly, the 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).⁵⁹⁶ The 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 issue that have contributed to their offending by accessing counselling and other services in the community on their own initiative.⁵⁹⁷

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’.⁵⁹⁸ 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) access and comply with rehabilitation programs.⁵⁹⁹ 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.⁶⁰⁰

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.⁶⁰¹

There are opposing views as to whether or not a review power is appropriate. The 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’.⁶⁰² On this view, judicial monitoring is a powerful tool. An alternative view is that it is not the role of courts to manage

⁵⁹¹ *Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 1(3).

⁵⁹² *Ibid* s 1Z.

⁵⁹³ *Sentencing Act 1995* (WA) ss33D, 33E.

⁵⁹⁴ Freiberg and Morgan, above n 571, 230. See also VSAC, above n 9, [12.60].

⁵⁹⁵ Freiberg and Morgan, above n 571, 230.

⁵⁹⁶ VSAC, above n 9, [12.60].

⁵⁹⁷ *Ibid*.

⁵⁹⁸ *Ibid* [12.54].

⁵⁹⁹ NSWLRC, above n 50, [16.58]–[16.59].

⁶⁰⁰ Information provided by Arie Freiberg.

⁶⁰¹ See Appendix C Table C–1.

⁶⁰² VSAC, above n 9, [12.81].

offenders' sentences or to be 'rehabilitative agents',⁶⁰³ 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.⁶⁰⁴ 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.⁶⁰⁵

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.⁶⁰⁶ 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'.⁶⁰⁷ This issue has been addressed by the 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.⁶⁰⁸ 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.⁶⁰⁹

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.⁶¹⁰

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.⁶¹¹

⁶⁰³ Ibid [12.57].

⁶⁰⁴ See Appendix C Table C-1.

⁶⁰⁵ See *ibid*.

⁶⁰⁶ VSAC, above n 9, [12.55].

⁶⁰⁷ *Ibid*.

⁶⁰⁸ *R v Brown* (2009) 193 A Crim R 574; *R v Rayment* (2010) 200 A Crim R 48; *R v Farrell* [2014] NSWCCA 30.

⁶⁰⁹ VSAC, above n 9, [12.55]; *R v Farrell* [2014] NSWCCA 30, [62] (R A Hulme J, Hoeben CJ at CL and Adams J agreeing).

⁶¹⁰ Freiberg, above n 25, [2.275] summarising *R v Thompson* [2012] SASCF 149, [33].

⁶¹¹ *Western Australia v Polmear* [2013] WASCA 291, [25] (Mazza JA).

9.7 The Council's view

Based on the experience in other jurisdictions that deferral is seen as a useful sentencing tool and the advantages outlined for the deferral of sentencing, the Council's preliminary recommendation is that deferral of sentencing be extended to adult offenders. The Council's view is that Tasmania requires a range of flexible sentencing options to allow the court to respond to offenders⁶¹² 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.⁶¹³ 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 preliminary recommendation is that the maximum period for deferral should be 12 months. This is also consistent with the provisions under the *Youth Justice Act 1997* (Tas).⁶¹⁴ 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 preliminary 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 preliminary 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 preliminary 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.

It is the Council's preliminary 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 the 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

⁶¹² This was the view of VSAC, above n 28, [6.14].

⁶¹³ See VSAC, above n 9, [12.77].

⁶¹⁴ *Youth Justice Act 1997* (Tas) s 47(1A).

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.⁶¹⁵

Draft recommendations

Deferred sentencing

47. 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).

48. The maximum period of deferral should be 12 months.

49. Deferral should be available even if the court is intending to impose a term of imprisonment.

50. The Council's preliminary view is 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.

51. Appropriate support and services should be made available to offenders who require financial assistance to access rehabilitation services.

52. 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.

⁶¹⁵ *Youth Justice Act 1997* (Tas) s 47(1)(j).

Appendix A

Table A-1: Home Detention

Jurisdiction		Custodial	Sub- stitutional	Term	Standard conditions	Optional conditions	Restrictions on offences/offenders	Consequences of breach
Victoria	Before repealed ⁶¹⁶	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</p>	Any special conditions that court considers appropriate	<p>Not available for those found guilty of:</p> <ul style="list-style-type: none"> a sexual offence, violent offence, serious violent offence or drug offence (as defined in Schedule 1 of the <i>Sentencing Act 1991</i> (Vic)) offence committed in circumstances which involved behaviour of sexual nature offence involves use of firearm or prohibited weapon a breach of an intervention order stalking <p>Criteria in relation to prior convictions</p>	<p>Discretion to bring breach proceedings for contravention without reasonable excuse but MUST 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"> vary the home detention order confirm the order cancel the order and commit the offender to prison for unexpired term at date of contravention <p>Presumption of activation unless exceptional circumstances which have</p>

⁶¹⁶ Home detention was abolished by the *Sentencing Legislation Amendment (Abolition of Home Detention Act 2011)* (Vic) from 16 January 2012.

Jurisdiction		Custodial	Substitutional	Term	Standard conditions	Optional conditions	Restrictions on offences/offenders	Consequences of breach
					<p>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>			<p>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>
	VSAC	Yes	No	<p>No more than a year</p> <p>Allow for a reduction in hours (supported by statutory guidance)</p>				<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"> • vary the order • confirm the order or • cancel the order (and make no further order) <p>If breach of other conditions, court can:</p> <ul style="list-style-type: none"> • vary the order • confirm the order or • cancel the order and resentence • cancel the order (and make no further order)

Jurisdiction		Custodial	Substitutional	Term	Standard conditions	Optional conditions	Restrictions on offences/offenders	Consequences of breach
NSW ⁶¹⁷	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>Submit to searches and drug testing</p> <p>Engage in personal development activities or treatment programs if directed by supervisor</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"> • murder, attempted murder, manslaughter or assault causing death • sexual assault and sexual offences involving children • armed robbery • offences involving use of firearm • assault occasioning actual bodily harm or more serious assault • domestic violence offence if likely offender would reside or continue relationship if order made • stalking or intimidation • specified drug offences <p>Criteria in relation to prior convictions</p>	Supervised by Corrective Services NSW and serious breaches referred to State Parole Authority (SPA). If an order is breached, SPA can revoke it or impose additional conditions or vary any conditions
	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</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	

⁶¹⁷ *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
			offences			imprisonment	
NT ⁶¹⁸	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 Remain at premises unless permitted to leave Submit to monitoring Obey reasonable directions	Offender suitable and consents Not available if mandatory minimum terms of imprisonment apply (Level 5, 4 and 3 violent offences) ⁶¹⁹ 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.	Offender breaches: <ul style="list-style-type: none"> • if fails to reside at premises • fails to comply with a term or condition of order • damages or removes monitoring device • fails to undergo breath test, breath analysis or blood or urine test • disturbs or interferes with other person residing in premises • assaults, threatens, insults or uses abusive language to probation and parole office • commits a breach of Regulations • commits an offence 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

⁶¹⁸ Sentencing Act 1995 (NT) s 44. See also *Prison (Correctional Services) Act (NT)*, *Sentencing Regulations (NT)* and *Prisons (Correctional Services)(Home Detention Orders) Regulations (NT)*.

⁶¹⁹ Sentencing Act 1995 (NT) s 78BA, inserted by *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013 (NT)*.

Jurisdiction	Custodial	Substitutional	Term	Standard conditions	Optional conditions	Restrictions on offences/offenders	Consequences of breach
							<p>is not a regulatory offence.</p> <p>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</p> <p>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</p>
New Zealand ⁶²⁰	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>Condition in relation to finances or earnings</p> <p>Required to take prescription medication</p> <p>Conditions relating to a programme</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</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</p>

⁶²⁰ Sentencing Act 2002 (NZ) ss 15A, 80A–80ZI.

Jurisdiction	Custodial	Sub- stitutional	Term	Standard conditions	Optional conditions	Restrictions on offences/offenders	Consequences of breach
				Non-association requirements Take part in rehabilitative and reintegrative needs assessment	likelihood of further offending ⁶²¹ The court may (if sentence less six 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 ⁶²²		to court to vary or cancel the sentence On application to cancel the sentence, the court may: <ul style="list-style-type: none"> • remit, suspend or vary any special condition imposed by court or impose additional special conditions or • vary the home detention residence or • cancel the sentence • cancel the sentence and substitute any other sentence that could have been imposed at time of sentence.

⁶²² Ministry of Justice, New Zealand, above n 258, 6.

Table A–2: Community Detention Orders

Jurisdiction	Name of order	Custodial	Substitutional	Term	Standard conditions	Optional conditions	Restrictions on offences/offenders	Consequences of breach
NSW (recommendation of NSWLRC) ⁶²³	Community Detention Order ⁶²⁴	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"> revoke the order (and commit offender to full-time custody) not revoke the order where good reasons exist for excusing the breach refer back to court for variation
New Zealand	Community Detention ⁶²⁵	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 in rehabilitative and reintegrative activities programmes, attend restorative justice	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:

⁶²³ NSWLRC, above n 50.

⁶²⁴ To replace home detention, intensive correction order and suspended sentences.

⁶²⁵ *Sentencing Act 2002* (NZ) s 69B.

					<p>conference or undertaking arising from restorative justice conference or for humanitarian reasons)</p> <p>Report to probation officer and notify of change of address or occupation</p> <p>Submit to electronic monitoring</p>			<ul style="list-style-type: none"> • suspend or vary the curfew period • vary the curfew address • cancel the sentence and resentence
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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 ⁶²⁶	No	<p>In Magistrates' Court, must not exceed:</p> <ul style="list-style-type: none"> • 2 years for one offence • 4 years for two offences • 5 years for three or more offences <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"> • unpaid community work for up to 600 hours • 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 • supervision • non-association with a specific person or a class of person • residence restriction or exclusion which may direct that the offender reside at a specified 	<p>Can not 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"> • vary the order • confirm the order • cancel the order and resentence the offender • cancel the order and make no further order

⁶²⁶ Sentencing Act 1991 (Vic) ss 36–48Q, 80, 83AS, 83AE, 83ASA.

Jurisdiction		Name of order	Custodial	Term	Standard conditions	Optional conditions	Restrictions on use for offences	Consequences of breach
						<ul style="list-style-type: none"> place or not reside at a specified place • place or area exclusion which directs that offender must not enter or remain at specified place or area • 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) • alcohol exclusion which directs that offender not enter licenced premises, the location of any major event, not consume liquor in licenced premises • bond condition which requires the offender to pay a bond • judicial monitoring which allows the court to monitor an offender • justice plan for offenders with an intellectual disability • electronic monitoring which can be imposed by higher courts • residual condition to 		

Jurisdiction		Name of order	Custodial	Term	Standard conditions	Optional conditions	Restrictions on use for offences	Consequences of breach
						<p>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.</p> <p>Can impose an intensive compliance period if court is making an order to 6 months or longer.</p>		
	Former law ⁶²⁷	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</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"> • alcohol and other drug treatment program • drink drivers programs • young offenders training program. 	<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"> • vary the order • confirm the order originally made or • cancel the order and commit the offender to prison for the portion of sentence unexpired at the date of the breach <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</p>

⁶²⁷ 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
					<p>balance undergoing counselling or treatment for a specified psychological, psychiatric, drug or alcohol problem as directed 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>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>
	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</p>	<p>Court can impose one or more program conditions:</p> <ul style="list-style-type: none"> • assessment and treatment for alcohol or drug addiction • medical, psychological or psychiatric assessment and treatment • attend educational, vocational, cultural, rehabilitative, reintegration or personal development programs • live in specified place for a specified period • submit to testing for drug or alcohol use as specified in the order or as directed • any other condition court 	<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"> • vary the ICO • confirm the order • cancel the order (and make no further order) <p>If a breach of other</p>

Jurisdiction		Name of order	Custodial	Term	Standard conditions	Optional conditions	Restrictions on use for offences	Consequences of breach
					<p>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>considers necessary or desirable fit but cannot include a condition about making restitution or the payment of compensation, costs or damages</p> <p>Can impose special conditions:</p> <ul style="list-style-type: none"> not associate with specified person or person of a specified class not enter a place specified in order not live at address that directed not to live at 		<p>condition, a court should be permitted to:</p> <ul style="list-style-type: none"> vary the ICO confirm the order cancel the order and resentence the offender cancel the order (and make no further order)
		Intensive Correction Order (Drug and Alcohol)	No	<p>2 years</p> <p>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</p>	As with ICO but without community work as a core condition.	<p>Order should have at least one program condition attached</p> <p>Court can impose one or more program conditions:</p> <ul style="list-style-type: none"> assessment and treatment for alcohol or drug addiction medical, psychological or psychiatric assessment and treatment submit to testing for drug or alcohol use as specified in the order or as directed attend vocational, 	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
						educational, employment or other program as directed <ul style="list-style-type: none"> • perform unpaid community work • any other condition considered necessary relating to offender's drug or alcohol dependency Can impose special conditions: <ul style="list-style-type: none"> • not associate with specified person or person of a specified class • not enter a place specified in order • not live at address that directed not to live at • comply with judicial monitoring 		
NSW	Current law	Intensive Correction Order ⁶²⁸	Yes - substitutinal	Up to 2 years	Be of good behaviour and not commit an offence Report to Corrective Services Reside at approved premises and receive visits Not leave NSW without	Accept direction of supervisor in relation to maintaining or finding employment Authorise contact between any employer and supervisor Comply with direction of	Not available for certain sexual offences (victim under 16 or offence involves sexual penetration)	A breach is a failure to comply with any obligation under ICO On a breach, the Commissioner can take no action or impose a formal warning and/or impose more stringent

⁶²⁸ *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 7, 63–73A; *Crimes (Administration of Sentences) Act 1999* (NSW) ss 88–90, 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
					<p>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</p>	<p>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 re-offending</p>		<p>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"> • impose a sanction that Commissioner could impose • impose a period of up to 7 days' home detention by imposing a requirement that offender remain in residence • revoke ICO <p>If ICO is revoked, if the remainder of the term is 18 months or less, then can order home detention</p>

Jurisdiction		Name of order	Custodial	Term	Standard conditions	Optional conditions	Restrictions on use for offences	Consequences of breach
					or otherwise comply with the order			
	NSWLRC ⁶²⁹	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 ⁶³⁰	Yes - substitutional	Less than 1 year	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	Submit to medical, psychiatric or psychological treatment Comply with conditions that court considers necessary to: <ul style="list-style-type: none"> • cause offender to behave in way that is acceptable to the community • stop offender from committing the same type of offence • stop the offender from committing other offences Note that the court has separate power to make	No	Breach is a punishable offence If offender contravenes order, a court may: <ul style="list-style-type: none"> • revoke the order and commit offender to prison for portion of imprisonment still to serve • resentence the offender • fine the offender • admonish and discharge

⁶²⁹ NSWLRC, above n 50, Chapter 9.

⁶³⁰ *Penalties and Sentences Act 1992* (Qld) ss 111–120, 121–132.

Jurisdiction	Name of order	Custodial	Term	Standard conditions	Optional conditions	Restrictions on use for offences	Consequences of breach
				<p>services officer directs</p> <p>Notify of change of address/employment</p> <p>Not leave Queensland without permission</p> <p>Obey directions of authorised corrective services officer</p>	<p>non-contact orders to prevent the offender from contacting the victim or someone who was with the victim when the offence took place⁶³¹ and banning orders which prevent the offender from entry to licensed premises.⁶³²</p>		
WA	Intensive Supervision Order ⁶³³	No	Between 6 and 24 months	<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</i> (WA) 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"> • programme requirement • community service requirement • a curfew requirement 	No	<p>Breach is a punishable offence</p> <p>If offender contravenes order or is convicted of an imprisonable offence a court may:</p> <ul style="list-style-type: none"> • confirm the order • amend the order • cancel the order and resentence the offender
Northern Territory	Community Custody	Yes	For period of imprisonment but no longer than 12	Not commit another offence punishable by imprisonment	May impose either or both of the following conditions on the order:	Not available for sexual offences, violent offences, common	If breach of the statutory conditions, there is a presumption that the

⁶³¹ *Penalties and Sentences Act 1992* (Qld) ss 43A–43F.

⁶³² *Penalties and Sentences Act 1992* (Qld) ss 43G–43O.

⁶³³ *Sentencing Act 1995* (WA), ss 68–75.

Jurisdiction	Name of order	Custodial	Term	Standard conditions	Optional conditions	Restrictions on use for offences	Consequences of breach
	Order ⁶³⁴		months	<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 the 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</p>	<ul style="list-style-type: none"> offender must undertake specified prescribed programs offender must not consume or purchase alcohol or a drug (other than as prescribed by a medical practitioner or other health practitioner) <p>In addition, the court may impose the following conditions:</p> <ul style="list-style-type: none"> must reside at a specified place 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 must allow the placing or installation in, and retrieval from, a specified place of anything necessary for the effective operation of the monitoring device <p>Also, a prescribed program may be residential or community-based</p>	<p>assault in circumstances of aggravation and other prescribed offences</p> <p>Not impose if imprisoned for longer than 12 months</p>	<p>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"> confirm the order vary the order 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

⁶³⁴ Sentencing Act (NT) ss 48A–48Q.

Jurisdiction	Name of order	Custodial	Term	Standard conditions	Optional conditions	Restrictions on use for offences	Consequences of breach
				<p>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>			
NZ	Intensive Supervision ⁶³⁵	No	Between 6 and 24 months	<p>Report to probation officer</p> <p>Report at least one 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>Can impose special conditions in relation to programmes (residential or non-residential) which includes:</p> <ul style="list-style-type: none"> • psychiatric or other counselling or assessment • attendance at any medical, psychological, social, therapeutic, cultural, educational, employment-related, rehabilitative or reintegrative program <p>Any other special conditions in relation to:</p> <ul style="list-style-type: none"> • offender's place of residence (which may include a condition that 	No	<p>A breach is a punishable offence</p> <p>A court may:</p> <ul style="list-style-type: none"> • Remit, suspend or vary any special conditions or impose additional special conditions • cancel the sentence • cancel the sentence and resentence the offender

⁶³⁵ *Sentencing Act 2002* (NZ) ss 54–54L, 70A.

Jurisdiction	Name of order	Custodial	Term	Standard conditions	Optional conditions	Restrictions on use for offences	Consequences of breach
				<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>the offender not move residence), finances or earnings</p> <ul style="list-style-type: none"> • take prescription medication • training in basic work and living skills • judicial monitoring • any other condition to reduce the likelihood of further reoffending⁶³⁶ 		

⁶³⁶ 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 54I(4).

Appendix B

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 condition	Other conditions
Victoria	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	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 condition	Other conditions
		activities (such as activities whose purpose is reparation and educational and life skills)									
	Intensive Correction Order (Drugs and Alcohol) (as recommended by VSAC)	O	-	O	S	O	-	O	O	O	Program conditions (O) including residential drug treatment
NSW	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)
Northern Territory	Home Detention	-	S (can include	O	S	S	S	-	-	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 condition	Other conditions
			electronic monitoring)								
	Community Custody Order	S	No but can include electronic monitoring	S	S	O	-	O	-	-	Can include residence requirement
Queensland	Intensive Correction Order	S	-	S	S	-	Court can make a separate non contact order	-	-	O	Reside at community residential facilities
Western Australia	Intensive Supervision Order	O	O	O (can include electronic monitoring)	S	-	-	-	-	-	-
New Zealand	Home Detention	Can be combined with community work	S (including electronic monitoring)	S (assessment)	S	-	S	-	O	O	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	O	O	Directions in relation to employment (S) Relating to finances and earnings (O) Requirement to

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 condition	Other conditions
											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	O	-

Appendix C

Table C-1 - Deferred sentence provisions

Jurisdiction	Legislation	Purposes of deferral	Maximum period	Conditions	Review Powers	Sentencing Powers
Victoria	<p>Deferral of sentencing: <i>Sentencing Act 1991</i> (Vic) s 83A</p> <p>Only in Magistrates Court and County Court</p>	<p>Deferral is for the purpose of:</p> <ul style="list-style-type: none"> 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 	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	<p>Power to review with ability to:</p> <ul style="list-style-type: none"> take no further action cancel the deferred sentence and sentence the offender 	Court has regard to behaviour during period of deferral
ACT	<i>Crimes (Sentencing) Act 2005</i> (ACT) s 27, Chapter 8	<p>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</p> <p>The court must not make a deferred sentence order for the offender unless it considers that:</p> <ul style="list-style-type: none"> 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 	12 months	Any condition as well as requirement to impose bail (which can be imposed with conditions)	<p>Power to review with ability to:</p> <ul style="list-style-type: none"> take no further action give the offender a warning about need to comply with obligations and conditions amend any conditions cancel the deferred sentence (if offender requests) 	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
		<ul style="list-style-type: none"> 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 			or on breach) and sentence the offender	
NSW	Deferral of sentence: <i>Crimes (Sentencing Procedure) Act 1999</i> (NSW) s 11	Deferral for the purpose of: <ul style="list-style-type: none"> assessing the offender's capacity and prospects for rehabilitation allowing the offender to demonstrate that rehabilitation has taken place assessing the offender's capacity and prospects for participation in an intervention program allowing the offender to participate in an intervention program any other purpose the court considers appropriate in the circumstances 	Up to 12 months	Can impose bail conditions ⁶³⁷	–	–
South Australia	Deferral of sentence: <i>Criminal Law (Sentencing) Act 1988</i> (SA) s 19B	Deferral for the purpose of: <ul style="list-style-type: none"> assessing the offender's capacity and prospects for rehabilitation allowing the offender to demonstrate that rehabilitation has taken place assessing the offender's capacity and prospects for participation in an intervention program allowing the offender to participate in an intervention program any other purpose the court considers appropriate in the circumstances 	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	–	–
Western Australia	Pre-sentence order (PSO): <i>Sentencing Act 1995</i> (WA) ss 33A–33Q	Court may make a PSO in respect of the offender if it considers that: <ul style="list-style-type: none"> the seriousness of the imprisonable offence or offences warrants the imposition of a term of imprisonment 	2 years	Standard obligations of a PSO are that the offender must: <ul style="list-style-type: none"> report to a community corrections centre notify a CCO of any change of address or place of 	Provisions in relation to performance reports during period of order	Must take account of behaviour while subject to PSO

⁶³⁷ See Judicial Commission of NSW, *Sentencing Bench Book*, [5–410] <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
	Available for imprisonable offence unless the offence has mandatory imprisonment as the penalty or an offence under <i>Prisons Act 1981</i> , s 79 (aggravated prison offence)	<ul style="list-style-type: none"> a PSO would allow the offender to address his or her criminal behaviour and any factors which contributed to the behaviour if the offender were to comply with a PSO the court might not impose a term of imprisonment for the offence or offences 		<p>employment must not leave Western Australia except with, and in accordance with, the permission</p> <ul style="list-style-type: none"> comply with section 76 of the <i>Sentence Administration Act 2003</i> <p>Court must impose at least one primary requirements:</p> <ul style="list-style-type: none"> a supervision requirement a programme requirement a curfew requirement 		
United Kingdom	Deferred sentence: <i>Powers of Criminal Courts (Sentencing) Act 2000</i> (UK) 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"> conduct after conviction (including, where appropriate, the making of reparation for the offence) any change in circumstances 	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>	–	–

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