Suspended Sentences and Intermediate Sentencing Orders

Suspended Sentences
Final Report—Part 2

April 2008
Sentencing Advisory Council
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## Abbreviations

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<th>Description</th>
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<td>ABS</td>
<td>Australian Bureau of Statistics</td>
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<tr>
<td>A Crim R</td>
<td>Australian Criminal Reports</td>
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<td>AC</td>
<td>Appeal Cases (United Kingdom)</td>
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<td>ABS</td>
<td>Australian Bureau of Statistics</td>
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<tr>
<td>ACT</td>
<td>Australian Capital Territory</td>
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<td>A JA</td>
<td>Acting Justice of Appeal</td>
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<td>ALRC</td>
<td>Australian Law Reform Commission</td>
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<td>CCTO</td>
<td>Combined Custody and Treatment Order</td>
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<td>CBO</td>
<td>Community-Based Order</td>
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<td>FDO</td>
<td>Fine Default Order</td>
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<td>ICO</td>
<td>Intensive Correction Order</td>
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<tr>
<td>IRO</td>
<td>Imprisonment Release Order</td>
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<tr>
<td>J</td>
<td>Justice (JJ plural)</td>
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<td>JA</td>
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<tr>
<td>OCSC</td>
<td>Office of Correctional Services Commissioner</td>
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<td>P</td>
<td>President (judicial office)</td>
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<td>QB</td>
<td>Law Reports, Queen’s Bench</td>
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<td>QC</td>
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<td>s</td>
<td>section (ss plural)</td>
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<td>Youth Training Centre</td>
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<td>YRC</td>
<td>Youth Residential Centre</td>
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### Glossary

<table>
<thead>
<tr>
<th>Term</th>
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<tr>
<td><strong>Adjourned undertaking</strong>&lt;br&gt;(ss 72–79 Sentencing Act 1991 (Vic))</td>
<td>Release (unsupervised) with or without recording a conviction, for a period of up to five years, with conditions.</td>
</tr>
<tr>
<td><strong>Combined custody and treatment order</strong>&lt;br&gt;(ss 18Q–18W Sentencing Act 1991 (Vic))</td>
<td>A term of imprisonment served by a combination of an immediate prison term of at least six months followed by supervised drug rehabilitation treatment while living in the community (maximum one year).</td>
</tr>
<tr>
<td><strong>Common law</strong></td>
<td>Principles of law arising from judicial decisions (case law) rather than derived from legislation (statutory law).</td>
</tr>
<tr>
<td><strong>Community-based order</strong>&lt;br&gt;(ss 36–48 Sentencing Act 1991 (Vic))</td>
<td>Supervised non-custodial sentence, with or without recording a conviction, with conditions including supervision, treatment and/or unpaid community work (maximum two years).</td>
</tr>
<tr>
<td><strong>Deferral of sentencing</strong>&lt;br&gt;(s 83A Sentencing Act 1991 (Vic))</td>
<td>The Magistrates’ Court may defer sentencing of a young offender aged 18 or over but under 25 years, and may adjourn the proceedings for up to six months to enable the offender to demonstrate his or her rehabilitation.</td>
</tr>
<tr>
<td><strong>Discharge</strong>&lt;br&gt;(s 73 Sentencing Act 1991 (Vic))</td>
<td>After convicting a person of an offence a court may discharge that person.</td>
</tr>
<tr>
<td><strong>Dismissal</strong>&lt;br&gt;(s 76 Sentencing Act 1991 (Vic))</td>
<td>After finding someone guilty of an offence a court may dismiss the charge without recording a conviction.</td>
</tr>
<tr>
<td><strong>Drug treatment order</strong>&lt;br&gt;(ss 18X–18XS Sentencing Act 1991 (Vic))&lt;br&gt;[Drug Court Division of the Magistrates’ Court only—Pilot program]</td>
<td>An order imposed by the Drug Court, which consists of a treatment and supervision component (which operates for two years or until that part of the order is cancelled) and a custodial component (which must not exceed two years) (maximum two years).</td>
</tr>
<tr>
<td><strong>Fine</strong>&lt;br&gt;(ss 49–69 Sentencing Act 1991 (Vic))</td>
<td>Monetary penalty (can be in addition to, or instead of, another order and with or without recording a conviction).</td>
</tr>
<tr>
<td><strong>Home detention order</strong>&lt;br&gt;(ss 18ZT–18ZZR Sentencing Act 1991 (Vic))</td>
<td>A term of imprisonment served by way of home detention. This is not available for certain offences (e.g. sexual offences, breach of intervention or stalking order). While on a home detention order the offender is subject to electronic monitoring (maximum one year).</td>
</tr>
<tr>
<td><strong>Imprisonment</strong>&lt;br&gt;(ss 9–18P Sentencing Act 1991 (Vic))</td>
<td>A term of imprisonment is not always served by confinement in prison. It can be served in other ways, such as by an intensive correction order (see below). The maximum term of imprisonment that a judge can impose for an offence is determined by Parliament, although courts generally have the discretion to sentence an offender to less than the maximum penalty.</td>
</tr>
<tr>
<td><strong>Indefinite sentence</strong>&lt;br&gt;(ss 18A–18C Sentencing Act 1991 (Vic))</td>
<td>A sentence of an indeterminate length that may be imposed by the Supreme Court or County Court on offenders who are deemed to pose a serious danger to the community and who have been convicted of specified serious offences (e.g. murder, manslaughter, armed robbery, rape, sexual penetration of a child under 16). The court must set a nominal sentence (equal in length to the non-parole period that it would have fixed had the court sentenced the offender to a fixed-term sentence). The expiration of the nominal sentence triggers a review of the order.</td>
</tr>
<tr>
<td><strong>Intensive correction order</strong>&lt;br&gt;(ss 19–26 Sentencing Act 1991 (Vic))</td>
<td>A term of imprisonment served in the community by way of intensive correction, combining supervision and/or personal development programs and including conditions such as treatment and unpaid community work (maximum one year).</td>
</tr>
</tbody>
</table>
Life imprisonment

A sentence under which the offender is liable to be imprisoned for the term of his or her natural life. Offences that carry a maximum penalty of life imprisonment include murder, treason and trafficking in a large commercial quantity of a drug of dependence. The court must still fix a minimum prison term, which the offender must serve before being eligible for parole, unless the court considers the setting of a non-parole period inappropriate based on the nature of the offence or the past history of the offender, in which case the offender will remain in prison for the rest of his or her life.

Mandatory imprisonment

Some offences (e.g. driving while disqualified under section 30 of the Road Safety Act 1986 (Vic)) carry a mandatory minimum prison sentence. This means that a judge has no discretion and must impose a term of imprisonment on the offender for the offence.

Net-widening

The use of a more severe sentencing order than required to achieve the purpose or purposes of sentencing in a particular case: e.g. the use of a suspended sentence for an offender who would not otherwise have received a prison sentence.

Parole

(s 11 Sentencing Act 1991 (Vic)—fixing of a non-parole period)

A form of supervised release for prisoners intended to ensure that they receive assistance in the transition from prison into the community while also being subject to supervision. A non-parole period is the minimum portion of a prison sentence that an offender must serve before becoming eligible for parole. When a court sentences an offender to a prison sentence of two years or more it must set a non-parole period unless it regards the fixing of the non-parole period as inappropriate. If a court sentences an offender to a prison sentence of 12 months or more but less than two years it may set a non-parole period. In both cases the non-parole period must be at least six months less than the term of the sentence.

Parsimony

The principle that a sentencer must not impose a sentence that is more severe than necessary to achieve the purpose or purposes for which the sentence is imposed. The principle of parsimony is given statutory recognition in Victoria in section 5(3) of the Sentencing Act 1991 (Vic).

Sentence inflation

Sentence inflation, as it applies to suspended sentences, refers to a longer period of imprisonment than would have been imposed had the sentence been ordered to be served immediately, on the basis that it will be suspended.

Suspended sentence

(ss 27–31 Sentencing Act 1991 (Vic))

A term of imprisonment that is suspended (i.e. not activated) wholly or in part for a specified period (the ‘operational period’), subject to the condition to be of good behaviour (i.e. not re-offend) (maximum two years (Magistrates’ Court), three years (County and Supreme Courts)).

Substitutional sanction

A sentencing order that is intended to be used as a direct substitute for prison. Examples of substitutional sanctions in Victoria include suspended sentences, combined custody and treatment orders, home detention and intensive correction orders. A court is required to impose a prison sentence before making one of these orders.

Youth justice centre (previously youth training centre) and youth residential centre orders

(ss 32–35 Sentencing Act 1991 (Vic))

A sentence requiring a young offender (under 21 years old) to be detained in a youth justice centre (15 years or older) or youth residential centre (under 15 years old) (maximum two years (Magistrates’ Court), three years (County and Supreme Courts)).
Preface

This second part of our Final Report brings to an end a project that has spanned almost the whole life of the Council. It is the fifth publication relating to a reference that has already produced significant changes in the law relating to suspended sentences. In late 2006 the Sentencing (Suspended Sentences) Act 2006 (Vic) adopted many of the recommendations in Part 1 of our Final Report and which have, we believe, already started to change sentencing practices in the way that Parliament intended. The Council hopes that this report, which examines both suspended sentences and other sentencing orders, will be similarly well-received.

In reviewing the operation of suspended sentences in Victoria, the Council has consistently taken the view that reform of these sentences cannot be undertaken in isolation. Changes to one part of a complex system, such as sentencing, will always affect others, often in ways that cannot be foreseen. The majority of the forty-five detailed recommendations in this report are aimed at improving the broader sentencing framework rather than focusing even more closely on the suspended sentence.

The Council has also taken the view that change should be gradual. An immediate abolition of suspended sentences might have a catastrophic impact upon prison populations which would be unmanageable, unwise and very expensive. The Victorian prison population stands at record levels and is already growing steadily, placing pressure on correctional facilities.

In this report we recommend major changes to the whole range of intermediate sanctions covering the Intensive Correction Order, the Combined Custody and Treatment Order, Home Detention Orders, Community-based Orders as well as the courts’ powers to defer sentence. We do so in the belief that the use (and overuse) of suspended sentences is due in part to the deficiencies of these orders. We recommend the abolition of some orders and the introduction, modification or extension of others. We do so after extensive consideration of the operation of these orders in Victoria, of similar orders elsewhere in Australia and overseas and after consultation with a wide range of stakeholders as to the most suitable forms of orders for this jurisdiction.

Some of the recommendations are aimed at improving sentencing responses to offenders who are over-represented in the criminal justice system and for whom the current responses are not proving effective, namely offenders with drug or alcohol related problems and some groups of young offenders. For these, sometimes highly recidivist groups, it is vital that the sanctions we propose are supported by sufficient correctional, social and other services.

Other recommendations, particularly in relation to the abolition of the mandatory minimum sentence of one month’s imprisonment under section 30 of the Road Safety Act 1986 (Vic) for second and subsequent offences of driving whilst disqualified are likely to be highly controversial. This offence represents nearly 19% of all suspended sentences imposed in the Magistrates’ Court. No other Australian jurisdiction has a similar penalty for this offence and the Council believes that it lacks a clear rationale. The Council has commenced a project to examine the growing problem of driving whilst disqualified or suspended from a variety of viewpoints.

Although we continue to be concerned about the inherent flaws of suspended sentences and the effect that this sanction has on public confidence in the criminal justice system, we believe that the changes we recommend in relation to intermediate orders should be fully tested before any further moves are made to further restrict sentencers’ ability to make this order.

We recognise that the government will require time to consider our proposals and should our recommendations be accepted, for reforms to be introduced and funding secured to support their implementation. For these reasons we no longer consider that the original three-year timetable for the phasing out of suspended sentences by 2009 to be realistic.
In relation to suspended sentences, our major recommendation is that appropriate use of the power to suspend a prison sentence in Victoria should be reviewed after the reforms recommended in this Report (to the extent that they are adopted) have been implemented and sufficient time has elapsed to properly evaluate their impact. Though this approach may dismay those who have called for immediate action, the Council believes that its approach is the only responsible transitional path to a new sentencing structure.

As always, this Report has been informed by the numerous and extensive formal and informal submissions and consultations with courts, corrections, the legal profession and others who have given generously of their time. The Council is grateful for the time and effort given by these parties to what must have seemed an interminable process.

The primary responsibility for researching and writing this Report has lain with Victoria Moore, with the able assistance of Andrea David, Nick Turner and Geoff Fisher. Victoria’s work over the life of this project has been superlative and its success is very much due to her efforts. Jo Metcalf, the Council’s foundation CEO, capably managed the project until her appointment as Director, Court Services in late 2007.

Arie Freiberg
Chair
Sentencing Advisory Council
Executive Summary

Background

In August 2004, the Attorney-General asked the Sentencing Advisory Council to advise on the current use of suspended sentences of imprisonment and on whether reported community concerns about their operation indicated a need for reform. If reforms were required, the Council was asked to consider how the order could be improved: for example, whether it should continue to be available for all offences and whether it should be subject to conditions. The Attorney-General expressed particular interest in the views of the community, including victims of crime, on these issues.

A suspended sentence involves two steps. First, a court imposes a sentence of imprisonment on an offender. Then the court orders that all or part of the term of imprisonment be held in suspense for a specified period (referred to as the operational period), on the condition that the offender does not commit any further offence punishable by imprisonment during that period. The offender is only liable to serve the term of imprisonment in prison if the offender breaches that condition and the court determines that the original prison sentence imposed should be activated.

Historically, the courts had few sentencing options other than imprisonment. Therefore, the power to suspend a sentence of imprisonment was an important option for diverting offenders from prison in appropriate cases. However, more recently, a range of intermediate sentencing orders was introduced in Victoria including combined custody and treatment orders (prison sentences served partly in detention, and partly in the community), home detention orders, intensive correction orders (prison sentences served in the community) and community-based orders.

While it might be expected that the existence of these other forms of orders would limit the use of suspended sentences, this has not been the case. In fact, until 2004, the courts were making increasing use of suspended sentences. When this review began in 2004-05, approximately 8.5% of defendants found guilty in Victoria received a suspended sentence (approximately 7,000 for the year).

In addition, there was evidence to suggest that, rather than diverting offenders from prison, suspended sentences had in some cases been imposed on offenders who might otherwise have received a non-custodial sentence (referred to as ‘net-widening’).

The Review Process

In the course of the Council’s review, it became increasingly clear that it is not possible to consider reforms to suspended sentences without also examining the other intermediate sentencing orders currently available in Victoria. The Council formed the view that deficiencies in the form and operation of existing intermediate sentencing orders contributed to the overuse of suspended sentences.

The review has involved extensive consultation with a wide range of people and organisations. It has also involved the publication of:

- an Information Paper in March 2005;
- a Discussion Paper in April 2005;
- an Interim Report in October 2005;
- Part 1 of the Final Report in May 2006; and
- the present Part 2 of the Final Report.
Suspended Sentences

Final Report: Part 1

In Part 1 of the Final Report we concluded that the suspended sentence is an inherently flawed order that has been overused and, in some cases, misused. At that stage, we recommended:

- initial reforms to restrict the use of suspended sentences and to provide greater guidance to the courts on the use of suspended sentences (these reforms included restricting the availability of suspended sentences for more serious forms of offending and the provision of legislative guidance on factors that must be taken into account before a prison sentence is suspended);
- that the suspended sentence should be gradually phased out; and
- that a more credible, flexible and conceptually coherent range of intermediate sentencing orders should be established.

Since we released Part 1 of our Final Report, the initial reforms that we recommended have been partially adopted in the Sentencing (Suspended Sentences) Act 2006 (Vic).

No legislative reform has yet taken place regarding the removal of suspended sentences as a sentencing option. The initial timetable proposed by the Council for the phasing out of suspended sentences was three years (by 2009). The three-year timetable was based on an assumption that no move to abolish suspended sentences should be made until the recommended reforms to intermediate orders (to be contained in Part 2 of the Final Report) had come into effect.

Final Report: Part 2

The final phase of our review has been complex and the finalisation of our recommendations has been a lengthy process. It has involved consideration of possible reforms not just to one sentencing order, but to a number of intermediate orders currently available in Victoria, as well as a further series of consultations on the more technical aspects of our proposals.

Encouragingly, recent data on the use of suspended sentences in Victoria indicate that:

- The higher courts have reduced the use of both wholly and partially suspended sentences (see Figure 2).
- The Magistrates’ Court has reduced the use of wholly suspended sentences, while its use of partially suspended sentences has remained stable (see Figure 4).
- The use of suspended sentences for serious offences is declining. For example, while in 2005–06 23.6 per cent of offenders sentenced for intentionally causing serious injury and 8.1 per cent of offenders sentenced for rape received a wholly suspended sentence, by 2006–07 the proportion of offenders receiving a wholly suspended sentence for these offences had dropped to 12.4 per cent and 1.9 per cent respectively. The use of wholly suspended sentences for armed robbery has also been steadily decreasing from 14.1 per cent in 2003–04 to 8.2 per cent in 2006–07 (see Figure 7).

These changes have occurred largely in advance of the initial reforms referred to above. For example, restrictions on the availability of the power to suspend a sentence in the case of serious offences apply only to offences committed on or after 1 November 2006. Taking into account the time taken for offenders charged with these offences to come before the courts and to be sentenced, it is unlikely that the downward trend in the use of the power to suspend a prison sentence for these offences can be attributed to the legislative restrictions and guidelines.

Now that those initial reforms are in place, it is expected that the downward trend in the use of suspended sentences—including for more serious offences—will accelerate. This is something the Council intends to monitor and report on in coming years.
We recognise that the government will require time to consider our proposals. If the government accepts our recommendations, it will take further time to introduce the reforms and to secure funding to support their implementation. Even once the new laws are in force, there will be a substantial time lag before this legislation begins to apply to individual cases. This is because the new laws will apply only to offences that are committed after the legislation comes into force. Those offences will need to be detected, investigated, charged and prosecuted. Therefore, it will be many months after the new legislation comes into operation before offenders begin to be sentenced under the new laws.

For these reasons, we no longer consider that the original timetable for the phasing out of suspended sentences by 2009 is appropriate.

Consistent with our original recommendations in Part 1, in this report we recommend that the final decision concerning the removal of the power to suspend should be deferred until the reforms to other intermediate sentencing orders recommended in this report have been made and fully tested (see Recommendation 2-1). Allowing suspended sentences to exist alongside the reformed intermediate sentencing orders will make it possible to assess the effect of those reforms and to determine whether additional changes to the sentencing hierarchy are necessary. It will also avoid the risk of substantial and unsustainable increases in the prison population and the attendant costs of these increases to the correctional system.

Suspended Sentences and the impact of mandatory sentencing

One of the major factors that has led to the high use of suspended sentences in the Magistrates’ Court is the mandatory minimum sentence of one month’s imprisonment that applies under s 30 of the Road Safety Act 1986 (Vic) to second and subsequent offences of driving while disqualified or suspended. In 2006–07, nearly a quarter of the people found guilty of that offence received a suspended sentence. The suspended sentences for just that one offence constitute almost one fifth of all suspended sentences imposed in the Magistrates’ Court. The overwhelming majority of these sentences were wholly suspended.

The high rates of use of suspended sentences for s 30 offences could be addressed by removing the power of the court in sentencing an offender to substitute other forms of ‘imprisonment’ (such as a suspended sentence or intensive correction order). However, this would risk a dramatic rise in the prison population due to the influx of offenders convicted of this lower-level summary offence.

It would also fail to address the more fundamental concerns of a majority of the Council about why this relatively low-level offence should carry a mandatory minimum penalty when other offences that can have potentially more serious consequences, such as driving in a dangerous manner or drink driving, do not. We note that Victoria is the only Australian jurisdiction in which this offence attracts a mandatory minimum prison sentence.

There is some evidence that driving while disqualified or suspended increases the risk of accidents and injury both to the driver and to others on the road and often occurs alongside other dangerous and illegal conduct (for example, drink driving and other traffic offences). However, the offence itself is constituted by the simple act of driving of a vehicle on a roadway and may therefore occur in circumstances in which the offender is not driving dangerously, is not affected by alcohol or drugs and no direct injury is caused. There is nothing extraordinary about second or subsequent instances of this offence that would warrant it being singled out for a mandatory minimum penalty, when there are other much more serious offences for which the courts retain their sentencing discretion.

While we do not wish to discount the significant challenges faced by the criminal justice system in responding effectively to road users who drive while disqualified or suspended, we do not regard mandatory minimum sentences as the solution. The current provision mandates the use of a particular sanction (imprisonment) of a minimum length irrespective of the circumstances of the case and an offender’s prior record. This carries with it the potential for injustice. It is also clearly contrary to the principle of proportionality. The increasing number of s 30 offences being dealt with by the courts provides some evidence of the failure of this penalty to meet its original objective—that is, to deter people from driving while disqualified or suspended.
A majority of the Council recommends that the mandatory minimum penalty under s 30 of the Road Safety Act 1986 (Vic) for driving while disqualified or suspended should be removed on the ground that it is anomalous (see Recommendation 1-1). If this recommendation is adopted, a court would still be able to impose an immediate or a suspended term of imprisonment if it were appropriate to do so in the circumstances of the particular case. However, if those sanctions were not appropriate for the particular case, the court would be able to impose other sanctions.

A minority of the Council, while sharing concerns about the effectiveness of the mandatory penalty and its contribution to the high numbers of suspended sentences in Victoria, considers that any reforms to this offence should be deferred until additional research has been undertaken and more effective sentencing responses have been identified.

The Council is unanimous in its view that further research is required to develop more effective responses to this to this form of criminal behaviour. Accordingly, the Council has commenced work on a research project to examine the underlying causes and consequences of driving while disqualified or suspended.

Improving intermediate sanctions generally

Like the suspended sentence, many of the other intermediate sentencing orders available in Victoria involve first imposing a term of imprisonment and then making an order that modifies the effect of the imprisonment. In the case of a suspended sentence, the term of imprisonment is ordered to be wholly or partially suspended for a specified period. In the case of an intensive correction order, the court orders the sentence of up to 12 months’ imprisonment to be served in the community by way of intensive correction (which involves the offender complying with community work conditions and other conditions imposed by the court). Similarly, in the case of a home detention order, a term of imprisonment is imposed but ordered to be served by way of home detention.

The Council considers that such substitutional orders should be kept to a minimum. Our reasons for this include the following:

• First, substitutional orders may place offenders who might otherwise have received a less severe sentence at real risk of serving a prison sentence, as these orders are treated at law as ‘sentences of imprisonment’ and carry a presumption on breach that offenders will serve their sentences in prison. Further, these orders may result in the imposition of a longer term of imprisonment than might have been imposed had the sentence been ordered to be served by way of full-time detention in prison.

• Secondly, as a result of net-widening, offenders may be exposed to a greater risk of going to prison if found guilty of further offences in the future as a result of having a prison sentence on their criminal record.

• Finally, we believe substitutional orders generate confusion and risk undermining public confidence in sentencing. In our view sentencing orders should be made more transparent. The label ‘imprisonment’ should be reserved for immediate sentences of imprisonment, while sentencing orders that are contingent upon a prison sentence being imposed but do not involve an offender serving prison time should be recast as orders in their own right.

In considering the range and structure of sentencing dispositions that should be available in Victoria, we have been mindful of the need to strike a balance between specificity and flexibility.

It is important to retain a number of distinct sentencing orders to provide well-defined ‘rungs’ in the penal ladder, and to affirm that a sentence of immediate imprisonment is a sentence of last resort reserved for the most serious offences, and for offenders at high risk of reoffending.
If there are too many distinct sentencing orders (including orders targeted at specific offender groups), there can be confusion about the options that are appropriate in a given case, and the orders can be so complex as to become unworkable. A smaller range of more flexible orders would have the benefit of enabling courts to tailor orders more appropriately to the individual circumstances of the offence and the offender. However, a small range of more flexible orders may carry a number of risks including the potential fast-tracking of offenders to prison, and disparities in sentencing outcomes.

In our Interim Report we proposed rationalising the six current intermediate sentencing orders into four new orders, two of which were to be custodial and two of which were to be non-custodial.

After considering responses to the Interim Report, we now consider that, except for the combined custody and treatment order, the existing range of intermediate sentencing orders should be retained. However, we recommend a number of reforms to remedy what we believe are the most serious structural problems with these orders, including their substitutional nature.

Substitutional Custodial Sanctions

Home Detention

Home detention is a custodial sentence. The court imposes a term of imprisonment of up to 12 months, and then orders that it be served by way of home detention. (Home detention orders can also be made during sentence on application to the Adult Parole Board. These are known as ‘back-end’ orders. As they are not sentencing orders, they are not dealt with in this report).

In our Interim Report we had expressed a preliminary view that home detention need not be retained as a distinct form of order, but could simply be a condition available as part of a more generic community order. After reconsidering the issue, and taking into account the significant restrictions on movement placed on an offender subject to home detention, we now believe that there is value in retaining home detention as a separate form of custodial sentence for the small group of offenders for whom such an order is considered suitable.

Our key recommendations regarding home detention are:

- **Home detention should be recast as a sentence in its own right rather than treated at law as a form of ‘prison’ sentence (Recommendation 3–1).** This will address the concerns noted above about substitutional orders generally. It may also encourage courts to make greater use of home detention. This is because currently if a court is considering ordering home detention it must first sentence the offender to a term of imprisonment. Then the court must obtain a report on whether the offender is suitable to serve that term of imprisonment by way of home detention. If the report recommends that the offender is not suitable for home detention, the offender must serve the term of imprisonment in prison. If the report recommends that the offender is suitable for home detention, under the proposed reforms, the court will be able to impose whatever length of home detention it considers appropriate, without being constrained by the term of imprisonment it might otherwise have imposed.

- **A court should only be permitted to make a home detention order if the offence is punishable by imprisonment, and the court might otherwise have considered sentencing the offender to a term of imprisonment (Recommendation 3–4).** This is to avoid the potential for net-widening. Ensuring that sentencers understand the nature of the restrictions placed on an offender under a home detention order will also help them to determine whether home detention is appropriate and in setting the length of the order.
The conditions of home detention should be permitted to be scaled back over time (Recommendation 3–4). Under our proposals, although the offender would initially be subject to full-time home detention (except when at work or for any other authorised purposes), if he or she complies with the requirements of the order it should be possible to reduce the number of hours for which the offender is subject to detention. For example, it should be possible to convert the detention into a weekend or evening curfew. This would bring the arrangements for managing offenders subject to home detention in line with those that currently govern offenders sentenced to imprisonment who are eligible for parole. While this scaling down of hours could be managed administratively, in the interests of transparency, we support some limited form of legislative guidance being provided. This legislative guidance could take the form, for example, of specifying the minimum period or proportion of the sentence that must be served before a reduction in hours is permitted, and the total number of hours an offender is permitted to be absent from the authorised residence for an unspecified purpose once this point is reached.

Once home detention becomes a sentencing order in its own right, it will no longer be appropriate for the Adult Parole Board to have the power to revoke the order (although the Adult Parole Board would still maintain administrative control over prisoners on ‘back-end’ home detention orders). The offender would need to be brought back before the court that made the original order or, in the case of home detention orders imposed on appeal, the original sentencing court, to determine how the breach should be responded to.

There is a danger that the need to bring an offender back before the original sentencing court may give rise to delays in responding to breaches. We believe this is best dealt with through measures to expedite breach proceedings (for example, by establishing a Community Corrections Board to deal with breaches of conditions of orders and by providing more resources to Corrections Victoria, the Office of Public Prosecutions and the courts) discussed in Chapter 11 of the Report.

Periodic Detention

Some jurisdictions, including the Australian Capital Territory and New South Wales, provide for sentences of imprisonment to be served by way of periodic detention. This involves having to serve certain periods (typically each weekend) in prison.

There was some interest in our early consultations in this option being explored in Victoria. The New South Wales government recently announced it is considering abolishing periodic detention; this announcement followed the release of a report by the NSW Sentencing Council recommending the replacement of periodic detention with a new order—a community corrections order—similar in form to the intensive correction order which currently exists in Victoria and Queensland.

After considering the merits of periodic detention, the Council recommends against its introduction in Victoria (Recommendation 4-1). The Council is concerned that periodic detention is limited in its ability to target the underlying causes of offending. We consider that attention is better focused on improving the current range of alternatives to full-time imprisonment. In particular, we believe home detention may achieve many of the same benefits as periodic detention, while avoiding the likely logistical and cost issues associated with the establishment of a periodic detention scheme.

Intensive Correction Orders

The most significant reforms in this part of the Final Report relate to intensive correction orders (ICOs).

ICOs were introduced in Victoria in April 1992. They are sentences of imprisonment of up to 12 months that are served by way of intensive correction in the community. Offenders on ICOs must comply with a range of conditions over the term of the order. Conditions include that the offender attend a community correction centre for a minimum of 8 hours a week (up to a maximum of 12 hours) to perform unpaid community work, and the balance (if any) of hours over the mandatory 8 hours of community work undergoing counselling or treatment. The offender must have regular contact with a community corrections officer (at least twice a week), must notify community corrections of any change of address and cannot leave Victoria without obtaining permission.
ICOs have only ever been used in a very small proportion of cases. We consider that this is at least in part due to problems with the structure of the order, and a possible lack of confidence by the courts in its effectiveness. Many of the stakeholders we consulted were critical of the current form of ICOs.

In our Interim Report we proposed that ICOs be subsumed into a broader and more flexible form of community order. After reconsidering the matter, we now believe the better option is to retain ICOs and community-based orders as separate forms of sentencing orders. This will avoid some of the possible consequences if the earlier approach were adopted, such as the possible fast-tracking of offenders to prison and the potential for uncertainty and disparities in sentencing outcomes should a broader range of conditions be made available under a single form of community order.

Our key recommendations regarding ICOs are that:

- ICOs should be recast as sentences in their own right rather than treated at law as forms of ‘prison’ sentences (Recommendation 5–1). In recommending that the link with imprisonment be removed, we note that there have been concerns about the possible negative impacts on deterrence and on breach rates; however, we do not think that the change will have those consequences.

- ICOs should be targeted at offences of relatively high seriousness and at offenders who are at medium to high risk of re-offending (Recommendation 5–2). As with the current ICO, before imposing the order the court would have to obtain a pre-sentence report. To protect against possible net-widening and ensure the order is used only in appropriate cases, under the Council’s proposals, the court would only be permitted to impose an ICO if it might have otherwise sentenced the offender to a term of imprisonment.

- The maximum term of the order should be increased from 12 months to 2 years (Recommendation 5–4). The Council considers that the longer term of the order is necessary if the order is to be a viable alternative to imprisonment for the target offender group. Concerns have been expressed that if the maximum duration of the order were increased, offenders will be more likely to breach their orders. We believe this risk can be minimised by changes to the structure of the order: in particular, by scaling back the more intensive aspects of the order, where appropriate, after an initial supervision period has expired, so that for the remainder of the order the offender is subject only to the core conditions.

- As a general rule, ICOs should be at least 6 months in length (Recommendation 5–4). One of the central purposes of the order is to reduce the likelihood of the offender reoffending. It does this by conditions designed to rehabilitate and reintegrate the offender. To achieve this purpose, it is important that the order runs for long enough to allow the offender to participate in treatment and other programs. In our view, short orders have little prospect of achieving their rehabilitative purpose. We recommend that the use of ICOs for periods of less than 6 months should be discouraged through the use of guidelines.

- It should be possible to combine an ICO with an immediate term of imprisonment of up to 3 months (Recommendations 5–4 and 7–1). This is consistent with the current position in relation to community-based orders. The rationale for this is discussed below in relation to intermediate semi-custodial sanctions.

- When sentencing an offender for more than one offence, a court should be permitted to make both an ICO and a community-based order (Recommendation 5–4). This will allow courts to make the appropriate order, depending on the seriousness of the offence or offences concerned. Ordinarily, the two orders should be served concurrently. The Council has recommended that the combined effect of the orders should not require the offender to perform more than 500 hours of community service.
There should be greater flexibility as to the community work component of the sentence, the types of conditions a court may order and the powers to vary or cancel an order (Recommendation 5–4). Under the Council’s proposals, while community work would remain a core condition of the order, the court would set the number of hours to be completed depending on the seriousness of the offence (up to a maximum of 500 hours) rather than this being legislatively prescribed (8-12 hours/wk for the duration of the order or shorter period). Under the Council’s proposals, the court could allow work hours to be completed as an activity requirement. In the case of offenders with an intellectual disability, the court could order the offender to participate in the services set out in a justice plan. The court would also be permitted to attach a broader range of conditions to the order than is currently possible, including assessment and drug treatment conditions, program conditions, and non-association or place restriction conditions (prohibiting the offender from associating with particular people, or excluding them from particular places). The grounds for varying or cancelling an ICO would also be expanded, providing a greater incentive to offenders to comply with the order, and courts with additional powers to monitor the progress of offenders on orders and adjust orders accordingly.

The powers on breach should be reformed to take into account its new status as a non-custodial order (Recommendation 5–4). If an offender breaches an ICO by committing a further offence, there should be a presumption that the court will cancel the order and re-sentence the offender for the original offence. Consistent with the current position, the court should have a broader range of powers on breach of conditions only, including to vary the conditions of the order.

In the consultations we conducted, there was some support for the introduction of specialised types of ICOs, such as an ICO for offenders with gambling issues and an ICO for sex offenders. We consider that the restructured ICO has sufficient flexibility (through the combinations of program and special conditions) to deal with such offenders.

However, as discussed below, we consider that there is a need for a specialist ICO for offenders with drug and alcohol dependency issues.

Intermediate Sanctions for Offenders who are Alcohol or Drug Dependent

A significant proportion of offenders have problems with alcohol or other drugs. In many cases, the use of alcohol or other drugs has contributed to the commission of the crime.

Victoria currently has two sentencing orders that are specifically targeted at such offenders.

- The drug treatment order (DTO). This was introduced in 2002 with the establishment of the Victorian Drug Court in Dandenong. It is a form of conditional suspended sentence. The court imposes a sentence of imprisonment of up to 2 years, and then orders that the imprisonment is suspended while the offender undergoes treatment and supervision.

- The combined custody and treatment order (CCTO). This was introduced in 1997. It is a form of imprisonment of no more than 12 months, with at least 6 months of the sentence to be served in prison and the remainder to be served under conditions in the community.

As DTOs and the Drug Court appear to be working well, the Council does not recommend any changes to that order.

The CCTO is used in only a very small proportion of cases. In 2006–07 just 29 offenders were sentenced to a CCTO in Victoria. The order has been extensively criticised on the basis that it is too inflexible and that the length of the order does not allow enough time for treatment (particularly in situations where the offender has been in custody, without receiving treatment, prior to sentencing and this time on remand is credited to the offender when he or she is eventually sentenced).

The Council recommends that the CCTO should be abolished and replaced by a targeted form of ICO: the intensive correction order (drug and alcohol) (ICO(D&A)). This order would share many of the same features as the standard form of ICO, with the following key differences.
• **Community work (Recommendation 6–6).** Unlike the standard form of ICO, community work would not be a core condition of the order. Instead, courts would be required to attach at least one program condition aimed at addressing the offender’s dependency on drugs or alcohol.

• **Residential treatment (Recommendation 6–6).** The program conditions would include a condition directing the offender to undergo drug or alcohol treatment in a residential facility. Residential treatment programs can be particularly suitable for offenders who have complex and multiple needs that cannot be treated effectively on an outpatient basis.

• **Judicial monitoring (Recommendation 6–6).** A court would be permitted in making the order to attach a condition enabling the court to review the progress of the offender at regular intervals. This would build on the success of the Drug Court model of management and allow a court to put in place arrangements for additional monitoring and support where this is considered appropriate. If, as proposed in Chapter 11 of this Report, a Community Corrections Board is established, some responsibility for monitoring the progress of offenders on these orders might be assigned to the Board.

As for the standard form of ICO, it is recommended that the circumstances in which an application can be varied or cancelled should be expanded, including to reward good progress made by an offender under an order. If a judicial monitoring condition was attached to the order, the court could vary or cancel the order on its own initiative.

The Council believes that this form of ICO will allow the principles which have successfully guided the Drug Court in Dandenong in its administration of the drug treatment order to be applied more broadly by courts across Victoria.

In some cases, the seriousness of the offence will warrant a period of actual imprisonment. As with the standard form of ICO discussed above, under our proposals the court will be able to combine a short term of imprisonment (up to 3 months) with an ICO(D&A). This may be of particular benefit for cases involving a sentence of less than 12 months. This is because if a court imposes a term of imprisonment of less than 12 months, it cannot fix a non-parole period. Enabling an ICO(D&A) to be combined with a short term of imprisonment would also enable the courts, in appropriate cases, to recognise expressly time that an offender may have spent in custody on remand in the sentence imposed.

### Intermediate Semi-Custodial Sanctions

The CCTO, which was discussed above, is a semi-custodial order as it involves a period of actual imprisonment followed by a period of time in the community while subject to conditions.

There are currently several other ways that a semi-custodial sentence can be achieved in sentencing an offender for a single offence.

One is a partially suspended sentence, which involves a court imposing a sentence of imprisonment and ordering that part of the sentence be suspended for a specified time (the operational period). For example, a court can impose a sentence of two years’ imprisonment, with 18 months of that sentence suspended for a two year period. This means the offender will spend six months in custody, and will then be at liberty for the remainder of the operational period. However, if the offender commits another offence punishable by imprisonment during the two year operational period, he or she is liable to serve the remaining period of the sentence suspended (18 months) in prison.

Another way that a semi-custodial sentence can be imposed for a single offence is if the court combines a term of imprisonment of up to 3 months with a community-based order (CBO).

In cases where the court has found the offender guilty of more than one offence, the court has a broader range of options. For example, a court can combine a sentence of imprisonment for one offence (suspended or unsuspended) with other forms of orders, such as a CBO, for the other offences.

A term of imprisonment followed by a period of release in the community on parole could be considered as a semi-custodial sentence; however, release on parole is not available in relation to sentences of imprisonment that are less than 12 months.
In our Interim Report, we recommended the creation of an Imprisonment and Release Order (IRO). This would have broadened the options available and may have avoided some of the dangers of semi-custodial substitutional sanctions. However, such an option may have given risk to potential inequities of treatment on breach.

In the end, the Council has reached the view that rather than introducing a new form of semi-custodial order, a slightly broader range of combination orders should be available. In particular, the Council has recommended that a court should be able to combine a short term of imprisonment of up to 3 months with the new form of ICO. A court would also be permitted to combine a suspended sentence with an ICO when sentencing an offender for more than one offence. Both powers are consistent with those which already exist in relation to a CBO.

We considered, but rejected, the possibility of extending the term of imprisonment that could be combined with a community order from 3 to 6 months due to the inherent difficulties of assessing an offender’s suitability for an order so far in advance of it coming into effect. Such a move would also raise issues of the ability of an offender to give meaningful consent to the making of such an order. These difficulties may be even more pronounced if an ICO(D&A) is combined with a term of imprisonment.

One of the benefits of combination orders consisting of a term of imprisonment followed by a community order is that a breach of the conditions of the community order only trigger the standard breach powers that ordinarily apply on breach of these orders, rather than creating a presumption in favour of imprisonment.

We do not think it is desirable to be able to combine a broader range of sentences because this could lead to uncertainty and inconsistency.

While we initially proposed that the power to fix a non-parole period be limited to sentences of two years or longer, this recommendation was made in the context of an Imprisonment Plus Release Order being introduced. We therefore recommend that the current power to fix a non-parole period for sentences of between 12 months and two years should be retained in its current form. Parole remains an important means of reintegrating offenders back into the community towards the end of their sentences. The possibility of release on parole also provides a powerful incentive for offenders to be of good behaviour and further their rehabilitation while in prison.

Community-Based Orders

Community-based orders (CBOs) are non-custodial sentences of up to two years in duration that are served in the community. They are targeted at offences of low to medium seriousness and at a broad range of offenders (from those with low to high risks and needs).

They were introduced in their current form in 1986. They impose a series of core conditions on the offender (including that the offender not commit any further offence punishable by imprisonment for the duration of the order as well as various reporting and supervision conditions). A court making a CBO also must attach at least one program condition to the order, such as that the offender perform a certain number of hours of unpaid community work, or participate in educational programs or drug and alcohol treatment programs.

In our Interim Report, we proposed that CBOs and ICOs should be amalgamated into a new generic community order. In our consultations there was strong support for retaining the CBO in its current form. After considering that support and the potential risks of merging the two steps in the sentencing hierarchy, we now consider that ICOs and CBOs should remain separate sentencing options.
Therefore, we recommend that CBOs be retained in their current form, with only minor changes. The key changes recommended are:

- **The maximum number of hours of community work should be reduced from 500 to 300 hours (Recommendation 9–3).** Data on the use of CBOs for the period 2005–06 to 2006-07 indicate that less than one per cent of offenders commencing a CBO were required to complete more than 300 hours of community work. This suggests that a maximum of 300 hours would be sufficient. It would also properly differentiate the CBO from the reformed ICO, because the new form of ICO will allow a court to order up to 500 hours of community work.

- **When sentencing an offender for more than one offence, a court should be permitted to combine a CBO with an ICO (Recommendation 9–4).** This is discussed above in relation to intensive correction orders.

- **Courts should have broader powers to vary or cancel a CBO (Recommendation 9–5).** This is consistent with our recommendations regarding the reformed ICO and our general view that orders should be flexible and responsive. This makes it possible to reward an offender for consistently complying with the order of for making progress in rehabilitation.

Removing the substitutational aspect of the ICO increases the similarity between the ICO and CBO. However, there are several important distinctions between the two types of order:

- Community service would continue to be optional for a CBO, whereas it would remain a core condition of the new form of ICO.

- The maximum number of unpaid community work hours for an ICO would be set at 500 hours, whereas under our proposed reforms, would be capped at 300 hours for a CBO.

- Minimum reporting requirements would be set in the case of an ICO (at least once a week in the first three months of the order, and thereafter at least once a month) whereas they would remain flexible in the case of a CBO.

- When making an ICO a court would be able to impose more onerous forms of conditions (such as residence conditions, place restriction conditions and non-association conditions) than it could impose when making a CBO.

- More serious consequences would follow on breach of an ICO by reoffending than on breach of a CBO. In the case of an ICO breached by the commission of a new offence, there would be a presumption in favour of the order being cancelled and the offender being resentenced for the original offence (including to an immediate term of imprisonment), while on breach of a CBO by reoffending courts would continue to have full discretion to confirm, vary or cancel the order.

### Intermediate Sanctions for Young Adult Offenders

Consistent with recent research in the area, many of those who participated in the Council’s consultations noted that young adult offenders have distinct needs from older offenders. Young adult offenders are those aged between 18 (and so are no longer legally a ‘child’) and the mid-twenties.

The courts have indicated that rehabilitation is a primary consideration when sentencing such offenders. This is reflected in the fact that young adult offenders are less likely than older adult offenders to receive a custodial sentence. It is also reflected in the fact that, when young adult offenders receive a CBO, they tend to have different conditions (and different combinations of conditions) than older offenders who receive a CBO.

However, young adult offenders are more likely than older offenders to breach a CBO or ICO. This has led to criticisms that these highly-structured, appointment-based orders are not appropriate for the chaotic lifestyles of some young people, particularly those who are addicted to drugs, and that such orders set these offenders up to fail.

In our Interim Report, we proposed the introduction of a new Youth Correction and Supervision Order, which was to be a distinctive form of the broader Correction and Supervision Order that we had recommended to replace the CBO. Our subsequent consultations found broad support for such an order.
As noted above, we no longer recommend that CBOs should be replaced by a broader Correction and Supervision Order. However, we still consider that there should be a form of order tailored for young adult offenders. Accordingly, this report recommends the introduction of a new Community-Based Order for Young Adult Offenders (CBO (YAO)) (Recommendation 10–1). We envisage that it would have the same basic conditions as the adult CBO (see Recommendations 10–5 and 10–8), but with a greater focus on dealing with those factors linked to specific developmental needs in order to help the offender’s rehabilitation and re-integration (see Recommendation 10–2). For example, the current CBO has a condition linked to education, which it seems is rarely used. Such a condition, we believe, could be a powerful tool in assisting an offender to increase his or her opportunities for employment and therefore greater long-term stability.

Other key features of the proposed new order are:

- The order should be limited to offenders who are under the age of 25 years at the time of being sentenced (Recommendation 10–3). We are mindful of the limitations of age-based criteria, and we accept that the focus should be on the ‘developmental’ age of the young adult; however, the different rates of maturity among young adults make it difficult to set a clear age boundary. In the interests of clarity and certainty, we believe that a ‘cut-off’ point is necessary. We note that adopting an age criterion of 25 is broadly consistent with the approach to youth policy in Victoria.

- Specific eligibility criteria should be developed (Recommendation 10–10) and the order should be targeted at those offenders in the relevant age group who are assessed as having a high level of need and who pose a moderate to high risk of re-offending (Recommendation 10–3). Under our proposals, other offenders in this age group who do not have the same level of need or pose the same risk of re-offending could be dealt with by the courts under the standard forms of orders, including CBOs and ICOs.

- Young adult offenders on a CBO (YAO) should be managed by specialist caseworkers pursuant to a case management plan under separate arrangements to offenders on standard CBOs (Recommendation 10–9).

- The maximum term of the order should be shorter than the standard form of CBO (18 months rather than 2 years) (Recommendation 10–6). This recognises that shorter interventions are generally more useful for young people in terms of promoting their rehabilitation.

- The maximum number of hours of community work should be 200 hours rather than 300 hours (Recommendation 10–7). This is consistent with the shorter maximum term of the order.

**Compliance Management and Breach Powers**

The wide range of conditions that can apply to intermediate orders means that the gravity of breaches of an order can vary widely from a single failure to turn up to an appointment with a community corrections officer through to a persistent failure to attend at a course or community work or the commission of a serious offence.

The way in which the system responds to breaches has a significant impact on the confidence that sentencers and the community have in intermediate orders.

Detecting and dealing with breaches quickly and consistently enhances the credibility of these orders. However, research suggests that the longer offenders remain on programs the less likely they are to commit further offences, and that tougher enforcement practices may be counterproductive. Providing offenders with incentives to comply is an important way to improve the effectiveness of these orders and to reduce the risks to the community of future offending.

The Council believes that while there are a number of disincentives designed to prevent offenders breaching the terms of their orders, there are insufficient formal incentives provided to encourage compliance. To remedy this state of affairs, we recommend that the courts should have greater powers to vary an ICO or CBO where it is appropriate to do so, and that they should also be able to reward good progress by terminating orders early where appropriate. We note that this model has now been adopted in a number of jurisdictions, including England and Wales, as well as New Zealand.
Key recommendations in relation to breach are:

- **Breach of a sentencing order should no longer constitute a separate offence (Recommendation 12–1).** Currently, it is a separate offence to breach a CCTO, an ICO, a CBO or an adjourned undertaking unless the offender has a reasonable excuse (such as illness). This means that if an offender breaches an order by committing a new offence, he or she can be punished in three ways. First, the offender can be punished for the new offence. Secondly, he or she can be dealt with for failing to comply with the original order (for example, by the court cancelling the order and re-sentencing the offender for the original offence). Thirdly, the offender can be punished for the separate offence of breaching an order. The offence of breach appears to exist primarily as a mechanism to bring an offender back before a court to be dealt with for the breach. This recommendation is consistent with our earlier recommendation in Part 1 of our Final Report that breach of a suspended sentence should no longer constitute an offence. That recommendation was implemented in 2006.

- **A time limit of one year after the order ceases to be in force should be adopted for initiating breach proceedings (Recommendation 11–1).** Currently, proceedings for breach of an order can be commenced up to 3 years after the breach occurs. This means that proceedings for breach can commence well after an order has expired. The Council considers that, if breach proceedings are to have value as a means of giving force to sentencing, they need to be reasonably proximate to the breach itself. Issues of unfairness may arise in situations where the breach occurs shortly before the order expires, but are even more likely if the breach proceedings are not commenced for another 3 years. While we accept that there are currently significant delays in commencing breach proceedings, we believe that structural factors such as this should not compromise the underlying fairness of the system.

- **Consideration should be given to establishing a Community Corrections Board to deal with more serious technical breaches of orders (that is, breaches that do not involve further offending) (Recommendation 11–2).** A number of people consulted raised concerns about consistency in the management of offenders under orders and the need to respond quickly and effectively to breaches of orders. The Council believes that the establishment of a Community Corrections Board would provide a means of improving the management of orders as well as responses to breach. This body could have a number of roles. It could contribute to the development of more detailed guidelines around the management of offenders on community sentences. It could monitor the administration of sentences and, in particular, higher risk offenders. It could also provide a formal intermediate step between Community Correctional Services and the courts in responding to breaches of conditions and rewarding offenders for good progress.

**Deferral of Sentencing**

The purpose of deferring the sentencing of offenders is to provide them with an opportunity to address issues that have contributed to their offending and to demonstrate to the court that they are taking steps to get their life back on track. A period of deferral may also allow offenders to participate in restorative justice or other programs prior to sentencing.

Whereas a suspended sentence operates as a warning or threat to an offender (commit another offence, and the term of imprisonment imposed will be activated), deferral provides an incentive to offenders (demonstrate the seriousness of your commitment to rehabilitation to the court, and you may receive a less severe sentence or, in the case of more serious offences, you may receive a different form of sanction).

For many years, the courts had a common law power to adjourn sentencing on the condition that the offender entered into a recognizance to be of good behaviour. This power was put onto a statutory footing initially in the Children’s Court. In 2000, the power to defer sentence was extended to the Magistrates’ Court when sentencing a young adult offender under the age of 25 years. In 2006 the power was further extended to offenders of all ages sentenced in the Neighbourhood Justice Division of the Magistrates’ Court.
Our key recommendations in relation to deferral are:

- **The power to defer sentencing should be extended to the County Court, and the current age restrictions should be removed (Recommendations 13–1 and 13–2).** We are mindful of concerns that, where a very serious offence has been committed, deferring sentencing may prolong the resolution of the case, adding to the potential trauma experienced by a victim. However, following our discussions with judges of the County Court, we believe that deferral may in fact encourage offenders to plead guilty earlier in the process. This is because the current absence of a formal power to defer sentencing can have the effect that defendants in the County Court reserve their plea until shortly before trial in order to gain as much time as possible to demonstrate their rehabilitation.

- **The maximum period of deferral should be increased from 6 months to 12 months (Recommendations 13–1 and 13–2).** There was some support for retaining the current six month maximum period for deferral. While we envisage in most cases a shorter period will be sufficient, setting the upper limit at 12 months will provide offenders with the best opportunity to undertake programs and demonstrate their rehabilitation.

- **A court should be permitted to review an offender’s progress on deferral at regular intervals (Recommendation 13–4).** We recommend that the court should have the explicit power to review an offender’s progress during the period of deferral to ensure that the purpose for which the sentence was deferred is being fulfilled. The court should be able to set a timetable to review the offender’s progress. However, we consider that courts should not be able to impose formal obligations on the offender as a condition of deferral. If the court considers it necessary to impose conditions to ensure the offender complies with the order, in our view the court should not defer but should proceed straight to sentencing.

### Implementation and Other Issues

Chapter 13 briefly reviews some of the challenges that the Council believes will need to be considered to ensure the effective implementation of the recommended reforms, including the development of appropriate guidelines around the administration of orders and the investment of additional funding to support the proper administration of orders.
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Scope of the Inquiry

1.1 The Attorney-General wrote to the Sentencing Advisory Council on 24 August 2004, requesting the Council’s advice on:

1. Whether reported community concerns are indicative of a need for reform of any aspect of suspended sentences.
2. The current use of suspended sentences, including:
   - the frequency with which they are used;
   - the offences for which they are used;
   - the length of sentences; and
   - breach rates.
3. Whether the operation of suspended sentences can be improved in any way; for example:
   - whether suspended sentences should be available in relation to all offences; and/or
   - whether they should be subject to any conditions (for example, conditional upon treatment orders).

1.2 The Attorney-General expressed particular interest in the views of the community, including victims of crime, on these issues.

The Council’s Approach

Overview

1.3 This reference has been a challenging one for the Council and has involved a number of stages.

1.4 An Information Paper was released in February 2005,1 followed by a detailed Discussion Paper in April 20052 that examined the current use of suspended sentences in Victoria and outlined issues and options for reform. The Council carried out an extensive public consultation process following the release of the Discussion Paper. Submissions on the Discussion Paper were also invited, and 54 submissions were received.

1.5 The Council then released an Interim Report in October 2005,3 followed by the first part of its Final Report in May 2006.4

1.6 The release of this Report represents the final stage of the Council’s work on this reference. The Council will continue, however, to take an active monitoring and reporting role, whether our recommendations are adopted in whole or in part, to identify how the system is working as a whole, and any future areas for improvement.

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Responses to the Discussion Paper

1.7 Those who made submissions5 and participated in consultations6 overwhelmingly favoured the retention of suspended sentences. However, a small number of those consulted7 and those who made submissions supported the abolition of suspended sentences as part of a call for mandatory sentences or harsher punishments8 or on the basis that other sentencing options, such as home detention, could appropriately be used in their place.9

1.8 Despite support for the retention of suspended sentences, it became clear to the Council there was equally a level of dissatisfaction with their current status and operation. Some of the views emerging from submissions and consultations were that:

- a wholly suspended sentence of imprisonment as a ‘custodial order’ or as a ‘term of imprisonment’ is a fiction;
- the gap between an order to serve a straight term of imprisonment and a sentence of an equivalent term of imprisonment that is wholly suspended is too wide—a suspended sentence should have more of a punitive element;10
- courts should be permitted to attach conditions to suspended sentence orders;
- courts are using suspended sentences inappropriately in some cases—imposing a suspended sentence where a non-custodial penalty, such as a community based sentence, may have been justified (‘net-widening’)—and this has serious implications on breach;
- the current breach provisions are inflexible and risk injustice in individual cases (which, it was suggested, has led to the practice by some judicial officers of finding ‘exceptional circumstances’ whereby the offender’s circumstances are merely changed rather than exceptional);
- suspended sentences put young people at risk of entering the adult correctional system, since on breach a young person must serve the sentence in an adult gaol unless transferred under the provisions of the Children and Young Persons Act 1989 (Vic) (now the Children, Youth and Families Act 2005 (Vic));11 and

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5 Submissions 1.2 (B. Abeysinghe), 1.4 (C. Moore), 1.5 (Y. Zole), 1.6 (M. Douglas), 1.9 (J. Hemmerling), 1.11 (Emmanuel College—C. Peddle, C. Finnigan), 1.13 (Ballarat Catholic Diocese Justice, Development and Peace Commission), 1.15 (Anonymous) [for offenders under the age of 18 years only who had a mental illness or a drug addiction], 1.20 (W. Atkinson), 1.23 (L. Francis) [only where there are ‘extenuating circumstances’], 1.24 (County Court of Victoria), 1.31 (J. Bignold), 1.32 (Anonymous), 1.33 (J. Black), 1.35 (G. Anderson), 1.36 (Magistrates’ Court of Victoria), 1.37 (A. Avery), 1.38 (Victoria Legal Aid), 1.39 (Federation of Community Legal Centres), 1.40 (S. Rothwell) [only where there are ‘extenuating circumstances’], 1.41 (Youthlaw), 1.42 (VAADA), 1.43 (Victorian Aboriginal Legal Service), 1.44 (Fitzroy Legal Service) and 1.45 (Mental Health Legal Centre), 1.51 (Law Institute of Victoria).

6 Feedback forms were completed by many participants of community forums and victims’ focus groups. Of the 118 feedback forms received, only nine favoured the abolition of suspended sentences as a sentencing option, with the remainder supporting their retention.

7 Submissions 1.8 (S. Mehanni), 1.11 (Emmanuel College—M. Azzopardi and A. Symons), 1.17 (F. and A. Waites), 1.26 (R. Thomas) [wholly suspended sentences only], 1.27 (D.A. Paul) [wholly suspended sentences only, with partially suspended sentences retained for cases involving exceptional circumstances].

8 Submission 1.8 (S. Mehanni).

9 Submission 1.11 (Emmanuel College—M. Azzopardi and A. Symons).

10 See, for example, Submission 1.29 (Professor van Groningen) which argued that “the imposition of a suspended sentence in a real way weakens the sentencing concept by not including a punitive element”.

11 Children, Youth and Families Act 2005 (Vic) s 471(1).
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wholly suspended sentences are inappropriate for serious crimes of personal violence, including rape, sexual assault and intentionally or recklessly causing serious injury.  

1.9 There was a particularly high level of support for introducing changes to allow courts to attach conditions to suspended sentence orders in appropriate cases. The need to address the fiction of a suspended sentence as a ‘prison sentence’ or a ‘custodial sentence’ also was identified as a priority issue by a number of those consulted.

1.10 The Council’s consultations highlighted that there is a disjuncture between the treatment at law of suspended sentences and community perceptions. Consultations with victims of crime and some submissions confirmed that the offender’s receipt of a suspended sentence in some cases can make victims feel as though the offender has ‘gotten off’, while the victim and his or her family are left to deal with the consequences of this offending. The South Eastern Centre Against Sexual Assault (SECASA) reported that a suspended sentence could result in ‘considerable distress’ for a victim of sexual assault and lead victims to regard the legal system as ‘unsupportive and a waste of time’. A strong theme that emerged from all consultations with victims of crime was the need for the impact of the offence on the victim to be properly understood and taken into account at sentencing.

The Interim Report Proposals

1.11 The responses to the Council’s Discussion Paper and the consultation process led the Council to the view that merely tinkering with suspended sentences would not resolve some of the key concerns. The Interim Report, released in October 2005, reflected the Council’s view that any recommended modifications to the use and operation of suspended sentences—such as introducing a conditional form of order—would fail to address more fundamental problems and might compound existing problems. The Interim Report therefore proposed the abolition of suspended sentences as part of broader reforms to intermediate sentencing orders in Victoria.

On the perceived inappropriateness of suspended sentences for these types of offences see, for example, Submissions 1.3 (Anonymous), 1.5 (Y. Zole), 1.9 (J. Hemmerling), 1.11 (Emmanuel College—C. Peddle), 1.15 (Anonymous), 1.16 (Anonymous), 1.18 (T. Heselwood) [sexual offences], 1.23 (L. Francis), 1.40 (S. Rothwell) [murder, manslaughter, culpable driving (involving drug or alcohol use), serious violent offences, other violent offences, armed robbery, aggravated burglary, sexual offences (including rape), drug trafficking and drug cultivation], 1.46 (B. Pringle) [‘crimes of violence, rape, sexual penetration of a child or adult, malicious, wilful or criminal damage to property and some anti-social offences involving firearms and weapons in the commission of an offence, assaults by kicking or in company’] and 1.47 (Anonymous) [suspended sentences should be available to violent offenders in exceptional circumstances only]. This view was also expressed by those who attended community forums and victims’ focus groups. While 25 out of 112 responses on the feedback forms distributed to participants at the forums and focus groups supported the availability of suspended sentences for all offences, a high proportion expressed the view that they should not be available for serious sexual and other violent crimes, or should be available only in exceptional cases. Most respondents (72) believed that the power to suspend should be removed in the case of serious sexual offences (such as rape). A further nine respondents felt that only in exceptional cases is the power to suspend appropriate for the most serious sexual offences. Opinion was more divided on the question of whether suspended sentences should be available for the most serious violent (non-sexual) offences (such as culpable driving or intentionally/recklessly causing serious injury), with 35 respondents expressing the view that the power to suspend should not be available at all in such cases, and a further 43 that it should be available only in exceptional cases. Opinion was similarly divided in the case of other (non-rape) sexual offences, with 38 respondents favouring removal of the power to suspend in these cases and 36 respondents favouring limiting the power to exceptional cases.


See, for example, Submissions 1.16 (Anonymous) and 1.52 (SECASA).

Submission 1.52 (SECASA).
1.12 The Council recommended, as had the Victorian Sentencing Review before it,\textsuperscript{16} that sentencing orders should exist as sentences in their own right, rather than being contingent on a term of imprisonment being imposed. In line with this recommendation, the Council proposed that the existing range of intermediate sentencing orders should be rationalised and a new range of sentencing orders introduced. It was envisaged that these new orders would change the form, but perform much the same function, as a suspended sentence and other existing intermediate orders, but would have the advantage of being more conceptually coherent, transparent and flexible than existing orders.

1.13 Under the new scheme proposed, the imposition of a term of imprisonment would result in an offender serving a term of immediate imprisonment. In place of the existing range of intermediate sanctions, including orders substituted for imprisonment, the Council proposed two new orders should be introduced:

- an imprisonment plus release order (IRO)—a part-imprisonment, part-community order designed to replace combined custody and treatment orders (CCTOs) and partially suspended sentences; and
- a correction and supervision order (CSO)—a community-based order that would exist as a more flexible and generic form of community sentence and occupy the position in the sentencing hierarchy currently occupied by intensive correction orders (ICOs), wholly suspended sentences and community-based orders.

1.14 The ultimate goal was to develop a range of orders that would deliver appropriate and flexible forms of sentences, but that would also be more clearly understandable to victims, offenders and the broader community.

Responses to the Interim Report

1.15 The release of the Interim Report provided the opportunity to consult with those who had been involved in the first stage of the review, to gauge support for the draft proposals, and to identify any modifications that might be required. As part of this consultation process, roundtables were reconvened and a number of individual meetings were held with representatives of the courts, those working with victims of crime (such as the Centres Against Sexual Assault) and the legal profession. Victims’ representatives who participated in the workshop following the release of the Discussion Paper were also briefed on the changes and were invited to provide further feedback on the proposals.

1.16 Submissions on the Interim Report were invited and 25 written submissions were received.

1.17 Strong support was expressed—primarily by representatives of the courts and other members of the legal profession—for the retention of suspended sentences. Concerns were raised that the new orders proposed in the Interim Report would fail to fulfil the function of suspended sentences and that substantial and unsustainable increases in the prison population would result from the removal of suspended sentences as a sentencing option. Views put forward in submissions and during consultations, and the Council’s recommendations, are discussed in depth in Chapter 2 of this Report.

1.18 Those who advocated in favour of the retention of suspended sentences suggested that the real problem with suspended sentences lay not with the order itself, but rather with public perceptions of what the order was and what it was intended to achieve. The education of the community, rather than the removal of suspended sentences as a sentencing option, it was argued, would alleviate many of the community concerns, particularly if a power to attach conditions to suspended sentences was also introduced. A number of organisations and individuals consulted also expressed concerns about the potential resourcing implications of introducing a range of new orders.

Final Report: Part 1

1.19 Part 1 of the Council’s Final Report presented the Council’s final recommendations in relation to suspended sentences and the proposed transition to the new range of sentencing orders. The decision to release the Final Report in two parts reflected the process the Council itself had undertaken in considering options for reform, as well as the staged implementation process it initially recommended.

Retention vs Abolition

1.20 After reviewing the arguments both for and against such a move, the Council remained committed to the view that the power to suspend a term of imprisonment should be removed. The suspended sentence, the Council suggested, is an inherently flawed order that has been overused and, in some cases, misused. While historically the suspended sentence played an important role in diverting offenders from prison, in a sentencing system equipped with a range of alternatives, its retention was no longer considered necessary. The Council believed that the changes proposed in the Interim Report would provide courts with a more credible, flexible and conceptually coherent range of intermediate sentencing orders that over time would overcome some of the existing problems with suspended sentences.

1.21 The Council indicated its desire through these changes to achieve not only a better sentencing system, but also a system that was more easily understandable to the broader community. The Council specifically rejected the view that community concerns about suspended sentences were solely a product of a lack of understanding about the nature and purpose of these orders, and suggested an important role also for improving the language and structure of sentencing to make it more logical, transparent and coherent.¹⁷

1.22 In order to enable a gradual transition, and the testing of the Council’s assumptions concerning sentencing behaviour following these changes, the Council recommended that suspended sentences should not be abolished immediately, but rather phased out. The initial timetable proposed was three years.

Reforms to Suspended Sentences

1.23 The retention of suspended sentences—even for a limited time—again raised questions of what improvements, if any, could be made to their operation. Thirteen of the 15 recommendations in Part 1 of the Final Report concerned modifications to the suspended sentence order while it continued to be available.

1.24 Key recommendations included:

1. the introduction of guidelines in the legislation about factors that might make the suspension of a prison sentence inappropriate (such as the gravity of the offence and its impact on the victim, the risk of the offender re-offending while on a suspended sentence and whether the offender committed the offence while on a suspended sentence);

2. allowing the use of suspended sentences for serious violent and sexual offences such as murder, manslaughter and rape only in exceptional circumstances; and

3. the retention of strict breach provisions that require the suspended prison sentence to be activated, unless there are exceptional circumstances.

1.25 The Council was conscious that much of the apparent community concern about the use of suspended sentences had resulted from their use in particular types of cases. Such cases had often, though not exclusively, concerned sexual offences and other violent offences, where the level of harm caused to a victim has been high. These offences account for only a tiny proportion of the total number of suspended sentences handed down annually. Nevertheless, the Council expressed sympathy with the view that once a court has determined that a gaol sentence is appropriate for such offences, there should be a presumption that the sentence will be served.

1.26 The reforms recommended were therefore designed to restrict the use of suspended sentences immediately for more serious types of offences, and to provide greater guidance to courts on the circumstances that may make suspension inappropriate in an individual case.

1.27 While many continued to support introducing a power to attach conditions to suspended sentence orders, the Council continued to have grave concerns about the potential impact of such a move and recommended against extending the power to suspend in this way. The Council’s concerns extended to possible sentence escalation that may result from introducing a power to attach conditions, and the potential for significantly higher breach rates that might result from an order being able to be breached not only through reoffending, but also through a failure to comply with the conditions of the order. The Council rejected the introduction of more flexible breach provisions as the appropriate solution to such concerns. Any broadening of the courts’ powers on breach, it was argued, would be undesirable and would compromise the integrity and internal logic of the order.

1.28 The Council concluded that any additional funding and resources that would have been required to support the introduction of conditional suspended sentence orders should instead be directed to supporting the types of reforms to intermediate orders it had proposed in the Interim Report.

The **Sentencing (Suspended Sentences) Act 2006 (Vic)**

1.29 The Council’s Part 1 recommendations were implemented by the **Sentencing (Suspended Sentences) Act 2006 (Vic)**, enacted in October 2006. This legislation made a number of amendments to the **Sentencing Act 1991 (Vic)**, including reforms to:

- clarify that a court should be permitted to take time spent in custody for a breach of a suspended sentence into account if the person is then ordered to serve part or all of the suspended sentence;\(^{18}\)
- remove the offence of breach of a suspended sentence order and provide alternative mechanisms to bring an offender back before the court to deal with the breach;\(^{19}\) and
- allow a court to order a young offender, on breaching a suspended sentence, to serve all or part of a restored suspended sentence in a youth justice centre or youth residential centre.\(^{20}\)

18 *Sentencing Act 1991 (Vic)* s 18(1).
19 *Sentencing Act 1991 (Vic)* s 31.
20 *Sentencing Act 1991 (Vic)* s 31(7).
Consistent with the recommendations made by the Council to limit the availability of suspended sentences for more serious forms of offending, the legislation also introduced a number of reforms that apply to offenders sentenced for offences committed on or after 1 November 2006, including:

- restricting the use of suspended sentences for ‘serious offences’ (including murder, manslaughter, intentionally causing serious injury, rape, sexual penetration of a child under 16 years and armed robbery) to cases in which there are ‘exceptional circumstances’ and in which it is in the ‘interests of justice’ to do so;
- requiring a court to take into account a range of factors in deciding whether or not to suspend a sentence of imprisonment, including:
  - the need, considering the nature of the offence, its impact on any victim of the offence and any injury, loss or damage resulting directly from the offence, to ensure that the sentence—
    - adequately manifests the denunciation by the court of the type of conduct in which the offender engaged;
    - adequately deters the offender or other persons from committing offences of the same or a similar character; and
    - reflects the gravity of the offence; and
  - any previous suspended sentence of imprisonment imposed on the offender and whether the offender breached the order suspending that sentence;
  - whether the offence was committed during the operational period of a suspended sentence of imprisonment; and
  - the degree of risk of the offender committing another offence punishable by imprisonment during the operational period of the sentence, if it were to be suspended.²¹

Final Report: Part 2

This Report presents the Council’s final recommendations on changes to suspended sentences and intermediate sentencing orders, as foreshadowed in our Interim Report. Taking into account the time that has passed since the original Discussion Paper was published, this Report also revisits the question of how suspended sentences are operating in practice and the Council’s views on whether their longer-term phasing out is still warranted.

The Council is conscious that since the release of Part 1 of its Final Report, a number of developments have taken place that may have affected the take-up and use of suspended sentences in Victoria, including the introduction of reforms recommended by the Council. To assist in gaining a better understanding of shifts in sentencing practices since we first began our inquiry, the Council carried out an analysis of the use of suspended sentences and community sentencing orders. This has formed the basis of two background reports published in 2007.²²

We are also aware of a number of developments in other jurisdictions that suggest that other jurisdictions are similarly grappling with the challenges of creating intermediate orders that are credible, promote community confidence and are effective in reducing, rather than contributing to ever-growing, prisoner numbers. We review some of these developments in Chapter 2 of this Report.

The Council’s final recommendations have been informed not only by these more recent developments, but also by views expressed in submissions and consultations over the course of our inquiry. We invited submissions and feedback on the Council’s draft proposals following the release of the Interim Report. Further targeted consultations on the more technical aspects of our draft proposals have been held with the courts, corrections and members of the legal community over the final phase of the reference.

²¹ Sentencing Act 1991 (Vic) s 27(1A).
1.35 The issue of resources has continued to feature prominently in our consultations on the Interim Report proposals. Some have suggested that the emphasis should be on improving the level of funding across the system, rather than reconfiguring existing sentencing orders. Concerns have continued to be expressed that any amount of change to intermediate orders will have a significant impact on corrections in Victoria, and that any such change must be accompanied by an injection of additional funding, or risk creating more problems than such a move might solve.

1.36 The Council is not insensitive to these concerns and, for this reason, our recommendations should be treated as conditional on an appropriate injection of additional funding being made into the correctional and court systems, as well as the community sector, to deliver programs and treatment to offenders and to support the proper implementation and operation of the recommended changes. While the implementation of these changes will come at a cost, the Council remains of the view that there is value in seeking to resolve some of the problems we have identified with the structure of existing orders to improve their overall effectiveness and use.

1.37 We accept that, as our inquiry has been confined to considering the range and structure of sentencing orders, the changes we propose ultimately can only play a small part in improving sentencing outcomes in Victoria. Clearly, there are other areas equally as deserving of attention, including improving systems for the identification of at-risk or need groups, the overall administration of orders and court processes (including building on successful programs such as the Koori Courts initiative and Drug Court initiative), as well as increasing the overall level of resourcing across the criminal justice and community sectors.

1.38 We also believe it is critical that any reforms be the subject of ongoing monitoring and evaluation to assess their impacts and identify any unintended and negative consequences. In this context, the Council acknowledges Victoria’s proud history of maintaining low rates of crime, as well as low imprisonment rates, and our concerns that this state of affairs not be placed in jeopardy.

1.39 Finally, we acknowledge, as the Sentencing Review has before us, that:

In the end, sentencing frameworks may have only a limited impact on sentencing behaviour. Legislation can send signals to sentencers and correctional authorities, but cannot directly control the direction of sentencing. And though the Australian states now have similar sentencing legislation they remain quite disparate in their rates of imprisonment. Most of the changes in prison population have been driven by more powerful and diffuse sources than changes to legislation such as social, legal and penal culture, emotional climate and general attitudes about what the ‘right’ punishment is.23

23 Freiberg (2002), above n 16, 45.
Overview of Final Report: Part 2

1.40 The recommendations in this Report are focused primarily on improving the sentencing framework in Victoria, rather than reviewing existing practices used to administer orders in Victoria, or the effectiveness of particular programs. The remainder of the Report is structured as follows:

Chapter 2—Suspended Sentences of Imprisonment reviews the use of suspended sentences in Victoria and presents the Council’s final recommendations concerning the possible phasing out of suspended sentences in Victoria.

Chapter 3—Reviewing Intermediate Sanctions explores the role and effectiveness of intermediate sanctions.

Chapter 4—Improving Intermediate Sanctions describes the Interim Report proposals and responses to that report, and discusses the principles that have informed the development of the Council’s final proposals for reforms to intermediate sanctions in Victoria.

Chapter 5—Substitutional Custodial Sanctions examines the use of home detention in Victoria and presents the Council’s final recommendations concerning the range of intermediate custodial orders that should be available in Victoria, including considering the merits of introducing a periodic detention scheme in Victoria.

Chapter 6—Intensive Correction Orders explores the use of intensive correction orders and supervision orders in Victoria and elsewhere, and presents the Council’s final recommendations on possible reforms.

Chapter 7—Intermediate Sanctions for Offenders who are Alcohol or Drug Dependents examines the range of intermediate sanctions in Victoria targeted at offenders with a drug or alcohol dependency, and presents the Council’s recommendations to remove combined custody and treatment orders as a sentencing option, and to introduce a new form of intensive correction order aimed at addressing the needs of offenders with drug and alcohol problems.

Chapter 8—Intermediate Semi-Custodial Sanctions considers existing part-custody orders and recommends changes to the power to combine a short term of imprisonment with community sentences.

Chapter 9—Community Sentences explores the use of community-based orders in Victoria and proposes some minor reforms to the order to improve its operation.

Chapter 10—Intermediate Sanctions for Young Adult Offenders identifies particular issues for young adult offenders and presents the Council’s recommendations concerning the introduction of a new form of community sentence for young offenders with higher support needs than the general young adult offender population.

Chapter 11—Compliance Management and Breach Powers discusses current approaches to responding to breach of intermediate sanctions, and alternative approaches, and presents the Council’s recommendations for reform.

Chapter 12—Deferral of Sentencing presents the Council’s final recommendations concerning the extension of the power to defer the sentencing of an offender.

Chapter 13—Implementation and Other Issues briefly reviews some of the challenges that the Council believes will need to be considered in order to ensure the effective implementation of the recommended reforms, including the development of appropriate guidelines around the administration of orders and the investment of additional funding to support the proper administration of orders.
1. Introduction
Chapter 2  Suspended Sentences of Imprisonment
2. Suspended Sentences of Imprisonment
Chapter 2  Suspended Sentences of Imprisonment

Introduction

2.1 Since the Council began its inquiry, a number of jurisdictions have introduced reforms to suspended sentence orders and other orders intended to be used as substitutes for, or alternatives to, immediate imprisonment. These changes provide further evidence of how complex, ambiguous and problematic these sentences are in jurisdictions with similar sentencing structures to Victoria. In this chapter we review the need to phase out suspended sentences in light of these developments. In the following chapters we identify the consequential changes to the range of sentencing options which we believe are required to modernise, rationalise and make more effective the Victorian sentencing system.

What is a Suspended Sentence?

2.2 A suspended sentence is a sentence of imprisonment imposed on an offender that is not activated. The imprisonment sentence may be either wholly suspended, in which case the offender does not serve any time in gaol following sentencing and is released into the community, or partially suspended, in which case the offender serves part of the sentence in prison and is then released into the community.

2.3 A suspended sentence involves two steps:

1. the imposition of a term of imprisonment by the court on an offender; and
2. an order that all or part of the gaol term be held in suspense for a set period (‘the operational period’).

2.4 The whole or partial suspension of a prison sentence is generally conditional upon the offender complying with certain obligations; for example, many jurisdictions require the offender to enter into a good behaviour bond. In Victoria, the only condition imposed is that the offender must not commit any further offences punishable by imprisonment during the period of the order. If the offender commits another offence punishable by imprisonment during the operational period (or where other conditions are imposed, if the offender breaches another condition of the order), then the court may order the offender to serve part or all of the original term of imprisonment.24

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24 See further Sentencing Advisory Council (2005), above n 2 and Sentencing Advisory Council (2006), above n 4 which review in detail the history and use of suspended sentences in Victoria.
The Current Legal Framework

2.5 Under section 27 of the Sentencing Act 1991 (Vic), a court may suspend a term or terms of imprisonment not exceeding three years in the case of the County Court and Supreme Court, or two years in the case of the Magistrates’ Court, wholly or partly ‘if satisfied that it is desirable to do so in the circumstances’. The only requirement of the order is that the offender must not commit another offence punishable by imprisonment during this operational period of the order. There is a presumption on breach that the suspended portion of the sentence will be activated and the offender ordered to serve the sentence in prison.

2.6 Part 1 of the Council’s Final Report recommended a number of reforms to the legislative framework governing the use of suspended sentences, which were adopted and enacted into law.

Other Australian Jurisdictions

2.7 Currently the power to order that a term of imprisonment be suspended exists in every jurisdiction in Australia. There are differences as to how the power operates in those jurisdictions, including:

- the maximum length of the term of imprisonment that can be suspended;
- the operational period;
- whether additional conditions may attach to the order to suspend;
- the options available to a court on breach; and
- whether the sentence of imprisonment can be wholly or partially suspended.

2.8 Since the Council commenced its inquiry, Western Australia has introduced a conditional suspended imprisonment (CSI) order, leaving Victoria and Queensland as the only two jurisdictions without a conditional form of suspended sentence. Queensland has, however, introduced a new form of court-ordered parole, which operates as a conditional form of order similar to a suspended sentence.

25 Sentencing Act 1991 (Vic) s 27(2).
26 Sentencing Act 1991 (Vic) s 27(1).
27 Sentencing Act 1991 (Vic) s 31(5A).
28 Crimes Act 1914 (Cth) s 20(1)(b); Crimes (Sentencing) Act 2005 (ACT) s 12; Crimes (Sentencing Procedure) Act 1999 (NSW) s 12; Sentencing Act 1995 (NT) s 40; Penalties and Sentences Act 1992 (Qld) s 144; Criminal Law (Sentencing) Act 1988 (SA) s 38; Sentencing Act 1997 (Tas) s 7(b); Sentencing Act 1991 (Vic) s 27; Sentencing Act 1995 (WA) s 76.
29 Sentencing Act 1995 (WA) Part 12, Division 1 inserted by Sentencing Legislation Amendment Act 2004 (WA). These provisions came into operation on 31 May 2006. ‘Prescribed courts’ are defined in Sentencing Regulations 1996 (WA) r 6B and include the Supreme Court, District Court, Children’s Court, and ‘speciality courts’, defined in r 4A (including the Magistrates’ Court).
30 While a court in Victoria may make a community-based order in addition to making a suspended sentence order, it cannot do so on a single count. Similarly, in Queensland a court could make a probation order or community work order in combination with a suspended term of imprisonment, provided the offender is convicted of multiple offences. The use of this combination of orders in Victoria is explored further in Chapter 8 of this Report.
31 See further [8.18]–[8.25]. Unlike a suspended sentence, an offender serving a term of imprisonment who is released on court-ordered parole on breach is liable only to serve the remainder of the sentence in prison, rather than the whole of the original sentence imposed (as is the case on breach of a suspended sentence).
2.9 An offender sentenced to a CSI in Western Australia must comply with the standard obligations of the order, and one or more primary requirements ordered by the court. The standard obligations of CSI are that the offender must report to a community corrections centre within 72 hours of being sentenced, or as otherwise ordered; notify a community corrections officer of any change of address or place of employment within two working days after the change, or as directed; and comply with the general requirements under section 76 of the *Sentencing Administration Act 2003* (WA). Primary requirements are a program requirement, a supervision requirement and a curfew requirement.

2.10 In Tasmania and the Northern Territory, the courts have a broad discretion to suspend a sentence of imprisonment ‘subject to such conditions as the court considers necessary or expedient’, or ‘as the court thinks fit’. In Tasmania, the court may also make a community service order or probation order in respect of the offender.

2.11 In the case of all other jurisdictions with the ability to attach conditions, suspension is conditional on the offender entering into a bond of good behaviour and complying with other conditions of the bond, including those set by the court. Conditions that may be attached to a bond include community work, supervision, residential conditions, program conditions and treatment conditions.

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32 Section 76 of the *Sentence Administration Act 2003* (WA) includes requirements that offenders comply with the lawful orders or directions of any community corrections officer, and if ordered to do community corrections activities, to do such community corrections activities as the manager of a centre determines and directs and to the satisfaction of the person supervising them.

33 *Sentencing Act 1995* (WA) s 84.

34 A program requirement requires an offender to obey the orders of a speciality court or a community corrections officer as to: (a) undergoing assessment by a medical practitioner, a psychiatrist, a psychologist or a social worker, or more than one of them and, if necessary, appropriate treatment; (b) undergoing assessment and, if necessary, appropriate treatment in relation to the abuse of alcohol, drugs or other substances; (c) attending educational, vocational, or personal development programmes or courses; and/or (d) living at a specified place for the purposes of any of the matters in paragraphs (a), (b) or (c): *Sentencing Act 1995* (WA) s 84A(2).

35 A supervision requirement is a requirement that the offender must contact a community corrections officer, or receive visits from a community corrections officer as ordered, however unless a CCO orders otherwise, the offender must contact a CCO at least once in any period of 28 days while subject to a supervision requirement. A court may also give any directions it decides are necessary to secure the good behaviour of the offender: *Sentencing Act 1995* (WA) s 84B.

36 A curfew requirement is a requirement that the offender: (a) must remain at a specified place for specified periods; and (b) must submit to surveillance or monitoring as ordered by a speciality court or a community corrections officer. The term of a curfew requirement must be set by the court when it imposes the requirement, but must not be imposed so as to result in a curfew requirement being in force, for a continuous period that exceeds 6 months, and the offender must not be ordered to remain at a place for periods that amount to less than 2 or more than 12 hours in any one day: *Sentencing Act 1995* (WA) s 84C.

37 *Sentencing Act 1997* (Tas) s 24.

38 *Sentencing Act 1995* (NT) s 40(2). A court also has the power to suspend a term of imprisonment on an offender entering into a home detention order: *Sentencing Act 1995* (NT) s 44(1).

39 *Sentencing Act 1997* (Tas) ss 8(1)(a)–(b). The court also has the power to fine an offender, to make a rehabilitation program order and to make a driving disqualification order in respect of the offender. *Sentencing Act 1997* (Tas) s 8(1)(c)–(d).

40 Australian Capital Territory, New South Wales, South Australia and the Commonwealth.

41 The option of community work is specifically excluded in NSW: *Crimes (Sentencing) Act 1999* (NSW) s 95(c).
2.12 The power to partially suspend a prison sentence is not currently available in New South Wales (NSW). The NSW Sentencing Council has recommended that the power to partially suspend prison sentences should be restored. The NSW Parliamentary Standing Committee on Law and Justice similarly has recommended as a result of its inquiry into community based sentencing options for rural and remote areas and disadvantaged populations that consideration be given to restoring the power of the courts to partially suspend prison sentences.

International Developments

England and Wales

2.13 A major package of sentencing reforms was announced by the United Kingdom (UK) government following the release of the Report of the Halliday Review of the English Sentencing Framework in 2001, and was given effect to by the Criminal Justice Act 2003 (UK). These reforms included the introduction of a new conditional suspended sentence, and the replacement of community orders with a single, generic community sentence. These new forms of orders commenced operation in April 2005.

2.14 In England and Wales, when sentencing an offender to a suspended sentence or community sentence, courts now have the power to impose one or more requirements on an offender, including:

- an unpaid work requirement, under which the offender must perform between 40 and 300 hours of unpaid work;
- an activity requirement, under which the offender must present himself or herself to a person specified in the order and/or participate in activities specified in the order;
- a program requirement, under which the offender must participate in an accredited program specified in the order;
- a prohibited activity requirement, under which the offender must refrain from participating in activities in the order on specified days, or for a specific period;
- a curfew requirement (of two to 12 hours each day);
- an exclusion requirement, prohibiting an offender from entering a specified place for a specified period;
- a residence requirement;
- a mental health, alcohol or drug treatment requirement;
- a supervision requirement; and
- in a case where the offender is aged under 25, an attendance centre requirement.

42 When suspended sentences were introduced in 2000 it was not clear whether courts had a power to partially suspend a prison sentence. In R v Gamgee (2001) 51 NSWLR 707 the NSW Court of Criminal Appeal held that partial suspension (including of the initial part of the sentence) was permitted. Subsequently the Act was amended to make clear that a court only had the power to wholly suspend a prison sentence imposed.


44 Standing Committee on Law and Justice, New South Wales Legislative Council, Community-Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations, Report No 30 (2006) Recommendation 24. The Committee recommended this matter be considered as part of the review of the Crimes (Sentencing Procedure) Act 1999 (NSW) being undertaken by the Attorney General’s Department.


48 Criminal Justice Act 2003 (UK) s 177.
2.15 The introduction of a conditional suspended sentence has had a significant impact on sentencing. Prior to the new provisions coming into operation, the power to suspend a prison sentence in England and Wales was limited to circumstances in which ‘exceptional circumstances’ could be shown⁴⁹ and, as a consequence, was used relatively infrequently.⁵⁰

Data on sentencing trends show that since the new orders came into operation, there has been a marked increase in the use of suspended sentence orders, and a corresponding decrease in the use of non-custodial orders, while the use of imprisonment has remained stable. As illustrated in Figure 1, in the final quarter of 2006, the rate of suspended sentences handed down in England and Wales was 8.3 per cent of all sentences, up 5.0 percentage points from a year earlier, while the immediate custody rate was 24.3 per cent—the same as the previous year.⁵¹ The use of fines and community sentences was down on the previous year—in the case of fines, 16.2 per cent, down 1.9 percentage points, while the community sentences rate was 33.8 per cent, down 2.7 percentage points.⁵² This suggests that, following the removal of the ‘exceptional circumstances’ requirement and availability of conditions, suspended sentences are being used in place of other non-custodial penalties, in place of immediate imprisonment.

![Figure 1: The rates of use of immediate imprisonment, fines, community sentences and suspended sentences across all courts in England and Wales](image)

Source: Ministry of Justice and National Offender Management Service, Probation Statistics, Quarterly Brief, April to June 2007, England and Wales (2007) Table 1

⁴⁹ Powers of Criminal Courts (Sentencing) Act 2000 (UK), s 118(4). The requirement that the court be satisfied that the exercise of the power to suspend could be justified by the exceptional circumstances of the case originally came into effect in 1992: Criminal Justice Act 1991 (UK) s 5(1).

⁵⁰ Based on data published by the National Offender Management Service, over the period April to June 2005, only 2.5 per cent of offenders sentenced in the Crown Court received a wholly suspended sentence, compared to around 35 per cent of offenders who received a community sentence, fine, or absolute or conditional discharge and around 60 per cent who were sentenced to a term of imprisonment to be served in detention or in the community: National Offender Management Service, Home Office, Sentencing Statistics Quarterly Brief: England and Wales: October to December 2005 (Crown Court and Magistrates’ Courts) (2005) Table 3.


⁵² Ibid.
The use of suspended sentences has far exceeded government projections of the likely outcome of changes introduced. Quarterly data released for the period October to December 2006 indicated that 2,910 suspended sentences were ordered by the magistrates’ courts, and a similar number (just over 3,000) by the Crown Court. In the first half of 2007, over 22,000 suspended sentences were imposed, representing 24 per cent of all supervised community orders—up from 21 per cent in 2006.

The jump in the usage of these orders and the existence of conditions has had consequences for the numbers of offenders breaching orders and subsequently ordered to serve time in prison. In 2006, 25 per cent of suspended sentences were terminated early due to the commission of a new offence, while a further 28 per cent were terminated due to a failure to comply with the conditions of the order. According to the Home Office, 800 people were imprisoned for breach between January and August 2006, compared to only 132 in the whole of 2005. Three quarters of orders breached were issued in the Magistrates’ Court, and nearly half were imposed for summary offences.

Recent reports suggest there are ‘growing concerns about the numbers of people on Suspended Sentence Orders who are going to prison as a result of small technical breaches’. The UK government is now considering removing the power to make a suspended sentence order altogether from magistrates to address this situation.

In deciding to make suspended sentences more broadly available, the UK government acted contrary to the original advice of the Halliday Review, which had argued for the retention of the ‘exceptional circumstances’ requirement:

If an offence, and previous convictions, mean that a prison sentence has to be passed, because no other sentence would be adequate, a decision not to impose it in practice, so that—provided no further offence is committed while the sentence is in force—the offender entirely escapes punishment, does need to be reserved for exceptional circumstances. Otherwise, the force of a custodial sentence will be lost, possibly along with the importance of reserving it for cases where no other sentence will do. If a court is as confident as it can be that the offender has a low risk of re-offending, but needs a tough punishment because of the seriousness of the offence, it can use its judgment to find the right balance.

In announcing the introduction of this new order, originally termed ‘custody minus’, it was suggested that offenders would be required to undertake ‘a demanding programme of activity in the community’, which presumably was intended to remedy the problem of an offender ‘escaping punishment’. This, and together with removal of the ‘exceptional requirement’ limitation, appears to have led to a significant increase in the use of this order.

54 Ministry of Justice and National Probation Service (2007), above n 51, Table 3.
58 Doward (2007), above n 53.
60 Doward (2007), above n 53.
61 Home Office (2001), above n 46, [5.16].
62 Home Office (2002), above n 45, [5.30].
2.22 One of the other much-publicised reforms under the Criminal Justice Act 2003 (UK) was the proposed introduction of a new sentence, referred to as ‘custody plus’. ‘Custody plus’, in the form as originally enacted, was a short prison sentence of 28–51 weeks, with 2–13 weeks served in prison and the remainder supervised in the community under licence. The period under licence was to be at least 26 weeks (approximately 6 months). The intention was that ‘custody plus’ would replace short terms of imprisonment of under 12 months.

2.23 The introduction of the custody plus order was originally deferred until Autumn 2006, and now appears to have been shelved indefinitely, due to workload and resourcing concerns.

Canada

2.24 Reforms have also recently been made to Canada’s conditional sentence of imprisonment—an order that is similar to the intensive correction order that exists in Victoria.

2.25 Conditional sentences were first introduced in Canada in 1996. They enable a court on sentencing an offender to a term of imprisonment of less than two years, to order the offender to serve the sentence in the community provided the court is satisfied that this would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing under the Canadian Criminal Code. On breach, a court has the power to order that an offender serve a portion of, or the entire period of, the sentence remaining to be served in prison.

2.26 The Canadian government has now passed legislation, which came into force in December 2007, that removes the possibility of a conditional sentence being imposed for a ‘serious personal injury offence’ (including a sexual offence), a terrorism offence or a criminal organisation

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63 Criminal Justice Act 2003 (UK) s 181. If two or more terms of imprisonment are ordered to be served consecutively, the aggregate length of imprisonment must be 65 weeks or under (with the aggregate length of the custodial period being 26 weeks or under): Criminal Justice Act 2003 (UK) s 181(7).

64 Criminal Justice Act 2003 (UK) s 181(6).

65 Section 181(1) of the Criminal Justice Act 2003 (UK) as originally enacted provides that any power of a court to impose a sentence of imprisonment for a term of less than 12 months on an offender must be exercised in accordance with s 181 unless the court makes an intermittent custody order. This provision is not yet in force.

66 In the Home Office’s Report—Rebalancing the Criminal Justice System in Favour of the Law-Abiding Majority: Cutting Crime, Reducing Reoffending and Protecting the Public (2006)—delays in implementing these reforms were attributed in particular to ‘the need to prioritise prison and probation resources on more serious offenders’: Ibid 34.


69 Criminal Code (R.S, 1985, c. C-46 ) s 742.6(9).

70 A ‘serious personal injury offence’ is defined in section 752 of the Criminal Code (R.S, 1985, c. C-46) as an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving the use or attempted use of violence against another person, or conduct endangering or likely to endanger the life or safety of another person, or inflicting or likely to inflict severe psychological damage upon another person. The offence must be one for which the offender may be sentenced to imprisonment for ten years or more. A ‘serious personal injury offence’ may also be an offence or attempt to commit an offence mentioned in ss 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).

71 A ‘terrorism offence’ is defined in s 2 of the Criminal Code to mean an offence under any of ss 83.02 to 83.04 or 83.18 to 83.23, an indictable offence committed for the benefit of, at the direction of or in association with a terrorist group, an indictable offence where the act or omission constituting the offence also constitutes a terrorist activity, or a conspiracy or attempt to commit, or being an accessory after the fact in relation to, or any counselling in relation to, any of the listed offences. The offences referred to encompass offences related to the financing of terrorism as well as to participating in the activity of a terrorist group, facilitating terrorist activity, instructing others to carry out terrorist activity, and harbouring or concealing a terrorist.
2.27 The impetus for these reforms has been described in similar terms to that which led the Council to recommend that the availability of suspended sentences in Victoria should be restricted in the case of serious violent (including sexual) offences:

While allowing persons not dangerous to the community, who would otherwise be incarcerated, and who have not committed serious or violent crime, to serve their sentence in the community is widely believed to be beneficial, it has also been argued that sometimes the very nature of the offence and the offender require incarceration. The fear is that to refuse to incarcerate an offender can bring the entire conditional sentence regime, and hence the criminal justice system, into disrepute. In other words, it is not the existence of conditional sentences that is problematic, but, rather, their use in cases that appear to justify incarceration.

2.28 In introducing the bill, the Parliamentary Secretary to the Minister of Justice and Attorney General pointed to community expectations as an important consideration in introducing the legislation:

Bill C-9 flows from the government’s clear commitment to Canadians to ensure that house arrest is no longer available for those who commit serious or violent crimes. As stated in section 718 of the Criminal Code, the fundamental purpose of sentencing is ‘to contribute ... to respect for the law and the maintenance of a just, peaceful and safe society’.

Conditional sentences were never intended for serious offences... However, in recent years we have witnessed far too many instances of improper use of this type of sentence. The public has had a great deal of concern about cases in which persons convicted of very serious offences have been permitted to serve their sentences in the community, often in the luxury of their own homes and with minimal safeguards to ensure compliance with the conditions of their sentence. Canadians find it hard to understand how such sentences comply with the fundamental purpose and principles of sentencing.

... The bill is based on the principle that conditional sentences ought to be used only in situations for which they were originally intended. This is for relatively minor cases, cases deserving of lenience and cases which do not offend the community’s sense of justice.

2.29 Conditional sentences represent only a small proportion of all sentences in Canada—around 5 per cent of all cases resulting in a conviction. In 2005–06, of the 93,801 sentences of custody imposed across Canada, 11,154 or 11.9 per cent, were conditional sentences of imprisonment. Of these, 3,619 conditional sentences (32.4 per cent) were imposed for property offences, 2,791

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72 A ‘criminal organisation offence’ is defined in s 2 of the Criminal Code (R.S, 1985, c. C-46) as an offence under s 467.11, 467.12 or 467.13, or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organisation. It also includes a conspiracy or attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, any of the listed offences. Offences included in the definition are participation in the activities of a criminal organisation, commission of an offence for a criminal organisation, and instructing the commission of an offence for a criminal organisation.


75 Canada, Parliamentary Debates, House of Commons, 29 May 2006, 1100 (Rob Moore, Parliamentary Secretary to the Minister of Justice).

76 Statistics Canada, Cases in Adult Criminal Court by Type of Sentence; Total Convicted Cases, Prison, Conditional Sentence, Probation, by Province and Territory (2007) <http://www40.statcan.ca/l01/cst01/legal22a.htm?sdid=conditional%20sentences> at 18 January 2008. Note that the proportion may be slightly higher than reported, as Quebec does not currently report conditional sentencing data.

77 Ibid.
(25 per cent) for crimes against the person and 2,144 (19 per cent) for drug possession and trafficking offences.  

Recent years have seen a drop in completion rates and an increase in the numbers of offenders returned to prison following breach. One study reported a drop in completion rates from 78 per cent in 1997–98 to 63 per cent in 2000–01. A study of the trial courts in Ontario and Manitoba also found an increase in the proportion of offenders on conditional sentences committed to custody following a breach of conditions. While in 1997–98 around two thirds of offenders in Manitoba who had breached their orders were committed to custody for some period, in 2000–01, this proportion had risen to around three quarters. Over the same period in Ontario, the proportion of offenders committed to custody on breach rose from 42 per cent to 50 per cent. 

New Zealand

New Zealand removed suspended sentences as a sentencing option with the introduction of the Sentencing Act 2002 (NZ). This change was made as part of broader reforms to sentencing and parole, including the abolition of the sentence of corrective training and the replacement of periodic detention and community service with a community work order. Changes were also made to parole under the new Sentencing Act 2002 (NZ) and Parole Act 2002 (NZ).

Since the abolition of suspended sentences on 30 June 2002 and introduction of the new sentencing and parole legislation, New Zealand has experienced a steady increase in the proportion of custodial sentences to 2005, from 8.2 per cent in 2001, to 8.4 per cent in 2002, 8.6 per cent in 2003, 9.4 per cent in 2004 and 9.8 per cent in 2005, before falling slightly to 9.3 per cent in 2006. The change from 2002 to 2004 alone represented an increase of approximately 23 per cent in overall numbers of offenders receiving custodial sentences (from 7,930 in 2002 to 10,353 in 2004). The removal of suspended sentences as a sentencing option has been pointed to as one of the factors that might have contributed to this increase.

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78 Ibid.
79 Julian V. Roberts, ‘The Evolution of Conditional Sentencing: An Empirical Analysis’, Criminal Reports, 6th Series, Vol. 3 (2002) 267, Table 7. This failure rate was largely attributed to breaches of the increasing number of conditions placed upon offenders rather than on breach by the commission of new offences.
81 Ibid 14.
82 Corrective training was a three-month custodial sentence for young offenders aged 16–19 years.
83 Under the previous Criminal Justice Act 1985 (NZ), offenders sentenced to 12 months’ imprisonment or less were released at the half-way point of their sentence. Other offenders on determinate sentences, with the exception of those involving a ‘serious violent offence’, were eligible for parole after serving one-third of their sentence, with a final release date two-thirds of the way through their sentence. Serious violent offenders, however, were not eligible for parole, and were released after serving two-thirds of their sentence. Under the Parole Act 2002 (NZ), offenders who are sentenced to imprisonment for two years or less are released after serving half of their sentence. Offenders sentenced to determinate sentences of more than two years are eligible for parole, as was previously the case, after serving one third of their sentence unless the court imposes a longer non-parole period. Offenders eligible for parole can now also be detained until the expiration of their entire sentence: Philip Spier and Barb Lash, Conviction and Sentencing of Offenders in New Zealand: 1994 to 2003 (2004) [4.5].
85 Ibid.
86 Spier and Lash (2004), above n 83, [4.5]. The information on custodial sentences imposed prior to the abolition of this option excluded offenders who received suspended sentences, and suspended sentences that were activated (due to the person offending within the suspension period); however, it included offenders imprisoned for the offence that led to the activation of the suspended sentence: Ibid.
2.33 Concerns over the rising prison population have led the New Zealand government to reconsider available sentencing options and to introduce a new package of reforms. The New Zealand parliament has now passed legislation that has:

- established home detention as a sentence in its own right (rather than as a means of serving a prison sentence); and
- introduced two new community sentences—community detention (involving use of an electronically monitored curfew) and a sentence of intensive supervision.87

2.34 These new forms of orders are discussed in more detail at [5.23]–[5.31] (home detention) and [6.41]–[6.44] (intensive supervision) of this Report.

2.35 In identifying possible reforms to stem the tide of an increasing number of offenders entering prison, the New Zealand government considered, but rejected, the option of reintroducing suspended sentences.88 In recommending against this option, the government pointed to previous research on the use of suspended sentences in New Zealand that found this option increased the prison population, with no associated reduction in reoffending.89

2.36 Due to the recent nature of these reforms, there is no way of knowing whether these measures will be successful in the longer term, or whether New Zealand will continue to experience a growth in the use of immediate imprisonment.

### Trends in the Use of Suspended Sentences in Victoria

2.37 Over the course of our inquiry, a number of people raised concerns about the potential impact of removing the power to suspend prison sentences on the Victorian prison population. It was felt that, even if new forms of conditional community orders were introduced, courts would be faced in many cases with no other option but to sentence an offender to a term of immediate imprisonment in circumstances in which, despite the seriousness of the offence concerned, this outcome might not be appropriate.

2.38 Many of the original concerns about the use of suspended sentences, reflected in our discussions with community members, were focused on their use for serious violent and sexual offenders. The reforms introduced under the Sentencing (Suspended Sentences) Act 2006 (Vic) are designed to limit the power to order a suspended sentence in these circumstances. These reforms apply only to offenders sentenced for offences committed on or after 1 November 2006.

2.39 While it is too early to assess the impact of the recent reforms, in early 2007 the Council conducted a study of trends in the use of suspended sentences, to identify any shifting patterns in their use since this inquiry commenced. The study, published in 2007,90 also has provided us with better information against which to measure the potential impact of any changes recommended, and to assess the overall effectiveness of these orders, including breach rates and outcomes.

2.40 Some interesting trends have emerged, which suggest that courts are taking a more cautious approach to the use of suspended sentences.

2.41 As shown in Figure 2, from March 2005 to June 2007, the percentage of people sentenced in the higher courts who received either a partially or wholly suspended sentence decreased steadily (down 7.1 percentage points), while the percentage of people who were sentenced to immediate imprisonment increased (up 5.4 percentage points).

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87 The Sentencing Amendment Act 2007 (NZ) (originally part of the Criminal Justice Bill 2006) was assented to on 31 July 2007. The majority of provisions came into force on 1 October 2007.


89 Ibid. See further Spier and Lash (2004), above n 83.

90 Turner (2007), above n 22.
2. Suspended Sentences of Imprisonment

Figure 2: The percentage of people who were sentenced to a period of imprisonment, wholly or partially suspended sentence of imprisonment, higher courts, July 2000 to June 2007

Source: Turner (2007)

2.42 Data produced by the Australian Bureau of Statistics (ABS), which compares the use of wholly suspended sentences between jurisdictions, indicate that Victorian higher courts were more likely than courts in New South Wales, Queensland, Western Australia or the Northern Territory to impose a wholly suspended sentence as the principal sentence, but less likely than courts in the Australian Capital Territory, South Australia or Tasmania to impose this type of sentence.91

91 Australian Bureau of Statistics, Criminal Courts 2005–06 (Cat. no. 4513.0) (2007).
2. Suspended Sentences of Imprisonment

In Victoria, from mid-2005 to mid-2007, the percentage of people sentenced in the Magistrates’ Court who received wholly suspended sentences also decreased slightly from 6.5 per cent of all sentence types to 6.0 per cent. During the same period, the percentage of intensive correction orders (ICOs) increased from 1.5 per cent of all sentence types to 2.0 per cent. The percentage of people who received a partially suspended sentence has remained relatively stable over the seven-year period shown, at just under one per cent (see Figure 4, below).

Figure 4: The percentage of people who were sentenced to an intensive correction order, wholly or partially suspended sentence of imprisonment, Magistrates’ Court, July 2000 to June 2007

Source: Turner (2007)
2.44 While the ABS does not publish national data on fully suspended sentences imposed by jurisdiction at the Magistrates’ Court level, Victoria has a higher proportion of sentences imposed at this level that are ‘custodial’ (including wholly suspended sentences and other custodial orders served in the community), compared with other jurisdictions. The Northern Territory had the highest proportion of custodial orders imposed at this court level (31.7 per cent), followed by Victoria (13.5 per cent) and the ACT (13.4 per cent). The higher rate of custodial sentences in Victoria suggests that the use of suspended sentences may have contributed to this trend (see Table 1, below).

Table 1: The percentage of defendants proven guilty by selected principal sentences and jurisdiction, Magistrates’ Court, 2005–06

<table>
<thead>
<tr>
<th>Order Type</th>
<th>NSW</th>
<th>Vic</th>
<th>Qld</th>
<th>SA</th>
<th>WA</th>
<th>Tas</th>
<th>NT</th>
<th>ACT</th>
<th>Aust</th>
</tr>
</thead>
<tbody>
<tr>
<td>Custodial orders</td>
<td>9.8</td>
<td>13.5</td>
<td>5.8</td>
<td>5.9</td>
<td>6.3</td>
<td>5.1</td>
<td>31.7</td>
<td>13.4</td>
<td>8.6</td>
</tr>
<tr>
<td>Monetary orders</td>
<td>59.9</td>
<td>53.5</td>
<td>82.3</td>
<td>78.0</td>
<td>83.3</td>
<td>88.1</td>
<td>58.0</td>
<td>75.1</td>
<td>71.3</td>
</tr>
<tr>
<td>Other non-custodial orders</td>
<td>30.3</td>
<td>32.4</td>
<td>11.9</td>
<td>16.1</td>
<td>10.4</td>
<td>6.8</td>
<td>10.3</td>
<td>11.4</td>
<td>20.0</td>
</tr>
</tbody>
</table>

Source: ABS, Criminal Courts, Australia, 2005–06 (Cat. no. 4513.0) (2007)

2.45 Of all the people who received a suspended sentence in the Magistrates’ Court, the most common 10 offences for which they were sentenced are represented in Figure 5, below. Figure 5 also displays the percentage of all people sentenced for these 10 offences who received a suspended sentence. As shown, the most common offence for which a suspended sentence was imposed was driving while disqualified (8,927 people or 23.7 per cent of all people sentenced for this offence).

Figure 5: The number and percentage of people who received a suspended sentence for each of the 10 offences that had the highest number of suspended sentences imposed, Magistrates’ Court, 2000–01 to 2006–07

<table>
<thead>
<tr>
<th>Offence</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Driving while disqualified</td>
<td>8,927</td>
<td>(23.7%)</td>
</tr>
<tr>
<td>Theft</td>
<td>6,384</td>
<td>(10.7%)</td>
</tr>
<tr>
<td>Burglary</td>
<td>2,599</td>
<td>(19.9%)</td>
</tr>
<tr>
<td>Drink driving</td>
<td>2,157</td>
<td>(4.9%)</td>
</tr>
<tr>
<td>Intentionally or recklessly cause injury</td>
<td>1,969</td>
<td>(15.1%)</td>
</tr>
<tr>
<td>Traffic in a drug of dependence</td>
<td>1,210</td>
<td>(29.8%)</td>
</tr>
<tr>
<td>Handling stolen goods</td>
<td>1,019</td>
<td>(13.1%)</td>
</tr>
<tr>
<td>Breach of intervention order</td>
<td>949</td>
<td>(11.0%)</td>
</tr>
<tr>
<td>Obtain property by deception</td>
<td>798</td>
<td>(17.0%)</td>
</tr>
<tr>
<td>Unlicensed driving</td>
<td>731</td>
<td>(8.9%)</td>
</tr>
</tbody>
</table>

Source: Courts Statistical Services, Department of Justice (Victoria), unpublished data

2.46 Of all the people who received a suspended sentence in the higher courts, the most common 10 offences for which they were sentenced are represented in Figure 6, below. Figure 6 also displays the percentage of all people sentenced for these 10 offences who received a suspended sentence. Offenders sentenced for trafficking in a drug of dependence made up the largest number of those receiving a suspended sentence, followed by those sentenced for aggravated burglary, recklessly causing serious injury, armed robbery and theft.

92 This table was compiled from data from ABS (2007), above n 91, Supplementary Data Cube 12.
2. Suspended Sentences of Imprisonment

Suspended Sentences and Intermediate Sentencing Orders

Figure 6: The number and percentage of people who received a suspended sentence for each of the 10 offences that had the highest number of suspended sentences imposed, higher courts, 2000–01 to 2006–07

<table>
<thead>
<tr>
<th>Offence</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Traffick a drug of dependence</td>
<td>381</td>
<td>41.8%</td>
</tr>
<tr>
<td>Aggravated burglary</td>
<td>336</td>
<td>41.4%</td>
</tr>
<tr>
<td>Recklessly cause serious injury</td>
<td>237</td>
<td>35.1%</td>
</tr>
<tr>
<td>Armed robbery</td>
<td>230</td>
<td>13.3%</td>
</tr>
<tr>
<td>Theft</td>
<td>229</td>
<td>41.9%</td>
</tr>
<tr>
<td>Intentionally or recklessly cause</td>
<td>203</td>
<td>31.7%</td>
</tr>
<tr>
<td>Intentionally cause serious injury</td>
<td>160</td>
<td>22.9%</td>
</tr>
<tr>
<td>Affray</td>
<td>155</td>
<td>38.2%</td>
</tr>
<tr>
<td>Obtain financial advantage by</td>
<td>153</td>
<td>45.8%</td>
</tr>
<tr>
<td>deception</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Obtain property by deception</td>
<td>148</td>
<td>48.8%</td>
</tr>
</tbody>
</table>

Source: Courts Statistical Services, Department of Justice (Victoria), unpublished data

2.47 Access to more complete court data also has enabled us to examine not only the use of suspended sentences, but also the frequency with which this order is made in combination with other orders, such as community-based orders (CBOs) and fines. While a suspended sentence cannot be combined with any order other than a fine on a single count, an offender found guilty of multiple offences may be sentenced to a suspended sentence for some offences, and a CBO or fine, for example, for others.

2.48 In the Magistrates’ Court, over half of all suspended sentences (58.5 per cent of wholly suspended sentences and 52.5 per cent of partially suspended sentences) ordered over the period 2004–05 to 2006–07 were combined with some other form of sentencing order. The most frequent other order type used in combination with a wholly suspended sentence was a fine (46.3 per cent), followed by a CBO (8.4 per cent) and immediate imprisonment (1.7 per cent). One in three partially suspended sentences was combined with a fine (33.6 per cent), while around 5 per cent were combined with a CBO (see Table 2 below).

Table 2: The percentage of selected sentence types imposed by other sentences imposed in the same case, Magistrates’ Court, 2004–05 to 2006–07

<table>
<thead>
<tr>
<th>Sentence Type</th>
<th>Imp</th>
<th>PSS</th>
<th>WSS</th>
<th>ICO</th>
<th>CBO</th>
<th>Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>Imprisonment (Imp)</td>
<td>100.0</td>
<td>14.7</td>
<td>1.7</td>
<td>1.5</td>
<td>1.5</td>
<td>2.4</td>
</tr>
<tr>
<td>Partially suspended sentence (PSS)</td>
<td>2.6</td>
<td>100.0</td>
<td>0.7</td>
<td>0.1</td>
<td>0.6</td>
<td>0.5</td>
</tr>
<tr>
<td>Wholly suspended sentence (WSS)</td>
<td>2.3</td>
<td>5.4</td>
<td>100.0</td>
<td>3.7</td>
<td>8.4</td>
<td>5.1</td>
</tr>
<tr>
<td>Intensive correction order (ICO)</td>
<td>0.5</td>
<td>0.3</td>
<td>1.0</td>
<td>100.0</td>
<td>0.6</td>
<td>1.1</td>
</tr>
<tr>
<td>Community-based order (CBO)</td>
<td>2.1</td>
<td>4.8</td>
<td>8.4</td>
<td>2.3</td>
<td>100.0</td>
<td>1.4</td>
</tr>
<tr>
<td>Fine</td>
<td>30.0</td>
<td>33.6</td>
<td>46.3</td>
<td>39.1</td>
<td>13.1</td>
<td>100.0</td>
</tr>
<tr>
<td>Total people sentenced</td>
<td>11,096</td>
<td>1,945</td>
<td>15,384</td>
<td>4,095</td>
<td>15,379</td>
<td>140,201</td>
</tr>
</tbody>
</table>

Source: Turner (2007)

93 Most data are published on the basis of the sentence attached to the ‘principal proven offence’ which generally refers to the offence proven that attracted the most serious sentence according to the sentencing hierarchy.

94 Department of Justice, unpublished data.
In the higher courts just under a third (31.8 per cent) of wholly suspended sentences were combined with another sentence type, while around 45 per cent of partially suspended sentences formed part of a combination order.\textsuperscript{95} Greater use is made in the higher courts of CBOs, in combination with suspended sentence orders, when compared to offenders sentenced in the Magistrates’ Court, while less use is made of fines. Over the period 2000–01 to 2006–07, just over 15 per cent of wholly suspended sentences were ordered in combination with a CBO, compared to more than 12 per cent ordered in combination with a fine. The Council has found that in the higher courts, there has been an increase in the use of the CBO/wholly suspended sentence combination. While in 2000–01, only around 6 per cent of wholly suspended sentences were ordered in combination with a CBO, by 2005–06 the proportion of wholly suspended sentences ordered in combination with a CBO had grown to 20 per cent, dropping back to 17 per cent in 2006–07.\textsuperscript{96}

<table>
<thead>
<tr>
<th></th>
<th>Imp</th>
<th>PSS</th>
<th>WSS</th>
<th>ICO</th>
<th>CBO</th>
<th>Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>Imprisonment (Imp)</td>
<td>100.0</td>
<td>31.5</td>
<td>2.1</td>
<td>0.3</td>
<td>3.1</td>
<td>24.6</td>
</tr>
<tr>
<td>Partially suspended sentence (PSS)</td>
<td>5.0</td>
<td>100.0</td>
<td>2.8</td>
<td>0.8</td>
<td>1.8</td>
<td>5.8</td>
</tr>
<tr>
<td>Wholly suspended sentence (WSS)</td>
<td>1.1</td>
<td>8.9</td>
<td>100.0</td>
<td>1.1</td>
<td>8.9</td>
<td>1.1</td>
</tr>
<tr>
<td>Intensive correction order (ICO)</td>
<td>0.0</td>
<td>0.3</td>
<td>1.0</td>
<td>100.0</td>
<td>0.1</td>
<td>2.5</td>
</tr>
<tr>
<td>Community-based order (CBO)</td>
<td>0.9</td>
<td>3.4</td>
<td>15.2</td>
<td>0.5</td>
<td>100.0</td>
<td>13.7</td>
</tr>
<tr>
<td>Fine</td>
<td>5.6</td>
<td>8.2</td>
<td>12.4</td>
<td>9.4</td>
<td>10.3</td>
<td>100.0</td>
</tr>
<tr>
<td>Total people sentenced</td>
<td>6,395</td>
<td>1,019</td>
<td>3,230</td>
<td>393</td>
<td>1,930</td>
<td>1,452</td>
</tr>
</tbody>
</table>

Source: Turner (2007)

The Council is also monitoring the use of suspended sentences for commonly occurring ‘serious offences’ as defined in section 3 of the Sentencing Act 1991 (Vic). For offences committed on or after 1 November 2006, courts are able to wholly suspend a prison sentence only in exceptional circumstances. Despite the fact that many offenders sentenced in 2006–07 would have been sentenced for offences committed prior to the new provisions coming into force, the data suggest that there has already been a shift in sentencing practices by the courts for these offences. From 2005–06 to 2006–07 the use of wholly suspended sentences has decreased for several offences:

- for rape the use of wholly suspended sentences has dropped from 8.1 per cent of all sentences to 1.9 per cent (representing one offence);
- for intentionally causing serious injury the use of wholly suspended sentences had dropped from 23.6 per cent of all sentences to 12.4 per cent; and
- for armed robbery the use of suspended sentences has dropped from 9.7 per cent to 8.2 per cent of all sentences.\textsuperscript{97} See further Figure 7, below.

\textsuperscript{95} Ibid.
\textsuperscript{96} Ibid.
\textsuperscript{97} Ibid.
Suspended Sentences and the Impact of Mandatory Sentences

Section 30 of the *Road Safety Act 1986* (Vic)

2.51 One of the major factors that has led to the high use of suspended sentences in the Magistrates’ Court is the mandatory minimum sentence of one month’s imprisonment that applies under section 30 of the *Road Safety Act 1986* (Vic) to second and subsequent offences of driving while disqualified or suspended. In 2006–07, nearly one in four (24.1 per cent) of those sentenced for the offence of driving while disqualified received a suspended sentence, representing approximately 18.5 per cent of all suspended sentences imposed in the Magistrates Court.99 The overwhelming majority of these sentences (95.2 per cent) were wholly suspended.100

2.52 As Figure 8 (below) illustrates, the number of people sentenced for this offence over the period 2000–01 to 2006–07 has increased markedly, with approximately three times as many people sentenced in 2006–07 compared with 2000–01.101 However, the proportion of people who received a suspended sentence for this offence has remained relatively stable at around one in four.102

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98 These figures are based on a count of principal proven offence for offences and the total effective sentence for sentence type.

99 Turner (2007), above n 22.

100 Ibid.

101 Ibid.

102 Ibid.
2. Suspended Sentences of Imprisonment

Figure 8: The number of suspended sentences imposed for driving while disqualified per year by type of suspended sentence, Magistrates’ Court, 2000–01 to 2006–07

Source: Turner (2007)

The five-year breach rate of suspended sentences imposed during 2000–01 and 2001–02 for driving while disqualified was 24.8 per cent, which was below the 29.1 per cent breach rate for all suspended sentences imposed by the Magistrates’ Court over this period.103 Consistent with the Council’s findings on breach more generally, offenders aged under 25 years had a higher five-year breach rate than those aged 25 years or older (30.6 per cent compared to 22.7 per cent).104 As Figure 9 shows, of all offenders who received a suspended sentence for a s 30 offence, 15.9 per cent had their sentence wholly or partially restored as a result of breach.105

Figure 9: The percentage of suspended sentences imposed for driving while disqualified by whether breached and the outcome of breach, Magistrates’ Court, 2000–01 and 2001–02

Source: Turner (2007)

103 Ibid.
104 Ibid.
105 Ibid.
2.54 The effects of this mandatory sentencing provision are also evident in the Council’s examination of the use of intensive correction orders (ICOs). Over one in four offenders who commenced an ICO in 2006–07 (28 per cent) received the ICO for a s 30 offence.  

2.55 A number of those consulted throughout this review have raised concerns about this mandatory penalty and, in particular, the potential impact on offenders convicted of this offence in Victoria if suspended sentences are phased out altogether.

Issues

2.56 The current mandatory minimum term of one month’s imprisonment for second and subsequent offences of driving while disqualified or while suspended was introduced in 1978 by the Motor Car Act 1978 (Vic), although the mandatory requirement to impose an immediate term of imprisonment, which originally applied also to first-time offenders, can be traced back to 1967. Prior to this the court had the option to impose a fine. The change was made in response to a recommendation by the Road Toll Committee.

2.57 As a recent article criticising this mandatory provision suggests: ‘A second or subsequent breach of s 30 is simply a summary traffic offence, yet the provision carries the harshest penalty that the State has the capacity to inflict’. A number of ostensibly more serious driving offences, such as dangerous driving and drink driving, to name but a few, do not carry this form of mandatory provision and allow a court to impose a fine, a term of imprisonment of any length up to the maximum permitted, or an alternative form of sanction (such as a CBO).

2.58 This same argument could be applied when comparing s 30 to other forms of criminal offences, which generally specify only a maximum penalty and allow courts a broad discretion to determine the appropriate and proportionate sentence. For example, depending on the circumstances of the case, an offender convicted of a serious offence, such as armed robbery or aggravated burglary, may not necessarily receive a sentence of imprisonment, while in sentencing an offender convicted of a repeat offence of driving while disqualified or suspended, a court has no other choice but to impose a custodial sentence.


107 Motor Car Act 1978 (Vic) s 6(1). While the offence of driving while disqualified or suspended as originally introduced in the Motor Car Act 1928 (Vic) by s 9 of the Motor Car (Amendment) Act 1949 (Vic) and later reproduced in the Motor Car Act 1951 (Vic) and Motor Car Act 1958 (Vic), carried a minimum penalty of one month’s imprisonment for second and subsequent offences, the court retained a power to fine offenders in lieu of imprisonment due to the operation of section 71 of the Justices Act 1915 (Vic), and later section 74(1) of the Justices Act 1958 (Vic). Consequently, the imposition of a term of imprisonment was not mandatory.

108 While there was no mandatory minimum sentence for first time offences, in 1967 the discretion to impose a fine in place of a term of imprisonment was removed: Motor Car Act 1967 (Vic) s 10. In 1978 mandatory imprisonment for a first offence was removed and the court was given the discretion to impose a penalty of not more than $1,000 or imprisonment of up to six months: Motor Car Act 1978 (Vic) s 6(1).


110 Ibid 28.

111 Ibid 47.

2.59 It has been argued that s 30 violates the principle of proportionality because the punishment ‘far outweighs the objective seriousness of the offence’ and ‘can impact disproportionately on those [who] use their motor vehicle often, particularly in the course of their work’.113

2.60 Further, the offence of driving while disqualified or suspended does not, of itself, cause any particular harm or injury. While there is some evidence that this offending behaviour increases the risk of accidents and injury to other road users and often occurs alongside other types of criminal behaviour, it has been argued that ‘the harmfulness of driving while disqualified is fully encapsulated in the characterisation of the offence as simply driving a car without the appropriate paperwork’.”114

2.61 There is a lack of a clear basis or rationale for the mandatory minimum. While originally the introduction of the offence with a penalty of imprisonment was linked to the concept of contempt of court, there are now a number of administrative processes that may lead to suspension or disqualification.115 Similarly, while subsequent increases in the penalty for s 30 offences have been justified on the basis that they would ‘deter drivers’,116 there is no reason to believe that such a penalty is effective in deterring this type of behaviour. For example, there has been a significant increase in the number of people sentenced for this offence over the period 2000–01 to 2006–07. There were approximately 2,846 people sentenced in Victoria for the principal offence of unlicensed driving in 2000–01, compared to 8,615 people in 2006–07.117

2.62 The growth in the use of administrative licence sanctions in more recent years was never envisaged when the mandatory provision was first introduced which also raises procedural fairness issues.118

2.63 Victoria is the only Australian jurisdiction that has a mandatory minimum penalty for a second or subsequent offence of driving while disqualified or suspended. While each state and territory in Australia has an equivalent offence, no other jurisdiction has a specified minimum term of imprisonment or precludes the court from fixing a penalty other than imprisonment.119

Submissions and Consultations

2.64 The Council, in preparing its draft recommendations, proposed the removal of the mandatory minimum penalty under s 30 of the Road Safety Act 1986 (Vic) to restore to courts full sentencing discretion.

2.65 The draft recommendation received strong support from most of those consulted. Victoria Legal Aid, the Law Institute of Victoria, Youthlaw, the Mental Health Legal Centre, Fitzroy Legal Service and the Federation of Community Legal Centres all endorsed the removal of the mandatory minimum penalty.120


114 Bagaric and Edney (2001), above n 113, 18.


118 Coleman (2006), above n 109, 35–41, 52.

119 Ibid 34.

120 Submissions 3.5 (Victoria Legal Aid), 3.7 (Youthlaw and the Mental Health Legal Centre), 3.9 (Fitzroy Legal Service), 3.10 (Federation of Community Legal Centres) and 3.11 (Law Institute of Victoria).
2.66 Victoria Legal Aid strongly supported the removal of the mandatory minimum penalty for this offence and suggested that its removal would be ‘an important step in restoring sentencing discretion to judges, and reducing criticism about the use of suspended sentences in Victoria’.\(^{121}\)

2.67 The Federation of Community Legal Centres and Fitzroy Legal Service also fully supported the restoration of full sentencing discretion to the courts for this offence.\(^{122}\) In their submission, the Federation argued that the abolition of the mandatory minimum penalty for this offence would be ‘in line with the Attorney-General’s Justice Statement which states a desire to “increase the ability of courts to tailor sentences to the distinctive characteristics of individual offenders, including where previous orders have been breached”’.\(^{123}\)

2.68 Fitzroy Legal Service was particularly concerned about the use of suspended sentences for driving while suspended or disqualified. It noted anecdotally that many of the suspended sentences imposed on their clients were in relation to this one offence and suggested that the high proportion of suspended sentences for this offence may indicate that the judiciary ‘prefer to use their discretion in relation to this offence’.\(^{124}\)

2.69 Corrections Victoria noted in its submission that the removal of the mandatory minimum penalty ‘would cause some decrease in custodial sentences’.\(^{125}\)

2.70 The Office of Public Prosecutions (OPP) had concerns about removing the mandatory minimum for this offence because of the dangers associated with this type of repeat offending and the need for deterrence. However, it acknowledged the tension created by such a mandatory penalty in relation to certain types of offenders, such as young offenders, where the emphasis is on rehabilitation. Ultimately, the OPP took the view that ‘other options for attaining an effective deterrent mechanism to deal with these offenders should be explored…before removing the penalty’.\(^{126}\)

### The Council’s View

2.71 The Council is concerned that one of the main drivers of the high use of suspended sentences in the Magistrates’ Court is the existence of the mandatory minimum sentence under s 30 of the Road Safety Act 1986 (Vic). As our examination of the data has shown, a substantial proportion of suspended sentences in Victoria (18.5 per cent) are imposed for this one offence, which is clearly a by-product of the existence of this mandatory provision.

2.72 The high rates of use of suspended sentences for section 30 offences could be addressed by removing the power of the court in sentencing an offender to substitute other forms of ‘imprisonment’ (such as a suspended sentence or ICO). However, this would risk a dramatic rise in the prison population due to the influx of offenders convicted of what is a summary offence.

2.73 It would also fail to address the more fundamental concerns of a majority of the Council regarding the existence of a mandatory minimum penalty for what is a lower-level offence. There are other offences that can have potentially more serious consequences, such as driving in a dangerous manner or drink driving, that do not attract a mandatory minimum sentence of imprisonment on a second or subsequent offence. We note that Victoria is the only Australian jurisdiction in which this offence attracts a mandatory minimum prison sentence.

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\(^{121}\) Submission 3.5 (Victoria Legal Aid).

\(^{122}\) Submissions 3.9 (Fitzroy Legal Service) and 3.10 (Federation of Community Legal Centres).

\(^{123}\) Department of Justice, Attorney General’s Justice Statement (2004) 30 cited in Submission 3.10 (Federation of Community Legal Centres).

\(^{124}\) Submission 3.9 (Fitzroy Legal Service).

\(^{125}\) Submission 3.6 (Corrections Victoria).

\(^{126}\) Submission 3.12 (Office of Public Prosecutions).
2.74 The Council acknowledges that there is some evidence that driving while disqualified or suspended increases the risk of accidents and injury both to the driver and to others on the road and often occurs alongside other dangerous and illegal conduct (for example, drink driving and other traffic offences).\(^{127}\) However, as some commentators have noted,\(^{128}\) the offence itself is constituted by the simple act of driving of a vehicle on a roadway and may therefore occur in circumstances in which the offender is not driving dangerously, is not affected by alcohol or drugs and no direct injury is caused. There is nothing extraordinary about second or subsequent instances of this offence that would warrant it being singled out for a mandatory minimum penalty, when there are other much more serious offences for which the courts retain their sentencing discretion.

2.75 While we do not wish to discount the significant challenges faced by the criminal justice system in responding effectively to road users who drive while disqualified or suspended, we do not regard mandatory minimum sentences as the solution. The current provision, which mandates the use of a particular sanction (imprisonment) of a minimum length irrespective of the particular circumstances of the case not only carries with it the potential for injustice but is clearly contrary to the principle of proportionality. The increasing number of s 30 offences being dealt with by the courts also provides some evidence of the failure of this penalty to meet its original objective—that is, to deter people from driving while disqualified or suspended.

2.76 On the basis of our concerns expressed above, the Council does not believe the current mandatory minimum penalty provides an appropriate, effective or sufficient response to reducing the harm associated with this offence. It is further concerned that, in part, the high use of suspended sentences in Victoria is a product of this mandatory penalty.

2.77 A majority of the Council believes that the mandatory minimum penalty for driving while disqualified or suspended is an anomalous provision that, in the absence of any convincing rationale for its retention, should be abolished. Accordingly, the Council recommends that the mandatory minimum penalty under s 30 of the Road Safety Act 1986 (Vic) should be removed to restore to sentencers the discretion to impose a proportionate and appropriate sentence. Should the mandatory minimum penalty be removed, a court would still be permitted to impose an immediate term of imprisonment or a suspended sentence; however, the use of these sanctions would be reserved for cases in which such an outcome is warranted.

2.78 A minority of the Council, while sharing concerns about the effectiveness of the mandatory penalty and its contribution to the high numbers of suspended sentences in Victoria, took the view that any reforms to the current provisions be deferred until such time as additional research has been undertaken and more effective sentencing responses identified.

2.79 The Council is unanimous in its view that further research is required to assist in the development of more effective responses that in the longer term may reduce the incidence of this offence and the harm it, and associated offending, may potentially cause to the community. With this in mind, the Council has commenced work on a research project that will examine the underlying causes and consequences of unlicensed driving, with a view to developing more effective criminal justice system responses, including sentencing responses, to this form of criminal behaviour.\(^{129}\)

RECOMMENDATION 1: Mandatory Minimum Penalty under Section 30 of the Road Safety Act 1986

**Recommendation 1–1**

Section 30 of the Road Safety Act 1986 (Vic) should be amended to remove the mandatory minimum penalty of one month’s imprisonment for second and subsequent offences of driving while disqualified or suspended, and to restore to the courts their full sentencing discretion in relation to this offence.

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127 See further Sentencing Advisory Council (2007), above n 117.
128 See, for example, Bagaric and Edney (2001), above n 113, 10.
Breach Rates of Suspended Sentences

2.80 Suspended sentences may only be breached by an offender committing a new offence punishable by imprisonment. Under the existing legislation, a court must restore the suspended prison sentence and order the offender to serve it in gaol unless of the opinion that it would be unjust to do so in view of any exceptional circumstances that have arisen since the original order was made. The Council recommended that this provision be retained in keeping with its positioning in the sentencing hierarchy below imprisonment, and to preserve what is considered to be the special deterrent value of a suspended sentence.130

2.81 The Council conducted an initial exploratory study of breach rates in its Discussion Paper, and as more recent and better quality data have become available, has re-examined breach rates for suspended sentence orders imposed by both the higher courts and the Magistrates’ Court.

2.82 The most recent data released by the Council include breach data for suspended sentences handed down over the two-year period 2000–01 to 2001–02. The breach rate of suspended sentences after five years was 27.5 per cent. Around half of these breaches were finalised within 12 months of the sentence being imposed (13.8 per cent), while nearly nine in 10 breaches were finalised within two years (23.6 per cent of 27.5 per cent) (see Figure 10, below).

Figure 10: Breach rate of suspended sentences by months till breach, Magistrates’ Court and higher courts combined, 2000–01 and 2001–02

Source: Turner (2007)

2.83 In the Magistrates’ Court, 28.7 per cent of wholly suspended sentence orders made over this period, and 31.8 per cent of partially suspended were breached by the commission of a new offence. The picture that emerges from an examination of the higher courts data, however, is quite different, with only 8.2 per cent of wholly suspended sentences, and 10 per cent of partially suspended sentences handed down over this same period resulting in breach action.131

2.84 As Figure 11 illustrates, overall the breach rate for the Magistrates’ Court was 29.1 per cent, compared to 8.6 per cent in the higher courts.

130 The capacity of a suspended sentence to achieve special deterrence has been questioned. A recent New South Wales study has found that, taking into account other characteristics of the offence and offender, a suspended sentence is no more likely to prevent reoffending than a supervised bond, which has far less certain consequences on breach: Don Weatherburn and Lorana Bartels, ‘The Deterrent Effect of Suspended Sentences in Australia’ (article under review).

131 Turner (2007), above n 22.
2.85 Of all people who initially received a suspended sentence over the two-year period examined, 17.2 per cent had the suspended prison sentence wholly or partially restored following a breach by further offending. Assuming that courts imposed a suspended sentence only in circumstances in which an immediate term of imprisonment would otherwise have been ordered (which, taking into account the known net-widening effects of suspended sentences, could be viewed as highly unlikely), the result is that of the 12,089 people who received a suspended sentence over this two-year period, 8,762 people were successfully diverted from prison. A further 10.2 per cent of people (n=1,239) breached the order and had the operational period of the order extended (2.7 per cent), or no further order made (7.5 per cent).
2.86 Examining outcomes of breach by court level, the restoration rates are quite similar (around 63 per cent in the Magistrates’ Court and 66 per cent in the higher courts) (see Figure 13, below). However, the use by magistrates of suspended sentences has a much larger overall impact on the number of prison receptions because the vast majority of suspended sentences (around 91 per cent, based on figures for 2006–07) are handed down in the Magistrates’ Court, (which sentences close to 98 per cent of adult offenders in Victoria), and of the suspended sentences handed down, a much higher proportion than those imposed by the higher courts is subsequently breached. Examining the data for suspended sentences handed down in 2000–01 to 2001–02, 97.6 per cent of all offenders processed for breach of a suspended sentence order had originally been sentenced in the Magistrates’ Court.

Figure 13: The percentage of suspended sentences by the result of breach and court level, 2000–01 and 2001–02

<table>
<thead>
<tr>
<th>Court Level</th>
<th>No order made</th>
<th>Term extended</th>
<th>Restored</th>
</tr>
</thead>
<tbody>
<tr>
<td>Magistrates’ Court</td>
<td>27.4</td>
<td>9.9</td>
<td>62.7</td>
</tr>
<tr>
<td>Higher courts</td>
<td>21.4</td>
<td>13.1</td>
<td>65.5</td>
</tr>
<tr>
<td>Combined</td>
<td>27.3</td>
<td>9.9</td>
<td>62.8</td>
</tr>
</tbody>
</table>

Source: Turner (2007)

2.87 Examining breach rates by age and gender:

- offenders aged under 25 years had a higher breach rate than those aged 25 years or older; this difference was more significant for sentences handed down by the higher courts (13.5 per cent versus 6.7 per cent), compared to the Magistrates’ Court (34.3 per cent versus 26.9 per cent); and
- in the Magistrates’ Court, men had a slightly higher breach rate than women (29.6 per cent compared to 26.6 per cent), while in the higher courts women had a slightly higher breach rate than men (10.1 per cent compared to 8.4 per cent).

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2.88 There was substantial variation in the breach rates when examined by offence type for which the sentence was imposed. Offenders who received a suspended sentence for a property offence in the Magistrates' Court had the highest breach rates (35.3 per cent)(see Figure 14, below).

Figure 14: Breach rate of suspended sentences by months till breach, person, property and drug offences, Magistrates' Court, 2000–01 and 2001–02

Source: Turner (2007)
Tables 4 and 5 set out the breach rates for the 10 offences for which a suspended sentence was imposed in the Magistrates’ Court over the period 2000–01 and 2001–02 that carried the highest breach rates and the lowest breach rates, respectively.\(^\text{133}\)

**Table 4:** The number of people who received a suspended sentence and the breach rate for each of the 10 offences that had the highest breach rates, Magistrates’ Court, 2000–01 and 2001–02

<table>
<thead>
<tr>
<th>Offence</th>
<th>No.</th>
<th>Breach rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Carry regulated weapon</td>
<td>146</td>
<td>52.1%</td>
</tr>
<tr>
<td>2 Aggravated burglary</td>
<td>68</td>
<td>45.6%</td>
</tr>
<tr>
<td>3 Possess proceeds of crime</td>
<td>95</td>
<td>43.2%</td>
</tr>
<tr>
<td>4 Fail to answer bail</td>
<td>150</td>
<td>40.7%</td>
</tr>
<tr>
<td>5 Burglary</td>
<td>1,128</td>
<td>39.1%</td>
</tr>
<tr>
<td>6 Theft</td>
<td>1,624</td>
<td>37.4%</td>
</tr>
<tr>
<td>7 Assault police</td>
<td>110</td>
<td>36.4%</td>
</tr>
<tr>
<td>8 Breach intervention orders</td>
<td>162</td>
<td>34.0%</td>
</tr>
<tr>
<td>9 Assault with weapon</td>
<td>140</td>
<td>33.6%</td>
</tr>
<tr>
<td>10 Handle stolen goods</td>
<td>243</td>
<td>30.9%</td>
</tr>
</tbody>
</table>

Source: Turner (2007)

**Table 5:** The number of people who received a suspended sentence and the breach rate for each of the 10 offences that had the lowest breach rates, Magistrates’ Court, 2000–01 and 2001–02

<table>
<thead>
<tr>
<th>Offence</th>
<th>No.</th>
<th>Breach rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Drink driving (s. 49.1.B)</td>
<td>73</td>
<td>12.3%</td>
</tr>
<tr>
<td>2 Stalking</td>
<td>74</td>
<td>13.5%</td>
</tr>
<tr>
<td>3 Obtain financial property by deception</td>
<td>92</td>
<td>14.1%</td>
</tr>
<tr>
<td>4 Drink driving (s. 49.1.F)</td>
<td>500</td>
<td>16.4%</td>
</tr>
<tr>
<td>5 Cultivate a narcotic plant</td>
<td>106</td>
<td>17.9%</td>
</tr>
<tr>
<td>6 Recklessly cause serious injury</td>
<td>188</td>
<td>18.1%</td>
</tr>
<tr>
<td>7 Unlicensed driving</td>
<td>141</td>
<td>21.3%</td>
</tr>
<tr>
<td>8 Reckless conduct</td>
<td>102</td>
<td>21.6%</td>
</tr>
<tr>
<td>9 Traffick a drug of dependence</td>
<td>778</td>
<td>21.9%</td>
</tr>
<tr>
<td>10 Dangerous driving</td>
<td>138</td>
<td>22.5%</td>
</tr>
</tbody>
</table>

Source: Turner (2007)

The highest breach rate was for the 146 people given a suspended sentence for the principal proven offence of carrying a controlled weapon (52.1 per cent), while the 73 people given a suspended sentence for the principal proven offence of drink driving (under s 49(1)(b) of the *Road Safety Act 1986* (Vic)) had the lowest breach rate (12.3 per cent).

The highest breach rates for offenders sentenced to a suspended sentence in the higher courts were for offenders convicted of a property or a person offence (both 9.0 per cent),\(^\text{134}\) although these rates were still substantially below the breach rates for offences attracting a suspended sentence in the Magistrates’ Court (see Figure 15, below).

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133 To protect against the effect of small numbers on the overall proportion of orders breached, this analysis includes only offences in which there were 50 or more people given a suspended sentence for that offence.

134 Turner (2007), above n 22.
2.92 Tables 6 and 7 set out the breach rates for the five offences for which a suspended sentence was imposed in the Magistrates’ Court over the period 2000–01 and 2001–02 that carried the highest breach rates and the lowest breach rates respectively.\textsuperscript{135}

2.93 The highest breach rate was for the 79 people given a suspended sentence for the principal proven offence of armed robbery (21.5 per cent). None of the 23 people who received a suspended sentence for indecent assault and none of the 21 people who received a suspended sentence for sexual penetration with a child aged between 10 and 16 breached their suspended sentence.

\textsuperscript{135} To protect against the effect of small numbers on the overall proportion of orders breached, this analysis includes only offences in which there were 20 or more people given a suspended sentence for that offence: Turner (2007), above n 22.
Table 6: The number of people who received a suspended sentence and the breach rate for each of the five offences that had the highest breach rates, higher courts, 2000–01 and 2001–02

<table>
<thead>
<tr>
<th>Offence</th>
<th>No.</th>
<th>Breach rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Armed robbery</td>
<td>79</td>
<td>21.5%</td>
</tr>
<tr>
<td>Aggravated burglary</td>
<td>68</td>
<td>16.2%</td>
</tr>
<tr>
<td>Traffick in a drug of dependence</td>
<td>88</td>
<td>12.5%</td>
</tr>
<tr>
<td>Causing injury intentionally or recklessly</td>
<td>45</td>
<td>11.1%</td>
</tr>
<tr>
<td>Obtain property by deception</td>
<td>31</td>
<td>9.7%</td>
</tr>
</tbody>
</table>

Source: Turner (2007)

Table 7: The number of people who received a suspended sentence and the breach rate for each of the five offences that had the lowest breach rates, higher courts, 2000–01 and 2001–02

<table>
<thead>
<tr>
<th>Offence</th>
<th>No.</th>
<th>Breach rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indecent assault</td>
<td>23</td>
<td>0.0%</td>
</tr>
<tr>
<td>Sexual penetration with a child aged between 10 and 16</td>
<td>21</td>
<td>0.0%</td>
</tr>
<tr>
<td>Handling stolen goods</td>
<td>27</td>
<td>3.7%</td>
</tr>
<tr>
<td>Theft</td>
<td>50</td>
<td>6.0%</td>
</tr>
<tr>
<td>Causing serious injury intentionally</td>
<td>47</td>
<td>6.4%</td>
</tr>
</tbody>
</table>

Source: Turner (2007)

The Future of Suspended Sentences

Issues and Consultation

2.94 In the Council’s more recent consultations on the draft proposals with representatives of the legal profession, there has continued to be widespread support for the retention of suspended sentences. The Law Institute of Victoria, reflecting the views of many, has urged the Council to reconsider the eventual phasing out of suspended sentences:

The LIV is strongly opposed to the abolition of suspended sentences and we refer to our previous submission to the SAC on this issue. We reiterate that suspended sentences play a crucial role in the sentencing hierarchy and allow courts to achieve a balance between high denunciation of the offending, general and specific deterrence, appropriate punishment and offender rehabilitation. We urge you to reconsider any removal or phase out of suspended sentences.

2.95 The Law Institute has pointed to the utility of suspended sentences not only more generally, but also in circumstances in which an offender has breached a conditional order, or for offences attracting a mandatory term of imprisonment, and has cautioned that their removal would result in an inevitable increase in prisoner numbers:

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136 For example, Submissions 3.2 (Victoria Legal Aid), 3.3 (Federation of Community Legal Centres) and 3.4 (Law Institute of Victoria).

137 Submission 3.4 (Law Institute of Victoria).
2. Suspended Sentences of Imprisonment

We note that suspended sentences are often imposed by judges or magistrates when a lesser sentence (such as a community-based order) has been breached by an offender. We also note that a suspended sentence is commonly imposed when a defendant is found guilty of an offence that carries a penalty of mandatory imprisonment, such as driving while disqualified. These examples highlight the utility of suspended sentences in the sentencing hierarchy. We submit that the removal of suspended sentences would result in huge cost implications due to the anticipated marked increase in prison numbers.138

2.96 Victoria Legal Aid also strongly supported the retention of suspended sentences, as it believes ‘there are occasions where suspended sentences are appropriate and their removal may result in some offenders receiving inappropriately harsh sentences’.139 Similarly, the Fitzroy Legal Service:

maintains that suspended sentences are an important disposition and are an appropriate sentencing option in many cases. FLS favours greater flexibility and options in sentencing and therefore supports the retention of suspended sentences in appropriate cases.140

2.97 Similar views were expressed by the Federation of Community Legal Centres, Youthlaw and the Mental Health Legal Centre.141

2.98 As our examination of the use of suspended sentences in Victoria suggests, the implications of removing suspended sentences as a sentencing option are likely to vary depending on the court level examined. While suspended sentences represent only around 6 per cent of sentencing outcomes in the Magistrates’ Court, this translates to over 5,500 people sentenced each year. The potential impact of removing the power to suspend a prison sentence in the Magistrates’ Court in terms of the overall numbers of offenders affected would therefore be significant.

2.99 In order to minimise the risks of significant increases in the prison population and correctional costs spiralling out of control, an alternative form of order or orders would need to be found that would fulfil the same purpose as a suspended sentence. The Council’s original interim proposals suggested many wholly suspended sentences could be replaced with a conditional community order with core reporting and notification conditions. However, requiring offenders to comply with even these minimal requirements would necessitate some allocation of additional funding to support the administration, management and monitoring of these conditions.

2.100 Apart from a fine, the only existing form of conditional sentencing order that is ‘cost neutral’, in that it does not involve the state providing any additional monitoring of, or services to offenders, is an adjourned undertaking or bond. Under this form of order an offender is released into the community for up to five years, with or without a conviction being recorded, conditional on the offender giving an undertaking to appear before the court when called upon to do so, to be of good behaviour and to comply with any other conditions the court imposes.142 A failure to comply with these conditions may result in the court confirming the order, varying the order, or resentencing the offender for the offence.143

138  Ibid.
139  Submission 3.5 (Victoria Legal Aid).
140  Submission 3.9 (Fitzroy Legal Service).
141  Submissions 3.7 (Youthlaw and the Mental Health Legal Centre) and 3.10 (Federation of Community Legal Centres).
142  Sentencing Act 1991 (Vic) ss 72 (with conviction) and 75 (without conviction).
143  Sentencing Act 1991 (Vic) s 79(4). In addition to these powers, the court is permitted to impose a level 10 fine.
2.101 While at one time bonds made up around 20 per cent of all dispositions in the higher courts, and 19 per cent of outcomes in the Magistrates’ Court, their usage fell dramatically in the higher courts following the introduction of the 1991 Sentencing Act and also declined in the Magistrates’ Court. Adjourned undertakings currently make up around 12.5 per cent of sentencing outcomes in the Magistrates’ Court, while adjourned undertakings, dismissals and discharges combined comprise only around 4 per cent of all sentencing outcomes in the higher courts. The drop in usage, particularly in the higher courts, may to some extent be due to the positioning of these orders in the sentencing hierarchy. These are lower-level orders and the stated purposes of these orders and other similar orders set out in the 1991 Sentencing Act suggest that they are primarily for use in the case of less serious forms of offending.

2.102 In the case of the Magistrates’ Court, the question is whether the possible net-widening effects of suspended sentences, combined with the substitutional nature of the sanction which is, but is not, a ‘term of imprisonment’, current breach rates and community confidence issues all justify the removal of this option in Victoria.

2.103 As discussed above, one issue that would need to be addressed should magistrates no longer have the power to order a prison sentence to be suspended is the mandatory one-month term of imprisonment for second or subsequent offences under s 30 of the Road Safety Act 1986 (Vic). As discussed above, offenders convicted of this offence constitute the largest single group of offenders receiving a suspended sentence in the Magistrates’ Court. In 2006–07 alone, nearly one in four people sentenced for the offence of driving while disqualified received a suspended sentence, representing 18.5 per cent of all suspended sentences imposed in the Magistrates’ Court. Intensive correction orders (ICOs)—another form of sanction that can be substituted for immediate imprisonment—similarly are often used for offenders convicted of this offence. ICOs are most commonly imposed on offenders for a traffic offence (around 43 per cent in 2006–07), and a substantial proportion of these (two-thirds) are for the offence of driving while disqualified.

148 The legislation itself provides that the purpose of order made under that Division of the Act governing the use of dismissions, discharges and adjournments are: (a) to provide for the rehabilitation of an offender by allowing the sentence to be served in the community unsupervised; (b) to take account of the trivial, technical or minor nature of the offence committed; (c) to allow for circumstances in which it is inappropriate to record a conviction (non-conviction orders only); (d) to allow for circumstances in which it is inappropriate to inflict any punishment other than a nominal punishment; (e) to allow for the existence of other extenuating or exceptional circumstances that justify the court showing mercy to an offender: Sentencing Act 1991 (Vic) s 70.
149 Some organisations consulted made specific recommendations in relation to undertakings. For example, a joint submission of the Mental Health Legal Centre and Youthlaw suggested this form of disposition ‘has great flexibility and is a more appropriate disposition to apply with treatment of behaviour conditions’, however suggested that there should be a process for review to allow for treatment conditions to be varied or revoked: Submission 3.1 (Youthlaw and the Mental Health Legal Centre).
In the case of sentences imposed in the higher courts, where from the recent data examined net-widening is not evident and breach rates are comparatively low, the question is whether suspended sentences are an appropriate sanction, taking into account the seriousness of the offence and the purposes of punishment. The low rates of breach of orders imposed by the higher courts that have been revealed by our more recent examination of the data suggest that the higher courts are appropriately targeting these orders at lower-risk offenders; however, this still leaves open the question of whether suspended sentences are an appropriate sentence in the case of more serious forms of offending, where something more than a prison record and the threat of the prison sentence being served on breach may be considered warranted. It was these concerns that led the Council in Part 1 of its Final Report to recommend restrictions to the availability of the power to wholly suspend a prison sentence. The impetus for reforms limiting the availability of other similar orders in Canada and elsewhere has been similar.

Taking the use of suspended sentences by both court levels into account, the abolition of the power to suspend may risk a substantial increase in the use of imprisonment if suitable community based alternatives are not found. The recent experience of New Zealand would seem to suggest that to avoid placing the correctional system under pressure, any reforms should be introduced incrementally, and their impacts closely monitored. Consistent with this the Federation of Community Legal Centres, while repeating its earlier support for the retention of suspended sentences, suggested that if suspended sentences are to be phased out, the original timelines should be revisited:

\[\ldots\] in order to ensure that adequate time is given to conduct longitudinal studies and sufficiently evaluate the impact of alternative sentencing options before suspended sentences are completely removed from the sentencing hierarchy.\[150\]

The Council’s View

After reviewing more recent evidence on the use of suspended sentences, the Council believes that sentencing practices have changed and that courts are taking a more cautious approach to the use of suspended sentences than was previously the case when we commenced this inquiry. The initial reforms that have taken place, including restricting the availability of suspended sentences for more serious forms of offending and the provision of legislative guidance on factors that must be taken into account before a prison sentence is suspended, we believe, over time will further contribute to the more responsible use of this order and minimise the risks of its inappropriate use. While it is too early to tell the true impact of these changes, the Council has already identified a downward shift in the use of suspended sentences for serious offences such as intentionally causing serious injury, armed robbery and rape. The Council accepts that it has an important role to play in continuing to monitor the use of this order, and to report back on any important trends.

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 system costs. We further recognise that the government will require time to consider our proposals and should our recommendations be accepted, for reforms to be introduced and funding secured to support their implementation. For these reasons we no longer consider the original three-year timetable for the phasing out of suspended sentences by 2009 to be realistic.

\[150\] Submission 3.3 (Federation of Community Legal Centres).
2.108 We suggest that the review of the use of the power to suspend in light of the existence of better intermediate sentencing orders should commence after the implementation of the other reforms recommended in this Report (to the extent that they are adopted) is complete and sufficient time has elapsed to allow a proper assessment to be undertaken of the impact of these reforms. In the interim, the Council intends to monitor and report back on the trends in the use of suspended sentences, including the apparent impact of the reforms to this and other forms of sentencing orders. The evaluation and monitoring of the changes proposed is discussed further at [13.31]–[13.32] of this Report.

## RECOMMENDATION 2: Suspended Sentences

<table>
<thead>
<tr>
<th>Recommendation 2-1</th>
</tr>
</thead>
<tbody>
<tr>
<td>The appropriate use of the power to suspend a prison sentence in Victoria under section 27 of the <em>Sentencing Act 1991 (Vic)</em> should be reviewed after the reforms recommended in this Report (to the extent that they are adopted) have been implemented and sufficient time has elapsed to evaluate their impact properly.</td>
</tr>
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<table>
<thead>
<tr>
<th>Recommendation 2-2</th>
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<tbody>
<tr>
<td>As recommended in Part 1 of the Council’s <em>Suspended Sentences: Final Report</em>, the Council should monitor the use of suspended sentences and other intermediate orders to inform the review.</td>
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Chapter 3  Reviewing Intermediate Sanctions
3. Reviewing Intermediate Sanctions

Suspended Sentences and Intermediate Sentencing Orders
Chapter 3  Reviewing Intermediate Sanctions

Introduction

3.1 Following the release of our Discussion Paper it became increasingly apparent to us that reforms to suspended sentences could not be considered without taking into account the broader range of sentencing orders currently available in Victoria. What we believed to be the overuse of suspended sentences in Victoria, in our view, was at least partly due to the failings of other intermediate orders.

3.2 The overuse of suspended sentences was particularly troubling due to evidence that suggested these orders were encroaching into the territory previously occupied by lower-level sentencing orders, thereby exposing offenders who might otherwise have received a non-custodial sentence to the real prospect of imprisonment.

3.3 In the case of more serious offences against the person, the Council was conscious of concerns that suspended sentences in most cases failed to achieve a sentence that appropriately reflected the gravity of the offence and the harm caused to the victim. We were concerned that sentencers were too often faced with a choice between immediate imprisonment and suspension, and that the gap between these two options in terms of the consequences for an offender was too wide.

3.4 While we endorsed the view that in circumstances in which an offender has been convicted of a serious violent offence an immediate term of imprisonment will ordinarily be warranted, we also saw value in improving the range and structure of existing mid-range sentencing orders that might provide greater scope for sentencers to impose an appropriate and proportionate sentence.

3.5 In this chapter we discuss the concept of intermediate sanctions, what has fuelled their growth, how effective these orders are and some of the barriers to their effective use.

What are Intermediate Sanctions?

3.6 Intermediate sanctions or punishments in Victoria can generally be understood to be those sentencing orders that fall between immediate imprisonment and dismissals, discharges and adjournments. Intermediate orders include orders such as CBOs in Victoria, periodic detention and intensive supervision and/or correction orders.

3.7 Freiberg and Ross have identified two broad categories of intermediate sanctions:
   - ‘substitutional sanctions’, which empower a court on imposing a term of imprisonment to alter the form of imprisonment (such as suspended sentence orders); and
   - ‘alternative sanctions’, which are not dependent on a term of imprisonment being imposed, but rather exist as sentencing orders in their own right (such as CBOs).


152 Ibid.
Intermediate Sanctions in Victoria

3.8 Victoria has four intermediate substitutional sanctions which, while treated as ‘custodial’, allow the offender to remain in the community for the whole term of the sentence, provided the offender complies with the conditions of the order. They are: drug treatment orders;\(^{153}\) suspended sentences;\(^{154}\) intensive correction orders (ICOs);\(^{155}\) and home detention orders, which are sentences of imprisonment served by offenders in their own homes.\(^{156}\)

3.9 Combined custody and treatment orders—a form of ‘split’ sentence targeted at offenders with drug and alcohol issues—are a hybrid form of intermediate order. Under this form of sentence an offender must spend at least six months in prison, with the remainder of the sentence (up to a maximum of 12 months) spent in the community under conditions.\(^{157}\)

3.10 The only truly non-custodial intermediate order available for adult offenders in Victoria is the CBO, introduced in 1986, which is positioned above fines, dismissals, discharges and adjournments, and below suspended sentences and ICOs.

Explaining the Growth in Intermediate Orders

3.11 The popularity of intermediate sanctions in Victoria and other Western jurisdictions generally since the mid-20th century has been attributed to a desire by governments to keep growing prison populations in check and to offer a lower-cost alternative that provides greater rehabilitative potential than imprisonment.\(^{158}\) The attraction of these orders also lies in part in their ability to respond effectively to just deserts concerns by creating ‘a continuum of sanctions’ that can be ‘scaled in intensity to be proportionate to the severity of the offender’s crime’.\(^{159}\) By providing courts with a range of graduated punishments, courts can 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.

3.12 In Victoria, the impetus for introducing particular forms of intermediate sanctions has varied. For example, the ICO, introduced by the 1991 Sentencing Act, was driven by a perceived gap in the sentencing range brought about by the removal of the attendance centre order (which had been replaced, along with probation and the community service order, with the CBO in 1986).\(^{160}\) More recent reforms, such as the introduction of home detention as a sentencing and back-end option, appear to have been driven largely by a desire to divert low-risk offenders from prison.\(^{161}\)

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153 See further [7.8]–[7.9].
154 See further Chapter 2.
155 See further Chapter 6.
156 See further [5.2]–[5.73].
157 See further [7.5]–[7.7].
159 Ibid 101.
160 Freiberg and Ross (1999), above n 144, 126.
The Effectiveness of Intermediate Orders

Introduction

3.13 The ‘success’ of intermediate orders can have many different measures as to how effective they are:

- in achieving the intended purpose or purposes of sentencing (for example, to punish the offender, express denunciation and/or 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 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.

The Purposes of Intermediate Orders

3.14 As for other sentencing orders, intermediate sanctions may meet a number of different sentencing purposes, including:

- to punish the offender;
- to deter the offender and others from committing offences in the future;
- to manifest denunciation of the conduct in which the offender engaged;
- to protect the community from the offender; and
- to facilitate an offender’s rehabilitation.

3.15 The purpose of different intermediate orders therefore may differ depending on the nature of the offence and the circumstances of the offender.

3.16 If intermediate orders are viewed as a way of denouncing an offender’s conduct and achieving a proportionate punishment, rather than just a means of diverting offenders from prison, their value depends on their capacity to achieve these objectives rather than simply their cost-effectiveness and ability to reduce an offender’s likelihood of reoffending.

3.17 Critical to the greater acceptance of intermediate sanctions as substitutes for imprisonment is a ‘de-coupling’ of denunciation from sentences of imprisonment and its ‘re-coupling’ to community sentences. The search for ways to invest community sanctions with the same kind of denunciatory power as imprisonment recognises that, in order to gain support for community alternatives, what has been termed the ‘emotional’ or ‘affective dimension’ of punishment cannot be ignored. This issue is important not only in terms of greater community acceptance of these sanctions, but also encouraging their use by sentencers. This is supported by findings of a Canadian study, which found that while a third of judges surveyed were of the view that community custody (a form of intermediate sanction) could almost never be as effective as imprisonment in achieving denunciation, members of the public interviewed viewed the two sanctions as equally as effective in meeting this objective.

3.18 One means suggested to engender greater confidence in these alternatives is through the kinds of conditions imposed and their enforcement. The use of conditions that are intrusive or restrict an offender’s liberty (in a similar way to imprisonment), which involve some other condemnatory component (such as requiring offenders convicted of offences to speak about the consequences of this behaviour), or which otherwise are seen to ‘have a real impact on the offender’s life’ are

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3.19 A common criticism of suspended sentences is that they are not sufficiently burdensome for an offender to ‘count’ as punishment. While the decision to suspend is usually highly influenced by rehabilitative concerns, the outcome may well seem to some to undervalue the seriousness of the offending.

3.20 During the Council’s early consultations in relation to suspended sentences, a common complaint voiced by community members was that offenders subject to a suspended sentence are not inconvenienced sufficiently to justify it being treated as a substitute for imprisonment. On this basis, many supported the introduction of conditions that could be attached to the order to give it, where necessary, more punitive weight as well as to support the offender’s rehabilitation.

3.21 While a number of jurisdictions either require, or allow, conditions to be attached to suspended sentence orders, for reasons discussed in Chapter 2 of this Report, the Council rejected the introduction of a conditional form of suspended sentence. This was largely on the basis that it would compound existing problems, and due to net-widening and the increased likelihood of breach, could result in many offenders who might otherwise not have received a prison sentence, serving time in prison. The recent experience of England and Wales would seem to support great caution being exercised in this area (see above [2.13]–[2.23]).

3.22 On the other hand, advocates of suspended sentences, including many members of the Victorian legal profession, point to the consequences for an offender of having a sentence of imprisonment on his or her criminal record, including its effects on employment prospects and travel, together with the fact the offender had a prison sentence ‘hanging over their heads’ as justifying its treatment at law as a custodial sentence. With this in mind, it was argued, any conditions imposed should be primarily aimed at the offender’s rehabilitation.

3.23 Studies that have invited respondents to rank sanctions in terms of their perceived severity have confirmed a high level of disagreement concerning the punitive weight of a suspended sentence. For example, a South Australian study found that victims of crime ranked suspended sentences as the least severe community based sanction, in contrast to judicial officers, who ranked them as the next most severe after home detention. Other research suggests that offenders also view a suspended sentence as less punitive than probation or some form of financial penalty.

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165 Ibid 170; Marinos (2005), above n 162, 450
167 Roberts (2004), above n 164, 171.
168 See, for example, Submissions 1.5 (Y.Zole), 1.9 (J.Hemmerling, Open Family Australia (Hume)) and 1.12 (A. English).
169 See, for example, Submission 2.22 (Fitzroy Legal Service Inc).
171 See, for example, Leslie Sebba and Gad Nathan, ‘Further Explorations in the Scaling of Penalties’ (1984) 23 (3) The British Journal of Criminology 221, 231. Sebba reported the findings of a study that found that offenders ranked suspended sentences of six months, 12 months and three years in terms of severity below a fine of $500 and below three years’ probation. These results need to be interpreted with caution due to the small number of respondents (15 prisoners).
A New Zealand Ministry of Justice survey of 387 people sentenced to periodic detention found that of all the types of sentences respondents were asked to rank, there was the greatest variation among respondents in the ranking of suspended sentences.\

Research on other conditional intermediate orders suggests that these orders are perceived by offenders as punitive. A study of 100 offenders in Victoria on ICOs found that, while 58 per cent of offenders agreed that ICOs were better than going to prison, 60 per cent disliked ICOs on the basis that they were too demanding and time consuming. Most (88 per cent) did not view ICOs as a ‘soft option’.

The Council understands from feedback received in consultations that offenders serving home detention orders also experience this order as quite onerous, including due to the significant restrictions placed on their domestic and recreational activities. This might be particularly true of offenders serving back-end orders placed on home detention after serving time in low-security correctional facilities.

However, some victims have been vocal in their opposition to the availability of home detention—particularly its use as a ‘back-end’ option for offenders convicted of culpable driving—viewing it as a soft option. This highlights that community support for intermediate sanctions is likely to depend not only on constructing them as penal equivalents, but also on their acceptance as appropriate alternatives.

Compliance, Recidivism, Rehabilitation and Community Protection

The effectiveness of intermediate sanctions, in terms of compliance, can be measured in a variety of ways; for example by whether:

- the order results in no further offending by the offender during the period of the order, or within a specified period (termed ‘simple non-reoffending’);
- the order results in no further offending, and it is probable that had the offender received a different penalty, he or she would have been more likely to reoffend (termed ‘comparative non-reoffending’);
- the offender completes the order with no breach of the formal requirements of the order (termed ‘successful completion of order’); or
- certain intermediate treatment goals are achieved (such as, for example, a reduction in drug use or alcohol use linked to an offender’s criminal behaviour) (termed ‘intermediate treatment goals’).

References:

172 Wendy Searle, Trish Knaggs and Kiri Simonsen, *Talking About Sentences and Crime: The Views of People on Periodic Detention* (2003). Overall, the nine-month suspended sentence with an operational period of 18 months was given a mean ranking of 6, suggesting that most offenders considered it more severe than a fine of $200, a fine of $500, 12 months’ supervision, 100 hours’ community service, or four months’ periodic detention, but less severe than a six-month residential community program, a fine of $1000, 12 months’ periodic detention, or terms of imprisonment between three months and three years. However, close to one in three (30 per cent) ranked it in the four ‘least tough’ positions and 16 per cent ranked it more severe than three months in prison: Searle, Knaggs and Simonsen (2003), 24 (Table 4.1), 29.


174 Ibid. The study also reported that 70 per cent of offenders disagreed with the statement that ‘it would be easier to complete a short prison term than an ICO’.


3.28 Using the measure of ‘comparative non-reoffending’, it seems that when measured against the use of imprisonment, intermediate orders are at least no less effective than imprisonment in reducing rates of reoffending. Meta-analyses, including those comparing offenders: (a) imprisoned versus subject to a community order; and (b) receiving more severe versus less severe intermediate sanctions have found that increasing punishment is associated with either a marginal increase in recidivism, or had no significant effect.\textsuperscript{177}

3.29 Australian corrections data support the finding that offenders sentenced to community orders are less likely to return to correctional services than offenders sentenced to imprisonment. However, the different ‘risk profiles’ of offenders sentenced to imprisonment, and those serving community orders must be taken into account. Offenders sentenced to imprisonment are more likely to have committed more serious offences and to have a more substantial criminal history than those sentenced to community based dispositions.

3.30 Of offenders released from prison in Australia during 2003–04, 45 per cent were sentenced to a new term of imprisonment or community corrections order within two years of release, compared to 29 per cent of offenders discharged from a community corrections order.\textsuperscript{178} However, it is possible that these different rates of return may simply reflect the different reoffending risk levels of offenders, rather than any independent effect of the penalty type itself. From these data it is also not possible to differentiate rates of return as between different types of community orders—for example, between higher-level intermediate orders and lower-level orders, such as bonds or fine default orders, or different kinds of intermediate orders.

3.31 A recent paper by the NSW Bureau of Crime Statistics and Research on the deterrent effect of suspended sentences has confirmed the importance of factoring in an offender’s level of risk when considering the relative effectiveness of different kinds of sanctions.\textsuperscript{179} The study found that there were no significant differences between the reconviction rates of offenders given suspended sentences and supervised bonds once the characteristics of the offenders were taken into account.

3.32 While a number of evaluations of individual sanctions have been undertaken, many have been criticised on the grounds of being methodologically flawed. A meta-analysis undertaken in 2006 on behalf of the Campbell Collaboration Crime and Justice Group found only five studies that qualified as meeting the criteria necessary for analysis. As a result of this review, the reviewers concluded that they were unable to say whether non-custodial sanctions were more effective than custodial sanctions in preventing reoffending.\textsuperscript{180}

3.33 Other studies have found more room for optimism, and confirmed that the effectiveness of intermediate orders is likely to vary depending on the nature of the intervention. Findings of other meta-analyses conducted have included that:

- well-designed and well-delivered programs can reduce recidivism by as much as 30 per cent;\textsuperscript{181}


\textsuperscript{179} Weatherburn and Bartels, above n 130.

\textsuperscript{180} Patrice Villettaz, Martin Killias and Isabel Zoder, \textit{The Effects of Custodial vs. Non-Custodial Sentences on Reoffending: A Systematic Review of the State of Knowledge} (Report to the Swiss National Science Foundation and to the Campbell Collaboration Crime and Justice Group) (2006) 43.

• punishment and deterrence-driven approaches alone (for example, supervision and electronic monitoring) have little or no impact, or in some cases have a negative impact on reoffending; 182
• when paired with prosocial or rehabilitation-oriented interventions, such as treatment, education or community service, recidivism rates are reduced significantly (re-arrests are as much as 20 per cent lower); 183
• intensive supervision programs (ISPs) that also include treatment services produce moderate reductions in recidivism (around 22 per cent); 184
• substance abuse treatment programs delivered in the community have the most promising results in terms of reducing recidivism; 185 and
• vocational education is the most successful form of educational/vocational program and services. 186

3.34 Interventions with juvenile offenders have similarly been found to decrease recidivism and problem behaviours by up to 30 per cent. 187

3.35 There is some evidence that offenders sentenced to community work have lower rates of reoffending than offenders sentenced to short terms of imprisonment, although this difference has in some cases not been found to be statistically significant. 188 The involvement of offenders in a ‘constructive experience’ has been suggested as one possible reason for lower rates of recidivism. 189 Support for this is found in a study of community service in Scotland that found that offenders who viewed their experience of community work as ‘rewarding’ had higher rates of compliance and lower rates of recidivism. 189

3.36 The effectiveness of individual intermediate interventions is likely to vary depending on the type of offender targeted. For example, while intensive supervision with treatment appears to be useful for high-risk offenders, there is evidence that this form of intervention may have a negative impact in the case of low-risk offenders. As illustrated in Table 8 below, one study found that, while the recidivism rates of offenders who had participated in an intensive rehabilitation supervision (IRS) program were significantly lower than those who served time in prison (31.6 per cent, compared to 51.1 per cent), the reverse was true for offenders assessed as low risk

185 See, for example Aos, Miller and Drake (2006) above n 182, 3. This study reported that drug treatment in the community resulted in a 12.4 per cent reduction in recidivism compared to a non-treatment group. Adult drug courts also showed positive results, reducing recidivism by around 11 per cent: Ibid Exhibit 1.
186 Ibid. Vocational education in prison in the studies examined resulted in a 12.6 per cent reduction in recidivism.
188 See, for example, Maria Lisa Muiluvuori, ‘Recidivism Among People Sentenced to Community Service in Finland’ (2001) 2(1) Journal of Scandinavian Studies in Criminology and Crime Prevention 72.
190 Gill McIvor, Sentenced to Serve: The Operation and Impact of Community Service by Offenders (1992).
3. Reviewing Intermediate Sanctions

3.36 Suspended Sentences and Intermediate Sentencing Orders

(32.3 per cent of those who participated in IRS reoffended, compared to only 14.5 per cent who had served time in prison). This is consistent with the findings of other similar research.

Table 8: Recidivism as a function of offender risk and treatment

<table>
<thead>
<tr>
<th>Risk Level</th>
<th>Treatment</th>
<th>Yes (IRS)</th>
<th>No (Prison)</th>
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</thead>
<tbody>
<tr>
<td>Low</td>
<td>32.3%</td>
<td>14.5%</td>
<td></td>
</tr>
<tr>
<td>High</td>
<td>31.6%</td>
<td>51.1%</td>
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Three possible reasons have been identified for the higher reoffending rates of low-risk offenders who have participated in intensive structured treatment programs. First, bringing low-risk offenders into contact with higher-risk offenders may have an impact on criminal attitudes and behaviours. Secondly, by placing low-risk offenders in these programs, it may disrupt their prosocial networks (such as school, friendships, employment and family). Thirdly, increased supervision, along with more stringent conditions (such as frequent drug testing), increases the likelihood that violations will occur.

The findings of this research suggest that more intrusive structured interventions should be targeted at higher-risk offenders, not only because this is considered to be a much better use of resources, but also because in the case of lower-risk offenders, such interventions may in fact increase the likelihood of reoffending.

Consistent with these findings, increasingly there is recognition that the effective assessment and treatment of offenders should be guided by four principles:

1. the risk principle—the intensity of services and supervision should be matched to the level of offender risk, with more intensive interventions targeted at higher-risk offenders;
2. the need principle—programs should aim to address criminogenic needs (that is, factors that are related to the offender’s criminal behaviour and that are amenable to change);
3. the responsivity principle—programs should use methods that are consistent with the abilities and learning styles of offenders; and
4. the principle of professional override—there are occasions when practitioners will be required to override assessment findings and to develop a plan of intervention guided by an offender’s individual qualities and unique needs.

In Victoria the risk–need approach has been supplemented by the ‘good lives model’, which determines the physical, social and psychological needs of defendants, and individualises interventions to meet these needs.

191 James Bonta, Suzanne Wallace-Capretta and Jennifer Rooney, ‘A Quasi-Experimental Evaluation of Intensive Rehabilitation Supervision Program (2000) 27(3) Criminal Justice and Behavior 312, 324. Recidivism in the study was defined as a reconviction within one year of completion of treatment or release from prison.

192 See, for example, Donald Andrews and Craig Dowden, ‘A Meta-Analytic Investigation into Effective Correctional Intervention for Female Offenders’ (1999) 11 Forum on Corrections Research 18; and Christopher Lowenkamp and Edward Latessa, Evaluation of Ohio’s Community Based Correctional Facilities and Halfway House Programs (2002).


Diversionary Impact

Introduction

3.41 The diversionary potential of intermediate orders depends upon the degree to which these orders are used in place of imprisonment rather than other lower-level orders, how commonly these orders are breached, and the response to breaches (for example, by variation of the existing order, or substitution of a term of imprisonment).

What Impact have Intermediate Orders had on the Use of Imprisonment?

3.42 Evidence suggests that CBOs, ICOs and suspended sentences have not had the impact on prison numbers in Victoria that might have been hoped and have at least partly encroached into the territory previously occupied by lower-level orders, such as fines and conditional adjournments. The ‘failed promise’ of these and other similar intermediate orders to deliver reductions in imprisonment rates has been attributed by some commentators to their lack of acceptance as prison alternatives:

The high expectations that these orders would decrease imprisonment rates was never fulfilled primarily because they were not true substitutes for imprisonment but provided a significant and proportionately punitive response to offences falling within the mid range of seriousness for which imprisonment would not have been an option. These orders have become known more properly as intermediate sanctions or community orders rather than ‘alternatives’ to imprisonment. The experience in most jurisdictions is that from their inception, such orders tended to replace fines and bonds rather than sentences of imprisonment. If anything, they tended to inflate the sentencing tariff.197

3.43 As other Australian commentators have noted ‘[c]ommunity corrections in most States have evolved not so much as a complete alternative to imprisonment, but rather as an appendage to it’.198

3.44 Little research has been carried out on sentencers’ levels of confidence in community orders. One of the few studies conducted in the late 1980s found that, while 75 per cent of the 18 New South Wales District Court judges and 22 magistrates interviewed saw community service as an alternative to imprisonment that made a positive contribution to the rehabilitation or education of offenders, some sentencers saw community service as lower down in the sentencing hierarchy and as an alternative to other non-custodial options such as fines.199 This provides a partial explanation for the failure of these orders to have a significant impact on the proportion of offenders sentenced to immediate imprisonment.

3.45 The phenomenon of subjecting offenders who otherwise might have received lower-level orders to more severe sanctions is commonly referred to as ‘net-widening’ while the use of longer sentences and community orders with more conditions is commonly referred to as ‘sentence inflation’. This trend has been experienced not only in Victoria, but also in other jurisdictions looking for effective alternatives to imprisonment.

3.46 Another much cited reason for the replacement of lower-level orders with more severe intermediate sanctions is increasing levels of punitiveness. A report reviewing the use and impact in the UK of the new form of community order and suspended sentence order has identified some evidence that sentences are getting more punitive, and noted that:

By subjecting offenders to increasingly severe sentences although their offences have not become more serious, levels of punitiveness are ratcheted up, the possibility of a custodial sentence ‘next time’ is increased…

Similarly, Rod Morgan has cautioned that despite the introduction of a range of intermediate orders in England and Wales:

custody has not been displaced. On the contrary, the changes have fuelled an increasingly interventionist and punitive sentencing trend resulting in a record prison population and a probation service overburdened with low-risk offenders to supervise. It has been a classic example … of net widening.

In more recent years in Victoria, increased sentence lengths, rather than an increase in the overall proportion of offenders sentenced to immediate custody, appears to be one of the main drivers of the increase in the prison population. A paper released by the Council, which examines data over the six-year period 2001–06, found the proportion of offenders sentenced to immediate custody in the Victorian Magistrates’ Court remained relatively stable, apart from a small drop experienced from 2002–03 to 2003–04 (from 6.2 to 5.4 per cent). In the higher courts over the same period the custody rate increased from 53.6 per cent in 2000–01 to 54.5 per cent in 2002–03, then declined to 50.8 per cent in 2004–05, before increasing again to 52.5 in 2005–06.

As Figures 16 and 17 illustrate, the use of community sentencing orders (ICOs and CBOs) also has remained relatively stable over time. The proportion of offenders sentenced to a CBO in the higher courts has fluctuated from 8.7 per cent in 2000–01, to a high of 11.1 per cent in 2002–03, while in the Magistrates’ Court 5.4 per cent of offenders were sentenced to a CBO in 2006–07, compared with 7.0 per cent in 2000–01. The proportion of offenders sentenced to an ICO in the higher courts over the years has been in the range of 2.0–3.5 per cent, while in the Magistrates’ Court only between 1.0–1.9 per cent of offenders have received this form of order.

Figure 16: The percentage of defendants proven guilty by selected sentences types, higher courts, 2000–01 to 2006–07

Source: Courts Statistical Services, Department of Justice (Victoria), unpublished data

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204 Ibid.
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Figure 17: The percentage of defendants proven guilty by selected sentences types, Magistrates’ Court, 1995–96 to 2006–07

The higher courts data represented in Figure 16 suggest that courts are using suspended sentences, at least in some cases, in place of immediate imprisonment as the drop in the use of suspended sentences in more recent years has coincided with an increase in the use of immediate imprisonment. These more recent trends stand in contrast to the trend that was evident following the reintroduction of suspended sentences in Victoria in 1986, which indicated that while they were in some cases diverting offenders from prison, in others they were being used in place of lower-level orders.205

More recent sentencing trends, however, may not necessarily provide conclusive evidence that net-widening is no longer an issue in the higher courts. For example, while offenders who have committed more serious offences may now be receiving an immediate custodial sentence, rather than a suspended sentence (explaining the decrease in the use of suspended sentences and the increase in the use of prison sentences), this does not necessarily mean that other suspended sentences imposed are being used only where the court would otherwise have imposed a prison sentence, rather than a non-custodial form of order.

As illustrated in Figure 17, the picture in the Magistrates’ Court is even more complex, with a slight decrease in the use of wholly suspended sentences occurring alongside a decrease in the use of CBOs and increase in the use of ICOs. Unlike the higher courts, the less frequent use of suspended sentences has not been accompanied by an increase in the use of imprisonment.

Some evidence of increasing punitiveness has been found in England and Wales. While the proportion of offenders sentenced in the Magistrates’ Court to a community sentence has increased (13 per cent in 2005, up from 8.5 per cent in 1995), there has been a corresponding decline in the use of fines.206 More recent data have shown a drop in the use of community sentences and fines, and a corresponding increase in the use of suspended sentences, which suggests suspended sentences are being used in place of lower-level orders rather than displacing immediate imprisonment (see above [2.13]–[2.23] and Figure 1). Community sentences are most often imposed for summary non-driving offences (28 per cent), followed by theft and handling of stolen goods (20 per cent) and summary driving offences (17 per cent).207

Source: Courts Statistical Services, Department of Justice (Victoria), unpublished data

205 See further, Sentencing Advisory Council (2005), above n 2, [5.5]–[5.9].

206 Solomon and Rutherford (2006), above n 57, 11.

207 Ibid 12.
Examining the use of the new form of community orders, the Home Office has conceded that:

The evidence so far is that the courts are not using Community Orders as fully as they might. The anticipated switch to these new community sentences from short terms of imprisonment that was envisaged has not happened but is a crucial part of the package of sentencing reform we wish to achieve.\(^{208}\)

The potential for these orders to lead to increasingly punitive outcomes for low-risk offenders has led one commentator to urge caution in introducing reforms in this area:

We should ask searching questions . . . of any further proposals to introduce new sentences, or additional conditions attached to existing sentences, particularly if they involve tougher, more intensive supervision or surveillance. Such proposals are likely to be accompanied by arguments, as they have been in the past, that the tougher orders or requirements are necessary for community penalties to be credible to sentencers: by that means alone will sentencers be willing to substitute punishment in the community for custody. This road has repeatedly been travelled before. Unless such proposals are accompanied by fundamental means to displace those low risk offenders currently subject to community penalties, the outcome is likely to be further ratcheting up of the punitive trend.\(^{209}\)

Two solutions have been offered to counter the problem of net-widening:

1. A shift in control over program placements from judges to correctional officers (as occurs with forms of ‘back-end’ home detention), or a limitation placed on sentencers’ decisions to decide between prison and probation (or community order) and allowing probation and prison authorities to decide what other sanction (such as home detention, intensive supervision or treatment programs) should be applied; or

2. The use of sentencing guidelines to structure sentencers’ decisions about the use of intermediate sanctions.\(^{210}\)

**Breach Consequences**

The diversionary potential of intermediate sanctions is also related to rates of breach, and restoration rates on breach. Assuming that these orders are used only in place of an immediate prison term, that breach rates are relatively low and that offenders are not imprisoned on breach, the diversionary impact of intermediate sanctions would be high. However, high rates of breach that result in the offenders serving time in prison may result in the diversionary effects of the order being minimal—particularly if accompanied by a degree of net-widening from non-custodial orders. The second scenario may in fact result in intermediate orders contributing to higher prisoner numbers.

Rates of breach are likely to reflect a range of factors apart from whether the offender has complied or not complied with the conditions of his or her order. For example, enforcement practices (that is, how carefully the compliance of offenders on community orders with the conditions of these orders is monitored, and decisions made as to whether formal breach proceedings should be initiated) can have a significant impact on rates of completion. The timeframe in which breach proceedings must be commenced is another relevant factor. For example, in Victoria, proceedings for breach may be commenced at any time up until three years after the date on which the breach is alleged to have been committed.\(^{211}\)
3.59 In Victoria, just under two thirds of community corrections orders with a supervision component (61.4 per cent) were successfully completed over 2006–07. This compares to a national average completion rate of 71 per cent. Tasmania had the highest rate of completion of orders with a supervision component (93 per cent), followed by the Australian Capital Territory (88 per cent), New South Wales (81 per cent) and South Australia (72 per cent). Examining breach rates by the type of order, a recent analysis of higher courts data undertaken by the Council found a breach rate of 35.0 per cent for ICOs and 25.4 per cent for CBOs.

3.60 Over three quarters of orders with a reparation (unpaid work) component were completed in Victoria (75.5 per cent), compared to a national average completion rate of 70 per cent.

3.61 Limited options on breach, together with net-widening effects, may not only erode the diversionary impact of intermediate orders, but may also contribute to harsher overall sentencing outcomes:

The rhetoric of community corrections often conceals and legitimates an extension of the penal sanction into more marginal areas of deviance as well as into the community and the lives of the offender in the broader sense. For example, a person sentenced to a community service order may end up in prison for defaulting on its conditions. In times when these orders were not available to the courts as a sentencing option, the offender may have received a good behaviour bond or a probation order, where the consequences of breach were not so automatic.

Cost Considerations

3.62 Even assuming that intermediate orders are used in place of other lower-level orders, some cost-benefits can be found. One review estimated the total savings per offender that could be provided by different program options, taking into account the net long-term benefits of crime reduction minus the net up-front marginal program costs, compared to the cost of the comparable alternative. The most beneficial programs (in terms of overall cost-effectiveness) are set out in Table 9 below. The most cost-effective community based programs (in order of cost savings) were found to be:

- intensive supervision with treatment-oriented programs;
- cognitive–behavioural therapy;
- drug treatment in the community;
- adult drug courts;
- employment and job training in the community; and
- electronic monitoring used to offset gaol time.

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213 Ibid.


215 Ibid.

216 Findlay, Odgers and Yeo (2005), above n 198, 243.


218 Ibid Exhibit 4.
### Table 9: Reducing crime with evidence-based options: What works, and benefits & costs

<table>
<thead>
<tr>
<th>Program</th>
<th>Net savings per offender (in US dollars)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vocational education in prison</td>
<td>$13,738</td>
</tr>
<tr>
<td>Intensive supervision with treatment-oriented programs</td>
<td>$11,563</td>
</tr>
<tr>
<td>General education in prison (basic education or post-secondary)</td>
<td>$10,669</td>
</tr>
<tr>
<td>Cognitive–behavioural therapy in prison or community</td>
<td>$10,299</td>
</tr>
<tr>
<td>Drug treatment in the community</td>
<td>$10,054</td>
</tr>
<tr>
<td>Correctional industries in prison</td>
<td>$9,439</td>
</tr>
<tr>
<td>Drug treatment in prison (therapeutic communities or outpatient)</td>
<td>$7,835</td>
</tr>
<tr>
<td>Adult drug courts</td>
<td>$4,767</td>
</tr>
<tr>
<td>Employment and job training in the community</td>
<td>$4,359</td>
</tr>
<tr>
<td>Electronic monitoring to offset gaol time</td>
<td>$870</td>
</tr>
</tbody>
</table>

Source: Aos, Miller and Drake (2006)

3.63 In circumstances in which community options with known impacts on recidivism are used in substitution for immediate terms of imprisonment, the cost benefits may be even more pronounced. The costs of imprisonment in Victoria in 2006–07 were $276 per prisoner per day, or $100,740 a year, compared to around $17 per day for offenders subject to community orders (or $6,205 a year).219

3.64 While there is only limited information publicly available on the cost savings of existing Victorian options, there is some evidence to suggest that significant savings can result through the use of the right forms of orders. For example, an evaluation of the Victorian drug treatment pilot program reported the overall costs of the program as $2.87 million, and the benefits in terms of reduced demand for prison beds as in the vicinity of $16.65 million, translating to savings to the community of $5.81 for every dollar spent.220

### Community Attitudes

3.65 Surveys of community attitudes to sentencing have found that the community generally is supportive of community based alternatives, provided they are used in what are perceived to be ‘appropriate’ cases.221

3.66 Some research in fact suggests that the level of community support for community sentences in Australia may be growing. The International Crime Victimisation Survey, conducted in Australia in 2000 and 2004, asked respondents to sentence a 21-year-old male recidivist burglar and provided a menu of different sentencing options that included a fine, prison, community service, suspended sentence or another sentence. In the 2000 survey, 37 per cent selected imprisonment as the appropriate sentence, while 35 per cent favoured community service, 8 per cent a fine and 10 per cent a suspended sentence.222 In the 2004 survey, corporal/capital punishment and treatment/rehabilitation were added to the list of possible options. Close to half of all respondents (47 per cent) favoured sentencing the offender to a community service order, with the percentage supporting imprisonment dropping to 33 per cent. There was no change in those favouring the use of a suspended sentence, but the proportion favouring fines dropped from 8 per cent to 5 per cent. Less than 1 per cent of respondents favoured corporal/capital punishment or an option of treatment/rehabilitation.

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219 Steering Committee for the Review of Government Service Provision (2008), above n 212, Table 8A.7. These costs include net recurrent and capital costs.


3.67 While a limited number of studies have gauged support for particular types of intermediate sanctions, the research that has been carried out indicates high levels of support for community sanctions. For example, a study of New York residents found substantial public support for the use of home detention with electronic monitoring on grounds of reduced correctional costs and lowering reoffending risks.223 A Canadian study also found broad support for the use of conditional sentences of imprisonment even for certain violent offences: 44 per cent for break and enter and 71 per cent for assault causing bodily harm.224 A later Canadian study confirmed, however, that the level of support for the use of conditional sentences is likely to vary significantly depending on the specific circumstances and nature of the offence. For example, while 77 per cent of respondents supported the use of a conditional sentence for a scenario involving an assault causing bodily harm, only 25 per cent supported its use over imprisonment for a case of impaired driving causing bodily harm, while just 3 per cent supported its use in the case of an offender convicted of sexual assaults perpetrated on his five-year old stepdaughter.225

3.68 There is evidence that the level of knowledge members of the public have about community options may be an important mediating factor affecting the level of support for these options. In the 1996 British Crime Survey, respondents were given a description of a real case and were asked to impose one or more sentences for a 23-year-old male repeat offender convicted of the burglary of an elderly man’s house. Half the sample was given a menu of options from which to choose, while the other half was asked to give unprompted responses.226 While a majority of respondents in both groups favoured imprisonment, the figure was significantly higher for those without the menu of sentencing options (67 per cent) than for those given information on other sentencing options available (54 per cent).227 Respondents with the sentencing menu were more likely to favour non-custodial options such as suspended sentences, community service, compensation and probation.228

3.69 It is also clear from research on public attitudes that independent of questions concerning severity, different forms of sanctions are viewed as having different functions depending on the nature of the offence. For example, a Canadian study found that fines were not viewed by the majority of respondents as being an appropriate disposition in the case of particular forms of violent offences. Presumably one of the reasons for the preferred use of imprisonment for violent offences was the perceived greater denunciatory value of imprisonment compared with fines.229

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225 Trevor Sanders and Julian V. Roberts, ‘Public Attitudes Toward Conditional Sentencing: Results of a National Survey’, 32(4) Canadian Journal of Behavioural Science (2000) 199, 204–6. The description of the offences was as follows: ‘Assault occasioning bodily harm: A 23-year-old man has been convicted of assault causing bodily harm. He hit and broke the nose of a man that he had a disagreement with in a local bar’; ‘Impaired driving causing bodily harm: After drinking heavily, the offender stole a car and drove at a high rate of speed through the city. He eventually lost control of the car and crashed. Two people were seriously injured. One person suffered permanent injuries that have had a devastating impact on her life’; ‘Sexual assault: A man was convicted of several sexual assaults against his five-year-old stepdaughter. The crimes were committed over a period of several years’.


228 Ibid.

Another study conducted in Ontario found that the willingness of members of the public to support the substitution of a fine or a community service order for a 30-day prison sentence varied depending on the nature of the offence and whether the offender was an adult or a juvenile. The three offences used for the purposes of the study were theft of CDs worth $200, assault and sexual assault (involving a man touching a woman's breasts without her consent). The highest level of support for the use of a community service order in place of imprisonment for adult offenders was for the offence of theft of CDs (80 per cent), followed by assault (71.5 per cent) and sexual assault (67 per cent). The use of a fine had the greatest support in the case of the theft (68.5 per cent), followed by the sexual assault (46 per cent) and the assault (41 per cent). Respondents were also asked to rate the importance of a number of different sentencing purposes. It was found that respondents who ranked denunciation as of high importance were significantly more likely to oppose the substitution of a fine for a short term of immediate imprisonment, compared to those who ranked this purpose of low importance (57 per cent compared to 42 per cent). Similarly, those who ranked denunciation as being of high importance were more likely to oppose the substitution of a community service order for prison than those who gave this purpose a medium or low ranking (36 per cent, compared with 17 per cent of those who ranked it of medium importance, and 29 per cent who considered it of low importance).

There appears to be acceptance by the community that prison has a limited capacity to reduce crime. A UK study reported that only 8 per cent of respondents nominated imprisoning offenders as the best way to reduce crime. More than half of respondents nominated drug treatment centres and education of young offenders as more appropriate than imprisonment, and suggested that tougher community punishments should be developed to allow offenders to pay back something to the community.

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230 Marinos (2005), above n 162.
231 Ibid 445.
232 Ibid.
235 Ibid.
Chapter 4  Improving Intermediate Sanctions
4. Improving Intermediate Sanctions

Suspended Sentences and Intermediate Sentencing Orders
Chapter 4   Improving Intermediate Sanctions

The Current Position in Victoria

Custodial and Part-Custody Intermediate Sanctions

4.1 There are eight different forms of ‘custodial’ sentences available to courts in Victoria under Part 3, Division 2 of the Sentencing Act 1991 (Vic) when sentencing adult offenders:

- imprisonment;
- indefinite sentences of imprisonment;
- combined custody and treatment orders (CCTOs);
- drug treatment orders (DTOs);
- home detention orders;
- intensive correction orders (ICOs);
- partially suspended sentences of imprisonment; and
- wholly suspended sentences of imprisonment.

4.2 Leaving indefinite sentences and straight terms of imprisonment aside, only two of the remaining six ‘custodial’ sentences involve the offender serving actual prison time, provided the offender does not breach the order: combined custody and treatment orders (CCTOs) and partially suspended sentences.

4.3 A community-based order (CBO) may also be combined with up to three months’ imprisonment, although this option is rarely used by the courts. Over the period 2004–05 to 2006–07, only seven offenders sentenced in the higher courts and 58 offenders sentenced in the Magistrates’ Court received a CBO combined with a term of imprisonment.

4.4 In the case of home detention orders and ICOs—which are also treated under the Sentencing Act 1991 (Vic) as ‘custodial’ orders—the court imposes a prison sentence of up to 12 months and orders it to be served by way of home detention or intensive correction in the community. These orders in their current form are therefore treated as different ways of serving a prison sentence.

4.5 In the case of a wholly suspended sentence order, the court also imposes a sentence of imprisonment (of up to two years in the Magistrates’ Court and three years in the higher courts); however this sentence is not activated. The only condition during the operational period of the order is that the offender does not commit any further offences punishable by imprisonment. The Council’s proposals and final recommendations in relation to suspended sentences were presented in Chapter 2 of this Report.

In the case of an offender with a mental illness, a court may instead make a special form of custodial order known as a hospital security order by way of sentence provided certain criteria set out in s 93A of the Sentencing Act 1991 (Vic) are satisfied. If at any time before the expiry of the hospital security order an order is made that the person be discharged as a security patient, the hospital security order takes effect as a prison sentence for the unexpired period of the order.

The fact that a person is subject to a custodial order does not mean that he or she is necessarily held in custody, in the sense of being held in confinement in a prison or correctional centre, but rather that the person is in the ‘custody of the state’ for the term of the order, with the state having the power to ‘coercively intervene in that individual’s daily life’ for the period of time the offender is under sentence: Richard Fox and Arie Freiberg, Sentencing: State and Federal Law in Victoria (2nd edn) (1999) 637–8.

Sentencing Act 1991 (Vic) s 36(2). The term of imprisonment must not be ordered to be served by way of intensive correction in the community or suspended in whole or in part.

Department of Justice, unpublished data.

Sentencing Act 1991 (Vic) s 18ZT(1).

Sentencing Act 1991 (Vic) s 19(1).
Non-Custodial Intermediate Sanctions

4.6 The CBO is the only true non-custodial intermediate sanction currently available in Victoria. CBOs are orders of up to two years in duration\(^{242}\) with a number of core conditions\(^{243}\) and at least one program condition.\(^{244}\) Program conditions include that the offender performs unpaid community work, be under the supervision of a community corrections officer, attends for education or other programs as directed, undergoes assessment and treatment for alcohol or drug addiction and submits to testing for alcohol or drug use.\(^{245}\)

The Approach in Other Jurisdictions

Substitutional Custodial and Part-Custody Orders

4.7 While all Australian jurisdictions currently have the power to order a term of imprisonment, and a form of suspended sentence, there is a high degree of variation in the range of substitutional or part-custodial orders in other jurisdictions in Australia. For example:

- periodic detention is available only in the Australian Capital Territory and New South Wales;\(^{246}\)
- home detention exists as a sentencing option only in Victoria, New South Wales and the Northern Territory;
- ICOs are available only in Victoria and Queensland—although a ‘non-custodial’ form of this order (an intensive supervision order) also exists in Western Australia.

4.8 The custodial sentencing options in place for federal offenders and in each of the Australian states and territories (excluding the power to suspend a prison sentence) are summarised in Table 15 in Appendix 4.

4.9 The variability in the number and type of custodial options available in different Australian jurisdictions demonstrates the clear rejection of a standard or uniform approach and the influence of local political and social conditions, as well as the established sentencing culture in shaping policy and practice.

4.10 The line that distinguishes ‘custodial’ from ‘non-custodial’ orders is not clear-cut. While Victoria classifies a number of orders as ‘custodial’ on the basis that they involve the imposition of a term of imprisonment, which is in some cases suspended or ordered to be served in some other way (such as by way of home detention, or intensive correction in the community), other jurisdictions do not group orders in this way.

4.11 For example, the NSW sentencing legislation, the *Crimes (Sentencing Procedure) Act 1999* (NSW) divides non-imprisonment sentences into ‘alternatives to full-time detention’ (Part 2, Division 2) and ‘non-custodial alternatives’ (Part 2, Division 3). Periodic detention and home detention are classed as ‘alternatives to full-time detention’, while suspended sentences are categorised as ‘non-custodial alternatives’.

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\(^{242}\) *Sentencing Act 1991 (Vic)* s 36(3).

\(^{243}\) *Sentencing Act 1991 (Vic)* s 37.

\(^{244}\) *Sentencing Act 1991 (Vic)* s 38(2).

\(^{245}\) *Sentencing Act 1991 (Vic)* s 38(1).

\(^{246}\) Following recommendations made by the New South Wales Sentencing Council, the NSW government has announced it is considering the abolition of periodic detention. See ‘New Plan to “Scrap Periodic Detention”’, *The Age* (Melbourne), 7 January 2008. See further New South Wales Sentencing Council, *Review of Periodic Detention* (2007).
Non-Custodial Intermediate Sanctions

4.12 The forms of non-custodial intermediate community sentences in Australia vary from jurisdiction to jurisdiction. However, most jurisdictions have some form of community work order, and a probation or supervision order (which includes the option of attaching program and treatment conditions). Non-custodial intermediate sanctions available in Australia are summarised in Table 16 in Appendix 4.

4.13 A range of approaches also has been taken by overseas jurisdictions in structuring community sentences. While some jurisdictions have aimed for maximum flexibility (such as England and Wales, which have introduced a generic form of community sentence), others have aimed for greater specificity. For example, under changes to the Sentencing Act 2002 (NZ), courts in New Zealand will be able to select from among four separate kinds of community orders that can be combined in various ways, as well as used in conjunction with home detention or a sentence of imprisonment:247 community detention, intensive supervision, supervision and community work (see further Table 17, Appendix 4).

The Council’s Interim Report

Introduction

4.14 In its Interim Report, the Council proposed a number of changes to the range of existing intermediate orders that should be available in Victoria. The Council was guided in developing this model by the following principles:

- imprisonment should remain a sanction of last resort, to be used when no other sentence would be appropriate;
- alternatives to prison should exist as sentences in their own right—there should no longer be a need for a court first to impose a term of imprisonment for these alternatives to be considered;
- there is a need for greater transparency and ‘truth in sentencing’—sentencing orders should ‘mean what they say’ (for example, ‘prison’ should mean a sentence of actual detention in prison);
- courts should be provided with the most flexible range of sentencing options possible to allow sentences to be tailored to the offence and the offender;
- appropriate community based options should be available for a broad spectrum of offending, including those for which a prison sentence might also be justified;
- sentencing orders served in the community on conditions should be of a realistic duration and should only have the minimum number of conditions necessary to fulfil the purpose or purposes of sentencing;
- while breach of an order should not, in and of itself, constitute an offence, serious consequences should follow on breach by an offender of the conditions of an order; and
- the need for flexibility of breach provisions to protect against injustice in individual cases should be balanced with the need to encourage compliance (and discourage non-compliance) by making known and certain the consequences of breach where a reasonable excuse cannot be provided.248

247 Permitted sentence combinations are set out in section 19 of the Sentencing Act 2002 (NZ). A sentence of supervision may be combined with any sentence except intensive supervision, home detention, or imprisonment. A sentence of community work may be combined with any sentence except imprisonment. A sentence of community detention may be combined with any sentence except home detention or imprisonment. A sentence of intensive supervision may be combined with any sentence except supervision, home detention, or imprisonment.

248 Sentencing Advisory Council (2005), above n 3, [3.1].
The New Sentencing Hierarchy

4.15 Under the changes recommended by the Council, it was proposed that courts would have the following sentencing options available in sentencing adult offenders (25 years and over):

- imprisonment of two years or more (with or without a non-parole period) for serious offences;
- a term of straight imprisonment (that is, without parole) of under two years where a short prison sentence without some form of supervised/conditional release is considered appropriate;
- an imprisonment plus release order (IRO), which would consist of a term of imprisonment of up to 12 months and a period on release in the community (up to a combined maximum term of three years) under conditions of varying intensity;
- a correction and supervision order (CSO) which, depending on the nature and seriousness of the offence, could consist of a form of restraint (such as home detention, curfew conditions or periodic detention) and/or other conditions such as supervision, community work, treatment, programs and other conditions;
- a fine; and
- adjourning the proceedings on the offender giving an undertaking to comply with certain conditions, discharging the offender, or dismissing the charge.

No changes were proposed to the availability of other forms of orders, such as indefinite sentences of imprisonment, hospital orders and hospital security orders, available under the Sentencing Act 1991 (Vic).

4.16 An important consideration for the Council in constructing the proposed new orders was to minimise the use of ‘substitutional sanctions’. The Council expressed a view that these forms of orders are undesirable due to their net-widening potential and link with imprisonment that on breach places offenders who might otherwise receive less severe sentences at real risk of serving prison sentences.

4.17 The Council also believed that there was benefit to be gained in increasing the transparency of sentencing orders by recasting orders contingent upon a prison sentence being imposed as orders in their own right.

4.18 Consistent with these concerns, and in line with common public perception that custody means ‘detention in prison’, in conceptualising the Interim Report model the Council sought to make a clearer distinction between sentences involving actual prison time and those served in the community. In advocating this approach the Council aimed to develop a range of orders it hoped would make sense to the community and to offenders.

4.19 Another purpose of the proposals was to streamline what the Council believed had become an increasingly complex sentencing structure, while adding a greater level of flexibility. Since the Sentencing Act 1991 (Vic) first came into force, the Council noted, there had been a proliferation of new orders, including combined custody and treatment orders (CCTOs), drug treatment orders (DTOs) and home detention orders, as well as the power to defer sentencing for young offenders (under 25 years).

4.21 Under the Council’s model, it was proposed that the IRO would replace partially suspended sentences, CCTOs and CBOs where combined with short terms of imprisonment, while ICOs and CBOs would be incorporated within the new CSO. This would reduce the number of ‘custodial’ options from six (imprisonment, CCTOs, DTOs, home detention, ICOs and suspended sentences) to three (imprisonment, the new IRO and DTOs).

249 Under s 36(2) of the Sentencing Act 1991 (Vic), a court may make a community-based order in addition to sentencing an offender to a term of imprisonment of not more than three months provided the sentence of imprisonment is not ordered to be served by way of intensive correction in the community or suspended in whole or part.
4.22 Other changes recommended included:

- introducing a new form of order for young offenders—a youth correction and supervision order (YCSO)—which would be tailored to meet the needs and circumstances of young offenders aged 18–24 years; and
- expanding the current power to defer sentencing by removing the current age restriction, increasing the period for which sentencing may be deferred to 12 months and providing the higher courts with a power to defer in appropriate cases.

4.23 The current sentencing hierarchy for adult offenders and the Council’s proposed revised sentencing hierarchy are represented in Appendix 3.

4.24 In setting out a possible new hierarchy, the Council endorsed the conclusions of the Freiberg Sentencing Review that the sentencing decision-making process and the range of sentencing orders are better understood as ‘multi-streamed “pathways”’, rather than as a simple hierarchy with sanctions increasing in seriousness the higher one progresses up the ladder. This approach recognises that the appropriate sentencing response in an individual case cannot be determined solely by reference to the seriousness of the offence or offences committed, but must also take into account the nature of the offence and the offender, and the broader purposes of sentencing. The Council suggested that under the new model there would be three principal sentencing pathways: a punishment/restitution pathway; a punishment/rehabilitation pathway; and a rehabilitation pathway. An overarching goal of all three pathways, it was suggested, should be community protection.

Advantages and Risks

4.25 The Council suggested that the new community order (CSO) proposed would retain many of the perceived advantages of suspended sentences referred to in submissions, including:

- allowing for the rehabilitation of an offender in the community;
- deterring the person from re-offending and deterring others from committing similar offences;
- denouncing the offender’s criminal conduct; and
- avoiding the negative effects of imprisonment on an offender.

4.26 By strengthening the range of community penalties, including providing conditions that would allow for the construction of a tougher form of community sentence, it was also hoped it would provide true alternative sanctions to imprisonment that would not rely on maintaining the fiction of a sentence served in the community or at home as a ‘prison’ sentence.

4.27 The Council acknowledged that factors likely to affect the success of the model proposed would include:

- the acceptance of non-custodial sanctions, including the proposed new CSO, as serious and appropriate sanctions;
- the perceived adequacy of alternative restraint and supervision mechanisms applied to sentences or part sentences served in the community under the new model proposed, in terms of ensuring community safety;
- the provision of additional resources to Corrections Victoria and in the community to ensure appropriate treatment and programs are available and delivered to offenders, and for the management of orders; and
- the credibility of the mechanisms for dealing with breaches of orders or part orders served in the community and sanctions imposed on breach (which may affect community confidence in the use of these kinds of orders).

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250 Freiberg (2002), above n 16, 37.
251 See, for example, Submissions 1.39 (Federation of Community Legal Centres), 1.41 (Youthlaw) and 1.43 (Victorian Aboriginal Legal Service).
4.28 Despite these challenges, and provided the reforms it recommended were properly implemented and adequately resourced, the Council argued in its Interim Report that the potential benefits to the Victorian community of these reforms could be significant. The Council emphasised the importance of sentencing options not simply being concerned with the punishment of offenders but also about reducing long-term re-offending and increasing community safety through addressing some of the contributing causes of offending. The Council argued that the development of more flexible options that would allow sentences to be better tailored to the purposes of sentencing and the needs and circumstances of offenders would be a step towards achieving that objective.

4.29 One of the specific risks of its proposal to subsume existing intermediate sentencing orders into two new orders was the potential for sentencing inconsistencies and for courts to load up orders with conditions. The Council proposed a number of measures to provide greater certainty and to minimise the risks of sentence escalation and sentencing disparities, including:

- the provision of better statutory guidance and the development, in consultation with the courts, Corrections Victoria and other interested persons, of guidelines to assist courts in applying this new sentence (including the identification of the main purposes of different conditions, and suggestions of the appropriate type and quantum of conditions for offences falling into the low, medium and high band of seriousness) (see further below);
- the continued use of pre-sentence reports to identify the most appropriate range of conditions; and
- a statutory provision directing courts not to impose any more special conditions than are necessary to achieve the purpose or purposes for which the order is made, similar in kind to that which currently applies in relation to the setting of program conditions under a CCTO, DTO and CBO.

4.30 The guidelines on the use of community sentences developed by the UK Sentencing Guidelines Council and the National Probation Service for England and Wales were referred to as providing a possible model for how guidelines might be developed in Victoria. The Guidelines Council has recommended that once the court has reached the provisional view that a community sentence is the appropriate disposition, the court should indicate whether the appropriate sentencing range is the ‘low’, ‘medium’ or ‘high’ category and the purpose or purposes that the sentence is intended to achieve when requesting a pre-sentence report. A Bench Book prepared by the National Probation Service for England and Wales and National Offender Management Service also assists sentencers by providing an explanation of the purposes of the various requirements, a brief description of each of the requirements, suggestions on compatible requirements, what information is required before a particular requirement can be made, and guidance on applying the requirement to different sentencing ranges (low, medium and high). Other detailed guidelines have been developed to assist those providing pre-sentence advice to courts and charged with the management of the new orders.

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252 Sentencing Act 1991 (Vic) s 18S(3).
253 Sentencing Act 1991 (Vic) s 18ZG(2).
254 Sentencing Act 1991 (Vic) s 38(3).
The National Probation Service has adopted a four-tiered approach to offender management, with suggested community sentence requirements mapping to these four tiers (see Table 10 below).

Table 10: UK national offender management model—community order tiers

<table>
<thead>
<tr>
<th>UK Offender Profiles</th>
<th>Suggested Approach</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Low likelihood of reoffending AND • a low risk of causing serious harm AND • presents no ‘manageability problems’ that would require something more than a minimal, administrative approach</td>
<td>Tier 1 approach (PUNISH): • Administrative/bureaucratic • Hands-off • Organising and arranging interventions to satisfy requirements • Monitoring compliance and progress • Enforcement</td>
</tr>
<tr>
<td>• High or very high risk of harm categorisation OR • is identified as falling within a local Prolific and Other Priority Offender Scheme OR • has a very high likelihood of reoffending AND • Whose needs are such that they either require a cognitive behavioural change programme AND • a treatment program of such complexity that it needs to be supported by supervision OR have more than five criminogenic needs that need to be addressed</td>
<td>Tier 4 approach (CONTROL): • Intensive • As for (HELP and CHANGE) plus framework of controls, restrictions and inter-agency management and coordination • Offender manager handling multiple information streams at inter-agency level</td>
</tr>
<tr>
<td>• High likelihood of reoffending OR • is suitable for an accredited offending behaviour program OR • needs a treatment program of such complexity that it needs to be supported by supervision OR • requires mental health treatment for a condition that is associated with their likelihood of reoffending</td>
<td>Tier 3 approach (CHANGE): • Integrated • Focused on attitudinal and behavioural change • Below (HELP) plus input with offender complementing structured change program or intervention</td>
</tr>
<tr>
<td>An offender who does not fit into any of the above categories</td>
<td>Tier 2 approach (HELP): • Brokerage • Organising and arranging interventions to satisfy requirements • Referring offenders to interventions to help with life situations and problems • Providing practical help, motivation and encouragement to support compliance • Monitoring compliance and progress • Trouble-shooting early signs of non-compliance • Enforcement</td>
</tr>
</tbody>
</table>
4.32 Under the UK form of guidance provided, it is suggested that in general:

- more requirements will equate to higher tiers;
- the inclusion of a supervision requirement means that any package of requirements could be allocated at Tiers 2, 3 or 4 depending on the offender factors and other requirements; and
- requirements that tackle practical or situational issues, such as employment or accommodation, will map into Tier 2, while those designed to effect personal change will map into Tier 3.\(^\text{258}\)

4.33 The recommended combination of requirements, taking into account the seriousness of the offence and the level of risk/needs of the offender is depicted in Figure 18 (below).

![Figure 18: Combination of requirements under the national implementation guide for the Criminal Justice Act 2003 (UK) community sentence provisions](image)

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### Legend to Figure 18

<table>
<thead>
<tr>
<th>No.</th>
<th>Label</th>
<th>Description</th>
<th>Tier</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Restrict = Restriction</td>
<td>Includes curfew requirement (up to 12 hours/day), exclusion requirement (up to 12 months) and prohibited activity requirement</td>
<td>Tier 1</td>
</tr>
<tr>
<td>2</td>
<td>Attendance Centre</td>
<td>Attend at centre 12–36 hrs</td>
<td>Tier 1</td>
</tr>
<tr>
<td>3</td>
<td>UW = Unpaid Work</td>
<td>Unpaid work up to 300 hrs</td>
<td>Tier 1</td>
</tr>
<tr>
<td>4</td>
<td>UW with ETE = Unpaid Work + Activity Requirement</td>
<td>Unpaid work up to 300 hrs + employment and training activity requirement</td>
<td>Tier 1 or 2</td>
</tr>
<tr>
<td>5</td>
<td>Practical Support</td>
<td>Supervision up to 12 months</td>
<td>Tier 2</td>
</tr>
<tr>
<td>6</td>
<td>Short Treatment</td>
<td>Either drug rehabilitation or alcohol treatment (up to 6 months)</td>
<td>Tier 2</td>
</tr>
<tr>
<td>7</td>
<td>Medium Personal Change</td>
<td>Supervision (12–18 months) + program requirement, specified activity or unpaid work (up to 100 hrs) + (if necessary) program requirement, specified activity, unpaid work or residence condition</td>
<td>Tier 3</td>
</tr>
<tr>
<td>8</td>
<td>Medium Treatment</td>
<td>Supervision (12–18 months) + drug rehabilitation, alcohol treatment or mental health treatment + (if necessary) program requirement, specified activity, or residence condition</td>
<td>Tier 3</td>
</tr>
<tr>
<td>9</td>
<td>Long Personal Change</td>
<td>Supervision (12+ months) + program requirement, specified activity requirement or unpaid work + (if appropriate) program requirement, specified activity, residence condition, unpaid work, prohibited activity, exclusion requirement, curfew or attendance centre requirement</td>
<td>Tier 3 or 4</td>
</tr>
<tr>
<td>10</td>
<td>Intensive Treatment</td>
<td>Supervision (12+ months) + drug, alcohol or mental health treatment + (if necessary) unpaid work, program requirement, specified activity requirement, residence condition, prohibited activity requirement, exclusion requirement, or curfew</td>
<td>Tier 3 or 4</td>
</tr>
<tr>
<td>11</td>
<td>Long UW (Unpaid Work) + Curfew</td>
<td>Unpaid work (150–300 hrs) + curfew (2–6 months)</td>
<td>Tier 1</td>
</tr>
<tr>
<td>12</td>
<td>Intensive Control</td>
<td>Three requirements: supervision (12 months +), program requirement, and specified activity (education and training) + (if appropriate) any other condition such as: unpaid work, program requirement, drug, alcohol or mental health treatment, residence condition, prohibited activity requirement, exclusion requirement or curfew</td>
<td>Tier 3 or 4</td>
</tr>
</tbody>
</table>

There is some evidence that this form of guidance may be effective in creating greater certainty concerning the appropriate conditions in a given case, and avoiding the potential risks of courts loading up orders with conditions (see further [9.42]).
Responses to the Interim Report

4.35 Support in submissions for the Interim Report’s proposals on the new orders was in most cases conditional on suspended sentences being retained as a sentencing option. The Criminal Bar Association was among those who took this position:

Broadly speaking, we are supportive of many of the proposals aimed at greater flexibility and clarity in community based sanctions. But we consider that these options could co-exist with suspended sentences being retained as a sentencing option.

In particular we support the abolition of CCTOs. We accept that the proposed Imprisonment Plus Release Order would be infinitely more flexible. As we understand the proposal, there would be no fixed time that an offender would be required to serve in prison under the custodial portion of such orders (para 4.19).260

4.36 Similarly, while voicing strong support for the retention of suspended sentences, the Victorian Bar indicated that it was ‘generally supportive of the approach taken in the report and is of the view that it contains many useful suggestions’.261 The Criminal Defence Lawyers’ Association, with the exception of the removal of suspended sentences as a sentencing option, also was broadly supportive of the direction proposed in the Interim Report:

The CDLA broadly supports the concept of replacing existing supervisory orders such as Intensive Corrections Orders and Community-Based Orders with the proposed Correction and Supervision Order which appears to be a hybrid order constructed to increase flexibility in tailoring conditions to the circumstances of individual offenders …

The CDLA also supports the Council’s proposal to abolish Combined Custody and Treatment Orders on the basis that these orders in our experience do not achieve their rehabilitative purpose in the majority of cases and courts increasingly express a lack of confidence in them as a sentencing option.262

4.37 The Mental Health Legal Centre supported some, but not all of the proposed changes:

… we are in favour of some, in particular the extension of deferral and the use of creative measures, including the use of the custodial supervision order (presently CBO) and the introduction of a youth correction and supervision order.263

4.38 The Law Institute of Victoria, as part of the Council’s more recent consultations, submitted that any new orders introduced should not be viewed as a substitute for suspended sentences:

The LIV supports the introduction of new sentencing orders as outlined below. However, we stress that these orders are not a suitable substitute for suspended sentences and therefore should not be seen as a replacement in the sentencing hierarchy. In particular, we emphasise that suspended sentences will continue to have an important role where an order is breached.264

4.39 Victoria Legal Aid, the Federation of Community Legal Centres (FCLC) and Fitzroy Legal Service Inc were among those who opposed the Interim Report proposals for new orders.265 The FCLC voiced concern that the changes proposed would result in less certainty and greater risk in exposing offenders convicted of less serious offences to more severe penalties:

We acknowledge that there may be a lack of flexibility in some of the orders currently available. But a smaller number of broader, albeit more flexible orders, may provide less guidance to the sentencing court and serve to make more severe penalties available.

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260 Submission 2.21 (Criminal Bar Association), referring to Sentencing Advisory Council (2005) above n 3, [4.19].
261 Submission 2.17 (Victorian Bar).
262 Submission 2.18 (Criminal Defence Lawyers’ Association).
263 Submission 2.24 (Mental Health Legal Centre).
264 Submission 3.4 (Law Institute of Victoria).
265 Submissions 2.12 (Victoria Legal Aid), 2.22 (Fitzroy Legal Service) and 2.23 (Federation of Community Legal Centres).
4. Improving Intermediate Sanctions

for less serious offences... It may... create confusion for offenders and the broader community about progression through the sentencing hierarchy. The [FCLC] does not support the removal of CBOs from the sentencing hierarchy... The order is generally well understood by the community... Any issues that do arise in relation to their effectiveness are substantially contributed to by problems associated with the design, availability and delivery of supports and services to assist rehabilitation.266

4.40 Particular concerns were expressed, including by the Victorian Aboriginal Legal Service (VALS) that the special conditions proposed for the new orders were 'potentially far more onerous' than a CBO and with or without the abolition of suspended sentences, would result in increased costs:

Even the most optimistic projection about the effectiveness of the new proposed system would be premised on increased jail time served and obviously increased costs associated with introduction or IROs and CSOs. These costs would include the increased number of court hearings about breach of core conditions and special conditions of IROs and CSOs, which will presumably be far more common in the new system.267

4.41 The Law Institute of Victoria (LIV) was similarly concerned that any reforms should be accompanied by increased funding, including funding for applications to vary conditions imposed and to allow agencies to provide support to offenders for the duration of the orders:

The LIV is concerned that adequate funding be available to ensure orders operate to their maximum effect. This is particularly the case were IRO type orders to be introduced. This class of order is new to the sentencing hierarchy and while similar to the existing CCTO is proposed to be available for considerably longer periods. As any term of imprisonment has a marked effect on individuals the LIV considers it probable that, with this class of order particularly, there may be a need to reconsider post prison conditions during the term of the order. In order to achieve this we consider it necessary to ensure that proper levels of funding are available to:

(a) Allow legal aided offenders to apply to the court, in appropriate cases, to have conditions attached to orders varied
(b) Ensure agencies are able to continue to provide adequate and meaningful interactions with offenders on orders.268

4.42 The LIV supported an alternative model to that proposed by the Council that would retain CBOs and would position a new form of intermediate order between the Council’s proposed IRO and a CBO. The LIV suggested this order could be referred to as a ‘suspended prison order’ and should encompass wholly suspended sentences, home detention orders and intensive correction orders.269

The Council’s View

4.43 The Council continues to believe that the use of orders substituted for immediate imprisonment should be kept to a minimum. In our view these sentences result in net-widening from other lower-level orders and, due to their legal status as ‘sentences of imprisonment’ and stringent breach provisions, place offenders who might otherwise have received a less severe sentence at real risk of serving a prison sentence. Even if the original sentence is not breached, the fact

266 Submission 2.23 (Federation of Community Legal Centres).
267 Submission 2.15 (Victorian Aboriginal Legal Service).
268 Submission 2.11 (Law Institute of Victoria).
269 Ibid.
of having a prison sentence on an offender’s criminal record may place him or her at greater risk of subsequent imprisonment in the case of future offending.270

4.44 We also maintain that there is benefit to be gained in increasing the transparency of sentencing orders by recasting orders contingent upon a prison sentence being imposed, as orders in their own right. This view has influenced our approach to possible reforms to the current sentencing framework in Victoria, outlined in the following chapters of this report.

4.45 In considering the range and structure of sentencing dispositions that should be available, we believe a balance must be struck between specificity and flexibility. On the one hand, retaining a number of discrete sentencing orders has the advantage of providing well-defined ‘rungs’ in the penal ladder, thereby affirming the place of imprisonment as an option of last resort. On the other, having too broad a range of orders, including those targeted at specific offender groups, may lead to confusion on the part of sentencers and the community as to what options are appropriate in a given case, and may result in orders that are so structured as to become unworkable. Providing courts with a smaller range of more flexible orders, while allowing for orders to be better tailored to the individual circumstances of the offence and offender, equally carries risks, including the potential to fast-track offenders to prison, to create uncertainty concerning the appropriate application of orders and to lead to disparities in sentencing outcomes.

4.46 In the end, after considering responses to the Interim Report, the Council has determined that, with the exception of the combined custody and treatment order, the existing range of intermediate sentencing orders in Victoria should be retained. However, we recommend a number of reforms to remedy what we believe are the most serious structural problems with these orders. Under our proposals:

- home detention would be retained as a separate custodial order, rather than transformed into a condition of a community order as originally proposed (see further Chapter 5);
- community-based orders and ICOs would be retained as separate forms of orders, rather than replaced with a single generic community order (a CSO) (see further Chapter 6 (ICOs) and Chapter 9 (CBOs));
- while a court would continue to be permitted in sentencing an offender to combine a short term of imprisonment with a community sentence, no new part-custody order, in the form of an IRO or another form of order, would be introduced (see further Chapter 8).

4.47 The most significant reforms the Council recommends are in relation to the ICO. Under the Council’s proposals the ICO would become a non-custodial order in its own right of up to two years, and while retaining unpaid community work as a core component, would allow greater flexibility than the current form of order as to the types of conditions attached and a court’s powers on breach. The Council has further recommended the introduction of a new form of ICO targeted at offenders with a drug or alcohol dependency, to address the underlying causes of offending behaviour. The drug and alcohol ICO would be different from the standard ICO, since community work would not be a core condition of the order and it would allow for the option of residential treatment and ongoing judicial monitoring to ensure an offender’s compliance with the conditions of the order (see further Chapter 7).

4.48 The Council has also recommended the introduction of a community order targeted at young adult offenders with high support needs (as originally proposed in its Interim Report) and expanding the availability of the power to defer the sentencing of an offender. Both these reforms, we believe, will provide an important means of improving sentencing outcomes for offenders and, by reducing risks of reoffending, the broader community.

270 See, for example, Kenneth Polk and David Tait, ‘The Use of Imprisonment by the Magistrates’ Courts’ (1988) 21 Australian and New Zealand Journal of Criminology 31. This study found that, on average, a person who had been to prison before was seven times more likely to go to prison again than someone who had not. A similar, but less pronounced, effect might be expected in the case of offenders sentenced to a suspended term of imprisonment, or other forms of substituted sanctions.
Chapter 5  Substitutional Custodial Sanctions
Chapter 5  Substitutional Custodial Sanctions

Introduction

5.1 In this Chapter we consider two forms of substitutional sanctions that involve the detention of an offender, used in place of full-time detention in prison:

- home detention; and
- periodic detention.

Home Detention

What is Home Detention?

5.2 Home detention is a period of detention that is served at the offender’s place of residence. In many cases it involves the offender being electronically monitored to ensure his or her compliance with the order.

The Victorian Home Detention Program

5.3 Victoria offers home detention as both a ‘front-end’ (sentencing) and a ‘back-end’ (post-sentencing and pre-release) option. In the case of home detention orders made by way of sentence, a court determines at the time of sentencing whether the sentence of imprisonment should be served by way of home detention taking into account the assessment report on the offender’s suitability for the order and the other requirements set out in the Sentencing Act 1991 (Vic). Post-sentence or ‘back-end’ home detention orders are made on application by an offender serving a prison sentence to the Adult Parole Board in accordance with the provisions of the Corrections Act 1986 (Vic).

5.4 The Victorian Home Detention Pilot Program commenced as a three-year pilot in November 2004. A funding commitment was made in the 2007–08 State Budget to fund the continuation of the program to 2010–11.

5.5 The Home Detention Program aims to:

- divert carefully selected non-violent low risk offenders from prison and to assist with the reintegration and rehabilitation of eligible non-violent minimum security prisoners back into the community.

5.6 While originally it was restricted to offenders living within a 25-kilometre radius from the Melbourne GPO, it was subsequently extended to 30 kilometres in July 2005 and 40 kilometres in January 2006.

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271 Sentencing Act 1991 (Vic) pt 3, div 2, subdiv (1D). Under the Act when a court orders a home detention assessment report, the order stays the execution of the sentence of imprisonment imposed and the offender is remanded in custody or granted bail as if he or she were still awaiting sentence until the final decision is made: s 18ZY(6).

272 Corrections Act 1986 (Vic) pt 8, div 4.


275 Ibid 15.
5.7 Home detention allows offenders to maintain community ties and employment, and can result in cost savings, since it provides an alternative option to full-time imprisonment. The Home Detention Program costs $1.6 million per year to operate. Based on the program operating at full capacity (80 offenders) the cost per offender for home detention is estimated to be $20,000 per annum, in comparison to a cost of over $50,000 per annum to house a prisoner in a minimum-security facility.

5.8 Home detention, as a sentencing order, is available once a court has sentenced a person to a term of imprisonment for up to 12 months. It is therefore structured as a direct penal equivalent to a straight term of imprisonment. Home detention is not available to offenders who have been found guilty at any time of:

- a sexual offence, violent offence, serious violent offence, or drug offence (as defined in Schedule 1 of the Sentencing Act 1991 (Vic));
- an offence which ‘in the opinion of the court, was committed in circumstances which involved behaviour of a sexual nature’;
- an offence that involves the use of a firearm or prohibited weapon;
- a breach of intervention order; or
- the offence of stalking.

5.9 Before making a home detention order, the court must be satisfied that all people over the age of 18 years who will be living with the offender have been consulted and have consented in writing to the offender living with them under a home detention order, and that the wishes and feelings of any person under 18 years in the household have been given due consideration. A court may only make a home detention order if satisfied that:

- the offender is a suitable person to serve a sentence of imprisonment by way of home detention;
- it is appropriate in all the circumstances that the sentence be served by way of home detention;
- a place will be available for the offender in a home detention program on the day his or her sentence commences and that the program is located close enough to where the offender will live during the period of the order to ensure adequate support and supervision;
- the offender has consented in writing to the making of the order and has made the necessary written undertakings, including to comply with the conditions of the order; and
- a home detention assessment report has been prepared.

5.10 A court is not permitted to make a home detention order if the assessment report states that, in the opinion of the person making the assessment, the offender is not a suitable person to serve a prison sentence by way of home detention.

5.11 While subject to home detention, an offender must comply with a number of conditions, including:

- to live only at premises approved by the Secretary to the Department of Justice;
- to remain at the approved place of residence at all times, other than when the absence is authorised, it is unsafe for the offender to remain there due to an immediate danger, or a person living at the approved residence has withdrawn his or her consent;


277 Ibid.

278 Sentencing Act 1991 (Vic) s 18ZV.

279 Sentencing Act 1991 (Vic) s 18ZU.

280 Sentencing Act 1991 (Vic) s 18ZW.

281 Sentencing Act 1991 (Vic) s 18ZW(4).
to accept any visit by the Secretary to the Department of Justice at any time;
• to submit to searches of places or things under the immediate control of the offender
  as directed;
• to submit to electronic monitoring of compliance with the home detention order;
• to comply with any reasonable direction of the Secretary to the Department of Justice in
  relation to associating with specified persons;
• not to consume alcohol or use prohibited drugs, obtain drugs unlawfully or abuse drugs
  of any kind;
• to submit to breath testing, urinalysis and other test procedures for detecting drug and
  alcohol use;
• to accept any reasonable direction of the Secretary to the Department of Justice in
  relation to the maintenance of, or obtaining of, employment;
• to engage in personal development activities or in counselling or treatment programs,
  as directed by the Secretary to the Department of Justice; and
• to undertake unpaid community work (up to 20 hours a week) as directed, if not otherwise
  employed.282

The court also has the power to attach any special conditions to the order that it considers
appropriate.283 Minor breaches of conditions can result in the Secretary to the Department of
Justice issuing a formal warning to the offender or to order a more stringent application of the
conditions of home detention (such as an increase of the hours of unpaid community work).284
Serious breaches of home detention orders285 can result in the Adult Parole Board revoking the
order (in which case the offender must serve the remainder of his or her sentence in prison),286
issuing a formal warning to the offender, ordering the offender to comply with additional special
conditions, or varying any special conditions of the order.287

The management of offenders on home detention in Victoria consists of different phases.288
During the initial phase (‘program induction’), there must be five contacts made with the offender
per week, with a maximum of one contact per day. Two contacts must be face to face (one of
which must occur on a weekend) and one contact must be between the hours of 5.30 p.m. and
7.30 a.m. The offender must also undergo a minimum of one urine/breath test per week (with
offenders with a drug or alcohol abuse history to remain on this testing frequency regardless
of the monitoring phase). During the remainder of the order (‘program maintenance’) three
contacts must be made with the offender per fortnight, one of which must be face to face. One
contact must occur on a weekend and one must be between the hours of 5.30 p.m. and 7.30
a.m. The offender is also subject to a random drug-testing regime.

5.12

5.13

282 Sentencing Act 1991 (Vic) s 18ZZB.
283 Sentencing Act 1991 (Vic) s 18ZZC(1).
284 Sentencing Act 1991 (Vic) s 18ZZH.
285 A ‘serious breach’ is defined as: (a) a breach that compromises the safety and security of the community,
any person residing with the offender or the offender’s family; (b) a breach that involves the commission of
an offence; (c) a breach that involves non-compliance with restitution order (under s 84) or a compensation
order (under s 86(1); (d) a breach that occurs after repeated failure to comply with the conditions of the
order; or (e) a breach of core conditions of the home detention order that the offender remain at the
approved residence at all times (other than as authorised by the Secretary to the Department of Justice
and under the Act) and that during authorised absences, the offender adhere to a specified activity plan:
Sentencing Act 1991 (Vic) s 18ZZI(6).
286 While the default position is that the offender must serve the period of imprisonment remaining at the date
of revocation, the Adult Parole Board has the power to direct that the effective date of revocation of the
order is the date that the breach of conditions occurred or any later date before the making of the order
revoking the order that the Board determines, if it considers it appropriate to do so: Sentencing Act 1991
(Vic) s 18ZZL(2)–(3).
287 Sentencing Act 1991 (Vic) s 18ZZK(2)–(3).
288 M & P Henderson & Associates Pty Ltd (2006), above n 274, 56; Corrections Victoria, Home Detention
Program: Operating Procedures (undated, Version 21).
The Approach in Other Australian Jurisdictions

5.14 Both New South Wales and the Northern Territory offer home detention as a ‘front-end’ (sentencing) option.

5.15 Although South Australia does not have a formal front-end home detention scheme, a court is permitted to include a home detention condition in a bond (up to a maximum period of 12 months) in circumstances in which a court suspends a sentence of imprisonment on the ground that it would be unduly harsh for the offender to spend any time in prison because of his or her ill health, disability or frailty.289

5.16 New South Wales and the Northern Territory, like Victoria, permit a home detention order to be made only as a sentencing order if the court has sentenced the offender to a term of imprisonment (in the case of NSW of up to 18 months,290 and in the Northern Territory a sentence of any length, although the maximum period the home detention order is to remain in force is 12 months291). In the Northern Territory, the term of imprisonment imposed is suspended during the period of the order, whereas in New South Wales, like Victoria, home detention is treated as means of serving a prison sentence.

5.17 As in Victoria, in New South Wales offenders convicted at any time of one of a number of violent (including sexual) offences and drug offences are ineligible.292 A court also is prohibited from making such an order ‘if the court considers it likely that the offender will commit any sexual offence or any offence involving violence while the order is in force, even though the offender may have no history of committing offences of that nature’.293 There are no legislative offence-based restrictions on the use of home detention in the Northern Territory or South Australia.

5.18 New South Wales also has similar requirements to Victoria around the consent of a person with whom it is likely the offender would live before an order can be made.294 As is the case in Victoria, a court must have regard to the contents of an assessment report on an offender,295 and may only make a home detention order if the report provides that in the opinion of the person making the assessment, the offender is a suitable person to serve a term of imprisonment by way of home detention.296

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289 Criminal Law (Sentencing) Act 1988 (SA) s 38(2c). In South Australia a court may suspend a sentence of imprisonment on the condition that the offender enter into a bond requiring him or her to be of good behaviour, and to comply with any additional conditions set by the court: s 38(1).

290 Crimes (Sentencing Procedure) Act 1999 (NSW) s 7.

291 Sentencing Act 1995 (NT) s 44. There is no requirement that the period of the order correspond with the term of imprisonment imposed. The home detention order may be made for a period longer or shorter than the term of imprisonment: Jongmin v McMaster [2004] NTSC 19 (Unreported, Bailey J, 8 April 2004) [28]–[30].

292 Crimes (Sentencing Procedure) Act 1999 (NSW) ss 76–77. Offences excluded include: murder, attempted murder, manslaughter, sexual assault of adults or children, or other sexual offences involving children, armed robbery, offences involving the use of a firearm, assault occasioning bodily harm and more serious assaults, stalking, a domestic violence offence against a person with whom it is likely the offender would live, or continue or resume a relationship with if a home detention order were made and a number of drug offences under the Drug Misuse and Trafficking Act 1985 (NSW).

293 Crimes (Sentencing Procedure) Act 1999 (NSW) s 78(6).

294 Crimes (Sentencing Procedure) Act 1999 (NSW) s 78(1). Before making a home detention order the court must be satisfied that that the persons with whom it is likely the offender would reside, or continue or resume a relationship, during the period of the offender’s home detention have consented in writing to the making of the order: s 78(1)(c).

295 Crimes (Sentencing Procedure) Act 1999 (NSW) s 78(2)(a).

296 Crimes (Sentencing Procedure) Act 1999 (NSW) s 78(4).
5.19 A court in the Northern Territory can make a home detention order in circumstances in which it is satisfied that it is ‘desirable to do so in the circumstances’. However, before making an order, the court must have received a report from the Director of Correctional Services specifying that suitable living arrangements are available, that the premises or place where the offender will live is suitable for the purposes of a home detention order and that the making of the order is not likely to inconvenience or put at risk other persons living in those premises or at that place or the community generally. A court can only make a home detention order if the offender consents to the making of the order.

5.20 As at 1 March 2007, there were 221 offenders subject to home detention or some other form of restricted movement in New South Wales and 34 offenders in the Northern Territory.

5.21 Prior to the commencement of the Corrective Services Act 2006 (Qld), home detention was available as a ‘back-end’ option for the release of prisoners in Queensland. Home detention was introduced in 1987, and it was intended to ‘assist prisoners to reintegrate successfully into the community by providing additional support and vigilant surveillance during the initial resettlement period’. Under the Queensland scheme, there were no offence restrictions on eligibility for home detention. There was no maximum duration for an order period, but in practice, generally, home detention orders were in force for a period no longer than four months.

5.22 In the period 1995–96 to 2004–05, there were 4,218 offenders on home detention orders in Queensland. Despite its widespread use, home detention was abolished in August 2006, as part of a series of reforms that replaced a number of post-release options with court-ordered parole. It was suggested that parole was a preferable option for release from imprisonment as ‘suitable accommodation options for home detention are not always available and home detention can place significant stress on families’.

New Zealand

5.23 Until October 2007, home detention operated in New Zealand as a back-end option only. In the case of short sentences (two years or less), a court was required to grant the offender leave to apply to the New Zealand Parole Board for home detention. An offender sentenced to a longer-term sentence also could apply to the Parole Board for home detention without the leave of the court at any time after five months prior to the expiry of their non-parole period. Ultimately, the decision whether to release an offender on home detention was the responsibility of the Parole Board.

297 Sentencing Act 1995 (NT) s 44(1).
298 Sentencing Act 1995 (NT) s 45(1)(a).
299 Sentencing Act 1995 (NT) s 45(1)(b).
300 Australian Bureau of Statistics, Corrective Services, Australia (Catalogue Ref 4512.0) (2007) Table 19.
302 Ibid 9.
303 Corrective Services Act 2000 (Qld) ss 134–41, repealed by Corrective Services 2006 (Qld).
305 Ibid 74.
307 Department of Corrective Services (Qld), Review of the Corrective Services Act 2000: Consultation Report for the Minister of Police and Corrective Services, the Honourable Judy Spence, MP (2005) 17.
308 Sentencing Act 2002 (NZ) s 97(1) (now repealed). Before granting leave, the court must have been satisfied that it would be appropriate to grant leave, taking into account the nature and seriousness of the offence, the circumstances and background of the offender and any relevant matters in the victim impact statement (if relevant).
309 Parole Act 2002 (NZ) s 33(2).
5.24 The New Zealand government now has introduced home detention as a sentence in its own right, and abolished home detention as a back-end option. Home detention is positioned below a term of imprisonment and above community based sentences.

5.25 The minimum period of home detention a court can order is 14 days and the maximum period is 12 months. Standard conditions are similar to those that exist in Victoria, including that the offender is required to be under the supervision of a probation officer, not leave the home detention residence at any time (except with the approval of a probation officer or in other circumstances involving medical or other emergencies), to submit to electronic monitoring and to comply with any lawful directions of a probation officer. A court may also impose one or more special conditions, including:

- any conditions the court thinks fit relating to the offender’s finances or earnings;
- conditions requiring the offender to take prescription medication;
- a program condition;
- a condition requiring the offender to comply with the requirements of judicial monitoring as directed by a probation officer or the sentencing judge;
- any other conditions that the court thinks fit to reduce the likelihood of the offender reoffending.

5.26 The court is permitted to defer the start date of home detention for a period of up to two months on humanitarian grounds, or if satisfied that it is in the interests of justice to do so.

310 These changes came into operation on 1 October 2007.
311 Sentencing Act 2002 (NZ) s 10A.
312 Sentencing Act 2002 (NZ) s 80A(3).
313 Sentencing Act 2002 (NZ) s 80C(2).
314 Sentencing Act 2002 (NZ) s 80D. A court can only impose special conditions if satisfied that: there is a significant risk of further offending by the offender; standard conditions alone would not adequately reduce the risk; and the imposition of special conditions would reduce the likelihood of further offending through the rehabilitation and reintegration of the offender: s 80D(2).
315 An offender can only be made subject to a special condition requiring him or her to take prescription medication if: the offender has been fully advised, by a person qualified to prescribe that medication, about the nature and likely or intended effect of the medication and any known risks; and he or she consents to taking the medication: Sentencing Act 2002 (NZ) s 80D(7). If an offender later withdraws consent to take the medication, this failure does not constitute a breach but may provide a ground for variation or cancellation of the sentence: Sentencing Act 2002 (NZ) s 80D(8).
316 Section 80D(5) gives a ‘program condition’ the same meaning as in s 54H (which relates to the use of intensive supervision orders). Section 54H defines programmes as residential and non-residential programs including: any psychiatric or other counselling and assessment; attendance at any medical, psychological, social, therapeutic, cultural, educational, employment-related, rehabilitative, or reintegrative program; and placement in the care of any people or agency approved by the Department of Corrections.
317 Before making a judicial monitoring condition, a court also must be satisfied that: ‘because of the special circumstances of the offender, this is necessary to assist the offender’s compliance with the sentence’: Sentencing Act 2002 (NZ) s 80D(3).
318 Sentencing Act 2002 (NZ) s 80W(1).
5.27 A court also may grant leave to an offender who has been sentenced to a ‘short-term’ prison sentence (a sentence of two years or less)\textsuperscript{319} to apply for substitution of a sentence of home detention in circumstances where it would have sentenced the offender to home detention at the time of sentencing if a suitable residence had been available at that time.\textsuperscript{320} The offender may apply for a substitution order at any time during the period of his or her sentence.\textsuperscript{321} If the court grants the application for substitution, it must take into account the portion of the original sentence that remains unserved at the time of the order.\textsuperscript{322}

5.28 There is some scope for probation officers to provide offenders subject to home detention with greater freedom towards the end of the detention period. While during the period of the detention order an offender may be given permission to leave his or her residence for specific purposes (such as to go to work, or seek employment, or to attend training or other rehabilitative or reintegrative activities or programs), an offender who has served at least three-quarters of a home detention sentence of six months or more may also be granted permission to leave the residence for up to four hours a day without a specific purpose for any or all days remaining to be served under the sentence.\textsuperscript{323}

5.29 Unlike the Victorian form of order, the legislation specifically provides for a post-detention period, during which the offender must comply with certain conditions.\textsuperscript{324} In the case of offenders sentenced to home detention of less than six months, the court has discretion whether or not to make an offender subject to post-detention conditions.\textsuperscript{325} Compliance with post-detention conditions is mandatory for offenders sentenced to a period of home detention of six months or more;\textsuperscript{326} however, the court has some flexibility in setting the length of time an offender must comply with these conditions (between 6–12 months from the detention end date).\textsuperscript{327} If no period is specified by the court, the standard post-detention conditions apply for 12 months.\textsuperscript{328}

\begin{itemize}
\item \textsuperscript{319} ‘Short-term sentence’ has the same meaning as in section 4(1) of the \textit{Parole Act 2002 (NZ): Sentencing Act 2002 (NZ)} s 4(1). The \textit{Parole Act 2002 (NZ)} defines a ‘short-term sentence’ as a: ‘sentence of imprisonment that is—(a) a determinate sentence of 24 months or less imposed on or after the commencement date; or (b) a notional single sentence of 24 months or less; or (c ) in the case of a pre-commencement sentence, a sentence of 12 months or less.’
\item \textsuperscript{320} \textit{Sentencing Act 2002 (NZ)} s 80I.
\item \textsuperscript{321} \textit{Sentencing Act 2002 (NZ)} s 80K(1).
\item \textsuperscript{322} \textit{Sentencing Act 2002 (NZ)} s 80K(6).
\item \textsuperscript{323} \textit{Sentencing Act 2002 (NZ)} s 80C(5).
\item \textsuperscript{324} Under the standard post-detention conditions, offenders subject to home detention: must report to a probation officer as and when required to do so and notify the probation officer of his or her address, and the nature and place of his or her employment when asked to do so; must not move to a new address in another probation area without the prior written consent of the probation officer; must give the probation officer reasonable notice before moving address and advise the probation officer of the new address; must not live at any address at which a probation officer has directed the offender not to live; must not engage, or continue to engage, in any employment or occupation in which the probation officer has directed the offender not to engage or to continue to engage; must not associate with any specified person, or people of a specified class, with whom the probation officer has, in writing, directed the offender not to associate; and must take part in a rehabilitative and reintegrative needs assessment if and when directed to do so by a probation officer: \textit{Sentencing Act 2002 (NZ)} s 80O. Offenders can also be required by the court to comply with a range of special post-detention conditions, including: any conditions the court thinks fit relating to the offender’s place of residence (including a condition that the offender not move), finances or earnings; conditions requiring the offender to take prescription medication; a program condition; and any other conditions that the court thinks fit to reduce the likelihood of the offender reoffending: \textit{Sentencing Act 2002 (NZ)} s 80P. However, a court is specifically prohibited from imposing a special post-detention condition requiring the offender to submit to electronic monitoring: \textit{Sentencing Act 2002 (NZ)} s 80P(4).
\item \textsuperscript{325} \textit{Sentencing Act 2002 (NZ)} s 80N(1).
\item \textsuperscript{326} \textit{Sentencing Act 2002 (NZ)} s 80N(2).
\item \textsuperscript{327} \textit{Sentencing Act 2002 (NZ)} s 80N(3).
\item \textsuperscript{328} \textit{Sentencing Act 2002 (NZ)} s 80N(2).
\end{itemize}
5.30 Breach of either detention conditions or post-detention conditions constitutes an offence; however, a different maximum penalty applies depending on whether the offender is still subject to detention or not. Either the offender or a probation officer may apply for variation or cancellation of the home detention sentence on grounds including that the offender is unable to comply, or has failed to comply with any detention conditions, and in circumstances in which the offender is convicted of an offence punishable by imprisonment.

5.31 On an application for variation or cancellation, the court may:
- remit, suspend or vary any special conditions imposed, or impose additional special conditions;
- vary the home detention residence;
- cancel the sentence; or
- cancel the sentence and resentence the offender (in which case the court must take into account the portion of the original sentence that remains unserved at the time the order is made).

Issues

5.32 Proponents of home detention argue that home detention provides a cost-effective alternative to imprisonment that avoids many of the negative consequences of full-time custody. It is argued that home detention more effectively supports the reintegration and rehabilitation of offenders, as it enables employment, accommodation, and family relationships to be maintained. Offenders subject to home detention also have been reported to have substantially lower rates of recidivism compared with offenders who serve their sentence in prison. For example, in New South Wales the recidivism rates of home detainees are around 12 per cent, compared with around 50 per cent of offenders discharged from prison, and 26 per cent of offenders who are serving orders involving supervision in the community.

5.33 However, home detention is not without its critics. When the Victorian Home Detention program was first proposed, there were a number of concerns expressed about its possible impact on families and others living with offenders, including that:
- 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.

329 A breach of detention conditions is punishable by up to 12 months’ imprisonment, or a fine of up to $2,000, while breach of post-detention conditions attracts a lesser penalty of up to six months imprisonment, or a fine of up to $1,500: Sentencing Act 2002 (NZ) ss 80S and 80U. There are powers under the Act for a police officer or probation officer to arrest an offender without a warrant, where there are reasonable grounds to believe the offender has breached any of his or her detention conditions or post-sentence conditions: Sentencing Act 2002 (NZ) s 80V.

330 Sentencing Act 2002 (NZ) s 80F(1)(a).

331 Sentencing Act 2002 (NZ) s 80F(2).

332 Sentencing Act 2002 (NZ) ss 80F(4) and 80G(2).

333 See, for example, Roberts (2004), above n 164.


335 Standing Committee on Law and Justice, New South Wales Legislation Council (2006), above n 44, [7.46]–[7.47].

5.34 The allegation has also been made that ‘in its design and impact, [home detention] is a sentence with inherent class, gender and racial bias’;\(^{337}\) the profile of average detainees in the Victorian program provides some evidence of this. An evaluation of the Victorian Home Detention pilot program completed in 2006 reported that the majority of home detainees had been born in Australia (73 per cent) and only a few Indigenous offenders had participated in the program.\(^{338}\) In comparison with prisoners generally, home detention offenders appeared to be better educated and at the time of the offence just under half (46 per cent) were employed with a high proportion of offenders being employed as professionals (43 per cent).\(^{339}\) The average age of detainees was 38 years.\(^{340}\)

5.35 While a good proportion of those accepted onto the program at the time of the evaluation (over one in five) were women,\(^ {341}\) it has been argued that women are particularly disadvantaged by home detention schemes. The reasons for this are said to include the particular difficulties women face in securing stable accommodation (a prerequisite for eligibility) and judges sentencing women more harshly when the option of home detention is available.\(^ {342}\) The experience of home detention, it is further suggested, is more onerous for many women due to their status as sole parents and the absence of other adult support in the home.\(^{343}\)

5.36 Despite these concerns, the evaluation of the Victorian Home Detention pilot program was generally positive about the operation of the program, including feedback received from co-residents about their experiences.\(^{344}\) Key findings of the evaluation team included that:

- Caseload numbers were lower than expected, but this was a reflection of the stringent assessment criteria adopted, and was partly offset by budgetary economies. The lower than expected caseload numbers were primarily the result of the very low rate of sentence orders applied for by the courts.
- Breach and revocation rates were low. There were only five serious breaches leading to revocation of an order, and a further 15 minor breaches. Three orders were also revoked because co-residents withdrew consent and/or the offender was unable to provide suitable accommodation. Breach and revocation rates were much lower on the post-prison component of the program than on the sentence component.
- Despite initial concerns about the potential for home detention to expose families to risk or unreasonable compliance pressures, there was no evidence of significant risk and the overwhelming response from families was supportive.
- The rate of re-offending by home detainees was lower than expected. The expected number of recidivists for the home detention program was 7.26, and the actual number was one plus a further home detainee on remand.
- Despite the relatively high unit costs that are a consequence of reduced caseloads, the VHD program returned $1.80 in benefits for every $1 spent on the program. In terms of overall cost-benefit, the program yielded superior outcomes for less cost than the alternative of imprisonment. There were also non-costed benefits in the form of low parole breach rates, reduced cost of crime and improved family outcomes.\(^ {345}\)


\(^{338}\) Melbourne Centre for Criminological Research and Evaluation (2006), above n 336, 36.

\(^{339}\) Ibid 37–8.

\(^{340}\) Ibid 34.

\(^{341}\) Ibid 35.

\(^{342}\) George (2006), above n 337, 82–3.

\(^{343}\) Ibid 83.

\(^{344}\) Melbourne Centre for Criminological Research and Evaluation (2006), above n 336.

\(^{345}\) Ibid 4–5.
New Zealand has had a similar positive experience with home detention. The New Zealand government, in supporting the continuation of the scheme, has cited a number of benefits of home detention over imprisonment, including lower rates of reconviction, high compliance rates and lower costs.\textsuperscript{346}

The New Zealand government, in reconfiguring home detention as a sentence in its own right, has suggested that the potential cost savings will outweigh any likely establishment and recurrent costs, due to offenders being diverted from prison.\textsuperscript{347} The costs to the correctional system of these changes have been estimated at around $15 million for 2006–07, $23.2 million for 2007–08 and $13.6 million annually thereafter.\textsuperscript{348} This costing includes set-up costs for new policies, procedures, recruitment and training, as well as capital costs for changes to the Integrated Offender Management System and four additional Community Probation Centres. Ongoing operational costs include costs associated with administering orders, including administering community work, the preparation of additional reports and accommodation costs for new staff.\textsuperscript{349}

The majority of orders made in Victoria have been ‘back-end’ rather than ‘front-end’ orders made by way of sentence. Of the 138 home detention orders made over the two-year period 2005–06 to 2006–07, 56 (40.6 per cent) were court ordered.\textsuperscript{350} In 2006–07, of the 42 home detention orders made by way of sentence, 40 were ordered by the Magistrates’ Court and two by the County Court.\textsuperscript{351} During 2006–07, the Adult Parole Board revoked nine orders—all due to positive urinalysis results.\textsuperscript{352}

Data examined by the Council have revealed that the most common offence for which home detention was used in the Magistrates’ Court was for the offence of driving while disqualified or suspended. This high use of home detention orders for this offence may be a by-product of the mandatory minimum penalty for this offence. Most of the home detention orders imposed for this offence were of three to four months in duration.\textsuperscript{353} The remaining offences for which a home detention order was imposed in the Magistrates’ Court included drink driving offences, and some minor drug trafficking offences.\textsuperscript{354} Of the two home detention orders imposed in the County Court, one was imposed for the offence of trafficking in a drug of dependence and the other for the offence of defrauding the Commonwealth.\textsuperscript{355}

The reasons for the limited use of home detention as a sentencing order identified in consultations have included:

- the requirement that a court must first impose a term of imprisonment before the offender’s suitability for home detention is assessed, which limits the information available to a sentencer at the time of sentencing, and removes the discretion to impose another form of sentence in the event that the offender is found ineligible or unsuitable to serve the sentence by way of home detention;

\textsuperscript{346} New Zealand Parliament (2006), above n 88. The rates of reconviction and reimportance for home detention have been reported to be ‘only one-quarter to one-third of the rates for offenders who are sentences to up to 12 months in prison’. The annual rate of recall of those on home detention is around 1–1.5 per cent.

\textsuperscript{347} Ibid.

\textsuperscript{348} Ibid.

\textsuperscript{349} Ibid.


\textsuperscript{351} Ibid 24.

\textsuperscript{352} Ibid.

\textsuperscript{353} Department of Justice, unpublished data.

\textsuperscript{354} Ibid.

\textsuperscript{355} Ibid.
the stringent eligibility criteria, which result in a number of offenders being found ineligible for the order due to the nature of their current, or past offending, despite these offenders being at low risk of reoffending and the availability of the order only to offenders living within a 40 kilometre radius of the Melbourne CBD; and

• a lack of clarity on the part of sentencers concerning the intended target group for the order.356

Issues of Penal Equivalence and the Nexus between Imprisonment and Home Detention

5.42 Both the New South Wales and Victorian schemes conceive of home detention as direct equivalents to full-time imprisonment, and require a term of imprisonment to be imposed before a home detention order can be made. It would seem that, at least in Victoria, sentencers do not view home detention as a direct equivalent to imprisonment. Media reports following the release of offenders on home detention also suggest that victims have difficulty accepting home detention as an appropriate substitute for a period of full-time imprisonment in some instances.357 The cancellation of the order and commitment of the offender to prison in the event of breach of a home detention order could further be pointed to as evidence that immediate imprisonment is viewed as a more severe sanction than serving a period of home detention.358

5.43 As discussed above, reforms to the New Zealand Sentencing Act 2002 (NZ) have established home detention as a sentence in its own right positioned between imprisonment and community based sentences.359 A court is permitted to sentence an offender to home detention for an offence punishable by imprisonment, or an offence that expressly provides that a sentence of home detention may be imposed on conviction.360

5.44 The Victorian Home Detention pilot program evaluation team supported replacing the current requirement for equivalence between the term of imprisonment imposed and the period of the home detention order with a provision allowing a court to set a term of home detention proportionate to the seriousness of the offence(s).361 However, the evaluation team recommended that the Adult Parole Board should retain a power to revoke a home detention order made by way of sentence resulting in the offender’s immediate return to prison and the matter returned to the original court of sentence to determine an appropriate period of imprisonment to be served in lieu of the order.362 If these recommendations were to be adopted, presumably home detention would still need to be treated at law as a term of imprisonment as otherwise the Adult Parole Board would have no jurisdiction over the offender.

356 Similar issues were raised by magistrates during consultations for the initial evaluation report completed in July 2005: Melbourne Centre for Criminological Research and Evaluation (2006), above n 336, 31–2.


358 See Roberts (2004) above n 164, 49. Roberts makes the point that: ‘If the sanctions were equivalent, one could hardly serve as a back-up for the other—it would be tantamount to imposing a fine on a person in an attempt to compel them to serve a previously imposed fine’.

359 Criminal Justice Reform Act 2002 (NZ) s 65 (inserting new Subpart 2A in the Sentencing Act 2002 (NZ)).

360 Sentencing Act 2002 (NZ) s 80A(1).


5.45 A potential risk of severing the connection between imprisonment and home detention is net-widening. Rather than using home detention solely as a substitute for imprisonment, some sentencers may use it when they otherwise might have ordered a community-based order, as home detention will ‘lack the status of imprisonment’. On the other hand, it could be argued that evidence of net-widening in the case of other sentencing orders that similarly require the court first to impose a term of imprisonment, such as suspended sentences, suggests that a formal requirement to first impose a term of imprisonment may provide little protection against this type of response.

5.46 A further result of recasting home detention as a stand alone sentencing option may be to increase the likelihood that sentencers will impose longer sentences on offenders sentenced to home detention, on the basis that the offenders will serve the sentence by way of home detention rather than in prison. Those who believe serving a sentence by way of home detention should be treated as equivalent to serving time in prison might argue that this type of response constitutes unjustified sentence inflation. Others who question whether home detention is a true penal equivalent to imprisonment, however, might suggest that this type of adjustment in the length of the sentence to allow for the fact the offender will be subject to home detention rather than imprisonment, is an appropriate response by sentencers to achieving a proportionate sentence.

Assessing the Effectiveness of Home Detention

5.47 While evaluations of home detention have generally been quite positive in terms of rates of reoffending, some have argued that its usefulness should be assessed against community based alternatives, rather than imprisonment. At the time of the evaluation of the Victorian Home Detention Program (April 2006), one offender had committed a further offence and been sentenced to a further term of imprisonment, while a second home detainee had been remanded in custody in relation to alleged offending. This translated to a recidivism rate of less than one per cent (if only the sentenced offender was counted) or two per cent (if both offenders were counted). This compared to a one-year predicted reoffending rate of 10 per cent (translating to around 7 recidivists), compared with 28 per cent for all prison releasees. The rates of reoffending were therefore found to be substantially lower than expected, even taking into account home detainees’ lower risk levels. The recidivism rates for home detainees were not compared with rates of reoffending for offenders sentenced to community-based orders.

5.48 While published recidivism rates may provide a possible guide as to how effective home detention is in terms of minimising risks of reoffending, compared to other community based dispositions there appears to be no published Victorian data on recidivism rates for offenders on community-based orders. Of those offenders discharged from community corrections orders during 2003–04 in other Australian jurisdictions, the rates of those who returned with a new correctional sanction within two years ranged from 19.8 per cent (in South Australia) to 41.8 per cent (in Western Australia), with an average of 29 per cent across all jurisdictions. On the basis of these figures, it would seem that recidivism rates of home detainees in Victoria are relatively low compared to community-based orders more generally, although this does not take into account the potentially different profile of offenders accepted for home detention (that is, low-risk, non-violent offenders who are comparatively better educated, more likely to be employed and have a stable lifestyle) to those likely to be placed on community-based orders.

363 Roberts (2004), above n 164, 129. Roberts refers to this as a danger of community custody more generally if it is no longer treated as a form of custody, rather than an intermediate sanction positioned between probation and imprisonment.
364 See, for example, George (2006), above n 337, 87.
366 Ibid.
367 Ibid 68.
5.49 The order also appears to be effective in satisfying the punishment purpose of sentencing. Offenders subject to home detention who participated in the Victorian evaluation identified the degree to which home detention restricted their home or recreational activities (particularly exercise) as one of the most difficult aspects of the order. The evaluation team reported that ‘[m]any participants found Stage 1 of their order (when activity restrictions were greatest and surveillance most intensive) to be extremely difficult psychologically’ and that:

These restrictions were sometimes experienced particularly acutely because of the contrast with the level of physical activity at the minimum security prisons where they had been immediately before commencing home detention.

5.50 The evaluation team suggested that the problems experienced pointed to ‘an obvious tension inherent in home detention’:

On the one hand, restrictions on activity and uncertainty about progressing to less restrictive conditions are a necessary part of home detention. The effective operation of home detention, and its acceptance by the community, is predicated on detainees experiencing significant limitations on what they can do, and on decisions about progression to less restrictive conditions being subject to discretionary judgments about compliance and risk. However, from the perspective of participants and co-residents, home detention is an intermediate point between prison and the resumption of their old lives.

5.51 In a sentencing context, the punitive character of home detention and other forms of electronic monitoring has been criticised on the basis that they result in more severe sentencing outcomes for offenders who previously would have received some form of community order. ‘The addition of constant surveillance utilising electronic monitoring combined with severe restrictions on movements’ is said to ‘add a punitive layer to community sanctions to allay community concerns about “criminals” wandering around freely on other community sentences’.

The Interim Report Proposals

5.52 The Council in its Interim Report proposed that home detention should be available as a condition of a community order, rather than as a separate sentencing disposition. Under these proposals, the making of a home detention order would no longer be conditional on an offender being sentenced to a term of imprisonment; rather, a court would have the option of sentencing an offender to a community order, and ordering the offender for part of the period of the order to be subject to home detention conditions.

5.53 The Council suggested that in the case of conditions involving restrictions on liberty, and other more onerous conditions, an upper limit should be set on the period such conditions are permitted to run (for example, six months).

370 Ibid. These views were expressed by those on ‘back-end’ home detention orders.
372 George, above n 337, 87–8.
Submissions and Consultations

5.54 In submissions, some expressed concerns about making conditions, such as home detention and curfew conditions with electronic monitoring, available as conditions of a community-based order rather than retaining home detention as a custodial option.\textsuperscript{373}

5.55 The Victorian Aboriginal Legal Service Inc (VALS) was concerned that the Interim Report failed to consider adequately ‘the scope for the new non-custodial orders to become increasingly punitive and legitimise significantly expanded custodial orders, such as home detention’.\textsuperscript{374} VALS suggested there was an inherent contradiction between ‘the insistence that suspended sentences not be mislabelled as custodial orders, but indifference to the idea that home detention or curfew are similarly mislabelled a non-custodial order’.\textsuperscript{375}

5.56 The potential for net-widening was another issue of concern, as was the problem of having no clear consequences on breach if the nexus between imprisonment and home detention was broken. Those who raised these concerns supported the Council investigating the option of a ‘tougher’ form of community-based order that would allow for a curfew condition to be attached.

5.57 In consultations undertaken by the Council in relation to its final recommendations, there was support for a proposal to retain home detention as a separate order, but to recast it as an order in its own right.\textsuperscript{376} The Law Institute of Victoria was generally supportive of the concept of home detention, but noted that it ‘is seldom used’ and suggested that ‘several aspects of the current orders need to be modified’.\textsuperscript{377} The LIV raised particular concerns around the lack of availability of home detention outside of Melbourne, which was viewed as both ‘unjustified and unfair’. The LIV also provided some anecdotal evidence that there are some issues with the use of the technology necessary for an offender to be monitored on home detention within metropolitan Melbourne.\textsuperscript{378} It submitted that ‘home detention should be available as a sentencing option across Victoria’.\textsuperscript{379}

5.58 The Law Institute of Victoria supported the assessment of eligibility for the order being carried out as part of the pre-sentence assessment process instead of post-sentence or post-imprisonment. The LIV suggested that benefits of this approach would include removing ‘the current anomaly that an offender is precluded from home detention if they receive a partially suspended sentence and a partial immediate term of imprisonment’ and would ‘also increase certainty for sentencing courts so that they can make informed decisions about the type of detention they are imposing’.\textsuperscript{380}

5.59 The Mental Health Legal Centre and Youthlaw noted that home detention was not an option for most of their clients, ‘many of whom are homeless as a result of family breakdown, mental illness, abuse and/or other issues’.\textsuperscript{381} The Victorian evaluation team in its report addressed similar concerns by suggesting that options should be developed for offenders without access to a residence, such as supported accommodation arrangements through programs like Housing

\textsuperscript{373} See, for example, Submission 2.12 (Victoria Legal Aid).
\textsuperscript{374} Submission 2.15 (Victorian Aboriginal Legal Service).
\textsuperscript{375} Ibid.
\textsuperscript{376} Meeting with judges of the County Court of Victoria (27 November 2007); Magistrates’ Court of Victoria (Meeting 5 December 2007); Submissions 3.2 & 3.5 (Victoria Legal Aid), 3.4 and 3.11 (Law Institute of Victoria), 3.7 (Youthlaw and the Mental Health Legal Centre) and 3.12 (Office of Public Prosecutions).
\textsuperscript{377} Submission 3.4 (Law Institute of Victoria).
\textsuperscript{378} Law Institute of Victoria (Meeting 19 November 2007).
\textsuperscript{379} Submission 3.4 (Law Institute of Victoria).
\textsuperscript{380} Ibid.
\textsuperscript{381} Submission 3.1 (Youthlaw and the Mental Health Legal Centre).
Pathways or Transitional Housing Managers. The team further recommended that the program should be extended to offenders living in regional Victoria.

The MHLC and Youthlaw further submitted that home detention ‘must only be applied if the sentence warrants a goal sentence’ and that its imposition ‘must be only with the informed consent from defendant(s) and their families and, where there are proper responsive supports and respite to families’. They argued that ‘an injection of increased resources is required to make this a viable option’.

There was also some discussion in consultations about whether or not there should be any changes to the maximum duration for an order for home detention. Most of those consulted felt that the current 12-month maximum was appropriate. Victoria Legal Aid submitted that an increase in the maximum duration ‘may have an inflationary impact on sentences and result in the imposition of some inappropriately long sentences’. Fitzroy Legal Service argued that the availability of longer orders ‘can also put undue pressure on families who are inevitably placed in the “monitoring and supervising” roles of the family member who is the recipient of the home detention order’.

Some consulted suggested that there should also be some scope for the ‘tapering off’ of the conditions over the period of the order. For example, some judges of the Victorian Court of Appeal suggested that the order should have some kind of legislatively guided tapering off of conditions and further administrative controls on the exercise of discretion by Corrections in the execution of the order.

The Council’s View

While the Council initially supported the condition of home detention being available as part of a community order rather than the retention of a separate home detention order, we now consider there is value in retaining this as a separate form of sentence for that small group of offenders for whom such an order is considered suitable.

The evaluation of the Victorian Home Detention program has identified a number of positive aspects of the home detention scheme, including low rates of reoffending by participants. While such a program inevitably carries some risks, it would seem that those involved in the program, including family members of offenders, are generally positive about the operation of the scheme and the benefits it can deliver.

Reflecting the Council’s view that sentencing orders should exist as separate forms of dispositions, rather than being treated as substitutes for imprisonment, the Council recommends that the order should be recast as a sentence in its own right. This change will not only remedy the substitutional nature of the order, but may also encourage its greater use, because sentencers will not be locked into imposing a term of imprisonment before an offender’s suitability for the order is assessed. Further, on an offender being found to be a suitable person to serve such an order, the court will be free to impose whatever term of detention it considers appropriate, without being constrained by the term of imprisonment it might otherwise have imposed. We note that this recommendation is consistent with the recommendations of the Home Detention program evaluation team.

382 Melbourne Centre for Criminological Research and Evaluation (2006), above n 336, Recommendation 5.
383 Ibid.
384 Ibid.
385 Submission 3.1 (Youthlaw and the Mental Health Legal Centre).
386 For example, Magistrates’ Court of Victoria (Meeting 5 December 2007).
387 Submission 3.5 (Victoria Legal Aid).
388 Submission 3.9 (Fitzroy Legal Service).
389 Meeting with judges of the Victorian Court of Appeal (16 November 2007).
Taking into account the significant demands home detention places on an offender, and the extended periods during which an offender's liberty is restricted under such an order, the Council supports home detention continuing to be classed as a custodial form of order.

The Council has not made any recommendations concerning the ongoing availability of home detention as a back-end order, since it believes that this is a matter for Corrections Victoria to determine. However, many of the arrangements outlined below, including the possible involvement of a Community Corrections Board in responding to breaches of orders, could equally apply to the use of home detention post-sentencing.

Once home detention as a sentencing order becomes a separate form of order rather than simply a means of serving a prison sentence, we believe the flexibility of the order should be increased. Under our proposals, while initially an offender on home detention would be subject to full-time detention, other than when at work or for any other authorised purposes, as the order progresses, and provided the offender has complied with the requirements of the order, the hours an offender would be subject to detention might be reduced; for example, to make an offender subject only to a weekend or evening curfew. This would bring the arrangements for managing offenders subject to home detention in line with those that currently govern offenders sentenced to imprisonment who are eligible for parole.

While this scaling down of hours might be managed administratively, in the interests of transparency, we support some limited form of legislative guidance being provided. This legislative guidance could take the form, for example, of specifying the minimum period or proportion of the sentence that must be served before a reduction in hours is permitted, and the total number of hours an offender is permitted to be absent from the authorised residence for an unspecified purpose once this point is reached. The Council suggests that the development of these guidelines should be led by Corrections Victoria and should occur in consultation with the courts and other legal and community stakeholders.

In Chapter 11 of this Report, the Council recommends that consideration should be given to the establishment of a Community Corrections Board to oversee the management of offenders serving community sentences. If established, this Board might also play a role in overseeing the management of offenders subject to home detention.

We accept that potential risks of severing the connection between home detention and imprisonment are net-widening and sentence inflation. However, we believe these risks can be adequately protected against by permitting a court to make a home detention order only if the offence is punishable by imprisonment and in circumstances in which the court might otherwise have considered sentencing the offender to a term of imprisonment. Ensuring sentencers have a proper understanding of the nature of the restrictions placed on an offender under such an order will also be important, in order to assist them in determining whether home detention is the appropriate form of sentence in the circumstances, and in setting the duration of the order.

If home detention becomes a sentencing order in its own right, it would no longer be appropriate to invest power in the Adult Parole Board to revoke those orders made by way of sentencing resulting in the immediate imprisonment of the offender (although this power would remain in the case of ‘back-end’ orders). Rather, the offender would need to be brought back before the court that made the original order, or in the case of home detention orders imposed on appeal, the original sentencing court, to determine the response to the breach.

While we acknowledge that bringing an offender back before the original sentencing court may give rise to delays, we believe this is best dealt with through measures designed to expedite breach proceedings explored in Chapter 11 of this Report, including the possible establishment of a Community Corrections Board to respond to breach of conditions of orders and improving current resourcing levels of Corrections Victoria, the Office of Public Prosecutions and the courts.
RECOMMENDATION 3: Home Detention

Recommendation 3–1
Home detention as a sentencing order should be recast as a separate custodial sentencing order in its own right, rather than as a means of serving a prison sentence. A court should be permitted to impose a sentence of home detention if the offender is convicted of an offence punishable by imprisonment and the other criteria as set out in sections 18ZU–ZW of the Sentencing Act 1991 (Vic) are satisfied.

Recommendation 3–2
The specific purposes of home detention should be to allow for:
- the adequate punishment of an offender in the community;
- the rehabilitation of an offender in the community; and
- the monitoring, surveillance and supervision of an offender.

Recommendation 3–3
Home detention as a sentencing order should be targeted at offences of medium to high seriousness and low to medium risk/needs offenders.

Recommendation 3–4
The Council recommends the following reforms to home detention as a sentencing order:

Eligibility and Consent
A court should be permitted to make an order for home detention if:
(a) the person has been convicted of an offence or offences punishable by imprisonment (but excluding persons convicted of an offence to which s 18ZV of the Sentencing Act 1991 (Vic) refers (that is, a sexual offence, a violent offence, a drug offence, use of a firearm or prohibited weapon, breach of an intervention order or stalking));
(b) the court might otherwise have considered sentencing the offender to a term of imprisonment;
(c) it has received a pre-sentence (home detention assessment) report; and
(d) the offender agrees to comply with the order.

Duration
The maximum duration for an order for home detention should remain 12 months. The order should allow for a progressive reduction in the number of hours spent at the approved residence after the offender has served specified portions of the sentence.

The Council recommends that consideration should be given to including statutory guidance in the Sentencing Act 1991 (Vic) as to:
- the minimum period of the sentence that must be served before there can be a reduction in hours (for example, as a proportion of the sentence); and
- the reduction of hours that is permitted.

Variation/Revocation
The court should have the same powers to vary or revoke an order for home detention as are available for the reformed ICO (see Recommendation 5–4).

Breach
The court should have the same powers on breach of an order for home detention as are available for the reformed ICO (see Recommendation 5–4).
Periodic Detention

The Current Legal Framework

5.74 There is currently no power in Victoria for courts to sentence an offender to periodic detention. In submissions on the Interim Report, there was some support for consideration to be given to introducing an option of periodic detention in Victoria, particularly if suspended sentences were abolished as a sentencing option.391

How Does Periodic Detention Operate?

5.75 New South Wales and the Australian Capital Territory are the only two Australian jurisdictions with the sentencing option of periodic detention. This form of custody has also been piloted in the United Kingdom, with offenders serving between 14 and 90 days in custody, and the remainder of the sentence (up to one year) on licence.392 Periodic detention also previously operated in New Zealand, but was abolished with the introduction of the Sentencing Act 2002 (NZ).

5.76 Periodic detention was first introduced in NSW in 1971393 and is now available to offenders who are sentenced to a term of imprisonment of not more than three years.394 In the ACT, the period of periodic detention must be at least three months and not longer than two years.395 The periodic detention period may be for all, or part of, the offender’s sentence of imprisonment.396

5.77 In NSW, periodic detention is not available to offenders who have ever served full-time detention for more than six months in relation to any one sentence of imprisonment.397 Offenders convicted of certain sexual offences are also excluded.398 Before making an order for periodic detention, the court must be satisfied that:

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391 See, for example, Submission 2.21 (Criminal Bar Association). The Law Institute of Victoria, by reference to the possible structure of a new imprisonment plus release order, suggested that periodic detention is ‘a disposition that would fit into this class of order’: Submission 2.11 (Law Institute of Victoria).

392 The two intermittent custody pilots at HMP Kirkham for male offenders and HMP Morton Hall for female offenders commenced operation in 2004 and concluded in November 2006. While intermittent custody is included as a sentencing option under the Criminal Justice Act 2003 (UK), the relevant provisions have not yet come into operation. The Home Office notes that: ‘The decision not now to roll out IC across England and Wales and to end the two pilots was taken in light of the decision in July to defer the introduction of Custody Plus’ and that ‘[a]s and when decision is taken on the introduction of Custody Plus we will consider whether it would be worthwhile to introduce intermittent custody on a national basis in England and Wales’: National Probation Service (UK), ‘Intermittent Custody: Withdrawal of Authority to Supervise Offenders’ (2006) 41 National Probation Service Bulletin 084/06.

393 Periodic detention was introduced under the Periodic Detention of Prisoners Act 1970 (NSW). The Act was replaced by the Periodic Detention of Prisoners Act 1981 (NSW), which was repealed on 3 April 2000 when the Crimes (Sentencing Procedure) Act 1999 (NSW) and the Crimes (Administration of Sentences) Act 1999 (NSW) came into operation.


395 Crimes (Sentencing) Act 2005 (ACT) s 11(3)(b).

396 Crimes (Sentencing) Act 2005 (ACT) s 11(3)(a).

397 Crimes (Sentencing Procedure) Act 1999 (NSW) s 65A. This eligibility criterion was inserted by the Crimes Legislation Amendment (Periodic and Home Detention) Act 2002 (NSW) and commenced on 2 December 2002. From 1986 to the amendments in 2002, there was no limitation on periodic detention based on an offender’s antecedents. Before 1986, periodic detention was available to persons who had not served a term of imprisonment of more than six months in the previous seven years. The intention behind the amending Act was to protect the integrity of the periodic detention scheme and improve compliance by excluding ‘unsuitable offenders’ and rectifying ‘the significant “gaol culture” within periodic detention centres’ attributed to the lengthy periods of full-time custody many detainees had previously served: New South Wales, Parliamentary Debates, Legislative Assembly, 28 June 2002, 4218 (Bryce Gaudry).

398 Crimes (Sentencing Procedure) Act 1999 (NSW) s 65B. A periodic detention order may not be made in respect of a sentence of imprisonment for a prescribed sexual offence. Prescribed sexual offences include sexual offences committed against a person under the age of 16 years, an offence committed on either an adult or a child, the elements of which include sexual intercourse and an offence of attempting, or of conspiracy or incitement, to commit one of these offences.
the offender is of or above the age of 18 years;
- the offender is a suitable person to serve the sentence by way of periodic detention;
- it is appropriate in all of the circumstances that the sentence be served by way of periodic detention;
- accommodation is available at a periodic detention centre for the offender to serve the sentence by way of periodic detention;
- transportation is available for the offender, to and from the periodic detention centre, for the purpose of serving the sentence by way of periodic detention, being arrangements that will not impose undue inconvenience, strain or hardship on the offender; and
- the offender has signed an undertaking to comply with his or her obligations under the periodic detention order.399

5.78 Periodic detention currently operates as a two-stage program in NSW. During Stage 1, offenders are required to report to a detention centre by 7.00 p.m. on a specified day of the week (usually a Friday) and to remain in custody until 4.30 p.m. two days later.400 Offenders must comply with this requirement every week until the completion of their sentence, or if the sentence is six months or more, the non-parole period of the sentence,401 or until they enter Stage 2. In order to be eligible to enter Stage 2 an offender must have completed either three months or one-third of his or her sentence (whichever is the greater).402 During Stage 2, the offender must complete two eight-hour periods of supervised community service work each week, but is no longer required to remain in custody overnight. In order to be eligible to move on to Stage 2, offenders must generally not have had ‘any absences without leave, have a proven record of good conduct and have demonstrated a capacity to function with minimal supervision’.403

5.79 In circumstances in which an offender breaches a periodic detention order and is not a federal offender, for example, by repeatedly failing to report (without leave of absence) or refusing to carry out community service work without good reason, the order may be revoked by the Parole Authority and the offender taken into custody to serve the remainder of the sentence of imprisonment. The Parole Authority may, in some circumstances, make an order directing that the offender serve the remainder of the sentence by way of home detention.404

5.80 The NSW Parole Board may revoke a periodic detention order if satisfied that an offender has failed to comply with his or her obligations under the order, if the offender has failed to appear before the Parole Authority when called on to do so, or if the offender has applied for the order to be revoked.405 Revocation is mandatory in the case of three unauthorised absences, or in the case of an offender who has previously had his or her order revoked and reinstated, one unauthorised absence.406 An application for revocation must be made in the case of three

399 Crimes (Sentencing Procedure) Act 1999 (NSW) s 66(1).
400 Crimes (Administration of Sentences) Act 1999 (NSW) s 3 (definition of ‘detention period’).
401 A court is not permitted to set a non-parole period if the sentence of imprisonment is six months or less: Crimes (Sentencing Procedure) Act 1999 (NSW) s 46.
402 NSW Department of Corrective Services, Brochure: Periodic Detention Stage 2, Guide for Detainees 2 as cited in Standing Committee on Law and Justice, New South Wales Legislative Council (2006), above n 44, 141.
403 Ibid. The NSW Department of Corrective Services advised the Committee that: ‘“Acceptable behaviour” includes all aspects of a detainee’s behaviour whilst in periodic detention custody, including attendance, good behaviour (eg no instances of possession of drugs or other contraband), urinalysis results, amenability to direction, and performance of work whilst on Stage 1 periodic detention.’ Correspondence from Commissioner of Corrective Services to Chair, 20 March 2006: Ibid.
404 Section 165 of the Crimes (Administration of Sentences) Act 1999 (NSW) provides that if, at the time the Parole Authority revokes a periodic detention order, the remainder of the order to be served is 18 months or less, the Parole Authority can make an order allowing the offender to serve the balance as home detention.
405 Crimes (Administration of Sentences) Act 1999 (NSW) s 163(1).
406 Crimes (Administration of Sentences) Act 1999 (NSW) s 163(2).
consecutive unauthorised absences, or in the case of an offender who has previously had his or her order revoked and reinstated, in relation to any unauthorised absence.\(^{407}\)

### The Use of Periodic Detention in NSW

5.81 As at 30 June 2006, of 724 offenders subject to periodic detention orders, 664 were male and 60 were female.\(^{408}\) The use of periodic detention rose to a high of 1,546 in 1997 before dropping to 724 in 2006. Over the same period the total inmate population increased from 7,966 in 1997 to 9,854 in 2006,\(^{409}\) indicating that periodic detention is now used less often as a sentencing option. Male offenders serving periodic detention were most commonly sentenced to periodic detention for driving/traffic offences (42.3 per cent) followed by major assault (14.2 per cent) and drug offences (9.8 per cent). The most common offences for female offenders serving periodic detention were fraud (35.0 per cent), followed by driving/traffic offences (18.3 per cent), drug offences (16.7 per cent) and other offences against property (such as misappropriation of property, motor vehicle theft, theft and unlawful possession of property) (16.7 per cent).\(^{410}\)

5.82 At 27 February 2005, the overall attendance rate for periodic detention was around 82 per cent (656 attendees out of 798 detainees).\(^ {411}\) For Stage 2 detainees, the rate was around 96 per cent (65 attendees from 68 detainees). Another study of outcomes for offenders sentenced to periodic detention over the period 2003–04 reported that 68 per cent were successfully completed, while 32 per cent of orders were revoked,\(^ {412}\) which compared to a completion rate of 76.5 per cent for community services orders.\(^ {413}\)

### Issues

5.83 The NSW Standing Committee on Law and Justice found in its 2006 Report on a review of community based sentencing options for rural and remote areas and disadvantaged populations that, while periodic detention has a number of potential benefits, including allowing offenders to maintain family and community ties and cost benefits, there are number of challenges to its effective operation, including:

- the lack of availability of program conditions for offenders serving a periodic detention order;
- access issues for offenders in rural and remote areas and offenders from certain disadvantaged groups, including a lack of access to affordable and reliable transport, lack of financial resources available to the offender, legislative exclusions for offenders who have previously served a term of imprisonment of over six months that disproportionately impact on Indigenous offenders, and limited periodic detention facilities for female offenders in rural and remote areas;
- a community perception of periodic detention as a ‘soft option; and
- the potential for sentence inflation if courts fix a longer period of imprisonment to allow for the fact that this period will be served by way of periodic detention.\(^ {414}\)

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409 Ibid 74.

410 Ibid 38. Other offences against property are classified as ‘other steal’. For a full list of offences falling within this category, see Ibid 82.

411 Standing Committee on Law and Justice, NSW Legislative Council (2006), above n 44, [6.14].


413 Ivan Potas, Simon Eyland and Jennifer Munro, ‘Successful Completion Rates for Supervised Sentencing Options’, *No. 33 Sentencing Trends and Issues* (2005) Table 1.

414 Standing Committee on Law and Justice, NSW Legislative Council (2006), above n 44, Chapter 6.
5.84 The Committee made a number of recommendations in this regard, including that the Attorney General, as part of the review of the Crimes (Sentencing Procedure) Act 1999 (NSW):

- consider an amendment giving discretion to the courts to order programs designed to reduce the likelihood of recidivism for offenders serving periodic detention orders;\(^\text{415}\)
- and
- examine the operation of section 65A of the Act with particular regard to its impact on Indigenous offenders, with a view to:
  - enabling offenders who have previously served imprisonment for more than six months by way of full-time detention in relation to any one sentence of imprisonment to be considered for periodic detention; and
  - allowing consideration of an offender’s compliance record with previous orders of the court when assessing suitability for periodic detention.\(^\text{416}\)

5.85 In response to access issues identified during the review, the Committee made recommendations that the Minister for Justice examine the feasibility of creating periodic detention beds in all Correctional Centres for male and female offenders,\(^\text{417}\) and examine ways of improving transport services for offenders to increase access to periodic detention for offenders in rural and remote areas.\(^\text{418}\) The Government in its response to the review has indicated it does not support the creation of periodic detention beds in all Correctional Centres, due to issues of practicality.\(^\text{419}\) The expansion of current bus services used to transport offenders to periodic detention centres has also been assessed as part of a review conducted by the Minister for Justice, as ‘unrealistic and financially unviable’.\(^\text{420}\)

5.86 In June 2007 the Minister for Justice announced a review by the NSW Sentencing Council on the operation of the periodic detention scheme.\(^\text{421}\) The terms of reference identify the following issues as issues to be considered as part of the review:

- the extent to which periodic detention is used as a sentencing option throughout the State, and the appropriateness and consistency of such use;
- the nature of the offences for which periodic detention orders are most commonly made;
- the method of enforcement of periodic detention orders, and the appropriateness of such enforcement;
- the advantages and disadvantages of periodic detention orders in comparison with other sentencing options;
- whether there are better alternatives to periodic detention orders;
- any modifications that may be made to periodic detention, including combination with other community-based orders; and
- the different arrangements for state and federal offenders under periodic detention orders.\(^\text{422}\)

\(^{415}\) Ibid 152, Recommendation 28.
\(^{416}\) Ibid 167, Recommendation 32.
\(^{417}\) Ibid 160, Recommendation 29.
\(^{418}\) Ibid 160, Recommendation 30.

\(^{420}\) Ibid.


5.87 A number of positive, as well as negative aspects of the NSW periodic detention scheme were identified in submissions to the review and in consultations undertaken by the Council. Advantages of periodic detention were said to include that it:

- provides a useful and flexible sentencing option to the courts, particularly where a custodial sentence is appropriate, but it is desirable for the offender to remain in the community;
- meets a number of sentencing purposes, including punishment, denunciation, deterrence and restoration;
- exists as a ‘buffer’ between community based sentencing options and full-time incarceration, thereby preserving the principle of parsimony and protecting against ‘sentence creep’ and ‘the imposition of an undeservedly severe sentence’;
- provides ‘social benefits’ and minimises financial and social costs by permitting offenders to live at home and maintain the support of family and friends while retaining their employment and/or continuing with their education;
- has rehabilitative value, including by allowing offenders to develop their skills and obtain employment through community work undertaken;
- is cost-effective, including due to the significantly lower costs of the scheme than full-time imprisonment, the financial benefits to the community through the unpaid community work undertaken and the avoidance of the indirect costs of imprisonment, such as disruption caused to housing and employment;
- is beneficial for vulnerable offenders, including Indigenous offenders, offenders with an intellectual disability and young offenders; and
- promotes public confidence by ‘detainees being seen to ‘pay back’ the community through undertaking highly visible work projects’.

5.88 A majority of the NSW Sentencing Council, however, supported the replacement of periodic detention with community corrections orders—similar to the existing form of intensive correction order (ICO) in Victoria. In preferring this approach, the Council identified a number of issues with the operation of the periodic detention scheme, including the lack of availability of periodic detention across the State, the underutilisation of current facilities and the absence of meaningful case management for periodic detainees. Other concerns raised in submissions and during consultations included: sentence inflation and net-widening effects; the onerous impact of the sentence on offenders, and in particular those offenders with families and significant caring responsibilities, and who were employed full-time; and the lack of access to long-term rehabilitative programs to address the underlying causes of offending.

5.89 The key findings of a 2006 evaluation of the intermittent custody pilots operating in the United Kingdom included the following:

- intermittent custody was most commonly imposed for offences of violence against the person, fraud/forgery, theft/handling, and public order offences of affray and violent disorder. As a proportion of all custodial disposals, the use of intermittent custody was highest for fraud and forgery offences;
- judges interviewed were ‘enthusiastic advocates of the disposal for cases involving serious “one-off” offences committed by offenders with jobs or childcare responsibilities’;
- reported obstacles to use included: a restricted pool of eligible offenders; a lack of probation proposals for intermittent custody in pre-sentence reports; the time-consuming and complicated nature of passing an intermittent custody order; and travel and childcare issues that disproportionately affected female offenders;

423 Ibid 86–100.
424 Ibid 192-6.
425 Ibid.
426 Ibid 112–14.
428 Ibid 107–12.
• the majority of offenders employed prior to being sentenced to intermittent custody kept their jobs and all those living with dependent children continued to do so while serving their sentence; and
• compliance was high, with fewer than 10 per cent of offenders sentenced to intermittent custody breaching the conditions of their intermittent custody orders.429

5.90 The UK evaluation of the pilot intermittent scheme identified a number of potential issues if the pilot scheme was rolled out nationally, including the lack of uptake for weekday intermittent custody, meaning that prison cells would be empty during the week. The authors of the evaluation concluded that: ‘[t]he infrequency with which the disposal is likely to be used may not justify the cost of implementation in terms of briefing sentencers, courts and probation service staff’.430

Submissions and Consultations

5.91 The option of periodic detention was not canvassed in the Council’s Interim Report. For this reason, apart from submissions encouraging the Council to give further consideration to this option, comments on its usefulness or otherwise were limited.

5.92 In consultations undertaken by the Council on its final recommendations, many of those consulted did not support the introduction of periodic detention.431 A number of those consulted expressed concerns about the practicality of funding beds for offenders that would only be occupied for part of the week, and equity and access issues, including for offenders located in rural and remote areas of the state. The Federation of Community Legal Centres was particularly concerned that the introduction of periodic detention ‘would widen the net of people who are exposed to custodial sentences’.432

5.93 Youthlaw and the Mental Health Legal Centre, while supporting the availability of an extended range of sentencing options, were concerned that periodic detention would suffer the same problems as home detention. They observed:

home detention is not an option for most of our clients, many of whom are homeless as a result of family breakdown, mental illness, abuse and/or other issues.433

The Council’s View

5.94 The introduction of periodic detention would involve a major resource investment, including the identification of prison beds that could be used for offenders subject to periodic detention. On the other hand, it has been suggested that this form of detention may have a number of positive benefits, including that:

• it provides an additional custodial option to the courts to meet the need for denunciation and deterrence while minimising the disruption to an offender’s employment, housing and caring responsibilities;
• it is less costly than full-time custody; and
• it provides a benefit to the community through the work undertaken by periodic detainees.434

430  Ibid 39.
431  Submissions 3.5 (Victoria Legal Aid), 3.1 (Youthlaw and the Mental Health Legal Centre), 3.9 (Fitzroy Legal Service), 3.10 (Federation of Community Legal Centres) and 3.12 (Office of Public Prosecutions).
432  Submission 3.10 (Federation of Community Legal Centres).
433  Submission 3.1 (Youthlaw and the Mental Health Legal Centre).
434  Standing Committee on Law and Justice, NSW Legislative Council (2006), above n 44, 147–50. See also NSW Sentencing Council, above n 422.
5.95 The experience of the UK and NSW suggests that if properly structured, the compliance rates with this form of order are high. However, the likely costs of establishing the scheme, including identifying beds that could be used to house offenders, or building new facilities, would be significant.

5.96 As the NSW Sentencing Council’s review of periodic detention has further recognised, periodic detention is limited in its ability to target the underlying causes of offending.

5.97 The current ‘custodial’ alternatives to full time imprisonment in Victoria (for offenders without an alcohol or drug addiction contributing to the commission of the offence) are:
- home detention orders (up to 12 months’ imprisonment);
- suspended sentences of imprisonment (up to three years’ imprisonment); and
- intensive correction orders (up to 12 months’ imprisonment).

435 Each of these options, which involve offenders in the community, could be viewed as a better alternative to periodic detention as, at least in theory, they have the effect of diverting offenders from prison. By combining a punitive component (community work) with program conditions, ICOs can also better support an offender’s rehabilitation, thereby lessening the risk and consequences to the community of the offender reoffending.

5.99 After considering the possible merits of introducing a periodic detention scheme, the Council believes that attention is better focused on improving the current range of alternatives to full-time imprisonment in Victoria, rather than introducing an order that may only be appropriate for a small group of offenders. In particular, we believe home detention may achieve many of the same benefits as periodic detention, while avoiding the likely logistical and cost issues associated with the establishment of a periodic detention scheme.

RECOMMENDATION 4: Periodic Detention

Recommendation 4–1
Periodic detention should not be introduced as a sentencing option in Victoria.

Under the Council’s recommendations an ICO will no longer be classified as a custodial order.
Chapter 6  Intensive Correction Orders
6. Intensive Correction Orders

Suspended Sentences and Intermediate Sentencing Orders
Chapter 6  Intensive Correction Orders

Introduction

6.1 Intensive Correction Orders (ICOs) were introduced in Victoria in April 1992 on the coming into force of the Sentencing Act 1991 (Vic). The Victorian form of ICO is a term of imprisonment served by an offender by way of intensive correction in the community.

6.2 In introducing the order, the Attorney-General suggested that the ICO ‘is designed to provide a severe punishment just short of imprisonment but more severe than a community-based order’. 436 Their introduction was driven by a perceived gap in the sentencing range brought about by the removal of the attendance centre order (which had been replaced, along with probation and the community service order, with the CBO in 1986).437 In practice, only limited use has been made of this order in Victoria.

The Current Legal Framework

6.3 An ICO, like a suspended sentence, is a form of substitutional sanction—a term of imprisonment of up to 12 months served by an offender in the community while under supervision. A court may make an ICO in circumstances where an offender has been convicted by the court of an offence and the court is considering sentencing him or her to a term of imprisonment and has received a pre-sentence report and the court is satisfied it is desirable to do so in the circumstances.438

As is the case with a suspended sentence, a court must not make an ICO if the sentence of imprisonment by itself would not have been appropriate in the circumstances.439

6.4 The core conditions of an ICO are that the offender:

- not commit another offence punishable by imprisonment during the period of the order;
- report to a specified community corrections centre within two working days after the coming into force of the order;
- report to or receive visits from a community corrections officer at least twice every week during the period, or shorter period as specified;
- attend a specified community corrections centre for 12 hours a week for the period of order, or a shorter period specified in the order, for the purposes of:
  (i) performing unpaid community work as directed for not less than eight of those hours; and
  (ii) undergoing counselling or treatment for a specified psychological, psychiatric, drug or alcohol problem as directed;
- notify an officer at the specified community corrections centre of any change of address or employment within two working days after the change;

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437 Freiberg and Ross (1999), above n 144, 126.
438 Sentencing Act 1991 (Vic) s 19(1).
439 Sentencing Act 1991 (Vic) s 19(3). In Simmons [1998] 2 VR 14 Brooking JA explained the application of this sections as follows: ‘Of course, once the court determines that a suspended sentence or an intensive correction order is the appropriate disposition, it follows that a sentence of imprisonment simpliciter is not appropriate, but the two subsections require the sentencer to consider whether, were it not for the existence of the alternative disposition constituted by a suspended sentence or, as the case may be, an intensive correction order, the imposition of the sentence of imprisonment in contemplation would be the appropriate disposition’: 16–17.
6.5 Under the Sentencing Regulations 2002 (Vic) offenders may be required under an ICO or a community-based order to perform unpaid community work:

- at a hospital, educational or charitable institution, or for any other non-profit body;
- at the home of any socially disadvantaged or disabled person, or any institution for such persons;
- on any Crown land or land occupied by the Crown; or
- on any land owned, leased or occupied for a public purpose by any person or body under any Act.

6.6 Offenders must not be required to perform work of a nature that would normally be performed by paid labour.

6.7 A court may also attach a special condition requiring the offender to attend at one or more specified, prescribed community based or residential programs during the period of the order, or a shorter period as specified in the order provided the pre-sentence report recommends this. Approved programs must be designed to address the personal factors that have contributed to the offender’s criminal behaviour.

6.8 ‘Prescribed programs’ for the purposes of this section are:

- alcohol and other drug treatment programs;
- drink drivers programs; and
- young adult offenders training programs.

In practice, other mainstream programs have been provided to offenders to meet these specific needs, since none of the specific prescribed programs have yet been established.

6.9 ICOs can be varied or cancelled by the court that made the original order if the court is satisfied that:

- the circumstances of the offender have materially altered since the order was made, and as a result the offender will not be able to comply with any condition of the order;
- the circumstances of the offender were wrongly stated or not accurately presented to the court or an author of a pre-sentence report before the order was made; or
- the offender is no longer willing to comply with the order.

6.10 The power to vary an ICO includes the power to vary special conditions as well as the power to alter the term of the order (whether or not the order is still in force). The power to ‘vary’, however, does not allow the court to order the term of imprisonment be suspended as it has been held that ‘[t]his amounts to re-sentencing the offender by imposing a different sentence’.

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440 Sentencing Act 1991 (Vic) s 20(1).
441 Sentencing Regulations 2002 (Vic) r 25(1).
442 Sentencing Regulations 2002 (Vic) r 25(2).
444 Sentencing Act 1991 (Vic) s 21(2).
445 Sentencing Regulations 2002 (Vic) r 18.
446 Sentencing Act 1991 (Vic) s 25(1).
447 Dimitrovski v Jones (Unreported, Supreme Court of Victoria, 23 August 1994, Mandie J); Aitken v Moten-Connor (Unreported, Supreme Court of Victoria, 9 February 1995, Smith J).
On cancellation of an ICO, the court has the same powers to sentence the offender as it would have had it just convicted him or her of the offence or offences for which the original sentence was imposed, but must take into account the extent to which the offender had complied with the order before its cancellation.449

Breach of an ICO is an offence punishable by a level 10 fine (around $1100).450 On breach of the conditions of an order a court must:

- vary the order;
- confirm the order originally made; or
- cancel the order (if it is still in force) and commit the offender to prison for the portion of the sentence unexpired at the date of the breach.451

If the breach was constituted in whole or in part by the offender committing another offence punishable by imprisonment, the court must commit the offender to prison for the unexpired portion of the sentence unless ‘the court is of the opinion that it would be unjust to do so in view of any exceptional circumstances that have arisen since the order was made’.452 This period of imprisonment must be served immediately and, unless the court orders otherwise, cumulatively on any other term of imprisonment previously imposed.453

The Use of ICOs in Victoria

ICOs have only ever occupied a small territory in the Victorian sentencing landscape, representing between 2.0 and 3.5 per cent of all sentencing outcomes in the higher courts, and between 1.5 and 2.0 per cent of sentencing outcomes in the Magistrates’ Court.454 Examining people commencing orders in 2006–07, almost 93 per cent (1,762 people) were sentenced by the Magistrates’ Court, while the remaining 7 per cent (137 people) were sentenced by the higher courts.455

Freiberg and Ross, referring to the limited use of this order since its introduction in 1991, suggest that: ‘It is apparent that, as was the case with its predecessor, the attendance centre order, the intensive correction order has failed to capture the imagination of sentencers and has had very little impact on sentencing patterns’.457

Examining data on orders commencing in 2006–07, the majority of people sentenced to an ICO were sentenced for a traffic offence (810 people or 42.7 per cent), and two-thirds of these offenders (540 people) were sentenced for the offence of driving while disqualified or suspended under section 30 of the Road Safety Act 1986 (Vic), which carries a mandatory minimum penalty

449 Sentencing Act 1991 (Vic) ss 25(1)–(2).
450 In accordance with the Monetary Units Act 2004 (Vic) the value of a penalty unit for the financial year commencing 1 July 2007 is $110.12. This is indexed annually. See Department of Treasury and Finance, Automatic Indexation for Fees and Penalties (2007).
451 Sentencing Act 2001 (Vic) s 26(3A).
452 Sentencing Act 2001 (Vic) s 26(3B).
453 Sentencing Act 2001 (Vic) s 26(4).
454 Fisher (2007), above n 22.
455 Corrections Victoria, Department of Justice, unpublished data.
456 The attendance centre order existed prior to the introduction of the current form of community–based order in 1986. Under the previous scheme, an offender, on being sentenced to a term of imprisonment of more than one month, but not more than 12 months, could be ordered to serve that term at an attendance centre instead of in prison. An offender on such an order was required to attend at an attendance centre three times a week for up to 18 hours a week. Two attendances were scheduled for week nights to allow an offender to attend personal development, educational and employment-related courses, and the third attendance was scheduled for the weekend during which time the offender was required to participate in community service work: Victorian Sentencing Committee, Sentencing: Report of the Victorian Sentencing Committee, Volume 1 (1988) [7.2.11].
457 Freiberg and Ross (1999), above n 144, 129.
for repeat offences of one month’s imprisonment. As under the Sentencing Act 1991 (Vic) ICOs are currently classed as terms of imprisonment, the large proportion of people sentenced to an ICO for this offence may be a result of these mandatory arrangements. We have discussed the relationship between suspended sentences and mandatory minimum sentences at [2.51] above and reiterate our concern over the inappropriate use of the ICO because of the inappropriate constraints on the courts’ sentencing discretion.

6.17 Just under one in five offenders commencing ICOs in 2006–07 received the order for an offence against the person (19.3 per cent). Of the remaining offenders commencing ICOs, 17.2 per cent had committed an offence falling into the category ‘other’, while 14.5 per cent were sentenced for a property offence, and 5.5 per cent for a drug offence.

6.18 Examining the data by court level, the most common offences (by principal proven offence) for which an ICO was imposed in the Magistrates’ Court in 2006–07 were:
- driving while disqualified or suspended (414 people, representing 27 per cent of ICOs imposed);
- theft (157 people, or 10 per cent of ICOs);
- drink driving (156 people, 10 per cent of ICOs);
- recklessly causing injury (123 people, or 8 per cent of ICOs); and
- drug trafficking (88 people, or 6 per cent of ICOs).

6.19 In the higher courts, ICOs were most commonly imposed in 2006–07 for the offences of:
- theft (seven, or 11.5 per cent of ICOs imposed);
- recklessly causing serious injury (six, or 10 per cent of ICOs);
- recklessly causing injury (six, or 10 per cent of ICOs); and
- armed robbery (five, or 8 per cent of ICOs).

6.20 While the average duration of ICOs was 4.9 months, three-quarters of all ICOs were six months or less.

### The Approach in Other Australian Jurisdictions

6.21 Queensland is the only jurisdiction with an ICO similar to Victoria. Western Australia has an intensive supervision order—a community-based order—which shares some similarities with ICOs, although it is a non-custodial form of order.

6.22 Following recommendations made by the NSW Sentencing Council in its review of periodic detention, the NSW Government has announced that it is considering the introduction of a community corrections order (CCO) which, like the existing forms of ICOs in Queensland and Victoria, would be a term of imprisonment served in the community under conditions, but would be more flexible than the existing forms of orders. Under the NSW Sentencing Council’s proposals, a CCO would be an order of up to two years in duration requiring an offender to comply with a number of core conditions, as well as any program conditions set by the court. The Council has recommended that a broad range of program conditions should be available to the courts in making such an order, including curfew or residential conditions, unpaid community work conditions, assessment and treatment conditions, electronic monitoring and substance...

459 Ibid.
460 Ibid.
461 Ibid.
462 ‘New Plan to “Scrap Periodic Detention”,’ The Age (Melbourne) 7 January 2008. These proposals are outlined in detail in the NSW Sentencing Council’s review of periodic detention: NSW Sentencing Council, above n 422.
463 NSW Sentencing Council, above n 422, Part 7.
abuse testing conditions and non-association conditions.\textsuperscript{464} The Council has recommended that, with the exception of federal offences, breaches of orders should be dealt with by the Parole Authority rather than by the courts.\textsuperscript{465}

Queensland

6.23 A court may make an ICO on sentencing an offender to a term of imprisonment of 12 months or less.\textsuperscript{466} As with the Victorian form of ICO, an offender subject to an ICO must comply with a number of core requirements, including:

- not to commit another offence during the period of the order;
- to report to an authorised corrective services officer at the place, and within the time, stated in the order;
- to report to, and receive visits from, an authorised corrective services officer at least twice in each week that the order is in force;
- to take part in counselling and satisfactorily attend other programs as directed by the court or an authorised corrective services officer during the period of the order;
- to perform in a satisfactory way community service that an authorised corrective services officer directs during the period of the order;
- during the period of the order, if an authorised corrective services officer directs, to reside at community residential facilities for periods (not longer than seven days at a time) that the officer directs;
- to notify an authorised corrective services officer of every change of the offender’s place of residence or employment within 2 business days after the change happens;
- not to leave or stay out of Queensland without the permission of an authorised corrective services officer; and
- to comply with every reasonable direction of an authorised corrective services officer.\textsuperscript{467}

6.24 Like the Victorian form of ICO, there is an upper limit placed on the hours per week an offender must participate in programs or perform community service under the Queensland order (not more than 12 hours in any week).\textsuperscript{468} Under the Queensland legislation, an offender must attend programs for one-third of the time directed (up to four hours per week) and perform community service for two-thirds of that time (up to eight hours per week), ‘unless the court or an authorised corrective services officer otherwise directs’.\textsuperscript{469} This means that, unlike the Victorian form of order, there is a general power for the court or an authorised corrective services officer to issue a different direction to the offender (for example, to spend more time participating in programs, and less time undertaking unpaid community work).

6.25 The court may also order the offender to comply with additional requirements, including:

- to submit to medical, psychiatric or psychological treatment; and
- to comply, during the whole or part of the period of the order, with conditions that the court considers are necessary—
  (i) to cause the offender to behave in a way that is acceptable to the community;
  or
  (ii) to stop the offender from again committing the same type of offence for which the order was made; or
  (iii) to stop the offender from committing other offences.\textsuperscript{470}

\textsuperscript{464} Ibid.
\textsuperscript{465} Ibid.
\textsuperscript{466} \textit{Penalties and Sentences Act 1992 (Qld)} s 112.
\textsuperscript{467} \textit{Penalties and Sentences Act 1992 (Qld)} s 114(1).
\textsuperscript{468} \textit{Penalties and Sentences Act 1992 (Qld)} s 114(2).
\textsuperscript{469} \textit{Penalties and Sentences Act 1992 (Qld)} s 114(2A).
\textsuperscript{470} \textit{Penalties and Sentences Act 1992 (Qld)} s 115.
6.26 On breach, the court has the power either to revoke the order and commit the offender to prison for the portion of the sentence unexpired on the day the breach occurred, or to resentence the offender for the offence.

Western Australia

6.27 Intensive supervision orders (ISOs) were introduced in 1996 together with community-based orders (CBOs) under the new Sentencing Act 1995 (WA) to replace probation orders and community service orders. The Western Australian Government’s intention in introducing these new orders was:

- to provide a more adequate basis than that which exists at present for courts to sanction offenders and to provide for their supervision in the community, without having to resort to imprisonment.

6.28 In introducing this legislation, the Attorney-General suggested the ISO would provide ‘a necessary intermediate step between … non-custodial options and imprisonment’ and ‘serve to fill an important gap in the current continuum of sentencing options’.

6.29 Unlike the Victorian and Queensland ICOs, an ISO is not contingent upon the imposition of a term of imprisonment, but rather is a sentencing order in its own right. It is positioned between community-based orders and a suspended sentence of imprisonment. ISOs can be made for a period of between six months and 24 months.

6.30 On being sentenced to an ISO, an offender must comply with a requirement to contact a community corrections officer (CCO), and receive visits from a CCO, as directed (referred to as a ‘supervision requirement’). Unless a CCO orders otherwise, an offender subject to a supervision requirement must contact a CCO at least once every 28 days. The offender must comply with these requirements for the duration of the order. The stated purpose of supervision under the legislation is:

- to allow for the offender to be regularly monitored in the community, and to receive regular counselling, in a way and to an extent decided by a CCO, for the purpose of either or both—
  - rehabilitating the offender;
  - ensuring the offender complies with any direction given by the court when imposing the requirement.

6.31 In practice, the frequency of reporting is dictated by the offender’s risk level and the nature of the order. Offenders subject to a low level of supervision are generally required to report twice in the first month, monthly for the next two months and then every two months thereafter. Offenders assigned to medium supervision generally report weekly for the first month, then...
fortnightly for five months, and thereafter on a monthly basis. As a general guide, offenders subject to the highest level of supervision are required to report weekly for the first six months of the order, and then fortnightly for the remainder of the order.

6.32 An offender subject to an ISO also must comply with the following standard conditions:

- report to a community corrections centre within 72 hours after being released by the court, or as otherwise ordered by a CCO;
- not change address or place of employment without the prior permission of a CCO;
- not leave Western Australia except with, and in accordance with, the permission of the CEO (Corrections); and
- comply with section 76 of the Sentence Administration Act 2003 (WA) (including complying with all lawful instructions and directions of a CCO).

6.33 A court also may order an offender to comply with:

- a program requirement, which requires the offender to obey the orders of a CCO as to—
  (a) undergoing assessment by a medical practitioner, a psychiatrist, a psychologist and/or social worker and, if necessary, appropriate treatment;
  (b) undergoing assessment and, if necessary, appropriate treatment in relation to the abuse of alcohol, drugs or other substances;
  (c) attending educational, vocational, or personal development programs or courses; and/or
  (d) living at a specified place for the purposes of assessment, treatment or attending educational, vocational or personal development programs;
  (e) more than one of the above;
- a community service requirement—which requires the offender to do unpaid community work for a number of hours set by the court (between 40–240 hours), to complete at least 12 hours of that work a week and to perform community corrections activities if and as ordered by the CEO of Corrections; and/or
- a curfew requirement—which requires the offender to remain at a specified place for specified periods (between two and 12 hours a day, but not more than six months continuously), and to submit to surveillance or monitoring as directed by a CCO.

6.34 A CCO has the power to terminate a program requirement before the end of the order by giving the offender notice of the termination. Community service requirements come to an end when the offender finishes working the hours set to the satisfaction of a CCO or when the ISO ceases to be in force, whichever happens sooner. An offender must comply with the curfew requirement for the period specified, or when the ISO ceases to be in force, whichever happens sooner.

6.35 Breach of an ISO is an offence punishable by a fine of up to $1,000. On breach the court may:

- confirm the order (if still in force);

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481 Ibid.
482 Ibid.
483 Sentencing Act 1995 (WA) s 70.
484 Sentencing Act 1995 (WA) ss 72 and 73(2).
485 Sentencing Act 1995 (WA) ss 72 and 74(2)–(3).
486 Sentencing Act 1995 (WA) ss 72 and 75.
487 Sentencing Act 1995 (WA) ss 73(6).
488 Sentencing Act 1995 (WA) ss 74(6).
489 Sentencing Act 1995 (WA) ss 75(9).
• amend the order (if still in force); or
• whether or not the order is still in force, cancel the order and sentence the person for
  the offence in any manner the court could if it had just convicted the person of that
  offence.491

6.36 If the court resentsences the offender for the offence, the court must take into account the extent
to which the person has complied with the order or orders in respect of the offence for which the
original order was made and how long the person has been subject to the order.492

6.37 Greater use appears to be made of ISOs in Western Australia than the ICO that exists in
Victoria—particularly in the case of the higher courts. Examining data for 2004 on sentencing
outcomes, ISOs represented 13.5 per cent of sentences imposed by the higher courts and
3.2 per cent of sentences imposed by the Magistrates’ Court.493 In comparison, suspended
sentences represented 12.7 per cent of sentences imposed in the higher courts, and around 4
per cent of sentences imposed in the Magistrates’ Court.494

6.38 Based on 2005 data, the most common offences for which courts impose ISOs are:
• offences against the person (37.1 per cent, of which 73.1 per cent were for assault and
9.8 per cent were for dangerous/negligent driving);
• burglary/theft offences (31.5 per cent);
• good order offences (12.9 per cent); and
• drug offences (8.5 per cent).495

6.39 Over half of orders made were for a period of seven to 12 months (51.1 per cent), with around
28 per cent of orders made for a period of 13–18 months, and 15 per cent for more than 18
months.496

International Developments

6.40 Intensive supervision programs have been introduced in a number of jurisdictions seeking to
provide high-level, community based sentences for offenders who might otherwise have served
time in prison. In the United States, intensive supervision probation (or parole) (ISPs) have
involved not only more intensive levels of supervision with smaller caseloads, but also other
forms of surveillance and control, such as random drug testing, electronic monitoring, curfews
and home detention.497 Some of these developments are explored briefly below.

New Zealand

6.41 New Zealand recently has moved to introduce a new form of intensive supervision order (ISO).
The legislation, now passed by the New Zealand Parliament, provides for an ISO to be made for
a period of between six and 24 months.498 Unlike the Victorian form of order, it is not necessary
for the court first to impose a term of imprisonment.

491 Sentencing Act 1995 (WA) s 133(1).
492 Sentencing Act 1995 (WA) s 135(2).
493 This is based on data contained in: The University of Western Australia, Crime Research Centre, Crime
  and Justice Statistics for Western Australia 2004 (2005) 68 and 78.
494 Ibid.
495 This is based on data contained in: The University of Western Australia, Crime Research Centre, Crime
  and Justice Statistics for Western Australia 2005 (2006) 162.
496 Ibid 161, Table XVII.
498 Sentencing Act 2002 (NZ) s 54B(2).
6.42 Under the legislation, a court is only be permitted to impose a sentence of intensive supervision if satisfied that:

- a sentence of intensive supervision would reduce the likelihood of further offending by the offender through the rehabilitation and reintegration of the offender; and
- the nature of the offender’s rehabilitative or other needs requires the imposition of conditions for a period longer than 12 months, or that are not available through a sentence of supervision.499

6.43 The standard conditions are largely the same as those that exist under the standard sentence of supervision; however, in the case of the ISO, minimum requirements for the frequency of reporting are set out in the legislation.500 A court may also impose special conditions,501 including program conditions,502 and ‘any other conditions that the court thinks fit to reduce the likelihood of further offending by the offender’.503

6.44 A failure to comply with the conditions of the order constitutes an offence punishable by up to six months’ imprisonment or a fine of up to $1,500. On breach of the conditions of the order, or the commission of another offence, the probation officer may make an application to the court for variation or cancellation.504 A court in this case may:

- remit, suspend, or vary any special conditions imposed by the court, or impose additional special conditions;

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499 Sentencing Act 2002 (NZ) s 54C.

500 See sections 49(1) (supervision) and 54F(1) (intensive supervision) of the Sentencing Act 2002 (NZ). The standard conditions of intensive supervision orders are that the offender must: report in person to a probation officer no later than 72 hours after the sentence is imposed; report to a probation officer at least once a week during the first three months of the sentence, and thereafter at least once a month and, as and when required to do so by a probation officer; notify a probation officer of his or her residential address and the nature and place of his or her employment when asked to do so; not move to a new address in another probation area without the prior written consent of a probation officer (in which case the offender must report in the new probation area within 72 hours of arriving in that new area); give reasonable notice before moving from his or her residential address and advise the probation officer of the new address; not live at any address at which a probation officer has directed the offender not to live; not engage, or continue to engage, in any employment or occupation in which a probation officer has directed the offender not to engage or continue to engage; not associate with any specified person, or with persons of any specified class, with whom a probation officer has, in writing, directed the offender not to associate; and take part in a rehabilitative and reintegration needs assessment if and when directed to do so by a probation officer: Sentencing Act 2002 (NZ) s 54F(1).

501 In addition to program conditions, other special conditions a court can order include: conditions relating to the offender’s place of residence (including a condition that an offender not move residence), finances or earnings; conditions requiring the offender to take prescription medication; conditions requiring the offender to undertake training in basic work and living skills; a condition requiring the offender to comply with the requirements of judicial monitoring as directed by a probation officer or the sentencing judge: Sentencing Act 2002 (NZ) s 54I. A court can only impose special (including program) conditions if satisfied that: there is a significant risk of further offending by the offender (Sentencing Act 2002 (NZ) ss 54G(a) (program conditions) 54I(1)(a) (other special conditions)); standard conditions alone would not adequately reduce that risk (Sentencing Act 2002 (NZ) ss 54G(b) (program conditions) and 54I(1)(b) (other special conditions)); in the case of program conditions, the offender requires a program to reduce the likelihood of further offending by the offender through the rehabilitation and reintegration of the offender (Sentencing Act 2002 (NZ) ss 54G(c)); and in the case of other special conditions, if the imposition of those conditions would reduce the likelihood of further offending by the offender through the rehabilitation and reintegration of the offender (Sentencing Act 2002 (NZ) s 54I(1)(c)).

502 Programs may include both residential and non-residential programs and include any psychiatric or other counselling and assessment; attendance at any medical, psychological, social, therapeutic, cultural, educational, employment-related, rehabilitative, or reintegrative program; and placement in the care of any people or agency approved by the chief executive of the Department of Corrections: Sentencing Act 2002 (NZ) s 54H.

503 Sentencing Act 2002 (NZ) s 54I(3)(e). However, a court may not impose a condition that requires an offender to pay a fine, reparation or other sum ordered to be paid on conviction, to perform any service that he or she could have been required to perform if sentenced to community work, or to submit electronic monitoring: Sentencing Act 2002 (NZ) s 54I(4).

504 Sentencing Act 2002 (NZ) ss 54K(1)(a) and 54K(2).
• cancel the sentence; or
• cancel the sentence and resentence the offender (in which case the court must take into account the portion of the original sentence that remains unserved at the time of the order).

### Issues and Consultation

6.45 A substantial body of research now supports the finding that participation in intensive supervision programs (ISPs) involving higher levels of contacts and supervision in itself is not associated with lower rates of recidivism. However, when combined with treatment, the results are more promising—in particular, when targeted at high-risk offenders (see above [3.35]).

6.46 Pure surveillance-based supervision approaches may therefore, at best, be viewed as a means of more closely monitoring an offender’s compliance with the order during the period of the order and of punishing the offender by imposing restrictions on his or her liberty, rather than a means of effecting any long-term behavioural change.

6.47 One of the other problems commonly experienced with ISPs is that more intensive supervision results in higher levels of technical breaches, most likely as a result of higher levels of surveillance and detection. As these orders typically are targeted at more serious offenders, they often have tougher breach provisions requiring the offender to serve some or all of the unfinished term in prison. Depending on the response to breaches, high breach rates may affect the potential of these forms of orders to divert offenders from prison.

6.48 In discussing the possible usefulness of a conditional suspended sentence, a number of those consulted and who made submissions also pointed to deficiencies with the operation of existing conditional orders. Both CCTOs and ICOs were criticised as being too inflexible and, due to the intensive nature of the conditions, as extremely difficult for offenders to complete successfully. Due to their intensive nature, it was suggested, it was difficult for offenders to hold down full-time employment or participate in vocational training or educational programs.

6.49 A study of 100 offenders on ICOs confirmed the demanding nature of the order. While 58 per cent of offenders agreed that ICOs were better than going to prison, 60 per cent disliked ICOs on the basis that they were too demanding and time consuming. Most (88 per cent) did not

505 Sentencing Act 2002 (NZ) ss 54K(3) and 54K(5).
507 See, for example, Joan Petersilia and Susan Turner, Evaluating Intensive Supervision Probation/Parole: Results of a Nationwide Experiment (1993). This study found that about 37 per cent of the ISP participants and 33 per cent of the control offenders had been arrested, and an average ISP violation rate of 65 per cent for ISP participants compared with 38 per cent for the controls. This suggests that the additional control of ISP increased the probability that criminal or technical violations would be detected.
508 See also Submissions 1.24 (County Court of Victoria), 1.38 (Victoria Legal Aid) and 3.12 (Office of Public Prosecutions).
509 This view was expressed during community forums held and other consultations. See, for example, Roundtable—Offenders with a Drug and/or Alcohol Addiction (19 May 2005).
510 Tomaino and Kapardis (1996), above n 173.
511 Ibid.
view ICOs as a soft option. Offenders nominated some of the positive aspects of the order as being that it assisted them to get off alcohol and drugs (57 per cent and 62 per cent), avoid the wrong people (66 per cent), improve relationships with people (69 per cent) and avoid reoffending (75 per cent).

6.05 The Manager of Gippsland Community Correctional Services, in his submission, described ICOs as 'overall, an administrative nightmare for CCOs [community correctional officers]'. Due to cultural issues, it was further suggested, the ICO is also an order that Indigenous offenders often find extremely difficult to comply with (even more so than CBOs). The positioning of a suspended sentence in the sentencing hierarchy below an ICO was also thought by many to be illogical.

6.06 During more recent consultations, there again was confirmation of the limitations of ICOs and some support for the replacement of ICOs with a more flexible form of order. The Law Institute of Victoria, which supported this position, identified the requirement for a court first to impose a term of imprisonment, the maximum period of the order of 12 months, and the lack of flexibility in the types of conditions available as some of the existing limitations of the current form of order. The LIV further submitted that '[t]he high breach rate of ICOs also suggests that they have too many onerous conditions with which it is difficult to comply'.

6.07 Similar problems were identified during consultations undertaken by the Freiberg Sentencing Review. The Review pointed to a number of factors viewed as contributing to the order being less successful than expected, including:

- the substitutional nature of the sanction, which has meant that some sentencers may have been reluctant to use the order even when viewed appropriate where the offence itself may not have warranted imprisonment;
- a failure to make program conditions available;
- insufficient resources being devoted to the order, resulting in a loss of confidence in the order;
- a perception that the order is too short for effective rehabilitation; and
- concerns that the breach conditions are too severe and inflexible.

6.08 The Deputy Chief Magistrate of Victoria, in a paper on the challenges faced by magistrates in sentencing vulnerable offenders, such as those who are mentally impaired, homeless, drug dependant or poor, has identified the current form of ICOs ‘with their mandatory 12 hours per week Community Correction Centre attendance and other onerous program requirements’ in particular as being ‘too difficult for many mentally impaired persons to negotiate’. The Fitzroy Legal Service raised similar concerns in it submission, suggesting:

Clients who have issues related to homelessness, drug and alcohol dependencies, mental health [issues] and acquired brain injuries find the current regime too restrictive for effective compliance. Furthermore, FLS solicitors have found it difficult to recommend ICOs unless there are sufficient resources that support clients with complex needs.

512 Ibid.
513 Ibid.
514 Submission 1.33 (J Black).
515 See, for example, Roundtable—Young Offenders (16 June 2005).
516 Submission 3.4 (Law Institute of Victoria).
517 Ibid.
518 Freiberg (2002), above n 16, 135.
520 Submission 3.9 (Fitzroy Legal Service).
A Reformed Intensive Correction Order?

6.54 As an alternative to introducing a single, generic, community-based order in the form of a CSO, the Council has considered the option of retaining and reforming the current ICO to resemble more closely the ISO that exists in Western Australia and has been introduced in New Zealand.

Structure

6.55 In informal consultations, there was some support for a Victorian form of ICO or ISO to exist as an order in its own right and for a court to be permitted to make an ICO instead of imposing a term of imprisonment. Some concerns, however, were expressed about the acceptance of the order as a high-level sentencing disposition appropriate only where a term of imprisonment might otherwise be appropriate.

6.56 The Sentencing Review, which similarly supported a reformed ICO being regarded ‘as a sentence in its own right and not a means of serving a sentence of imprisonment’ recommended that ‘the community work component should remain mandatory, in order to distinguish it from the community-based order’.521 It further proposed that ‘one or more of the program conditions should be mandated’ which might ‘restore the order to its intended form when it was established, which was a mixture of punitive and rehabilitative components’.522 Other recommendations to increase the flexibility of the order included: ‘allowing the hours of community work to be served over the period of the order at the discretion of Community Correctional Services and to be tapered off after a predetermined portion of the order has been served’.523

6.57 The other clear means of distinguishing a reformed ICO or new ISO from a CBO would be by means of the consequences following on breach of the order. This is discussed further below at [6.157]–[6.161].

6.58 In the Council’s consultations on its final recommendations, there was widespread support for the recasting of the ICO as an order in its own right by removing the nexus with imprisonment. The County Court of Victoria, Magistrates’ Court of Victoria, Victoria Legal Aid, Youthlaw, the Mental Health Legal Centre, Fitzroy Legal Service and the Federation of Community Legal Centres all supported reforming the ICO in this manner.524

6.59 The Office of Public Prosecutions had some reservations as to whether or not the ICO in its proposed form would be sufficiently distinguishable from a CBO on the basis of the Council’s proposals. The OPP was concerned that by reducing the number of custodial options, it would lead to more protracted plea negotiations and possibly lower plea rates.525

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521 Ibid 139, Recommendation 22.
523 Ibid 140, Recommendation 23.
524 Meeting with judges of the County Court of Victoria (27 November 2007); Magistrates’ Court of Victoria (Meeting 5 December 2007); Submissions 3.5 (Victoria Legal Aid), 3.7 (Youthlaw and the Mental Health Legal Centre), 3.9 (Fitzroy Legal Service) and 3.10 (Federation of Community Legal Centres).
525 Submission 3.12 (Office of Public Prosecutions).
Eligibility Criteria

There were a number of views expressed on the appropriate eligibility criteria for the order, should the order be recast as a form of non-custodial disposition. The Law Institute of Victoria supported criteria that would require a court to be satisfied that it is desirable for the offender to serve his or her sentence in the community under an ICO, based on the personal circumstances of the offender or the particular factors that contributed to the commission of the offence. Victoria Legal Aid supported the following formulation, based on the Council’s discussion model:

The court is satisfied that a term of imprisonment that does not:

- exceed 3 years in the higher courts;
- exceed 2 years in Magistrates’ court;

would otherwise be appropriate but is of the view that:

- due to the personal circumstances of the offender; or
- the particular factors that contributed to the commission of the offence, such as the offender’s drug or alcohol dependency, or mental condition;

it is desirable for the offender to serve his or her sentence in the community under an ICO.

Some support was also expressed for the use of the phrase ‘in lieu of imprisonment’ to signal the circumstances in which it would be appropriate to make such an order. The Sentencing Review supported a formulation that would allow a court to make an ICO in circumstances in which it was ‘considering sentencing the offender to a term of imprisonment’.

Those consulted also felt that a pre-sentence report should be mandatory before such an order was made.

Duration of order

A number of those consulted had concerns about extending the maximum duration of an ICO beyond the current maximum of 12 months. Victoria Legal Aid conceded that a longer order ‘may be justified in some circumstances … [to] allow particular offenders to avoid imprisonment’. However, it was also concerned about the impact on offenders if the maximum was increased to two years, suggesting:

doubling the maximum period may result in sentence inflation, with some offenders receiving inappropriately long orders. Increasing sentence lengths will also increase the risk of offenders breaching the conditions of their orders, with increased penalties for these breaches. The length of ICOs made, including any trends towards longer orders for similar offences, will need to be closely monitored if this recommendation is adopted.

Corrections Victoria also expressed concerns about the greater potential for breach if a longer order were to be made available to the courts, as did the Fitzroy Legal Service, which suggested that ‘expanding the duration of ICOs to 2 years leads to greater potential for non-compliance in what are already difficult to complete orders’.

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526 Submission 3.4 (Law Institute of Victoria).
527 Submission 3.2 (Victoria Legal Aid). The original discussion model proposed the replacement of the existing form of ICO with a new form of intensive supervision order. For the purposes of the discussion of views expressed on the possible elements of a new or reformed order, the term ICO has been substituted for ISO.
528 Freiberg (2002), above n 16, 139, Recommendation 22.
529 Submission 3.5 (Victoria Legal Aid).
530 Ibid.
531 Submission 3.6 (Corrections Victoria).
532 Submission 3.9 (Fitzroy Legal Service).
This view was supported by Youthlaw and the Mental Health Legal Centre, who pointed out that their ‘client groups are vulnerable to breaching prolonged orders’. Should a two year maximum term be adopted, it was submitted that program conditions should be limited to 12 months. The suggestion that part of the sentence could be designated as the period within which the community work component of the order and any program conditions should be completed was also raised in meetings with the Court of Appeal and the Law Institute of Victoria.

Minimum term

The majority of ICOs (58.6 per cent) in 2006–07 were less than six months in duration, and over half were between three and six months (see Figure 19, below). The average term was 4.9 months. The short duration of orders may well be a by-product of the high use of this order for the offence of driving while disqualified or suspended, which carries a mandatory minimum penalty for repeat offences of one month’s imprisonment.

There was a general acknowledgment that four to six months was required for meaningful rehabilitation, but at the same time, imposing any minimum period risks sentence inflation. Victoria Legal Aid supported a three month minimum term, while Corrections Victoria proposed a minimum term of six months for the reformed ICO.

Source: Corrections Victoria, Department of Justice, unpublished data

There was a general acknowledgment that four to six months was required for meaningful rehabilitation, but at the same time, imposing any minimum period risks sentence inflation. Victoria Legal Aid supported a three month minimum term, while Corrections Victoria proposed a minimum term of six months for the reformed ICO.

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533 Submission 3.7 (Youthlaw and the Mental Health Legal Centre).
534 Meeting with judges of the Victorian Court of Appeal (16 November 2007).
535 Law Institute of Victoria (Meeting 19 November 2007). See further discussion in the section on conditions below.
536 Fisher (2007), above n 22.
537 Ibid.
538 Road Safety Act 1986 (Vic) s 30.
539 Submission 3.2 (Victoria Legal Aid).
540 Submission 3.6 (Corrections Victoria).
Ability to combine an ICO with a term of imprisonment

6.68 One of the questions raised in the discussion model was whether a court should be permitted to combine a short term of imprisonment with an ICO in order to achieve a similar outcome to the existing form of CCTO, and consistent with the current power to combine up to three months’ imprisonment with a CBO when sentencing an offender for one or more offences (see further Chapter 8).

6.69 The Law Institute of Victoria was among those consulted who specifically opposed providing such a power, submitting:

We consider this combination unnecessary and really a form of parole. Where a court considers that a short term of imprisonment is desirable, followed by a period of supervision, this can be achieved by imposing a longer sentence with a short non-parole period. We submit that it is more appropriate for the Parole Board to set conditions after the period of imprisonment has been served (that is, at the ‘back-end’).541

6.70 However, a number of arguments could be advanced in favour of giving courts such a power. First, if the ICO is recast as a form of community sentence, allowing courts to combine an ICO with a short term of imprisonment would be in keeping with the current power to combine a CBO with imprisonment, thereby promoting consistency of approach in the use of community sentences. Secondly, it might broaden the options available to sentencers in circumstances in which a court is considering sentencing an offender to a term of imprisonment of less than 12 months, and the option of fixing a non-parole period would not have been available.542 By permitting a court to combine a short term of immediate imprisonment with an ICO, it might achieve a similar result to parole in those circumstances in which an immediate term of imprisonment followed by some form of supervision is considered warranted. Finally, it might allow a court to recognise time served by an offender in custody on remand prior to sentencing, rather than simply factoring this into the length of the community sentence ordered.

Conditions

6.71 Under the Council’s Interim Report proposals, which were broadly consistent with the draft recommendations, it was suggested the new order might have a number of core conditions, similar to the existing form of CBO including that the offender:

- not commit a further offence punishable by imprisonment;
- report to a specified community corrections centre within two days after the coming into force of the order;
- report to and receive visits from a community corrections officer as directed (and unless a CCO orders otherwise, at least once in any period of 28 days);
- notify of changes to address or other contact details;
- not leave Victoria without permission; and
- obey all lawful instructions and directions of community corrections officers.

6.72 The importance of getting the mix of conditions right and that the conditions required do not set up offenders to fail was a recurring theme of our more recent consultations. For example, the OPP submitted that ‘at present, the imposition of an ICO is regarded as being problematic due to the inherent difficulties associated with many offenders being unable to satisfy their requirements’.543

541 Submission 3.4 (Law Institute of Victoria).
542 There is no power to fix a non-parole period for sentences of less than 12 months: Sentencing Act 1991 (Vic) s 11.
543 Submission 3.12 (Office of Public Prosecutions).
6.73 The LIV, while supporting reforms to the current ICO, or replacement with a new form of ISO, cautioned that:

… the success of the [ICO] as a sentencing option will depend largely on whether the conditions attached to it are sensible and realistic. This will affect the breach rate and whether offenders are able to comply with the conditions. In light of this, we recommend that [ICOs] should be flexible enough to allow offenders to continue in employment.544

6.74 For this reason, in response to the Interim Report proposals, the LIV suggested that the only core condition should be that the offender should not commit another offence punishable by imprisonment, with all other conditions to be determined by the sentencing court.545 Victoria Legal Aid also expressed concerns that the core conditions proposed were too onerous, and raised the following issues in relation to the condition requiring an offender not to leave the state without permission, and that requiring an offender’s compliance with any lawful instructions and directions of a community corrections officer:

- Not leave Victoria without permission. This is a significant restriction on the right to freedom of movement and may effectively discriminate against defendants who reside close to state borders.
- Obey all lawful instructions and directions of a CCO. This effectively allows a Corrections Officer to impose conditions that are more onerous than those fixed by the court. The powers of the Corrections Officer should be limited to giving instructions and directions that are necessary for the implementation of the conditions imposed by the court.546

6.75 The LIV submitted that, while sentencers should have discretion to determine the nature and scope of other conditions imposed, ‘the list of potential conditions should be exhaustive so as to ensure certainty in sentencing’.547

The LIV recognises the benefit of continued supervision of offenders on [ICOs], to ensure that they are complying with the conditions of the order and to monitor their progress. We submit that judges and magistrates should have discretion to determine the frequency and location of offender reports to community corrections officers (CCOs), to ensure that the personal circumstances of the offender are taken into account. We suggest that where home visits by CCOs are contemplated, the safety of all parties and the interests of any children residing with the offender should be taken into account in deciding whether this will be appropriate.

The LIV supports ‘special conditions’ attached to [ICOs] based on program requirements, such as being required to reside at a residential rehabilitation clinic for a designated period. We suggest that Corrections be required to provide notices in writing to the offender outlining the details of these program requirements, to ensure that offenders are aware of their obligations under the order.

The LIV stresses that programs must be properly resourced in order for them to be effective. We also emphasise that where conditions are imposed that require an offender to attend a program, Corrections must ensure that there are programs available. Where no programs have been run, this should not constitute a breach of the [ICO] by the offender.

6.76 In their submission, Victoria Legal Aid had some concerns at the level of discretion left to Community Correctional Services officers under the draft conditions of the order:

for example, the ability to nominate the reporting requirements of offenders under ICOs. While we acknowledge this will lead to increased flexibility, including reduced reporting obligations in cases of good behaviour and/or where an offender nears the end of an
order, the application of this power will need to be carefully monitored to ensure that it is being exercised fairly.\(^{548}\)

6.77 The Office of Public Prosecutions also took the view that there should be more guidance provided in the legislation. However, it saw prescribing minimum requirements for reporting in the legislation as means of differentiating the reformed ICO from a CBO.\(^{549}\)

6.78 The Fitzroy Legal Service felt that ‘the current core conditions of minimum reporting requirements are overly prescriptive … we suggest that separate categories of compliance be adopted in sentencing to promote compliance and also reflect individuals’ varying capacity to comply with program requirements’.\(^{550}\)

6.79 The Fitzroy Legal Service and others\(^{551}\) also argued that special conditions should not be imposed if compliance was unlikely to be able to be achieved (for example, because adequate support services were not available to an offender in the community).\(^{552}\) This was viewed as particularly relevant to those with dual diagnosis drug and alcohol and mental health issues who often require the assistance of outreach workers merely to access services.\(^{553}\)

6.80 The Federation of Community Legal Centres raised the issue of compliance specifically in relation to the community work component of orders. It was suggested that there may be some offenders who, due to their particular circumstances, are unable to complete community work, such as an offender with an acquired brain injury. There were some discussions about the possibility of substituting other activities in place of community work, with an emphasis on activities that would increase the offender’s prospects of rehabilitation. These activities, it was suggested, could include computer skills or VCE equivalency courses.\(^{554}\)

6.81 Corrections Victoria was supportive of this proposal. In its submission, it noted that it is:

in favour of exploring the use of training programs or other similar personal development programs to replace and/or complement the unpaid community work component of an order. In order to ensure equity and consistency across Victoria detailed guidelines would need to be developed.\(^{555}\)

6.82 The Victorian Aboriginal Legal Service Inc, commenting on conditions that might be attached to a suspended sentence order, emphasised the need for conditions imposed on Indigenous offenders requiring the provision of services or programs to be culturally sensitive.\(^{556}\)

6.83 The LIV recommended that justice plans\(^{557}\) be extended, so that they are automatic conditions for all intellectually disabled offenders sentenced to an ICO.\(^{558}\)

6.84 One approach to structuring conditions, taking into account concerns raised, would be to minimise the number of core or standard conditions, and to allow a court to impose only those special conditions required in a given case. Rather than a highly structured order (as is currently the case) a reformed ICO might allow a court, taking into account recommendations in the

\(^{548}\) Submission 3.5 (Victoria Legal Aid).

\(^{549}\) Submission 3.12 (Office of Public Prosecutions).

\(^{550}\) Submission 3.9 (Fitzroy Legal Service).

\(^{551}\) See, for example, Submission 1.45 (Mental Health Legal Centre).

\(^{552}\) Submission 1.44 (Fitzroy Legal Service).

\(^{553}\) Ibid.

\(^{554}\) Federation of Community Legal Centres (Meeting 5 December 2007).

\(^{555}\) Submission 3.6 (Corrections Victoria).

\(^{556}\) Submission 1.43 (Victorian Aboriginal Legal Service).

\(^{557}\) A justice plan is a statement prepared by the Department of Human Services for offenders with an intellectual disability, which specifies services recommended for the offender and designed to reduce the likelihood of reoffending.

\(^{558}\) Submission 3.4 (Law Institute of Victoria).
6.85 Alternatively, as with the New Zealand form of order, the order could include a broader range of core conditions, but an offender might only be required to comply with specific conditions at the direction of the community corrections officer (CCO) supervising the order. For example, under the New Zealand form of order an offender must not live at any address ‘at which a probation officer has directed the offender not to reside’, or associate with any specified person, or with persons of any specified class, ‘with whom a probation officer has, in writing, directed the offender not to associate’.\(^{559}\) If no directions are given to an offender in relation to these two forms of obligation, then the offender is under no duty to comply. This type of approach to structuring orders may provide some flexibility by providing for these conditions to be used only in cases in which this is considered necessary (for example, to minimise the risks of the offender reoffending). On the other hand, it could be viewed as giving CCOs too much power to determine the types of conditions to which an offender should be subject.

6.86 In a similar way to some forms of conditional suspended sentence orders, supervision would not necessarily need to run for the entirety of the sentence. For example, a ‘supervision period’ could be designated, during which time the offender would be under intensive supervision and would have to comply with other special conditions, after which time the offender might be subject only to the core conditions of the order. However, on breach of the order, a court might have the power, together with the power to resentence the offender for the offence (including, if appropriate, to a term of imprisonment), to extend the supervision period (up to the maximum term of the order) and impose other special conditions.

Special Conditions

Curfews with Electronic Monitoring

6.87 One of the Council’s more contentious suggestions in its Interim Report was that curfew orders with electronic monitoring could be made available as conditions of a new community order. A similar suggestion was made by the Sentencing Review which, while noting the general lack of support among those consulted for a curfew condition, suggested it might provide a useful alternative to imprisonment ‘for some serious offenders, for limited periods of time’.\(^{560}\) Consequently, it recommended that ‘further detailed consideration be given to the desirability of attaching home detention, curfew, hostel residence or intensive supervision conditions’ to the ICO.\(^{561}\)

6.88 The Western Australian form of ISO allows a court to impose a curfew condition, although this power appears to be rarely exercised. Over the period July to September 2007, there was an average of only six offenders subject to a restricted movement order in WA.\(^{562}\)

6.89 The new forms of community order and suspended sentence order in the United Kingdom also provide for curfew requirements and electronic monitoring. Unlike the WA experience, there has been substantial use made of these requirements. While only around 3 per cent of the new community orders supervised by the Probation Service have a curfew condition, the Home Office estimates that the number of stand-alone curfew requirements is in the range of 17,600.\(^{563}\)

\(^{559}\) Sentencing Act 2002 (NZ) ss 54F(1)(g) and (i).

\(^{560}\) Freiberg (2002), above n 16, 142.

\(^{561}\) Ibid, Recommendation 25.


Most jurisdictions that provide for such a condition—either as a stand alone order or a condition of another form of community sentence—have limited the maximum term of the order or condition. For example, in England and Wales the maximum term of a curfew order is six months, and can be ordered for between two and 12 hours per day. Similarly, in New Zealand, community detention (a new form of curfew order for up to 84 hours a week with electronic monitoring) when introduced will be limited to a maximum period of six months.\footnote{Sentencing Act 2002 (NZ) s 69B(2).}

The Law Institute of Victoria, which opposed the inclusion of these types of conditions, submitted that curfews are ‘difficult to enforce and monitor’ and have ‘an unfair impact on other family members’ living with the offender who might be under pressure to ensure compliance with a curfew condition.\footnote{Submission 3.4 (Law Institute of Victoria).} Victoria Legal Aid also opposed the availability of curfews as a condition of the order.\footnote{Submission 3.2 (Victoria Legal Aid).}

The Federation of Community Legal Centres, Fitzroy Legal Service Inc and Youthlaw were of the view that conditions such as curfews, ‘are more properly used as bail conditions’ and suggested that if these types of conditions were to be introduced, ‘careful consideration must be given to the circumstances in which they may be attached’.\footnote{Submissions 2.20 (Youthlaw), 2.23 (Federation of Community Legal Centres) and 2.22 (Fitzroy Legal Service).}

Despite these reservations, it could be argued that one of the benefits of making curfew conditions available may be to allow offenders who otherwise might have received a short custodial sentence to remain in the community in circumstances in which there may be community protection concerns. By providing for an offender’s restricted liberty similar to, but less restrictive than home detention, curfew conditions may also serve a punitive purpose.

Evaluations of the curfew and electronic monitoring have produced mixed findings. In England and Wales, curfews and electronic monitoring initially had lower take-up rates than expected, although their popularity has grown in more recent years. The initially low take-up rate has been attributed to a range of factors including a lack of clarity about the target group for curfew orders and conditions.\footnote{For a review of the findings of various evaluations conducted of the UK electronic monitoring schemes, see George Mair, ‘Electronic Monitoring in England and Wales: Evidence-Based or Not?’ (2005) 5(3) Criminal Justice 257.}

The arguments in favour of the use of electronic monitoring and curfews are similar to those that apply to home detention as a sentencing option. For example, like home detention, electronic monitoring used in conjunction with curfew conditions may allow offenders to maintain their employment and ties to the community, while avoiding the negative effects of imprisonment.\footnote{Matt Black and Russell G. Smith, Electronic Monitoring in the Criminal Justice System (Trends and Issues in Crime and Criminal Justice No. 254) (2003) 4.} The benefits of such conditions are confirmed by a study of an electronic monitoring program operating in Canada, which found that offenders were generally positive about the program, with around 90 per cent agreeing with the statement that ‘electronic monitoring was a fair program for me’ and a similar proportion agreeing that the program was a ‘good correctional program’.\footnote{James Bonta, Suzanne Wallace-Capretta and Jennifer Rooney, Electronic Monitoring in Canada (1999) 29.} Benefits of the program identified by participants included maintaining contact with family members and allowing them to care for children, look for work and/or maintain their jobs and to attend treatment.\footnote{Ibid 30.}
Electronic monitoring with curfews also has the potential to reduce overall costs to the correctional system. However, this depends on its ability to divert offenders from prison, rather than increasing the carceral net. The targeting of these programs to low-risk offenders has been pointed to as providing evidence of the net-widening effects of electronic monitoring. If curfews are used in the place of, or in conjunction with, other less intensive and costly community based alternatives, it may actually increase overall correctional system costs.

Because offenders are not subject to the same level of restrictions on liberty as imprisonment, there is also a risk that offenders subject to electronic monitoring will reoffend during the term of their sentence. There is also the real possibility that the community will perceive these types of conditions as providing a 'soft option'.

Curfew and home detention orders generally have good completion rates (from 70 per cent to over 90 per cent). It has been cautioned that these findings may be misleading given the generally short duration of these orders.

Some studies on electronic monitoring used in the context of home detention have found electronic monitoring is effective in reducing the likelihood of reoffending and absconding from supervision during the period of the order, even when used with offenders convicted of more serious offences (including violent offences and drug offences). This suggests that if used in combination with curfew conditions or home detention conditions, electronic monitoring might provide an effective means of increasing public safety while an offender is on such an order.

Examining the longer-term effects of electronic monitoring, the findings are less certain. While some evaluations have found evidence of electronic monitoring increasing compliance with rehabilitative conditions during the term of the order, the longer-term rehabilitative potential of curfew orders and electronic monitoring has been questioned. At best, the findings of the effects of electronic monitoring on recidivism have been described as 'mixed or inconclusive'. A number of studies have found completion of curfew orders with electronic monitoring has had no significant impact on longer-term rates of reoffending. Where used in conjunction with treatment and other program conditions, electronic monitoring may have greater potential to reduce longer-term rates of reoffending.

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574 Black and Smith (2003), above n 569, 4.

575 Ibid.

576 Bonta, Wallace-Capretta and Rooney (1999), above n 570, 6.

577 See, for example, Padgett, Bales and Blomberg (2006), above n 573.

578 Ibid.


581 See Bonta et al (2000), above n 191. This study found that electronic monitoring had a positive effect on treatment program completion. In this study, most of the offenders subject to electronic monitoring completed treatment (87 per cent) compared to a completion rate of 52.9 per cent for probationers without electronic monitoring. However, it is suggested that this may have been a product of the threat of being returned to prison for non-compliance rather than the fear of being easily detected for failing to comply with the conditions of electronic monitoring.
6.101 One solution offered to the potential overuse and inappropriate use of such a condition offered during informal consultations was to assign Corrections Victoria the power to determine whether such a condition was necessary (in a similar way to how parole is administered). This approach is generally consistent with that which applies under the Western Australian legislation, and advocated by the Sentencing Review, which suggested a curfew condition imposed by the court could require the offender to:

- remain at a specified place for specified periods as ordered by a community corrections officer; and
- submit to surveillance or monitoring as ordered by a community corrections officer.582

**Non-association and place restriction conditions**

6.102 As part of its consultations on the draft recommendations, the Council sought comment on the use of non-association and place restriction conditions as an option for the court when imposing an ICO. Many of the arguments against the use of curfews and electronic monitoring are also applicable in relation to these sorts of conditions, but in the same way as those measures, these conditions could be used to signal that the ICO is a higher-level order.

6.103 These types of conditions are currently available in some Australian and overseas jurisdictions, and in some cases exist as separate forms of orders. For example, in New South Wales when sentencing an offender for an offence punishable by imprisonment for six months or more, a court may make either or both:

(a) a non-association order, being an order prohibiting the offender from associating with a specified person for a specified term;

(b) a place restriction order, being an order prohibiting the offender from frequenting or visiting a specified place or district for a specified term (not exceeding 12 months).583

6.104 Failure to comply with the order is punishable by 10 penalty units or six months’ imprisonment.584 A review of these provisions by the NSW Ombudsman found that use of non-association and place restriction conditions has been low. In the period 22 July 2002 to 21 July 2003, 12 non-association and place restriction orders were imposed by the courts, none of which was reported as being breached.585

6.105 Exclusion and non-association (prohibited activity) requirements, which are available to courts as conditions of community sentences and suspended sentences, have also been used relatively infrequently in England and Wales. In 2006, of just under 212,000 community sentences made, only 483 had a prohibited activity requirement attached, while 510 had an exclusion requirement—representing just 0.2 per cent of orders made.586

6.106 There was no support among those consulted for non-association and place restriction conditions. However, the availability of these conditions was recognised as a possible point of difference between the reformed ICO and the CBO.

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582 Freiberg (2002), above n 16, 142.
583 Crimes (Sentencing Procedure) Act 1999 (NSW) s 17A.
584 Crimes (Sentencing Procedure) Act 1999 (NSW) s 100E.
Victoria Legal Aid was concerned about the use of these types of conditions. It was of the view that if such conditions are to be available to the court, they should only be applied in ‘exceptional circumstances’.\(^{587}\) Similarly, Corrections Victoria had some concerns regarding the application of ‘special conditions’ on various orders;

> Whilst it is important that courts are satisfied that issues such as the risk of further offending by the offender is reduced, there will need to be safeguards in place to ensure that further special conditions achieve balance between punitive measures and the ability of the offender to engage in rehabilitation and successfully complete the order.\(^{588}\)

Youthlaw, the Mental Health Legal Centre and Fitzroy Legal Service were all concerned about the control aspect of these orders.\(^{589}\) In its submission, Fitzroy Legal Service highlighted the potential conflict between non–association and place restrictions conditions and the Victorian Charter of Human Rights and Responsibilities. It also noted the potential impact of such conditions on more vulnerable offenders:

> People who are the subject of ICOs are often very socially isolated and have few support networks. The imposition of restrictions upon a person’s movement and association will potentially only reinforce their isolation, disadvantage and subsequent disengagement with society. This could, in turn, lead to re-offending.\(^{590}\)

Further, Youthlaw and the Mental Health Legal Centre questioned how the court would decide to impose such conditions on an offender.\(^{591}\)

### Any Other Conditions the Court Considers Necessary or Desirable

In addition to the program conditions a court may attach to a CBO, there is a broad power for the court to impose ‘any other condition that the court considers necessary or desirable, other than one about the making of restitution or the payment of compensation, costs or damages’.\(^{592}\) The current provisions governing the making of an ICO do not include such a power.

The Council has found that in the case of CBOs, this provision is extremely popular with the courts. Just over half (51.2 per cent) of all people commencing a CBO in 2006–07 had a condition falling into the category ‘other’ imposed as part of their order.\(^{593}\) While the Council does not have information on the range of conditions falling into this category, presumably the range of conditions would be wide, and could include, for example, curfew conditions, non-association conditions and place restriction conditions.

Victoria Legal Aid raised concerns about the wide scope of the phrase: ‘any other condition the court considers necessary or desirable…’, and suggested that '[c]ourts may add a raft of conditions to try and “cover all bases” when the conditions are not necessary to achieve the purpose or purposes sought’.\(^{594}\) For this reason, VLA felt it important to include a provision directing courts to impose no more conditions than are necessary in order to achieve the purpose or purposes for which the order is made,\(^{595}\) similar in terms to that which guides the court in attaching conditions to CBOs.\(^{596}\)

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587 Submission 3.5 (Victoria Legal Aid).
588 Submission 3.6 (Corrections Victoria).
589 Submissions 3.7 (Youthlaw and the Mental Health Legal Centre) and 3.9 (Fitzroy Legal Service).
590 Submission 3.9 (Fitzroy Legal Service).
591 Submission 3.7 (Youthlaw and the Mental Health Legal Centre).
592 Sentencing Act 1991 (Vic) 38(1)(g).
593 Fisher (2007), above n 22.
594 Submission 3.2 (Victoria Legal Aid).
595 Ibid.
596 Section 38(3) of the Sentencing Act 1991 (Vic) provides: ‘A court must not impose any more program conditions than are necessary to achieve the purpose or purposes for which the order is made’. 
Breach of Orders

Under the Council’s revised proposals, it was suggested that breach of the reformed ICO should have similar consequences to those arising from breach of the Western Australian form of order. Under the WA Sentencing Act 1995, on breach of an ISO the court may:
- confirm the order (if still in force);
- amend the order (if still in force); or
- whether or not the order is still in force, cancel the order and sentence the person for the offence in any manner the court could if it had just convicted the person of that offence.\(^{597}\)

Unlike the Western Australian form of order, to signal the positioning of the order as a higher level order appropriate for more serious forms of offending, it was proposed that on breach of the order by further offending, the presumption should be in favour of the cancellation of the order and the re-sentencing of the offender, unless of the opinion it would be unjust to do so.

This approach is more flexible than the current ICO provisions that require a court, on breach (in whole or in part) by further offending, to cancel the order (if still in force) and commit the offender to prison for the unexpired portion of the sentence at the date of breach, unless of the opinion that it would be unjust to do so in light of any exceptional circumstances arising since the order was made.\(^{598}\)

Those consulted were generally supportive of a more flexible approach. In particular, Victoria Legal Aid supported:
- the removal of the need to demonstrate ‘exceptional circumstances’ following breach by further offending to avoid automatic re-sentencing. The more flexible approach that is recommended, including the options to vary, confirm or cancel the ICO, would allow judges more appropriate ways to deal with particular offenders.\(^{599}\)
- This approach was also supported by the County Court of Victoria, Youthlaw and the Mental Health Legal Centre and the Fitzroy Legal Service.\(^{600}\) However the LIV considered it ‘inappropriate’ for a court to have a power to vary orders ‘because this would result in judges and magistrates acting as courts of appeal for decisions of their peers’.\(^{601}\) It was also viewed as important that if a decision was made to resentence an offender on breach, the court should be required to take into account time already served by the offender on the ICO.\(^{602}\)
- The LIV felt that suspended sentences would play an important role in circumstances in which an ICO was breached: ‘Otherwise, a court will have little option but to imprison offenders who have breached their conditions’.\(^{603}\)
- The Office of Public Prosecutions felt that ‘a straight re-sentence on breach [would be] insufficient as a means of punishment if the [reformed ICO] is meant to be a higher level order’.\(^{604}\)
- Some felt that the current three year limit for initiating breach proceedings was too generous, and suggested in the alternative that breach proceedings should be initiated within 12 months of the relevant authority being made aware of the breach.\(^{605}\)

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597 Sentencing Act 1995 (WA) s 133(1).
598 Sentencing Act 1991 (Vic) ss 26(3A)–(3B).
599 Submission 3.5 (Victoria Legal Aid).
600 Meeting with judges of the County Court of Victoria (27 November 2007); Submissions 3.7 (Youthlaw and the Mental Health Legal Centre) and 3.9 (Fitzroy Legal Service).
601 Submission 3.4 (Law Institute of Victoria).
602 Ibid.
603 Ibid.
604 Submission 3.12 (Office of Public Prosecutions).
605 Submission 3.4 (Law Institute of Victoria).
The Western Australian Experience

6.121 While the Western Australian ISO might be viewed as being more flexible than the ICO, including due to its status as a true community-based order rather than a substitute for immediate imprisonment, this order has attracted similar criticisms to other intermediate orders.

6.122 There is some evidence to suggest that ISOs, together with suspended sentences, CBOs and other ‘non-custody’ options, have made little impact on the proportion of custodial sentences imposed in the higher courts (70.3 per cent in 1995 prior to the introduction of these reforms, compared with 67.5 per cent in 2000)—although a contributing factor may have been the trend for less serious cases to be heard in the Court of Petty Sessions rather than the higher courts.606

6.123 There is also evidence that community orders are becoming more onerous in terms of more conditions being imposed by the courts. A report by the WA Auditor-General found that in 1997, while 39 per cent of CBOs and ISOs had only one requirement attached, by 2000 this had declined to 30 per cent.607 The proportion of orders over this period with two requirements rose from 38 per cent to 44 per cent, while the proportion of orders with all three requirements increased from 22 per cent to 25 per cent.608

6.124 This suggests that the fears about courts ‘loading up orders’ with conditions, thereby increasing the severity of orders, may be well-founded. On the other hand, if these orders are truly being used as an alternative to immediate imprisonment, the use of these conditions may be viewed as necessary to achieve a proportionate sentence. The types of measures introduced in England and Wales, such as greater guidance on their appropriate use, may also protect against this outcome (see Chapter 4 above [4.30]–[4.34]).

The Council’s View

6.125 The Council believes that the current limited use of the ICO in Victoria is at least in part due to problems with the structure of this order, and a possible lack of confidence in its effectiveness as a sentencing order. This, together with the number of criticisms made of this order during our consultations, we believe, justifies consideration being given to its reform.

Recasting the ICO as a Sentencing Order in its Own Right

6.126 In our Interim Report we proposed that ICOs should be subsumed into a broader, and more flexible, form of community order. Taking into account the concerns expressed to us about the possible consequences of such a move, including the possible fast-tracking of offenders to prison, we now consider that the better approach is to retain a separate intensive order that is positioned above other community orders, and reform it to improve its use and operation.

6.127 Consistent with our view that the substitutional orders should be kept to a minimum, we recommend that the ICO should be recast as an order in its own right, rather than a means of serving a prison sentence. The Council recommends that the order should be classed as a non-custodial form order and should be positioned above a community-based order and below a suspended sentence of imprisonment in the sentencing hierarchy.

6.128 The Council’s recommendations in relation to the restructured ICO will have the effect of converting this order into a more intensive form of community-based order; however, there would remain a number of important distinctions between the two forms of order. First, community service would remain a core condition of the new form of ICO, but would continue to be optional for a CBO. Secondly, the number of unpaid community work hours able to be ordered by a court

607 Auditor-General for Western Australia, Implementing and Managing Community-Based Sentences: Performance Examination (2001) 18.
608 Ibid.
in making a CBO would be capped at 300 hours, while up to 500 hours of community work would be available to a court when making an ICO. Thirdly, more onerous forms of conditions than are available under a CBO, such as residence conditions, place restriction conditions and non-association conditions, would be available to a court when making an ICO in recognition of the potential higher risk of reoffending of offenders subject to this form of order. Finally, more serious consequences would follow on breach of an ICO by reoffending than on breach of a CBO. In the case of an ICO breached by the commission of a new offence, there would be a presumption in favour of the order being cancelled and the offender being resentenced for the original offence (including to an immediate term of imprisonment), while on breach of a CBO by reoffending courts would continue to have full discretion to confirm, vary or cancel the order.

6.129 The Council specifically rejects the contention that one of the consequences of removing the link with imprisonment will be higher rates of breach. While we acknowledge concerns by some that because an ICO will no longer constitute a ‘prison sentence’, it will reduce its capacity for special deterrence, 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. In this context we refer to the findings of a recent New South Wales study that offenders given a suspended sentence are no less likely to reoffend than those given supervised bonds when controlling for other factors individual to the offender.609 Existing evidence would further suggest that options that allow an offender to remain on a community order in some cases, even following a breach, may in fact prove more effective in reducing the longer-term risks to the community of reoffending (see further Chapter 11).

Eligibility Criteria and Purpose

6.130 In line with evidence that suggests that more intensive forms of interventions are most effective when used with higher-risk offenders, we recommend that the order should be directed at offences of relatively high seriousness and at offenders who are at medium to high risk of reoffending. The order should be aimed at addressing and controlling criminogenic factors, and retain a punitive, but more flexible, community work component. The supervision provided under the order should not be viewed as an end in and of itself, but rather tied to achieving a rehabilitative purpose and promoting compliance with other conditions of the order, including the condition of community work.

6.131 The Council recommends that a court should be directed to make an ICO only if it has convicted an offender of an offence or offences punishable by imprisonment and might otherwise have considered sentencing the offender to a term of imprisonment. This will clearly position the ICO as an order that is suitable for offences that prior to these changes may have been dealt with through the imposition of a substitutional ‘prison’ sanction, and will limit the potential for net-widening from lower-level orders.

6.132 As for the current form of ICO, a pre-sentence report would be required and the offender would have to agree to comply with the order prior to it being made.

Duration of the Order

6.133 The Council recommends the maximum period of the order should be increased from 12 months to two years, with a limited number of core conditions and a wider range of program conditions. While we are sympathetic to concerns about the higher risk of breach should the maximum term of these orders be increased, in our view this is necessary to provide a viable alternative form of order for offences of higher seriousness that might otherwise have attracted an immediate term of imprisonment, or a suspended sentence. We further believe the risks of breach can be minimised by structuring the order differently.

609 Weatherburn and Bartels, above n 130.
6.134 In most cases it will be appropriate for an offender to complete the more intensive aspects of the order shortly after being sentenced, after which time the level of contact and supervision may be scaled back. In order to facilitate this transition, we recommend that in the case of orders of six months or longer, the court should be able to specify a ‘supervision period’ that is shorter than the maximum term of the order. At the expiry of this period the offender would no longer be subject to program and special conditions or subject to intensive supervision, but would still have to comply with the other core conditions of the order. The expectation would be that the offender must complete his or her unpaid work requirements during this supervision period.

6.135 If a ‘supervision period’ is set by the court, the court on breach or an application to vary the order, could decide to extend this period, or if it has expired, to reactivate the period as a result of which the offender would again be subject to intensive supervision and reporting requirements.

6.136 In Chapter 11 of this Report, we suggest the establishment of a Community Corrections Board to oversee the management of offenders on community sentences. Should such a board be created, an alternative model that might be considered to manage offenders on sentences with a supervision period would be to treat the ‘supervision period’ as similar to a non-parole period. Under this approach the Board would decide whether or not the offender should continue to be supervised and be required to comply with program and other special conditions, or whether in light of his or her progress under the order, should be subject only to the core conditions until the expiry of the order.

Minimum Term

6.137 The Council endorses views expressed by some consulted that orders of under six months are of limited value in meeting the rehabilitative purpose of an ICO. While on this basis we initially considered setting a legislatively prescribed minimum term, we believe the issue is better dealt with through the use of guidelines. This will ensure that in the few cases in which a shorter sentence is considered appropriate, for example, due to the less serious nature of the offence and any programs completed by the offender pre-sentence, this option will still be available to the courts.

6.138 The Council suggests that the use of short-term ICOs of under six months should be monitored following the introduction of the reforms proposed, in order to identify any ongoing issues.

Permitted Sentence Combinations

6.139 Consistent with the current position in relation to community-based orders, the Council recommends that in sentencing an offender in respect of one or more offences in the same proceeding, a court should be permitted to make an ICO in addition to sentencing the offender to an immediate term of imprisonment of not more than three months.

6.140 The Council believes that providing courts with the power to combine an ICO with a short term of imprisonment would have a number of benefits, including: ensuring the powers available to a court in making an ICO or CBO are consistent; providing courts with greater flexibility in sentencing offenders to short-term sentences of less than 12 months (in which case a court does not have the power to order a straight term of imprisonment with a non-parole period); and allowing courts to recognise expressly time spent in custody on remand when sentencing an offender in circumstances in which it is appropriate to do so. We suggest that the use of this power should be monitored following the introduction of these reforms in order to determine how this power is being used.

6.141 A court would also be permitted under our proposals in sentencing an offender for more than one offence to make both an ICO and a CBO. This power will allow a court to order different forms of community sentences in circumstances in which it is sentencing an offender for offences of differing levels of seriousness.
6.142 The Council recommends that the same principles should apply to the making of two or more community sentences, as currently apply to the making of CBOs. That is:

- if a court makes separate community orders (ICOs and/or CBOs) in respect of two or more offences committed by the offender, the conditions of those orders should be concurrent unless the court directs otherwise;
- the conditions of an order made in respect of an offender should be, unless the court directs otherwise, concurrent with those of any other community order in force in respect of that offender; and
- a court should not be permitted not to give a direction that would result in the maximum number of community work hours permitted to be ordered under an ICO (500 hours) being exceeded.

Core Conditions

6.143 Under the Council’s proposals, ICOs would retain the mandatory supervision and unpaid work requirements. However, the court would be responsible for setting the number of community service hours to be completed, taking into account the seriousness of the offence, including the maximum penalty for the offence.

6.144 The Council believes it is important that the ICO retains a punitive component, as the new form of order should only be used when a court might otherwise have considered sentencing the offender to a term of imprisonment. However, we accept that in some cases it may be more appropriate for an offender, depending on his or her personal circumstances, to undertake all or some of the hours ordered as an activity requirement. While one means of achieving this would be to allow this to be dealt with administratively, in the interests of transparency, the Council supports the initial decision concerning whether activity hours should be permitted to be credited as work hours being made by a court. We therefore recommend that at the time of making the order, or on an application to vary the order, a court should be empowered to make an order permitting part, or all, of the community work hours specified in the order to be completed as an activity requirement if satisfied that due to the personal circumstances of the offender, it is desirable to do so. The Council recommends that ‘approved activities’ for this purpose should be determined by Corrections Victoria in consultation with the courts and other relevant stakeholders and should include:

- activities whose purpose is that of reparation, such as activities involving contact between offenders and persons affected by their offences (by consent); and
- educational, employment-related and life skills activities.

6.145 In the case of offenders with an intellectual disability, the Council recommends that courts should have the option to direct an offender to participate in the services specified in a justice plan as an alternative to ordering community work.

6.146 Other core conditions would be consistent with those that apply to the existing form of CBO and include that the offender not commit a further offence punishable by imprisonment during the period of the order, notify the relevant community corrections officer of any change of address or employment within two clear working days after the change, and not leave Victoria without permission granted generally or in relation to the particular case.

6.147 The Council also has recommended that the core condition that an offender must obey all lawful instructions and directions of community corrections officers should continue to be available in its current form. While we are sympathetic to concerns about the dangers of having such a broad condition which potentially might lead to the imposition of quite onerous requirements, we believe this outcome is adequately protected against by the obligation of Corrections Victoria to exercise its discretionary powers consistently with the principles set out in the Victorian Charter of Human Rights and Responsibilities.
Program and Special Conditions

6.148 Under the Council’s proposals, a much broader range of program and special conditions than are currently available for an ICO would be permitted under the order, including program conditions, residence conditions, non-association conditions and place restriction conditions. The Council believes this will allow courts to tailor orders more appropriately to the circumstances of offenders and respond to the underlying causes of offending. The use of these conditions would not be mandatory, but would be at the discretion of the court. Courts would be expressly prohibited from imposing any more conditions than are necessary to meet the purposes of the order.

6.149 The Council acknowledges particular concerns expressed in relation to the use of non-association and place restriction conditions. We understand that Corrective Services is already employing the use of these conditions in the case of high-risk offenders, under the authority of issuing lawful instructions and directions to offenders under orders.

6.150 Despite concerns expressed, given ICOs may be made where an immediate term of imprisonment might also have been considered, we believe there may be some cases in which these conditions are considered necessary to protect the community by minimising the likelihood that the offender will reoffend. We are of the view that, in the interests of transparency, the more appropriate body to consider and, where necessary, impose such conditions is a court.

6.151 These conditions will only be available when the court sentences an offender to an ICO and therefore, serve to distinguish this order as being a more serious sanction than a CBO. We note that these forms of conditions are considerably less onerous and intrusive than other possible alternatives that were initially considered, such as curfew orders with electronic monitoring, and that experience here may mirror that of NSW and England where, despite these conditions being available, they have been used very infrequently by the courts.

6.152 However, we accept that, given the potential dangers of these types of conditions, there is value in setting out some broad legislative criteria to guide the use of these conditions. Drawing on the principle of the ‘least restrictive alternative’ recognised in the Charter of Human Rights and Responsibilities, the Council therefore recommends that before a court sets such a condition it should be satisfied that:

(a) there is a significant risk of further offending by the offender; and

(b) the imposition of one or more of these conditions would reduce the likelihood of further offending by the offender which could not be achieved by any less restrictive condition or combination of conditions.

Powers of Variation/Cancellation

6.153 In Chapter 11 of this Report, we consider a number of possible strategies that may enhance compliance with community orders.

6.154 In our view, one of the current limitations of community sentences in Victoria in achieving good rates of compliance is the lack of formal incentives provided to offenders to comply with orders and to recognise good progress made. By comparison, a term of imprisonment in many cases carries with it the prospect for an offender of being released on parole and, over time, to be subject to less restrictive forms of supervision and control.

6.155 On this basis the Council believes there is some value in expanding the current grounds for varying or cancelling an ICO set out in section 25 of the Sentencing Act 1991 (Vic) and recommends that a court should be permitted:

- to vary the order (including by cancelling, suspending or varying existing program and special conditions, imposing additional conditions, varying the supervision period of the order, or reducing the hours of community work to be done under the order); or
6. Intensive Correction Orders

6.156 These recommendations are consistent with provisions that exist in England and Wales, which allow for the early termination of community sentences, and recent changes introduced in New Zealand.

Powers on Breach

6.157 Because ICOs are directed at offenders who have engaged in more serious forms of offending, the Council believes it is appropriate on breach of these orders constituted in whole or in part by further offending, that the discretion of courts to respond to these breaches should to some extent be limited. This is consistent with the current breach provisions for ICOs under the Sentencing Act 1991 (Vic). However, because an ICO under the Council’s proposals will not constitute a form of ‘prison’ sentence, the current presumption that the order should be cancelled and the offender committed to prison, is clearly no longer appropriate. The presumption under the new form of order, we believe, should be in favour of the cancellation of the order and the resentencing of the offender for the original offence or offences (including, where appropriate, to an immediate term of imprisonment).

6.158 As for the current form of ICO, the Council recommends that a more flexible approach should be taken in the case of breach by a failure to comply with the other conditions of the order.

6.159 Unlike the breach provisions for suspended sentences, we do not believe in the case of breach by further offending that it should be necessary for a court to be satisfied that the circumstances arising since the order was made are ‘exceptional’ in order to take an alternative course of action. Along with providing for an offender’s rehabilitation and denouncing the offender’s conduct, a suspended sentence is primarily directed at deterring the offender from reoffending through the threat of the prison sentence being activated and does not require an offender to comply with any conditions other than not to commit another offence. The powers of a court in such a case necessarily should be limited.

6.160 In contrast, an ICO is intended to serve a combination of purposes, including punishment and rehabilitation, and is a conditional form of order served by the offender rather than a sentence that is imposed, but that remains inactivated. Due to the conditional nature of the order, the options available to a court on breach are far broader than for a suspended sentence, including varying the conditions of the order. Under the Council’s proposals, courts would also have a power on breach to extend or reactivate the supervision period, thereby requiring the offender to be subject to intensive supervision. Taking these considerations into account, while we support a presumption in favour of cancellation and resentencing, we believe a greater degree of flexibility is warranted than is currently permitted under the requirement to demonstrate ‘exceptional’ circumstances.

6.161 In addition to the existing powers on breach to cancel, to vary or to confirm the order, the Council has recommended that an additional power be included that would allow a court to cancel the order and make no further order. The use of this power is envisaged in circumstances in which the offender has been sentenced to a substantial period of imprisonment for a new or prior offence, and where no useful purpose would be served by resentencing the offender, varying the order or confirming the original order made.
New Form of ICO for Offenders with Drug and Alcohol Issues

The Council also supports a specialised stream of the ICO (Drug and Alcohol) being introduced that would be targeted towards offenders who are dependent on drugs or alcohol where this dependency has contributed to their offending behaviours. Under the Council’s proposals, this order, which is intended to replace the current combined custody and treatment order, could require residential or non-residential programs and similar to the Drug Treatment Order, would also allow for the option of judicial monitoring and supervision. This form of order is discussed further in Chapter 7.

The Need for Other Specialised ICOs

In consultations, some support was expressed for the introduction of other specialised streams of ICOs, such as an ICO for offenders with gambling issues and sex offenders. The Council believes that the needs of these types of offenders can be encompassed within the restructured ICO through the combinations of program and special conditions attached to these orders. As is discussed further in Chapter 7, the need for a specialist response in relation to offenders with drug and alcohol dependency issues has been identified on the basis of the prevalence of drug and alcohol problems among offenders.

We recognise, however, that the proper targeting of orders cannot take place without proper pre-sentence assessments taking place to inform the preparation of comprehensive pre-sentence reports. As recommended later in this report, additional funding may be necessary to support this process.

In order to ensure consistency of approach in providing pre-sentence advice, and to improve the targeting of orders, the Council further suggests that it may also be useful to develop model combinations of conditions similar to those developed by the National Probation Service for England and Wales.\footnote{National Probation Service for England and Wales, National Offender Management Service, \textit{National Implementation Guide for the Criminal Justice Act 2003 Community Sentence Provisions} (2nd edn, 2005).}

**RECOMMENDATION 5: Intensive Correction Orders**

**Recommendation 5–1**

Intensive correction orders (ICO) should be retained in Victoria, but recast as sentencing orders in their own right. The new form of ICO should be classed as a ‘non-custodial’ order and should be positioned above community-based orders, and below a suspended sentence of imprisonment in the sentencing hierarchy.

**Recommendation 5–2**

Intensive correction orders should be targeted at offences of medium to high seriousness and medium to high-risk/needs offenders.

**Recommendation 5–3**

The particular purposes of an ICO should be to reduce the likelihood of the offender reoffending through the rehabilitation and reintegration of the offender and to allow for the adequate punishment of an offender in the community.
RECOMMENDATION 5: Intensive Correction Orders

Recommendation 5–4

The Council recommends the form of order should be structured as follows:

Eligibility and Consent

A court should be permitted to make an ICO if:
(a) the person has been convicted of an offence or offences punishable by imprisonment;
(b) the court might otherwise have considered sentencing the offender to a term of imprisonment;
(c) it has received a pre-sentence report; and
(d) the offender agrees to comply with the order.

Duration of the Order

The maximum term of an ICO should be increased from 12 months to two years in the Magistrates’ Court and higher courts.

In making an intensive correction order of six months or longer, courts should be permitted to specify a ‘supervision period’ (that is shorter than the term of the sentence) during which time the offender must be supervised and must complete the work conditions and other program conditions attached to the order. Once the supervision period has expired, the offender should be subject only to the remaining core conditions of the order until the order expires.

A court should be permitted, on application, to vary the supervision period (for example, to increase or decrease the period of supervision).

Minimum Term

The order should have no legislatively prescribed minimum term.

[See further Recommendation 15–2 on the development of guidelines around the use of orders. As a general rule, orders of under six months should be discouraged as they are unlikely to meet one of the intended purposes of the order—to reduce the likelihood of the offender reoffending through the rehabilitation and reintegration of the offender.]

Permitted Sentence Combinations

In sentencing an offender in respect of one or more offences in the same proceeding, a court should be permitted to make an ICO in addition to sentencing the offender to an immediate term of imprisonment of not more than three months and/or to impose a fine.

The same power to combine a CBO with a suspended sentence (whether wholly or partially suspended) when sentencing an offender for more than one offence in the same proceeding should apply to an ICO.

Commencement of the Order

As is the current position under regulation 21 of the Sentencing Regulations 2002 (Vic) in relation to CBOs, a court should be permitted to fix a date for the commencement of the ICO that is not more than three months after the order is made.
RECOMMENDATION 5: Intensive Correction Orders

Orders in Respect of Two or More Offences

The same principles should apply as currently apply to the making of CBOs. That is:
- if a court makes separate community orders (ICOs and/or CBOs) in respect of two or more
  offences committed by the offender, the conditions of those orders should be concurrent
  unless the court otherwise directs;
- the conditions of an order made in respect of an offender should be, unless the court
  otherwise directs, concurrent with those of any other community order in force in respect of
  that offender; and
- a court may not give a direction that would result in the maximum number of community work
  hours permitted to be ordered under an ICO (500 hours) being exceeded.

Core Conditions

The core conditions of an ICO should be the same as for a CBO, with the additional core condition of
community work (up to a maximum of 500 hours). The core conditions of an ICO should be that the
offender:
- not commit a further offence punishable by imprisonment during the period of the order;
- reports to a specified community corrections centre within two clear working days after the
  coming into force of the order;
- reports to, and receives visits from, a community corrections officer at least once a week
  in the first three months of the order, and thereafter at least once every 28 days and/or
  as otherwise ordered by the Regional Manager of Community Correctional Services (CCS)
  during the period of the order, or supervision period (if specified);
- notify of changes to address or employment within two clear working days after the change;
- not leave Victoria without permission granted generally or in relation to the particular case;
- obey all lawful instructions and directions of community corrections officers; and
- perform unpaid community work as specified in the order (up to a total of 500 hours—flexible
  over the term of the order) or, subject to Division 6 Part 3 of the Sentencing Act 1991 (Vic),
  participate in the services specified in a justice plan.

The court should be permitted to direct that part, or all, of the community work hours specified in the
order are permitted to be completed as an activity requirement if the court is satisfied that due to the
personal circumstances of the offender, it is desirable to do so.

Approved activities should be determined by Corrections Victoria in consultation with the courts and
other relevant stakeholders and should include:
- activities whose purpose is that of reparation, such as activities involving contact between
  offenders and persons affected by their offences (by consent); and
- educational, employment-related and life skills activities.

Unpaid Community Work: Additional Requirements

The maximum number of hours of unpaid community work to be worked or approved activities
completed in any period of seven days should not be permitted to exceed 20 hours, unless the
offender requests to do so and signs a written consent to working the extra number of hours, in which
case he or she may work up to 40 hours in a period of seven days.
RECOMMENDATION 5: Intensive Correction Orders

Program Conditions
A court should be permitted, but not required, to attach one or more program conditions to an order. Program conditions should include conditions that the offender:
- undergo assessment and treatment for alcohol or drug addiction as specified in the order or as directed by the Regional Manager of Community Correctional Services (CCS);
- submit to medical, psychological or psychiatric assessment and treatment as specified in the order or as directed by the Regional Manager of CCS;
- attend for educational, vocational, cultural, rehabilitative, reintegration or personal development programs or courses as specified in the order or as directed by the Regional Manager of CCS;
- live at a specified place for a specified period;
- submit to testing for drug or alcohol use as specified in the order or as directed by the Regional Manager of CCS; and
- any other conditions that the court considers necessary or desirable to reduce likelihood of further offending by the offender other than one about the making of restitution or the payment of compensation, costs or damages.

Program Conditions: Additional Criteria
A court should not be permitted to attach any more program conditions than are necessary to achieve the purpose or purposes for which the order is made.

Special Conditions
A court should be permitted to impose one or more special conditions to an order. Special conditions:
- not associate with any specified person, or with persons of any specified class, as specified in the order (‘non-association condition’);
- not enter a place specified in the order for a period so specified (‘place restriction condition’); and
- not live at any address at which the court has directed the offender not to live (‘place restriction (residence) condition’).

A court should only be permitted to impose a non-association condition or place restriction condition if satisfied that:
(a) there is a significant risk of further offending by the offender;
(b) the imposition of one or more of these conditions would reduce the likelihood of further offending by the offender that could not be achieved by any less restrictive condition or combination of conditions.

Special conditions should be permitted to apply for the duration of the order, or a shorter period as ordered.

Suspension of Orders
The current provision relating to the circumstances in which an ICO is permitted to be suspended under section 25 of the Sentencing Act 1991 (Vic) should continue to apply (the Secretary to the Department of Justice may suspend the order if the offender is ill or in other exceptional circumstances).
### RECOMMENDATION 5: Intensive Correction Orders

#### Powers of Variation/Cancellation: General

In addition to the current grounds for varying or cancelling an ICO set out in section 25 of the *Sentencing Act 1991* (Vic), a court should be permitted:

- to vary the order (including by cancelling, suspending or varying existing program and special conditions, imposing additional conditions, varying the supervision period of the order, or reducing the hours of community work to be done under the order); or
- to cancel an order (and take no further action);

on the application of the offender, a prescribed person or member of a prescribed class of person, or the Director of Public Prosecutions, if having regard to any change in circumstances since the sentence was imposed and to the manner in which the offender has responded to the sentence:

- (a) the rehabilitation and reintegration of the offender would be advanced by the remission, suspension, or variation of any special conditions, or the imposition of additional special conditions; or
- (b) the continuation of the sentence is no longer necessary in the interests of the community or the offender.

#### Breach by Further Offending

On breach constituted in whole or in part by the offender committing another offence punishable by imprisonment during the period of the order, there should be a presumption in favour of the court:

- cancelling the order (if it is still in force); and
- (whether or not it is still in force) dealing with the offender for the offence or offences with respect to which the original order was made in any manner in which the court could deal with the offender if it had just found him or her guilty of that offence or offences;

unless the court is of the opinion that it would be unjust to do so having regard to circumstances that have arisen since the order was made.

In addition to this power the court should be permitted to:

- vary the ICO (including by adding, removing or varying program or special conditions, or by extending the supervision period of the order);
- confirm the order originally made; or
- cancel the order (and make no further order).

A court, in determining how to deal with an offender following the cancellation of an order, should be required to take into account the extent to which the offender had complied with the order before its cancellation.

On cancelling an ICO, a court should be permitted to resentence the offender by imposing another ICO or other orders.

#### Breach of Other Conditions

On breach other than by further offending, a court should be permitted to:

- vary the ICO (including by cancelling, suspending or varying existing program or special conditions or imposing additional conditions or by extending the supervision period of the order);
- confirm the order originally made;
- cancel the order (if it is still in force) and (whether or not it is still in force) deal with the offender for the offence or offences with respect to which the original order was made in any manner in which the court could deal with the offender if it had just found him or her guilty of that offence or offences; or
- cancel the order (and make no further order).
Chapter 7  Intermediate Sanctions for Offenders who are Alcohol or Drug Dependent
7 Intermediate Sanctions for Offenders who are Alcohol or Drug Dependent
Chapter 7  Intermediate Sanctions for Offenders who are Alcohol or Drug Dependent

The Extent of the Problem

7.1 Offenders with drug and alcohol issues continue to present challenges for the Victorian criminal justice system. As at 30 June 2000, 41 per cent of the Victorian prison population identified that they had a drug problem at the time of their entry to prison.\textsuperscript{611} The Arthur Andersen Review of Community Correctional Services in Victoria reported anecdotal evidence from magistrates suggesting that at least 80 per cent of offences were drug related.\textsuperscript{612} The same review reported that in the year 2000, offenders identified as having a drug or alcohol problem represented 68 per cent of offenders on community–based orders (CBOs), 55 per cent of offenders on parole and 40 per cent of offenders on intensive correction orders (ICOs).\textsuperscript{613}

7.2 More recent data gathered as part of the Drug Use Monitoring in Australia (DUMA) program confirm the link between drug use and crime.\textsuperscript{614} Findings from data collected in 2006 included:
- just under half (47 per cent) of adult detainees interviewed in 2006 who were charged with an offence in the previous 12 months reported they had taken drugs (other than alcohol) just prior to committing at least one of the offences for which they were charged;
- around a third of all detainees attributed some of their offending to drugs (32 per cent);
- just under half of all adult detainees were classified as dependent on illicit drugs (46 per cent), and close to a third were dependent on alcohol (31 per cent);
- over half (56 per cent) of adult detainees had a prior charge in the previous year and 16 per cent of all adult detainees had been in prison in the previous year;
- detainees classified as drug dependent had the highest average number (mean) of charges in the previous 12 months.\textsuperscript{615}

7.3 A study published by the NSW Bureau of Crime Statistics and Research, which assessed levels of social and psychological disadvantage among a sample of NSW Local Court defendants, found 70 per cent met the criteria for one or more measures of disordered/dependent substance use.\textsuperscript{616} Three-quarters of those defendants who self-reported one or more psychiatric disorders also met one or more criteria for disordered or dependent substance use. When asked what assistance they needed on a day-to-day basis, two-thirds of respondents referred to the need for treatment or support for substance abuse and/or mental health problems.

\textsuperscript{612}  Ibid.
\textsuperscript{613}  Ibid 32.
\textsuperscript{615}  Ibid xi, xiii–xiv.
\textsuperscript{616}  Craig Jones and Sandra Crawford, The Psychosocial Needs of NSW Court Defendants (2007) 4.
The Current Legal Framework

Current Options

7.4 Victoria has two sentencing orders directed at offenders with a drug and alcohol dependency that has contributed to their offending behaviour:

- combined custody and treatment orders (CCTOs); and
- drug treatment orders (DTOs);

Combined Custody and Treatment Orders

7.5 CCTOs were first introduced in Victoria in 1997 under amendments to the Sentencing Act 1991 (Vic), at the same time that section 28 orders (a form of conditional suspended sentences for alcoholic and drug-addicted offenders) were removed as a sentencing option.617

7.6 A CCTO is a particular kind of custodial order available to a court in circumstances in which a person has been convicted of an offence and the court:

- is satisfied that drunkenness or drug addiction contributed to the commission of the offence;
- is considering sentencing him or her to a term of imprisonment of not more than 12 months; and
- considers it desirable in the circumstances to impose a sentence of imprisonment of not more than 12 months and order that not less than six months of that sentence be served in custody and the balance served in the community on the conditions attached to the order.618

7.7 The core conditions include a requirement that the offender not commit another offence punishable by imprisonment, as well as treatment conditions and reporting conditions.619 Additional program conditions may also be attached, including that the offender submit to drug and alcohol testing during the period of the order.620

Drug Treatment Orders

7.8 The Drug Court is the only court in Victoria that can make a DTO.621 The Drug Court can only make a DTO if:

- the offender pleads guilty to an offence within the jurisdiction of the Magistrates’ Court punishable by imprisonment (other than a sexual offence or an offence involving the infliction of actual bodily harm);
- the offender is not currently subject to a parole order, CCTO, or a sentencing order imposed by the County Court or Supreme Court;
- the court convicts the offender of the offence;
- the court is satisfied on the balance of probabilities that the offender is dependent on drugs or alcohol and that dependency contributed to the commission of the offence;
- the court considers that a sentence of imprisonment would otherwise be appropriate, and it would not have suspended that sentence in whole or part, or ordered it to be served by way of intensive correction in the community;

617 For a discussion of the precursors of this order, see Sentencing Advisory Council (2005), above n 2, [2.29]–[2.30] and [2.40]–[2.41].
618 Sentencing Act 1991 (Vic) s 18Q.
619 Sentencing Act 1991 (Vic) s 18R.
620 Sentencing Act 1991 (Vic) s 18S.
621 The Drug Court is based in the Dandenong Magistrates’ Court and its catchment area is limited to the Greater Dandenong area, from Labertouche in the east, to Clayton in the west, Emerald in the north and Lang Lang in the south. Department of Justice, Victorian Drug Court Information Pack: Catchment Area (2005).
the court has received a drug treatment order assessment report;
the court is satisfied it is appropriate to make a DTO; and
the offender agrees in writing to the making of the order and to comply with the treatment and supervision requirements.622

7.9 DTOs can be up to two years in duration, and consist of two parts:

- A custodial part: A term of imprisonment of up to two years623 suspended while the treatment and supervision part of the sentence operates. Part, or all, of the sentence may be activated on breach.624
- A treatment and supervision part: This part operates for two years or until that part of the order is cancelled, and consists of conditions designed to address the offender’s drug dependency issues.625


7.10 The Sentencing Review recommended separating the existing CBO into three broad orders or ‘sub-orders’, including a drug and alcohol program order and a supervision and treatment order.626

The Drug and Alcohol Program Order

7.11 The Drug and Alcohol Program Order (DAPO), as envisaged by the Review, would be a stand-alone order rather than a form of CBO with program conditions of assessment, treatment and testing. The Review suggested:

The order would be a mid level equivalent of the drug treatment order for less serious offenders and offences, which would be less resource intensive than the drug treatment order, and would not be linked to a sentence of imprisonment and would not require judicial supervision.627

7.12 Such an order, it was recommended, should be available in circumstances in which:

- the court is satisfied that the offender’s drug or alcohol dependency contributed to the commission of the offence, or the offender is dependent on drugs or alcohol;
- the offender has consented to treatment; and
- a pre-sentence report has been received.628

7.13 The recommended purposes of a DAPO would be to:

- facilitate the rehabilitation of the offender by providing an administratively supervised drug or alcohol treatment and supervision regime in the community;
- take account of an offender’s drug or alcohol dependency;
- reduce the level of criminal activity associated with drug or alcohol dependency; and
- reduce the offender’s health risks associated with drug or alcohol dependency.

622 Sentencing Act 1991 (Vic) s 18Z(1)–(3).
623 Sentencing Act 1991 (Vic) s 18ZD.
624 Sentencing Act 1991 (Vic) s 18ZE.
625 Sentencing Act 1991 (Vic) s 18ZC.
626 Freiberg (2002), above n 16, 166.
628 Ibid 173.
The Review recommended that together with the core conditions of a CBO, the DAPO could require that an offender must obey the orders of a community correctional officer as to:

(a) undergoing assessment and, if necessary, appropriate treatment in relation to the abuse of alcohol, drugs or other substances;
(b) living at a specified place for the purposes of any of the matters in paragraph (a);
(c) receiving treatment as a non-resident in or at such institution or place, and at such intervals, as may be specified;
(d) submitting to detoxification or other treatment;
(e) submitting to drug or alcohol testing;
(f) not associating with specified persons; or
(g) anything considered necessary or appropriate concerning the offender’s drug or alcohol dependency.

Offenders on DAPOs, it was proposed, would be case managed by a drug treatment team, and would be subject to regular random drug testing. Under the order, offenders could be required to attend residential treatment facilities, or to access treatment in the community, at a place and at such intervals as specified in the order. The Review conceded that the success of the order would be ‘predicated on the adequate provision of treatment, counselling and other services’.

The key points of distinction from a DTO would be that the order:

• could be imposed by any court (rather than only the Drug Court Division of the Magistrates’ Court);
• would not be restricted to offenders who had pleaded guilty;
• would not be restricted, as the DTO is, in terms of the types of offences for which it can be imposed;
• would not necessarily have a sentence of imprisonment as a default option on breach, as the court would have a power to resentence the offender; and
• would be supervised by Community Correctional Services rather than by a court.

Supervision and Treatment Orders

The Review envisaged the role of the supervision and treatment order as being to bring together ‘the various elements of supervision, treatment, educational and training programs and possibly some restrictions on movement’. This form of order was viewed as potentially being useful for ‘minor drug and alcohol cases’ that would not qualify for the proposed DAPO or other drug and alcohol options.

It was recommended that the purposes of a supervision and program order should be:

(a) to reduce the likelihood of further offending by the offender through the rehabilitation and reintegration into the community of the offender;
(b) to permit the monitoring or supervision of an offender in the community whether or not the offender demonstrates a high risk of reoffending;
(c) to allow for the offender to receive counselling or treatment, or to attend and participate in programs in a way and to an extent decided by a community corrections officer;
(d) to allow for any personal factors that may have contributed to the offender’s criminal behaviour to be assessed; and
(e) to provide an opportunity for the offender to recognise and take steps to control and, if necessary, receive appropriate treatment for those factors.
7.19 Under the order, an offender would be required to obey the orders of a community correctional officer (CCO) as to:

(a) contacting a CCO, or receiving visits from a CCO, as ordered by a CCO;

(b) undergoing assessment by a medical practitioner, a psychiatrist, a psychologist or a social worker, or more than one of them and, if necessary, appropriate treatment;

(c) attending educational, social, therapeutic, cultural or employment related rehabilitative, re-integrative, or personal development programs or courses;

(d) placement in the care of an appropriate cultural or ethnic group;

(e) residing in a specified place for the purposes of any of the matters in paragraphs (a) and (b); and

(f) associating with any specified person or persons of any specified class.634

7.20 As with the proposed community work order, the Review recommended that a system of rewards should be built into the scheme—in this case, a power for the court to cancel the order if the court considers that:

(a) the offender has to date fully or substantially complied with the conditions attached to the order; and

(b) the continuation of the order is no longer necessary to meet the purposes for which it was made.635

7.21 The reforms recommended by the Review are yet to be acted upon.

Recent Developments in the Treatment of Drug-Dependent Offenders

Compulsory Drug Treatment Detention (NSW)

7.22 Reforms along the lines proposed by the Sentencing Review would result in an order with a similar function to the compulsory drug treatment detention order recently introduced in New South Wales, but would have broader availability. A compulsory drug treatment detention order can only be made by the NSW Drug Court.

7.23 An offender is eligible for this form of detention if he or she meets a number of criteria, including that he or she:

- has not been convicted of certain specified violent and drug offences;
- has been sentenced to a term of imprisonment to be served by way of full-time detention and the unexpired non-parole period is a period of at least 18 months and no more than three years;
- has been convicted in the five-year period immediately before the person was sentenced, of at least two other offences that resulted in the offender being sentenced to a term of imprisonment, a community service order, or being required to enter into a good behaviour bond or recognizance;
- has a long-term dependency on the use of prohibited drugs; and
- the facts in connection with the offence for which the person has been sentenced, together with the person’s antecedents and any other information available, indicate that the offence was related to the person’s long-term drug dependency and associated lifestyle.636

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634 Ibid 172.
635 Ibid.
636 Drug Court Act 1998 (NSW) s 5A.
7.24 The order is ‘compulsory’ because neither the prosecution nor the offender has the right to object to, or appeal against, referral to the Drug Court for consideration of whether a compulsory drug treatment order should be made.637

7.25 Before making an order the Drug Court must have referred the offender to the multidisciplinary team for assessment as to the eligibility and suitability of the offender for compulsory drug treatment detention and be satisfied on a number of matters.638

7.26 The program is a three-staged one.639 During the first stage, the offender is in closed detention in a secure unit with access to programs.640 In the second stage, the offender is held in semi-open detention and has access to employment, training and other programs in the community.641 In the final stage, the offender is housed in the community in accommodation approved by the Drug Court, under intensive supervision and with ongoing support.642 The timing of when an offender progresses to the next stage is dependent on an offender’s progress under the order.643 The Commissioner of Corrective Services is also permitted to offer other rewards for compliance, including:

- granting privileges to the offender;
- decreasing the level of management of the offender in the Compulsory Drug Treatment Correctional Centre;
- applying to the Drug Court to vary any community supervision order to decrease the level of supervision to which the offender is subject; and
- applying to the Drug Court to vary the offender’s compulsory drug treatment personal plan to decrease the frequency with which the offender must undergo periodic testing for drugs.644

7.27 The Drug Court has the power to order an offender to regress to a higher level of detention if satisfied, on the balance of probabilities that he or she has failed to comply in a serious respect with any condition of the offender’s compulsory drug treatment personal plan.645 For example, if an offender has progressed to community custody (Stage 3) the court may regress him or her to semi-open detention (Stage 2) or closed detention (Stage 1).646

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638 These include that: the offender is of or above the age of 18 years; the offender is an eligible convicted offender; and the offender is a suitable person to serve the sentence by way of compulsory drug treatment detention; it is appropriate in all of the circumstances that the sentence be served by way of compulsory drug treatment detention; there is accommodation available (or is likely to be available within 14 days) at the Compulsory Drug Treatment Correctional Centre for the offender to serve the sentence by way of compulsory drug treatment detention; and the offender’s participation in the program will not damage the program or any other person’s participation in it: Drug Court Act 1998 (NSW) s 18D(1).


640 Ibid.

641 Ibid.

642 Ibid.

643 All offenders are initially assigned to closed detention (Stage 1). The Drug Court may order that the offender progress to Stage 2 (semi-open detention) after the offender has served his or her sentence in closed detention (Stage 1) for a period of at least six months. After a further six months, the Drug Court may order that the offender progress to community custody (Stage 3): Crimes (Administration of Sentences) Act 1999 (NSW) ss 106L, 106M(1) and 106M(2).

644 Crimes (Administration of Sentences) Act 1999 (NSW) s 106J.

645 Crimes (Administration of Sentences) Act 1999 (NSW) s 106M(3).

646 Crimes (Administration of Sentences) Act 1999 (NSW) s 106M(3)(b).
Marngoneet Correctional Centre (Victoria)

7.28 The Marngoneet Correctional Centre was opened in March 2006. It is a 300-bed, medium security correctional programs prison. The Centre provides a range of programs, including drug and alcohol treatment programs, vocational services programs and violent offender treatment programs.

7.29 Offenders eligible to be transferred to Marngoneet are those who are at moderate to high-risk of reoffending, with at least six months of their sentence left to serve at the time of transfer.\textsuperscript{647}

7.30 The physical design of the Marngoneet creates ‘three neighbourhoods that function as therapeutic communities, where all prisoners participate as members of the neighbourhood community’.\textsuperscript{648}

The physical design of Marngoneet maximises normal living conditions and minimises institutionalisation, shapes social interaction, provides small living units and promotes significant levels of personal and social responsibility.\textsuperscript{649}

7.31 Each ‘neighbourhood’, or ‘zone’, includes:
- a 40-bed main unit, which accommodates offenders in secure single cells on lock-up;
- two six-bed units, with shared kitchen and living areas, and offenders during lock-up being secured in single cells;
- six accommodation units in six-room flat style, which allow offenders to self-secure their rooms, and which have shared kitchen, living and bathroom areas; and
- three four-room cottage style accommodation, which have similar facilities to the flat-style accommodation.\textsuperscript{650}

7.32 One therapeutic community is specifically targeted at offenders with drug and alcohol issues.\textsuperscript{651}

7.33 The main differences between the approach taken in Victoria and the NSW compulsory drug treatment detention appear to be that:
- the period of time an offender is housed at the centre—under the NSW program, a prisoner must have at least 18 months left to serve in prison to be eligible for the program, and can be subject to this form of detention for up to three years, whereas prisoners may be eligible to be accommodated at Marngoneet if they have at least six months left to serve on their sentence at the time of transfer;
- the structure of the order—offenders transferred to Marngoneet Correctional Centre are under a standard sentence, whereas offenders may only be housed at the Compulsory Drug Treatment Correctional Centre if the Drug Court has ordered that the offender’s sentence of imprisonment be served by way of compulsory drug treatment detention. Once the Drug Court makes this order, it exposes the offender to a different set of administrative arrangements; and
- the management of the order—offenders transferred to Marngoneet Correctional Centre remain subject to supervision by Corrections Victoria, whereas the NSW Drug Court has responsibility for overseeing the management of offenders subject to a Compulsory Drug Treatment Order, including the level of supervision to which they are subject.

\textsuperscript{647} Department of Justice, Corrections Victoria, \textit{Marngoneet Correctional Centre: General Information} (Brochure) (2005)

\textsuperscript{648} Department of Justice, Corrections Victoria, \textit{Marngoneet Correctional Centre: Prison Neighbourhoods} (Brochure) (2005).

\textsuperscript{649} Ibid.

\textsuperscript{650} Ibid.

\textsuperscript{651} Submission 1.9 (St Kilda Legal Service).
Court Integrated Services Program (Victoria)

7.34 In the 2005–06 budget, $24.3 million was allocated over four years for the Breaking the Cycle of Reoffending Program, including the development of the Court Integrated Services Program (CISP—previously the Court Intervention Program) and continuation of the Drug Court at Dandenong.

7.35 The CISP has operated in three Magistrates’ court locations—Melbourne, Sunshine and LaTrobe Valley—since early 2007.652 It is a pre-sentence program designed to address the underlying causes of offending behaviour through individualised case management and a specialist, multidisciplinary approach. CISP engages a holistic approach to address various needs such as homelessness, mental health, disability services and social welfare.

7.36 Accused persons may be referred to CISP by a number of sources, including self-referral, but since its introduction, most referrals have come from legal representatives.653 Once a person is referred to the program, he or she is assessed to confirm the issues that led to the referral and to identify any other underlying difficulties that may have contributed to offending behaviour. There are three levels of service response: intensive, intermediate and community referral. Once a person has been assessed, he or she is allocated to the appropriate level of service response based on his or her level of risk and need.654

7.37 As discussed earlier at [7.1]–[7.3], drug dependence is a serious issue for a significant number of offenders. This is reflected in the high percentage of accused people who are referred to CISP for specialised case management. Of the cases referred to CISP for assessment over the period January to December 2007, 83.5 per cent were identified for assistance with drug problems. Just under half (43 per cent) were identified as having problems with alcohol.655


653 Ibid.

654 Ibid.

655 Ibid.
What Works in Reducing Reoffending with Drug Offenders?

The Existing Evidence

7.38 Evaluations of drug treatment have generally reported the most positive outcomes for treatment provided in the community, although positive outcomes have also been experienced with in-prison programs—particularly those with aftercare services. For example, a meta-analysis undertaken by the Washington State Institute of Public Policy reported the following reductions in recidivism of participants compared to a ‘treatment as usual’ group:

<table>
<thead>
<tr>
<th>Programs for Drug Offenders</th>
<th>Percentage Reduction in Recidivism</th>
</tr>
</thead>
<tbody>
<tr>
<td>Drug treatment in the community</td>
<td>-12.4%</td>
</tr>
<tr>
<td>Adult drug courts</td>
<td>-10.7%</td>
</tr>
<tr>
<td>In-prison ‘therapeutic communities’ with community aftercare</td>
<td>-6.9%</td>
</tr>
<tr>
<td>Cognitive–behavioural drug treatment in prison</td>
<td>-6.8%</td>
</tr>
<tr>
<td>Drug treatment in gaol</td>
<td>-6.0%</td>
</tr>
<tr>
<td>In-prison ‘therapeutic communities’ without community aftercare</td>
<td>-5.3%</td>
</tr>
</tbody>
</table>

7.39 The form of treatment provided in Marrgongee Correctional Centre in Victoria would seem to fit most closely the ‘in-prison “therapeutic communities” with community aftercare’ description, while the Compulsory Drug Treatment Program in NSW seems to combine the ‘in-prison “therapeutic communities”’ approach with a drug court management model.

7.40 The same researchers who conducted this meta-analysis found the cost savings (taking into account effects of reductions in recidivism and the marginal program costs compared to the costs of the alternatives) per participant for programs aimed specifically at drug offenders were highest for drug treatment delivered in the community (US$10,054), followed by drug treatment in prison (therapeutic communities or out-patient services) (US$7,835) and drug courts ($4,767).

7.41 While no formal evaluations have yet been undertaken of the cost-benefits of the Marrgongee Correctional Centre programs, an evaluation of the Victorian drug treatment program pilot reported the overall costs of the program as $2.87 million, and the benefits in terms of reduced demand for prison beds in the vicinity of $16.65 million, translating to savings to the community of $5.81 for every dollar spent.657

Drug Courts

7.42 Drug courts operating in Victoria and elsewhere have demonstrated particular success in reducing recidivism;658 however, it is unclear based on existing evidence what aspects of the drug court approach are associated with this outcome.659

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656 Aos, Miller and Drake (2006), above n 182, 3, Exhibit 1.
657 Acumen Alliance (2005), above n 220, 38.
658 See for example Doris Layton MacKenzie, What Works in Corrections: Reducing the Criminal Activities of Offenders and Delinquents (2006) 227-34. The Victorian Drug Court evaluation found that Drug Court participants committed offences: 23 per cent less per free day than offenders in a comparison group; significantly less than offenders whose DTOs had been cancelled (53 per cent of completers reoffended, compared with 92 per cent of those whose orders were cancelled); and 37 per cent less while on DTOs than prior to their participation in the program: Courts and Programs Development Unit, Department of Justice, The Drug Court: An Evaluation of the Victorian Pilot Program (2006) 6.
The first drug court was established in Florida in 1989, and there are now more than 1,000 in operation in the United States. A number of drug courts have been established across Australia, including in NSW, the Northern Territory, Queensland, South Australia, Western Australia and Victoria. Tasmania is also trialling the use of a DTO similar to that which exists in Victoria.

The Victorian Drug Court commenced operation as a three-year pilot program in May 2002 and operates at the Dandenong Magistrates’ Court. In May 2005, funding was provided to 2008–09 to support the Drug Court’s continued operation.

Based on figures for 2004–05 to 2005–06, just over 40 people a year are placed on a DTO, with between 50 and 60 offenders subject to orders at any one time.

Drug courts take a number of different forms, but share a common approach ‘designed to use the authority of the courts to reduce crime by changing defendants’ drug-using behaviour’. Freiberg has identified the following as ‘distinctive features’ of drug courts and other problem-solving or problem-oriented courts:

- an approach by the judicial officer that moves away from the immediate question of guilt or innocence towards the broader issues of improvements in the health and wellbeing of the offender, of public safety and amenity more broadly, and of the social and communal problems that may be conducive to criminal behaviour;
- ongoing judicial supervision: the court is required to monitor the progress of the offender and the orders made by requiring the offender to report back to the court as directed by the court;
- integration of service provision: the court, and the court building, can provide a focus for the provision of social, welfare and health services and can coordinate their delivery in particular cases. However, courts do not deliver these services, nor are they budget holders for them;
- direct engagement with defendants: though not negating or denying the role of the prosecution and defence, judicial officers can talk directly to defendants as part of the process of making the court more meaningful for participants and exploiting the powerful role of the court as enforcer/mentor/supervisor; and
- a non-adversarial approach: most problem-oriented courts require a plea of guilty, or, if they are pre-plea, an acknowledgment of guilt. They seek improved outcomes by encouraging all participants, including legal counsel, to resolve cases and issues by collaboration rather than confrontation.

661 The court was established by the Sentencing (Amendment) Act 2002 (Vic).
662 In 2005/06, 43 orders were made, while 41 orders were made in 2004/05: Magistrates’ Court of Victoria, Annual Report 2005–06 (2006) 13.
663 Ibid 45.
665 Freiberg (2005), above n 660, 197–8.
Treatment in the Community

7.47 There is some evidence that treatment programs ordered as part of a community sentence can be effective in reducing reoffending, and particularly in the case of those offenders who complete their orders. See, for example, Acumen Alliance (2005), above n 220. Similarly, an evaluation of the UK Drug Treatment and Testing Orders found statistically significant differences in reconviction rates between those whose orders were revoked (91 per cent) and those who completed their orders (53 per cent): Mike Hough, et al, *The Impact of Drug Treatment and Testing Orders on Offending: Two-Year Reconviction Results (2003)* 1.

7.48 While DTOs in Victoria are available only to offenders dealt with by the Drug Court, community sentencing dispositions that are more broadly available, such as ICOs and CBOs, often have a drug assessment and treatment component. In fact, the second most common condition for offenders commencing CBOs in Victoria in 2006–07 was an assessment and treatment condition (60.2 per cent). This condition includes assessment and treatment for alcohol or drug addiction, as well as a requirement to submit to medical, psychological or psychiatric assessment and treatment: *Sentencing Act 1991 (Vic) s 38(1)(d).*

7.49 Assessments for drug and alcohol treatment are undertaken in Victoria by the Community Offenders Advice and Treatment Service (COATS), which is funded by the Department of Human Services (DHS). The COATS Program, established in November 1997, is run by the Australian Community Support Organisation (ACSO). In 2005–06 alone, over 7,000 referrals were made to the COATS service. Together with assessing clients referred by the courts, Community Correctional Services and others, COATS is responsible for developing alcohol and drug treatment plans and purchasing treatment services from DHS-accredited, community based alcohol and drug treatment agencies. ACSO has identified that in some cases, brokering treatment has taken longer than anticipated.

Issues and Consultation

The Use of CCTOs

7.50 While CCTOs were introduced to deal with more serious offenders who have drug and alcohol issues, courts have made limited use of CCTOs since their introduction. In the financial year 1997–98, a CCTO was imposed on 85 offenders in the Magistrates’ Court. The number of those receiving a CCTO rose to a high of 171 in 2000–01, representing 0.2 per cent of all people sentenced. From this time the number of people sentenced to a CCTO declined steadily to 27 in 2004–05, and has remained at this level. In the higher courts, 14 people were sentenced to a CCTO in 2000–01 (0.7 per cent of all those sentenced), but just two orders were made in 2006–07.

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666 See, for example, Acumen Alliance (2005), above n 220. Similarly, an evaluation of the UK Drug Treatment and Testing Orders found statistically significant differences in reconviction rates between those whose orders were revoked (91 per cent) and those who completed their orders (53 per cent): Mike Hough, et al, *The Impact of Drug Treatment and Testing Orders on Offending: Two-Year Reconviction Results (2003)* 1.

667 Fisher (2007), above n 22. This condition includes assessment and treatment for alcohol or drug addiction, as well as a requirement to submit to medical, psychological or psychiatric assessment and treatment: *Sentencing Act 1991 (Vic) s 38(1)(d).*


670 ACSO has attributed this to a number of factors ‘including treatment agency staff shortages, staff not replaced when on leave, satellite offices manned on a limited basis with limited treatment times available: Ibid.'
7. Intermediate Sanctions for Offenders who are Alcohol or Drug Dependent

Figure 20: The number of defendants who received a CCTO by court level, 2000–01 to 2006–07

Source: Courts Statistical Services, Department of Justice (Victoria), unpublished data

7.51 Data provided to the Sentencing Review by the Office of the Correctional Services Commissioner reported that 59 per cent of offenders released on the community component of their order had a breach action initiated against them. Of those breaches, 22 per cent were breaches by further offending only, 36 per cent for breach by further offending and a failure to comply with other conditions of the order, and 42 per cent were for breaches of conditions only.

Criticisms of CCTOs

7.52 CCTOs have been almost universally criticised, including due to their lack of flexibility and the limited time available under the order for treatment to be provided to offenders. A number of those consulted and/or who made submissions supported their abolition, including on the basis of the required gaol term. At one roundtable, participants noted that by the time offenders are sentenced many have already spent some time in custody but have not received any treatment. Consequently there is only time for the offender to be admitted into a short program (10–12 weeks) and the person is then transferred out of prison with little supervision and support. The provision of adequate treatment services in prison has also been an issue with the Adult Parole Board again raising concerns about the availability of treatment programs in prison in its 2006–07 Annual Report.

671 Freiberg (2002), above n 16, 73.
672 Ibid 74.
673 Ibid 75–6.
674 See, for example, Submissions 1.38 (Victoria Legal Aid) and 1.39 (Federation of Community Legal Centres). Judge Anderson (Submission 1.35) also noted there are significant limitations with CCTOs.
675 Roundtable—Legal Issues (23 May 2005).
676 Freiberg (2002), above n 16, 75–6.
677 Adult Parole Board of Victoria, Annual Report 2006/2007 (2007) 7. The Board notes that: ‘as at the end of March 2007 the intensive drug treatment program at Fulham Prison had a waiting list of 146 prisoners who had both applied and been assessed as being suitable to undertake the program. Most regrettably, at that time by reason of resource restrictions, the likelihood was that the overwhelming number of those prisoners would not be able to undertake such a program at Fulham Prison. Similar concerns are obvious to the Board members upon their visits to Barwon, Loddon and Ararat Prisons’: Ibid.
7.53 In early consultations there was some support for an order along the lines of the conditional suspended sentence orders previously available under section 28 of the Sentencing Act 1991 (Vic).678 A number of those consulted identified funding and resourcing as the critical issue in considering alternative options. The comment was made that drug and alcohol services are already stretched to the limit and in order to work effectively any new order introduced would need to be accompanied by a significant investment of additional resources.

7.54 Similar concerns were expressed by stakeholders who were consulted for the Freiberg Sentencing Review.679 The Review ultimately recommended that the CCTO should be abolished.680 The Review favoured reintroducing a revised version of section 28 orders (conditional suspended sentence for drug offences), which would be available if the court was considering sentencing the offender to a term of imprisonment of not more than five years, with the first part of the sentence (not more than 12 months) to be served in a programs prison or another secure treatment facility.681 Under these proposals, the court would have the option to order the offender’s earlier release on an application by correctional authorities. The rest of the sentence would be suspended on conditions similar to a CCTO.

7.55 The Review recommended that if CCTOs were to be retained, rather than removed as a sentencing option, they should be reformed by:

- increasing the duration of the order from 12 months to two years;
- allowing the court to determine the term of imprisonment;
- reducing the minimum period of the order from six months to three months;
- requiring the period of imprisonment to be served in a therapeutic environment;
- providing for the community portion of the sentence to be served under the supervision of a drug court or similar regime; and
- allowing greater flexibility on breach.682

The Interim Report Proposals

7.56 In its Interim Report the Council proposed that the most beneficial aspects of the CCTO—the provision for a period of supervised release with the provision of treatment and other services—should be incorporated in the proposed new IRO, and the less beneficial aspects, such as the lack of flexibility in setting the ‘custodial’ component and the short period of the order, should be abandoned.

7.57 While the Council did not suggest that this order be used exclusively for offenders with drug and alcohol issues, reflecting general trends of substance misuse among prisoners and offenders subject to community correctional orders, it was envisaged that a substantial proportion of offenders sentenced to such an order would be offenders requiring some form of drug treatment.

678 The power to make these orders was removed at the same time that combined custody and treatment orders were introduced in 1997. For a discussion of the history of these provisions, see further Sentencing Advisory Council (2005), above n 2, Chapter 2.
680 Ibid 78, Recommendation 5.
681 Ibid 80–2, Recommendation 7.
682 Ibid 78–9, Recommendation 6.
Submissions and Consultations

7.58 Support for the abolition of CCTOs was again expressed in submissions made on the Interim Report. The Criminal Defence Lawyers’ Association supported their abolition on the basis that “these orders in our experience do not achieve their rehabilitative purpose in the majority of cases and courts increasingly express a lack of confidence in them as a sentencing option”. The Criminal Bar Association also supported the removal of this option, supporting the reintroduction of a conditional suspended sentence, particularly for drug and alcohol dependent offenders.

7.59 A number of organisations with experience in working with offenders who have drug or alcohol addictions made submissions that included a discussion of the principles that should guide the sentencing of these types of offenders and the types of sentencing options that would assist in their rehabilitation.

7.60 In its submission, St Kilda Legal Service stressed the importance of ‘sentencing outcomes where drug rehabilitation is a priority’ for offenders with a substance dependence. It warned against imposing onerous conditions on these offenders as part of a sentencing order; to do so would be to ignore the reality that offenders who had some form of dependence will often relapse many times before they are able to complete their rehabilitation successfully. Responses to these offenders must be flexible enough to deal with the unpredictable nature of undergoing this sort of behavioural change. Similarly, the Victorian Alcohol and Drug Association (VAADA) highlighted the importance of flexibility in the design and administration of sentencing orders, taking into consideration the possibility of relapse. The Fitzroy Legal Service also raised this issue, arguing that:

Drug users are in a more difficult position than most groups facing the criminal justice system. This is because sentencing principles based on escalation of penalty for repeat offenders tend not to recognise the difficulties faced by drug users with little support who, despite efforts to control drug dependence, regularly relapse. Research has shown that punitive or ‘tough’ sentences based on such principles, in turn, do little more than perpetuate their recipient’s marginalised position within the community.

7.61 The St Kilda Legal Service was also concerned about the long waiting lists for drug treatment services at that time. It argued that if an order were to be made by the court, a condition of which was to attend for drug assessment and treatment, there would have to be significant additional resources allocated to support and assist compliance with such a condition.

7.62 VAADA supported sentencing orders that included conditions ‘solely for the purpose of addressing any therapeutic needs of [these] offenders, while ensuring support structures are present so that the offender can comply with these conditions’. It suggested that conditions imposed could be similar to what is currently available under ICOs and CBOs, such as conditions to undergo treatment for drug and alcohol addiction and submit to medical, psychological or psychiatric treatment; report to and receive visitors from a community corrections officer; and attend educational or other assistance programs. However, it was also of the view that such conditions must take into account or address environmental factors that can impact on an offender’s ability to comply with them, such as the inadequacy of specialist drug services; the long waiting list for drug treatment services; the reluctance of these treatment agencies to take on forensic clients and a dearth of residential treatment facilities.

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683 Submission 2.18 (Criminal Defence Lawyers’ Association).
684 Submission 2.21 (Criminal Bar Association).
685 Submission 1.9 (St Kilda Legal Service).
686 Ibid.
687 Submission 1.42 (Victorian Alcohol and Drug Association).
688 Submission 1.44 (Fitzroy Legal Service).
689 Submission 1.9 (St Kilda Legal Service).
690 Submission 1.42 (Victorian Alcohol and Drug Association).
7.63 One submission pointed out a drawback of the current Victorian Drug Court, which only available in a certain geographical area, as being that ‘the relationship between drug use and offending and the consequential need for specialised drug treatment is not limited to certain council boundaries’.  

7.64 In consultations during the development of the Council’s final recommendations, there was widespread support for CCTOs to be abolished. Victoria Legal Aid, which endorsed this proposal, suggested that community orders ‘may be a more appropriate substitute for CCTOs in many cases because any period of imprisonment is likely to disrupt the offender’s treatment and access to other support services’. The Federation of Community Legal Centres submitted that it supported the abolition of CCTOs as its members felt the order was ‘inflexible and rarely used’.  

7.65 The Council also canvassed views about a dedicated intensive correction drug and alcohol order in its consultations on its final recommendations. It was envisaged that such an order would be largely similar to the new form of ICO, but with specific eligibility criteria, no core condition of community work and more options for conditions directed at the specific drug/alcohol rehabilitation of the offender, including judicial monitoring of the order.  

7.66 There was general support for an intensive correction drug and alcohol order. The County and Magistrates’ Court of Victoria, Victoria Legal Aid, Youthlaw and the Mental Health Legal Centre all expressed broad support for the introduction of such an order. It was recognised that one of the strengths of the order was that it would allow for magistrates sitting outside the Drug Court to impose a sanction specifically targeting substance abuse issues faced by an offender. Victoria Legal Aid, Youthlaw and the Mental Health Legal Centre expressly supported excluding community work as a core condition for the intensive correction drug and alcohol order.  

7.67 Victoria Legal Aid saw potential benefits in extending this type of order to offenders with a gambling addiction, suggesting that:

This would allow program conditions, such as attendance at gambling counselling, to be imposed on the offender, and overall would result in a more appropriate sentence for people who have a gambling addiction.  

7.68 However, some of those consulted felt that the same goal of rehabilitation for this specific group of offenders could be achieved through a tailored mix of conditions within the ICO. In particular, Fitzroy Legal Service was concerned that a specialised order so named may have the effect of ‘further stigmatis[ing] drug and alcohol users’.  

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691 Submission 2.5 (T. McAllister).

692 Law Institute of Victoria (Meeting 19 November 2007); Meeting with judges of the County Court of Victoria (27 November 2007); Magistrates’ Court of Victoria (Meeting 5 December 2007) Submissions 3.5 (Victoria Legal Aid), 3.7 (Youthlaw and the Mental Health Legal Centre), 3.9 (Fitzroy Legal Service) 3.10 (Federation of Community Legal Centres) and 3.12 (Office of Public Prosecutions).

693 Submission 3.2 (Victoria Legal Aid).

694 Submission 3.10 (Federation of Community Legal Centres).

695 Meeting with judges of the County Court of Victoria (27 November 2007); Magistrates’ Court of Victoria (Meeting 5 December 2007) Submissions 3.5 (Victoria Legal Aid) and 3.7 (Youthlaw and the Mental Health Legal Centre).

696 Submissions 3.5 (Victoria Legal Aid) and 3.7 (Youthlaw and the Mental Health Legal Centre).

697 Submission 3.5 (Victoria Legal Aid).

698 Submissions 3.9 (Fitzroy Legal Service) and 3.10 (Federation of Community Legal Centres).

699 Submissions 3.9 (Fitzroy Legal Service).
The Council’s View

7.69 A significant proportion of people who come into contact with the criminal justice system have drug and alcohol dependency issues. In many cases, the use of alcohol and drugs has contributed the commission of the crime.

7.70 The Council does not consider the current form of CCTO—a short order with a mandatory minimum term of imprisonment—has provided a useful response to these cases. The limited use made of this order by the courts provides support for this view and suggests that the CCTO is a disposition viewed by the courts as appropriate only for a very small pool of offenders; it also points to a possible lack of confidence in this order to achieve its objectives.

7.71 Taking the existing problems with CCTOs into account, the Council recommends that they should be removed as a sentencing option in Victoria and a targeted form of intensive correction order (drug and alcohol) (ICO (D&A)) should be introduced. The Council’s proposals are consistent with existing evidence, which suggests that the most effective approaches to drug offenders are drug treatment in the community (including forms of residential drug treatment) and drug courts that adopt a case-management approach and involve the continuous monitoring of offenders.

7.72 Under our proposals, the drug and alcohol ICO would be a two-year order similar in form to the standard form of ICO but would exclude community work as a core condition of the order. Instead, courts would be required to attach at least one of a number of program conditions, including assessment and treatment conditions (including residential treatment conditions), aimed at addressing an offender’s drug or alcohol dependency.

7.73 The availability of residential treatment as a condition of the ICO (D&A), similar to the existing drug treatment order, in our view is an important aspect of the order. Residential treatment programs are likely to be particularly suitable for offenders who have complex and multiple needs that cannot be treated effectively on an outpatient basis. The benefits of residential treatment in a drug court context have been found to include a higher likelihood of successful completion of orders, and a corresponding lower likelihood of order termination (for example, due to reoffending).700

7.74 The Council believes that it is important to draw on the successes of the Drug Court in Victoria in determining how this order should be structured. We consider that one of the important elements of the court is its ability to monitor the progress of an offender while under order. Under the Council’s proposals, in making a drug and alcohol ICO a court would similarly have the option of attaching a judicial monitoring condition, which would allow the court to review the progress of the offender at regular intervals. If a Community Corrections Board, as proposed in Chapter 11 of this Report, is established, some responsibility for monitoring the progress of offenders on these orders might be assigned to the Board.

7.75 The Council also believes it is important to the success of the order to build both sanctions and rewards into the way the order is structured and managed. Under our proposals, at an administrative level, changes could be made to the way the order is managed (for example, to increase or decrease the frequency of reporting and drug or alcohol testing requirements). If established, a Community Corrections Board could play an important role in overseeing the exercise of these powers. Similar to the standard form of ICO, an application could also be made to vary or cancel the order (including as a reward for good progress made by the offender under the order) or if a judicial monitoring condition was attached, the court could vary or cancel the order on its own initiative.

Consistent with the purposes of the existing drug treatment order (DTO), we recommend that the particular purposes of an ICO (D&A) should be:

- to reduce the level of criminal activity by the offender through the rehabilitation and reintegration of the offender;
- to take into account the offender’s drug or alcohol dependency; and
- to reduce the offender’s health risks associated with drug or alcohol dependency.

As DTOs operate under a different regime administered by the Drug Court which appears to be working well, the Council recommends that no changes should be made to these orders at this time. Further, we believe that the introduction of the ICO (D&A) is a way of allowing the principles that have successfully guided the Drug Court in its administration of the DTO to be applied more broadly across Victoria without the need to create more specialist courts across the state.

We acknowledge that in some cases where an offender is eligible for an ICO (D&A) a term of immediate imprisonment will be warranted due to the seriousness of the offence and/or community safety concerns. Under our proposals courts will have the ability to combine a short term of imprisonment of three months or less with an ICO in sentencing an offender for one or more offences. As discussed at [6.140] of this Report, providing courts with the power to combine an ICO with a short term of imprisonment might have a number of benefits, including ensuring the powers available to a court in making an ICO or CBO are consistent; providing courts with greater flexibility in sentencing offenders to short-term sentences of less than 12 months (in which case a court does not have the power to order a straight term of imprisonment with a non-parole period); and allowing courts to recognise expressly time spent in custody on remand in sentencing an offender in circumstances in which it is appropriate to do so. We discuss the availability of semi-custodial sanctions further in Chapter 8 of this Report.

In circumstances in which a longer term of imprisonment is indicated, treatment services, such as those available at the Marngoneet Correctional Centre, and community services available to offenders on parole, will continue to play a pivotal role in facilitating offenders’ rehabilitation, thereby reducing the longer-term risks to the community of reoffending.

RECOMMENDATION 6: Combined Custody and Treatment Orders and a New Intensive Correction Order (Drug and Alcohol)

Recommendation 6–1
Combined custody and treatment orders should be removed as a sentencing option in Victoria.

Recommendation 6–2
Drug treatment orders should be retained in their current form.

Recommendation 6–3
A separate form of ICO targeted at offenders who are dependent on alcohol or drugs—an Intensive Correction Order (Drug and Alcohol)—should be introduced.

Recommendation 6–4
The order should be targeted at offences of medium to high seriousness and medium to high-risk/needs offenders who have a drug or alcohol dependency.

Recommendation 6–5
The particular purposes of the order should be consistent with the current purposes of a Drug Treatment Order. That is:
(a) to reduce the level of criminal activity by the offender through the rehabilitation and reintegration of the offender;
(b) to take into account the offender’s drug or alcohol dependency; and
(c) to reduce the offender’s health risks associated with drug or alcohol dependency.

Recommendation 6–6
The Council recommends the order should be structured as follows:

Eligibility
A court should be permitted to make the order if:
(a) the person has been convicted of an offence or offences punishable by imprisonment;
(b) the court might otherwise have considered sentencing the offender to a term of imprisonment;
(c) the court is satisfied that:
   (i) the offender is dependent on drugs or alcohol; and
   (ii) the offender’s dependency contributed to the commission of the offence;
(d) it has received a pre-sentence drug and alcohol assessment report (see further Part 6, Division 2A of the Sentencing Act 1991(Vic)); and
(e) the offender agrees to comply with the order.

Duration of the Order
As for the standard form of ICO, the maximum term of the order should be two years in the Magistrates’ Court and higher courts.

In making an order of six months or longer, courts should be permitted to specify a ‘supervision period’ (which is shorter than the term of the sentence), during which time the offender must be supervised and complete the program conditions attached to the order. Once the supervision period has expired, the offender should be subject only to the core conditions of the order until the order expires.

A court should be permitted, on application, to vary the supervision period (for example, to increase or decrease the period of supervision).
RECOMMENDATION 6: Combined Custody and Treatment Orders and a New Intensive Correction Order (Drug and Alcohol)

Minimum Term
The order should have no legislatively prescribed minimum term.

Permitted Sentence Combinations, Commencement of Orders and Orders in Respect of Two or More Offences
The same approach should be taken as for the standard form of ICO.

Core Conditions
The core conditions of the order should be as for the new standard form of ICO, but excluding community work as a core condition of the order.

Program Conditions
A court should be permitted to impose one or more program conditions to an order. Program conditions should include conditions that the offender:
- undergo assessment and treatment for drug or alcohol addiction (whether or not residential in nature);
- submit to medical, psychological or psychiatric assessment and treatment as directed by the court or the Regional Manager of Community Correctional Services (CCS);
- submit to testing for drug or alcohol use as directed by the court or the Regional Manager of CCS;
- attend vocational, educational, employment or other programs as directed by the Regional Manager of CCS;
- live at a specified place for a specified period, including for the purposes of assessment and/or treatment, as directed by the court or the Regional Manager of CCS;
- perform unpaid community work as directed by the Regional Manager of CCS for a period determined by the court (up to a maximum 500 hours); and
- any other condition relevant to the offender’s drug or alcohol dependency that the court considers desirable or necessary.

An order should be required to have all the core conditions attached to it and at least one program condition.

Program Conditions: Additional Criteria
A court should not be permitted to impose any more program conditions than are necessary to achieve the purpose or purposes for which the order is made.
**RECOMMENDATION 6: Combined Custody and Treatment Orders and a New Intensive Correction Order (Drug and Alcohol)**

### Special Conditions

A court should be permitted to attach one or more special conditions to an order. Special conditions:
- not associate with any specified person, or with persons of any specified class, as specified in the order (‘non-association condition’);
- not enter a place specified in the order for a period so specified (‘place restriction condition’);
- not live at any address at which the court has directed the offender not to live (‘place restriction (residence) condition’); and
- comply with the requirements of judicial monitoring as directed by the court (or monitoring by the proposed Community Corrections Board, if established—see further Recommendation 11-2).

A court should only be permitted to impose a non-association condition or place restriction condition if satisfied that:
- (a) there is a significant risk of further offending by the offender;
- (b) the imposition of one or more of these conditions would reduce the likelihood of further offending by the offender that could not be achieved by any less restrictive condition or combination of conditions.

Special conditions should be permitted to apply for the duration of the order, or a shorter period as ordered.

### Variation, Cancellation and Powers on Breach

The same powers to vary, or to cancel an order, and to respond to breaches of orders should apply to the Intensive Correction Order (Drug and Alcohol) as to the standard form of ICO. The court should also be permitted to vary or cancel an order on its own initiative if a judicial monitoring condition is attached to the order.
Chapter 8  Intermediate Semi-Custodial Sanctions
Chapter 8 Intermediate Semi-Custodial Sanctions

What are Semi-Custodial Sanctions?

8.1 Some sentences involve a combination of a period of detention followed by release into the community, with or without supervision. This period of part-custody and part-release in the community may be achieved as part of a single sentencing order (as is the case with the Victorian form of combined custody and treatment order and imprisonment with parole), or by combining two or more different sentencing orders in sentencing an offender for one or more offence. For the purposes of this Chapter, these forms of orders are referred to as semi-custodial sanctions.

The Current Position in Victoria

8.2 Discrete semi-custodial sanctions in Victoria include combined custody and treatment orders (CCTOs) and partially suspended sentences.

8.3 As discussed in Chapter 7, the Council believes that CCTOs should be abolished in Victoria, and a new form of intensive correction order (ICO) targeted at offenders with substance dependency issues introduced.

8.4 Partially suspended sentences provide for a period of custody followed by a period of unsupervised release (the suspended part of the sentence). The Council’s recommendations in relation to suspended sentences are outlined in Chapter 2.

8.5 A term of imprisonment that has a non-parole period set can also be considered as a form of semi-custodial sanction, as this provides the opportunity for an offender to be released into the community on conditions to serve out the remainder of his or her sentence, provided the Adult Parole Board determines it is appropriate to do so.

8.6 While a court, in sentencing an offender to imprisonment, can fix a non-parole period, after which time the offender may be released on parole, this is not possible for short-term sentences of less than 12 months. Under section 11 of the Sentencing Act 1991 (Vic) a court is required to fix a non-parole period for sentences of imprisonment of two years or more ‘unless it considers that the nature of the offence or the past history of the offender make the fixing of such a period inappropriate’.702 In the case of sentences of 12 months or more, but under two years, the court has a discretion whether or not to fix a non-parole period.703 Where a non-parole period is fixed, it must be at least six months less than the term of the sentence.704

8.7 The limited availability of the power of a court to fix a non-parole period in the case of short-term sentences affects a substantial number of offenders sentenced each year. In 2006–07 alone, 2,801 offenders received a prison sentence of less than 12 months, representing over half (62 per cent) of all offenders sentenced to imprisonment.705 A high proportion of these short-term prison sentences (82 per cent) were for periods of less than six months.706

702 Sentencing Act 1991 (Vic) s 11(1).
703 Sentencing Act 1991 (Vic) s 11(2).
704 Sentencing Act 1991 (Vic) s 11(3).
705 Department of Justice, unpublished data.
706 Ibid.
8.8 Courts, however, are permitted to combine a community-based order (CBO) with an immediate term of imprisonment of up to three months when sentencing an offender for one or more offences to achieve a short-term sentence that combines a short term of imprisonment with a period of supervised release. As discussed at [4.3], courts rarely use this power; only 65 of these orders were made by courts in Victoria over the three-year period 2004–05 to 2006–07.

8.9 Unlike a sentence of imprisonment with a non-parole period, once an offender sentenced to imprisonment with a CBO has served the term of imprisonment set by the court, his or her release from prison is automatic and not at the discretion of the Adult Parole Board. A sentencer is permitted under the Sentencing Regulations 2002 (Vic) to fix a date for the CBO’s commencement up to three months from the date of sentencing, which ensures that the CBO does not come into effect until after the term of imprisonment is served. There is no equivalent power to combine an ICO (which is itself treated under the current law as being a term of imprisonment) with a short immediate term of imprisonment, or to defer its commencement.

8.10 Justice Nathan in Young suggested that the reasons for limiting the term of imprisonment that can be combined with a CBO to three months:

are obvious and sound. Consent by the offender is required to serve a community-based order, and the Court must be satisfied of the offender’s suitability for such an order ... Obviously, meaningful assessments and a meaningful consent cannot be given, if the consents refer to some distant time, and plainly suitability, can only be assessed at a time relatively proximate to that time when the order will commence.

8.11 The Court of Appeal, however, has interpreted the section allowing a court to combine a term of imprisonment with a CBO as applying only to a sentence imposed in respect of an offence or offences referred to in section 36(1)(a) of the Act, which relates to the making of a CBO. This means, at least in theory, that a court is permitted to impose a longer term of imprisonment for other offences for which the offender is being sentenced in the same proceeding. As the Court of Appeal acknowledged in Young:

Only rarely ... is it likely that a court, in imposing a sentence for a number of offences, will conclude that—if it is appropriate to impose a custodial sentence exceeding three months for some of the offences—it is nonetheless appropriate to impose a community-based order for other offences.

8.12 In circumstances in which a court makes a CBO together with ordering a term of imprisonment of over three months, issues concerning the commencement of the CBO may also arise as the court can only defer the commencement of the order for up to three months. This may mean that the CBO commences to operate while the offender is still in custody.

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707 Under section 36(2) of the Sentencing Act 1991 (Vic) a court, in sentencing an offender for one or more offences, can make a CBO in combination with a term of immediate imprisonment of up to three months.


710 Young (1995) 81 A Crim R 70, 72-3. Section 36(1) of the Sentencing Act 1991 (Vic) provides that: 'A court may only make a community-based order in respect of an offender if (a) it has convicted the offender, or found the offender guilty, of an offence or offences punishable on conviction by imprisonment or a fine of more than 5 penalty units'.

Developments in Other Jurisdictions

‘Combination’ Sentences

8.13 The Australian Capital Territory has introduced a broader range of combination sentences that can be used in sentencing an offender for one or more offences. Under Part 3.6 of the Crimes (Sentencing) Act 2005 (ACT) if the offence is punishable by imprisonment, the court may impose a sentence consisting of two or more sentencing orders that include a term of immediate imprisonment. For example, a court may order a sentence of three years and six months, to be completed by way of two years’ imprisonment (full-time detention at a correctional centre), followed by one year of periodic detention and a good behaviour order for the remaining six months of the sentence.712 If the offence is punishable only by a fine, a court can make a combination sentence but cannot include imprisonment orders (full-time detention, periodic detention or a suspended sentence) as part of the sentence.713

8.14 Under the ACT provisions, courts have a broad discretion to determine when parts of the sentence should commence or end.714

8.15 In announcing these changes, the ACT Chief Minister identified one of the benefits of combination sentences as being to ‘improve the ability of judges and magistrates to prevent and manage offending behaviour and rehabilitate offenders, giving the courts the capacity to impose any number of orders as part of a whole sentence’.715

8.16 In New Zealand, courts are also now permitted in sentencing an offender for one or more offences to make a combination of orders. For example, a sentence of community work can be combined with any sentence apart from imprisonment, including home detention, community detention (a curfew with electronic monitoring), supervision, intensive supervision or a fine.716 If a court imposes both a sentence of community work and a sentence of intensive supervision or home detention, the court is also permitted to defer the commencement of the sentence of community work for a specified period if, in its opinion, deferral is necessary to enable the offender to comply with the conditions of these orders.717 If an offender during the currency of a community sentence is sentenced to a term of imprisonment of not more than 12 months, a court is permitted to suspend the sentence, or suspend it for the period during which the offender is detained.718 If the sentence is suspended during the period of detention, following the offender’s release from detention, he or she is required to complete the remainder of the community sentence originally ordered.719

712 Crimes (Sentencing) Act 2005 (ACT) s 29.
713 Crimes (Sentencing) Act 2005 (ACT) s 30.
714 Section 31 of the Crimes (Sentencing) Act 2005 (ACT) provides: ‘For a combination sentence, a court may set the start or end of the period of any part of the sentence, or of any order forming part of the sentence, by reference to anything the court considers appropriate, including, for example—(a) a stated day; or (b) the lapse of a stated period of time; or (c) whenever a stated event happens, or whenever the earlier or later of 2 or more stated events happens.’ The following example is provided for para (c): ‘a 5-year combination sentence consisting of the following orders:

- an order for imprisonment (i.e. full-time detention at a correctional centre) with a three-year non-parole period;
- a good behaviour order and a place restriction order, stated to start whenever (if at all) the offender is released on parole and to end at the end of the five-year term of the sentence;
- a driver licence disqualification order, also stated to start whenever (if at all) the offender is released on parole and to end at the end of the five-year term of the sentence.

715 Chief Minister. Australian Capital Territory, ‘Major Sentencing Reform for the ACT’ (Media Release 480/05, 22 November 2005).
716 Sentencing Act 2002 (NZ) s 19(5).
717 Sentencing Act 2002 (NZ) s 57A.
718 Sentencing Act 2002 (NZ) s 78.
719 See Sentencing Act 2002 (NZ) s 79 (period of suspension not counted towards sentence).
8.17 In the absence of guidelines about how these orders are to be combined, these types of combination orders could give rise to uncertainty about the relative seriousness of different combinations of offences and concerns about the potential for inconsistencies and disparities in sentencing outcomes. Similar concerns were raised in response to the Council’s original proposals to introduce a single, generic form of community sentence (see further [4.39]).

Court-Ordered Parole

What is Court-Ordered Parole?

8.18 Court-ordered parole requires a court to set the date on which the offender will be released on parole at the time of sentencing. The offender is then released on that date, without the need for recourse to a parole board, to serve the remainder of his or her sentence in the community, under supervision.720

8.19 Court-ordered parole has been introduced in Queensland and a form of this order was also considered for introduction in England and Wales (referred to as ‘custody plus’) for sentences of under 12 months.721 The ‘custody plus’ provisions were to be introduced in England and Wales as part of the package of reforms that included the introduction of conditional suspended sentences following the release of the Halliday Report in 2001,722 and the government’s white paper in 2002 (Justice for All).723 The introduction of custody plus in the UK was originally deferred until Autumn 2006,724 and has now been shelved indefinitely, including on the basis of workload and resourcing concerns.725

8.20 In Queensland, court-ordered parole is only applicable when an offender has not been convicted of a serious violent726 or sexual offence and is sentenced to a period of imprisonment of less than three years.727 For all other offenders, the court may fix a parole eligibility date.728 This is the date at which the Parole Board can consider the offender’s eligibility for parole.729 If a date is

720  Queensland Corrective Services (2006), above n 306. See also Corrective Services Act 2006 (Qld) s 199.
721  Under sections 181 and 182 of the Criminal Justice Act 2003 (UK), a custodial sentence of less than 12 months was to consist of a ‘custodial period’ of between two and 13 weeks and a ‘licence period’ of at least 26 weeks.
722  Home Office (2001), above n 46. The Halliday Report did not recommend the broader availability of suspended sentences, arguing that ‘[i]f an offence, and previous convictions, mean that a prison sentence has to be passed, because no other sentence would be adequate, a decision not to impose it in practice, so that—provided no further offence is committed while the sentence is in force—the offender entirely escapes punishment, does need to be reserved for exceptional circumstances. Otherwise, the force of a custodial sentence will be lost, possibly along with the importance of reserving it for cases where no other sentence will do. If a court is as confident as it can be that the offender has a low risk of re-offending, but needs a tough punishment because of the seriousness of the offence, it can use its judgment to find the right balance’: at [5.16].
723  Home Office (2002), above n 45.
724  Home Office (2006), above n 66, 34.
726  ‘Serious violent offences’ include wounding and similar acts, assaults occasioning actual bodily harm, grievous bodily harm, robbery, burglary as well as sexual offences such as rape, sexual assaults and the indecent treatment of a child under 16. See Schedule 1, Penalties and Sentences Act 1992 (Qld).
727  Penalties and Sentences Act 1992 (Qld) s 160B.
728  Penalties and Sentences Act 1992 (Qld) ss 160C and 160D.
729  Penalties and Sentences Act 1992 (Qld) s 160.
not fixed by the court, the *Corrective Services Act 2006* (Qld) provides for offenders to become eligible for parole automatically after they have served a specified portion of their sentence.730

8.21 Where court-ordered parole is available, the court has discretion as to the fixing of the parole release date. The court may fix the date for:

- the day of sentencing;
- any time during the period of imprisonment; or
- the last day of sentence.731

8.22 Offenders on court-ordered parole are subject to the same conditions as a traditional parole order and are under the jurisdiction of a Parole Board.732 If an offender fails to comply with the conditions of the parole order, a warrant would be issued for the offender’s arrest and he or she would be returned to custody.733 As at August 2007, there were 1,750 offenders on court-ordered parole.734

8.23 Prior to the introduction of court-ordered parole, offenders in Queensland who were sentenced to a term of imprisonment could be released by way of parole, conditional release or remission. Under the *Corrective Services Act 2006* (Qld), remissions were abolished and conditional release is being phased out, leaving parole as the only form of early release for prisoners.735 The Queensland government has committed $57.5 million over five years to administer the new court-ordered parole system and on the new Queensland probation and parole service.736

**The Impetus for the Introduction of Court-Ordered Parole**

8.24 The introduction of court-ordered parole in Queensland arose out of a review of the *Corrective Services Act 2000* (Qld). A previous review of corrective services had identified a need for increased focus to be placed on community corrections. The 1988 Commission of Review into Corrective Services in Queensland found that ‘all prisoners should have a period of supervision in the community prior to release from the sentence on the basis that corrections are better undertaken in a community setting [and] community supervision is a better idea than release on remission’.737

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730 Where an offender is serving a term of imprisonment for a serious violent offence, the offender’s parole eligibility date is the day after the day on which he or she has served the lesser of 80 per cent of the sentence or 15 years; s 182 of the *Corrective Services Act 2006* (Qld). Where an offender is serving a period of imprisonment for any offence other than a serious violent or sexual offence, of more than three years, or in the case of a sexual offence, a sentence of less than three years, in the absence of a parole eligibility date set by the court, the offender become eligible for parole the day after he or she has served half of the sentence; s 184 of the *Corrective Services Act 2006* (Qld).

731 Judicial Liaison Unit, Queensland Corrective Services, *Court-ordered Parole: Information Booklet* (Undated).

732 *Corrective Services Act 2006* (Qld) s 200 and Sch. 4. See also ss 204–208 for powers of parole boards.

733 *Corrective Services Act 2006* (Qld) ss 202 and 206.

734 Queensland Corrective Services, ‘Trends and Developments in Court-Ordered Parole’ (Attachment to letter from F P Rockett, Director-General Queensland Corrective Services to Professor Arie Freiberg, 21 December 2007).

735 Queensland, *Parliamentary Debates*, Legislative Assembly, 29 March 2006, 940 (Judy Spence, Minister for Police and Corrective Services). The Act also abolished home detention and release to work orders. Offenders who were sentenced to these orders prior to the commencement of the Act are now deemed to be on parole. See Queensland Corrective Services, *CSA 2006: Key Changes (Legislation Update: Implementation of the Corrective Services Act 2006)*, July 2006.


A number of reforms arose out of that review. However, there were still concerns about the many different ways in which offenders could be released from sentences of imprisonment, ranging from remission, release to work orders, home detention and parole. As part of the review of the Corrective Services Act 2000 (Qld) it was suggested in a consultation paper on community based release that:

By establishing parole orders as the single avenue for supervised release into the community, courts, prisoners and the community could anticipate with greater confidence the circumstances of prisoners’ release. This approach would also have administrative benefits as the process for approving community based release would be streamlined, resulting in a reduction in workload for Community Corrections Boards.

**Issues**

In the consultations undertaken as a part of the Queensland review there were a wide range of views as to what types of community based release should be available. Some respondents preferred parole to home detention orders because home detention can be limited by the accommodation available to the offender and can have a negative impact on other family members residing at the same place.

There was also some discussion as to whether release on parole should be discretionary or automatic, based on a date fixed by the court or provided for in legislation. In the consultation paper, it was suggested that as the court has detailed information about the commission of the offence and the offender’s personal circumstances at the time of sentencing, it may be appropriate, where a short sentence of imprisonment is being imposed, for the court to set the date on which the offender should be released on parole as ‘a court can make an appraisal of an offender’s risk after leaving prison and that risk is unlikely to change significantly after only a short period of incarceration’.

There was general support by respondents to the consultation paper and in focus groups that prisoners should be released into the community under supervision at a point fixed by the sentencing court. Many of those consulted were of the view that offenders should be released into the community automatically on a date set by the sentencing court, where the offender was serving a sentence of less than five years’ imprisonment. There was also support for offenders who ‘posed a low risk to the community to be released at the earliest available opportunity’.

One of the perceived advantages of court-ordered parole is that it allows for a period of supervision and support to offenders in making the transition from prison back into the community. This has not previously been possible (for example, due to the unavailability of parole for short prison sentences). However, equally the introduction of such an option could have the effect of increasing the prison population, if this sentence is viewed as a more attractive alternative than other non-custodial options, at great expense to the prison system.

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739  Ibid 15.
740  Department of Corrective Services (Qld) (2005), above n 307, 15.
741  Ibid 17.
742  Ibid 18.
743  Ibid.
The danger of such an order is that, as introduced in Queensland, it is a form of ‘substitutional order’, in the same way that a suspended sentence, ICO and home detention order currently are in Victoria. While in Queensland, court-ordered parole was introduced on the basis that it would bring ‘truth in sentencing by making sure that prisoners serve the sentence that was imposed by the court’ because it replaced remissions as a means for the release of prisoners from custody, it could be argued that like other forms of ‘community custody’ it perpetuates the ‘penal paradox’ of an offender serving a term of imprisonment ‘in the community’ and could place community confidence in sentencing in jeopardy. As an example, over a third (35 per cent) of offenders in Queensland sentenced to ‘imprisonment’ of between three and six months over the period 28 August 2006 to 31 March 2007 served little or no time in custody (that is, 10 per cent or less of the sentence duration), although the equivalent proportion of offenders serving 10 per cent or less of the sentence in prison for sentences of between two and three years was significantly lower at 10 per cent.

As a form of substitutional order, court-ordered parole carries with it the same dangers of net-widening and sentence inflation of other substitutional orders—the consequences of which are most acutely felt on breach. According to the second reading speech introducing court-ordered parole, the emphasis of this scheme is rehabilitation, with a focus on assisting offenders who have been incarcerated to integrate back into the community. Despite this aim, court-ordered parole may have the potential to be counter-productive in the rehabilitation of offenders as the diversionary potential of these orders may be limited by the possibility of net-widening. Instead of reducing the number of offenders in custody, the use of court-ordered parole could have the opposite effect of making more offenders subject to prison sentences, who would have otherwise received lower-level community orders.

Though court-ordered parole has only been in use for a relatively short period of time, there is already some evidence of net-widening. Since the introduction of court-ordered parole, there has been a decline in the use of ICOs, prison/probation orders and intensive drug rehabilitation orders. The most significant of these is the decline in the use of ICOs. There has been a 33 per cent decline in the use of ICOs since court-ordered parole was introduced (see Figure 21), which is the sharpest drop in the use of that order since its introduction.

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745 Roberts (2004), above n 164, 9.
746 Queensland Corrective Services, ‘Analysis of Court-Ordered Parole Data’ (Attachment to letter from F P Rockett, Director-General Queensland Corrective Services to Professor Arie Freiberg, 21 December 2007).
748 Queensland Corrective Services, ‘Trends and Developments in Court-Ordered Parole’ (Attachment to letter from F P Rockett, Director-General Queensland Corrective Services to Professor Arie Freiberg, 21 December 2007).
749 Ibid.
8. Intermediate Semi-Custodial Sanctions

Suspended Sentences and Intermediate Sentencing Orders

Figure 21: Number of offenders on intensive correction orders in Queensland, 2002–07


The decline in the use of this order would suggest 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 offenders who would otherwise have received a short sentence of imprisonment. There has been a similar decline in the use of intensive drug rehabilitation orders. As Figure 22 shows, the number of offenders on these orders declined from 143 in August 2006 to 80 in August 2007.

Figure 22: Number of offenders on intensive drug rehabilitation orders in Queensland, 2002–07


750 Ibid.
751 Ibid.
752 Ibid.
At the same time, Queensland has experienced a drop in the numbers of offenders serving short sentences in prison and an overall reduction in prison numbers (see Figure 23, below), which may also be explained by the use of court-ordered parole.\textsuperscript{753} According to data published by the Australian Bureau of Statistics, Queensland has experienced a reduction in the number of sentenced prisoners—one of only two Australian jurisdictions to do so recently (see Figure 24, below).

**Figure 23: Number of sentenced prisoners in Queensland, September quarter 2006 to September quarter 2007**\textsuperscript{754}

![Figure 23: Number of sentenced prisoners in Queensland, September quarter 2006 to September quarter 2007](image_url)

Source: ABS, Corrective Services, Australia, September Quarter 2007 (Cat. no. 4512.0) (2007)

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\textsuperscript{754} Ibid. Numbers represent the average of the counts on the first day of each month in quarter.
The true diversionary potential of court-ordered parole will ultimately depend on the extent to which net-widening continues to be a problem, as well as rates of, and responses to, breaches of these orders. As the conditions that can be imposed under court-ordered parole can be very onerous, it is likely that some offenders may have difficulty complying with such conditions, particularly given that orders can be made for up to three years. Early evidence suggests that around a third of offenders on these orders will ultimately breach their orders and be returned to custody.

Regardless of whether court-ordered parole is contributing, at least initially, to lower prisoner numbers, the problem remains that the impact of net-widening may be that an offender is made subject to a more severe form of penalty than he or she would have otherwise served.

As a form of substitutional sanction, there is also the potential for sentence inflation, whereby courts may impose longer sentences of imprisonment on offenders because they will be effectively serving such sentences in the community. This means that if the offender breaches any of the conditions of the order, he or she will be liable to serve the ‘inflated’ term of imprisonment in custody.

### The Interim Report Proposals

The Council’s draft proposals in the Interim Report sought to overcome the perceived problems with forms of substitutional semi-custodial orders such as partially suspended sentences and CCTOs, by proposing the introduction of a new form of sentence—an Imprisonment Plus Release Order (IRO). An IRO, it was proposed, would be a two-part order consisting of:

- a term of imprisonment (the custodial part or the order) of up to 12 months fixed by the court; and
- a release order, which would consist of a sentence served in the community on conditions of a less or more intensive nature.

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755 Ibid. Numbers represent the average of the counts on the first day of each month in quarter. The vast majority of ACT sentenced prisoners are housed in New South Wales prisons.

756 Close to two-thirds (62.5%) of orders were successfully completed between July 2006 and June 2007: Queensland Corrective Services, ‘Analysis of Court-Ordered Parole Data’ (Attachment to letter from F P Rockett, Director-General Queensland Corrective Services to Professor Arie Freiberg, 21 December 2007).
8.39 The effect of this order would be similar to that achieved by the courts in combining a short period of imprisonment with a CBO, although it was proposed that the court under an IRO should be permitted to impose a longer term of imprisonment (up to 12 months). Similar to a partially suspended sentence, following their release in the community offenders would be ‘at risk’ of being returned to prison if they breached the order prior to the expiration of the release order, but unlike the current form of suspended sentence, offenders would be subject to some form of conditions following their release from gaol.

8.40 So as to minimise possible confusion concerning when an IRO is appropriate and when a prison sentence with a non-parole period should be ordered, the Council further proposed that the Sentencing Act 1991 (Vic) be amended to remove the power of the courts to set a non-parole period when the sentence of imprisonment imposed is under two years. It was suggested that this would provide a clearer demarcation between situations in which it is appropriate to make a release order and those in which the court should instead fix a non-parole period.

8.41 The Council did not recommend that the IRO replace short straight terms of imprisonment in cases in which a court felt this option was appropriate. While the release order would form part of the sentence, unlike a ‘licence period’ it was proposed that it not be treated at law as part of the term of imprisonment. This was consistent with the Council’s position that sentencing orders should ‘mean what they say’ and exist as orders in their own right.

8.42 In order that the value of an extended ‘at risk’ period (during which an offender risks being returned to prison on breach), similar to the operational period of a partially suspended sentence, was retained, the Council recommended that the maximum period of the order should be three years for defendants sentenced in the higher courts and two years for those sentenced in the Magistrates’ Court.

8.43 The Council suggested that no minimum period should be placed on the term of imprisonment that the court could order or on the length of the sentence itself.

8.44 Since the overwhelming majority of defendants who currently receive a partially suspended sentence serve a prison sentence of 12 months or less prior to release, it was believed that the IRO would provide a viable alternative option for courts in cases in which a partially suspended sentence might previously have been ordered. Under the IRO, the courts would also be able to set different compliance periods for special conditions attached to the release order, with the core conditions operating until the expiration of the order. The Council recommended that some discretion should be vested in Community Corrections to scale down the intensity of these conditions over time.

8.45 Core conditions, it was proposed, would be similar to parole conditions and include conditions that the offender:

- not commit another offence punishable by imprisonment in or outside Victoria during the period of the order;
- report to a Community Corrections Centre within two working days after release from custody;
- obey all lawful instructions and directions of a Community Corrections Officer;
- notify any changes of address or employment within two working days after the change; and
- not leave Victoria except with permission granted generally or in relation to the particular case.
8.46 Additional ‘special’ conditions, it was proposed, might include a requirement that the offender:
- observe a curfew;
- live at a specified place for a specified period/live at approved premises;
- report to a Community Corrections Officer as directed and receive visits from a Community Corrections Officer;
- not associate with specified person/s;
- not enter or remain in specified places or areas, at specified times or all times;
- comply with any reasonable direction concerning associating with specified persons;
- submit to electronic monitoring of compliance with any release conditions;
- attend vocational, education, employment or other prescribed programs as directed;
- undergo counselling and/or treatment (drug, alcohol, psychological, psychiatric, medical or other) as specified in the order or as directed by Community Corrections;
- submit to drug or alcohol testing as directed;
- participate in services specified in a justice plan; or
- observe any other special conditions that the court considers necessary or desirable.

8.47 If, on a preliminary assessment, the offender was judged at low risk of reoffending by the court, the court could dispense with the need for a pre-sentence report and make a standard IRO with core conditions applying on release. In all other cases the court would be required to request a pre-sentence report that makes recommendations as to whether the offender is likely to require more intensive supervision/treatment and to take this into account in determining whether any special conditions should be attached.

8.48 The Council proposed that while core conditions would apply to a release order until the completion of the order, a court should be permitted to specify that special conditions operate for a shorter period of time. For example, if the period to be spent on a release order was 12 months it should be possible to order the offender to be under curfew for say, a six-month period following release. A maximum period for compliance with special conditions following an offender’s release from prison might also be set in the legislation, depending on the nature of the conditions ordered.

8.49 As the Council envisaged that an imprisonment plus release order would generally be made in the case of more serious offending, we suggested that if the order was breached by further offending or by failing to meet other conditions of the order, the appropriate course of action in most cases would be cancellation of the order and committing the offender to prison for the unexpired portion of the sentence.

8.50 Some of the potential advantages of an IRO over existing orders, the Council believed, were that it would:
- allow courts to make orders that include a period of detention in prison, where this is considered necessary, while providing for a period on release under conditions similar to parole for shorter prison sentences;
- provide for different levels of supervision for offenders on release based on the level of risk to the community and the offender’s needs; and
- allow courts the flexibility to tailor conditions on the community part of the order to the offence and offender, which will also allow courts to respond more appropriately to offenders with complex needs.

8.51 It was acknowledged by the Council that, if introduced, additional resources may need to be assigned to Community Correctional Services in order to administer the orders and ensure that where conditions include treatment or programs these services are properly funded.
Responses to the Interim Report

8.52 There was a range of reactions to the Council’s interim report proposals. The Criminal Bar Association, while supporting the retention of suspended sentences, was among those supporting the abolition of CCTOs and acknowledged the increased flexibility potentially offered by an order such as an IRO:

In particular we support the abolition of CCTOs. We accept that the proposed Imprisonment Plus Release Order would be infinitely more flexible. As we understand the proposal, there would be no fixed time that an offender would be required to serve in prison under the custodial portion of such orders (para 4.19).  

8.53 Some pointed to possible issues of inequity if the second part of the order were treated as a ‘non-custodial’ part but the offender breached and was ordered to serve the remaining time under the sentence in prison. It was suggested that this could result in the offender spending substantially longer in prison than would be warranted in the circumstances, particularly in circumstances in which the order was breached early on. The Law Institute of Victoria, in a submission endorsed by the Federation of Community Legal Centres, Fitzroy Legal Service Inc and Youthlaw, gave the following illustration:

For example, an order of 18 months duration comprising of 6 months’ imprisonment followed by 12 months’ supervision, if breached:

(a) At 14 months the offender will serve remaining 4 months of the order, resulting in a total of 10 months’ imprisonment;
(b) At 8 months the offender will serve remaining 10 months of the order, resulting in a total of 16 months’ imprisonment.

8.54 There was little support for removing the power to fix a non-parole period for shorter sentences of imprisonment. It was felt appropriate in many cases for the Adult Parole Board to have a role in supervising these offenders and for offenders to be required to ‘earn’ their release from custody.

8.55 Consistent with this view, the automatic nature of release under an IRO was viewed by some as problematic due to the lack of incentive provided to offenders to participate in programs during the period of imprisonment. The Law Institute of Victoria, which took this position, commented that “[t]he “automatic release” suggested in the Report does not appear to address this issue and may result in offenders being set to fail”.

8.56 Some suggested that in order to recognise the hybrid imprisonment/CBO nature of the new order, it should simply be referred to as an ‘imprisonment and community supervision or support order’.

8.57 In the Council’s consultations on its final recommendations, there was no support for the introduction of any further part-custody orders or any change to parole, with the exception of Corrections Victoria’s recommendation that ‘consideration [be] given by the Council to the concept of a Court-ordered parole scheme similar to the model in operation in Queensland’.

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757 Submission 2.21 (Criminal Bar Association).
758 Submission 2.11 (Law Institute of Victoria).
759 Those who supported the retention of the power to fix a non-parole period for sentences of under two years included the Criminal Defence Lawyers Association, the Federation of Community Legal Centres, Law Institute of Victoria and Victoria Legal Aid.
760 Submission 2.11 (Law Institute of Victoria).
761 Submissions 2.24 (Mental Health Legal Centre), 2.11 (Law Institute of Victoria) and 2.20 (Youthlaw).
762 Submission 3.6 (Corrections Victoria).
The Council’s View

8.58 The Council acknowledges the view that in some cases the seriousness of the offence may warrant an immediate term of imprisonment, but there may also be some value in the offender serving part of their sentence as a period of supervised release in the community. Because parole is not an option for short-term sentences, the current powers in Victoria to achieve this outcome are limited.

8.59 While the IRO originally proposed would have broadened the options available and may have avoided some of the dangers of semi-custodial substitutional sanctions, after giving the matter further consideration, the Council believes that the better approach is to retain the current power to combine a short term of imprisonment with a CBO and to extend this power to ICOs (which under the Council’s proposals, would become a form of community sentence). By allowing for these limited forms of combination sentences, it would overcome the potential problems with the IRO identified in submissions, including potential inequities arising on breach, as breach of the community sentence part of the order would give rise to the same powers available more generally for these forms of orders, including the cancellation of the order and the resentencing of the offender, rather than the offender being ordered to serve the remainder of his or her sentence in prison.

8.60 The Council suggests that, by limiting the options of combining sentences to a short term of imprisonment with a CBO or ICO, it might also minimise the potential for uncertainty and inconsistency of sentencing outcomes should a broader range of combination sentencing orders be made available.

8.61 While we initially considered lifting the maximum term of imprisonment that could be combined with a community sentence from three to six months, after further considering the matter we believe the current three-month maximum limit should be retained. To allow for a longer period of imprisonment to be imposed, in our view, would raise issues of how an offender is to be meaningfully assessed as suitable for a community order so far in advance of it coming into effect, and of the offender’s ability to consent to the making of such an order. The consequences of this were a drug and alcohol ICO is concerned, may be even more pronounced.

8.62 As a general rule, we believe a three-month limit on the period of imprisonment to be served in custody post-sentence is appropriate regardless of whether the offender is being sentenced for one or more offence, and whether or not these offences fall within section 36(1) of the Sentencing Act 1991 (Vic).

8.63 As is the case for a CBO, we recommend that in sentencing an offender for more than one offence, a court should be permitted to combine an ICO with a sentence of imprisonment of up to two years (in the case of the Magistrates’ Court) or three years (in the case of the higher courts) if the sentence of imprisonment is suspended in whole or in part.

8.64 We recommend that the current power to fix a non-parole period for sentences of 12 months and less than two years should be retained in its current form. Parole remains an important means of reintegrating offenders back into the community towards the end of their sentences, and non-parole periods are a powerful incentive to offenders to be of good behaviour and further their rehabilitation while in prison.

8.65 While an alternative option would have been to introduce a form of court-ordered parole, along the lines of the Queensland model, the Council has a number of concerns about the introduction of such a scheme. While Queensland has experienced a recent decrease in the use of short-term sentences and prison numbers, it is unlikely that the true impact of court-ordered parole will be known until more orders are made and breaches start flowing through the system. As a form of substitutional order, we are concerned it may lead to significant net-widening and sentence inflation. A court faced with the option of imposing a prison sentence of which none of the sentence, or only small part, must be served and the prospect of breaches being dealt with administratively rather than by a return to court, may be more inclined to use this option in place of a community sentence and to impose a longer sentence than it otherwise might. Despite the order having only been available for a relatively short period of time in Queensland, there is some evidence to substantiate our concerns.
Apart from issues relating to the capacity of the order to divert offenders from prison, we also have concerns about its possible impact on offenders. Assuming there is some degree of net-widening, court-ordered parole may not only expose offenders to more onerous conditions than are available under the standard form of conditional orders and the risk of serving the sentence in prison on breach, but also places responsibility for setting these conditions in the hands of an administrative, rather than a judicial, body. In contrast, responsibility for determining the appropriate mix of conditions and responses to more serious breaches under the orders proposed by the Council would remain with a court. In our view this is appropriate.

**RECOMMENDATION 7: Part-Custody Orders**

**Recommendation 7–1**

Consistent with the current power under section 36(2) of the *Sentencing Act 1991* (Vic) to combine a term of imprisonment with a CBO, a court should be permitted to combine an ICO with an immediate term of imprisonment of not more than three months.

**Recommendation 7–2**

The same power to combine a CBO with a suspended sentence (whether wholly or partially suspended) when sentencing an offender for more than one offence in the same proceeding should apply to an ICO.

**RECOMMENDATION 8: Power to Fix a Non-Parole Period**

**Recommendation 8–1**

The current discretionary power of a court to fix a non-parole period for sentences of 12 months or more, but under two years under section 11(2) of the *Sentencing Act 1991* (Vic) should be retained.
8. Intermediate Semi-Custodial Sanctions
Chapter 9  Community Sentences
Chapter 9  Community Sentences

What are Community Sentences?

9.1 Community sentences are non-custodial sentences that are served in the community setting. As discussed earlier in this Report, the forms of intermediate, non-custodial community sentences in Australia vary from jurisdiction to jurisdiction. However, most jurisdictions have some form of community work or community service order and a form of probation or supervision order.

9.2 The only true non-custodial intermediate sanction currently available in Victoria is the community-based order. Under the Council’s proposals, intensive correction orders would also become a form of non-custodial community sentence.

The Current Legal Framework

9.3 The current form of community-based order (CBO) came into operation in June 1986, and replaced attendance centre orders, community service orders and probation.763

9.4 CBOs are orders of up to two years in duration764 with a number of core conditions and at least one program condition. These orders may be combined with up to three months’ imprisonment in sentencing for a single offence, although this power is rarely used by the courts.

9.5 As the Freiberg Sentencing Review noted, the CBO is:

a sanction that contains both punitive elements (loss of leisure time) and rehabilitative ones (education and treatment) and is intended to constrain the offender’s time, behaviour and freedom of choice while still permitting the person to remain in the community.765

9.6 The core conditions of the CBO are that the offender must:

- not commit another offence punishable by imprisonment during the term of the order;
- report to a specified community corrections centre within two working days after the order comes into force;
- report to, and receive visits from, a community corrections officer;
- notify an officer at the community corrections centre of any change of address or employment within two working days after the change;
- not leave Victoria except with the permission of an officer at the community corrections centre, granted generally or in relation to the particular case; and
- obey all lawful instructions and directions of community corrections officer.766

9.7 A CBO must have all the core conditions attached to it.767 A court must also attach at least one program condition.768 Programs conditions include requirements that the offender must:

- perform unpaid community work;
- be under the supervision of a community corrections officer;
- attend educational or other programs as directed (for a maximum period of one year);
- undergo assessment and treatment for alcohol or drug addiction;

763 For a discussion of these previous orders, and the impetus for the introduction of the CBO, see Freiberg and Ross (1999), above n 144, Chapter 7.
764 Sentencing Act 1991 (Vic) s 36(3).
765 Freiberg (2002), above n 16, 163.
766 Sentencing Act 1991 (Vic) s 37(1).
767 Sentencing Act 1991 (Vic) s 37(2).
768 Sentencing Act 1991 (Vic) s 38(2).
submit to medical, psychological or psychiatric assessment and treatment;
- submit to testing for alcohol or drug use; and
- participate in the services specified in a justice plan.\(^{769}\)

9.8 The court also has broad discretion to impose ‘any other condition that the court considers necessary or desirable other than one about the making of restitution or the payment of compensation, costs or damages’.\(^{770}\) A court is prohibited from imposing any more program conditions than are necessary to achieve the purpose or purposes for which the order is made.\(^{771}\)

9.9 Community service in Victoria exists as a condition of a CBO, rather than as a separate order.\(^{772}\) Where the sole program condition is a condition requiring the offender to undertake 250 hours or fewer hours of work, the order expires on the satisfactory completion of those hours.\(^{773}\)

### The Use of CBOs in Victoria

9.10 While the higher courts are more likely to impose a CBO, the vast majority of CBOs are imposed in the Magistrates’ Court, due to the volume of people sentenced. Based on data for 2006–07, 14.2 per cent (281) of offenders sentenced in the higher courts received a CBO, compared with 5.4 per cent (4,334) of offenders sentenced in the Magistrates’ Court.\(^{774}\)

9.11 The Council’s study on the use of community sentences in Victoria found that, on average, courts attach 2.4 conditions to CBOs.\(^{775}\) As Figure 25 shows, 30.8 per cent of orders imposed in 2006–07 had one condition, while 69.2 per cent had multiple conditions. Around one in four orders (24.4 per cent) had three conditions imposed, while just over one in five (21.8 per cent) had four.

**Figure 25: The percentage of people commencing a CBO by number of conditions, 2006–07**

![Bar chart showing the percentage of people commencing a CBO by number of conditions, 2006–07.](chart)

Source: Fisher (2007)

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769 Sentencing Act 1991 (Vic) s 38.
770 Sentencing Act 1991 (Vic) s 38(1)(g).
771 Sentencing Act 1991 (Vic) s 38(3).
774 Fisher (2007), above n 22.
775 Ibid.
The most common condition was community work (78.5 per cent), followed by assessment and treatment (60.2 per cent), ‘other’ condition (51.2 per cent) and supervision (47.3 per cent). Alcohol or drug testing (9.0 per cent), educational program (4.9 per cent) and justice plan (1.8 per cent) were used in a small minority of cases (see Figure 26, below).

Figure 26: The percentage of people commencing a CBO by condition type, 2006–07

Figure 27 illustrates the number of conditions by type of conditions and condition combinations of orders commencing in 2006–07. A CBO with a community work condition only was the most common type of order made (27.2 per cent). The second most common order type was a CBO with four conditions: assessment and treatment, community work, supervision and ‘other’ (21.5 per cent). Orders with two conditions most commonly involved community work with an assessment and treatment condition (7.3 per cent of all orders. Common combinations for orders with three conditions included assessment and treatment, supervision and other (8.6 per cent), assessment and treatment, community work and other (7.8 per cent) and assessment and treatment, community work and supervision (5.9 per cent).

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776 The Sentencing Act 1991 (Vic) permits the court to impose a community work condition only and a court is not required to order a pre-sentence report if the only condition is a community service condition requiring 250 or fewer hours of community work (Sentencing Act 1991 (Vic) s 39(7)). The order expires upon the satisfactory completion of those hours of work (Sentencing Act 1991 (Vic) s 39(6)).
There appears to be differences in the common combinations or ‘packages’ of conditions used by the courts depending on the age of the offender and offence type. For example, young adult offenders (under 25 years) were substantially more likely to receive a CBO with four conditions of assessment and treatment, community work, supervision and ‘other’ (32 per cent compared with 15.5 per cent of orders imposed on offenders aged 25 years or over) and community work combined with an assessment and treatment condition (10.5 per cent compared with 1.7 per cent of offenders aged 25 years or over).

Examining the breakdown of conditions by offence type, a CBO with community work only was most commonly ordered in the case of property offences—36.8 per cent of CBOs imposed for a property offence had this single condition, compared with only 14.9 per cent of CBOs for offences against the person, and 18.1 per cent of those imposed for drug offences. A CBO with four conditions (community work, supervision, assessment and treatment, and other) was most common in the case of CBOs imposed for an offence against the person (27.7 per cent), followed by drug offences (25.9 per cent) and offences falling into the category ‘other’ (21.5 per cent).

Nearly all CBOs with supervision, alcohol and drug testing, education programs, other condition or assessment and treatment have at least two conditions attached. Almost half of CBOs with the alcohol and drug testing condition had five or more conditions (47.3 per cent) (see Table 12, below).
Table 12: The percentage of people commencing a CBO with a given condition type by the number of conditions attached to the order, 2006–07

<table>
<thead>
<tr>
<th>Condition</th>
<th>1 (%)</th>
<th>2 (%)</th>
<th>3 (%)</th>
<th>4 (%)</th>
<th>5+ (%)</th>
<th>Total (no.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assessment and treatment</td>
<td>3.4</td>
<td>20.0</td>
<td>32.4</td>
<td>35.7</td>
<td>8.5</td>
<td>3,525</td>
</tr>
<tr>
<td>Community work</td>
<td>34.4</td>
<td>13.8</td>
<td>20.2</td>
<td>25.2</td>
<td>6.3</td>
<td>4,599</td>
</tr>
<tr>
<td>Supervision</td>
<td>1.0</td>
<td>10.0</td>
<td>34.1</td>
<td>44.2</td>
<td>10.7</td>
<td>2,771</td>
</tr>
<tr>
<td>Education program</td>
<td>1.0</td>
<td>5.6</td>
<td>25.3</td>
<td>40.6</td>
<td>27.4</td>
<td>288</td>
</tr>
<tr>
<td>Justice plan</td>
<td>17.5</td>
<td>28.2</td>
<td>16.5</td>
<td>19.4</td>
<td>18.4</td>
<td>103</td>
</tr>
<tr>
<td>Other</td>
<td>1.7</td>
<td>14.0</td>
<td>36.2</td>
<td>38.7</td>
<td>9.4</td>
<td>3,001</td>
</tr>
<tr>
<td>Alcohol or drug testing</td>
<td>0.2</td>
<td>2.5</td>
<td>17.0</td>
<td>33.1</td>
<td>47.3</td>
<td>529</td>
</tr>
</tbody>
</table>

Source: Fisher (2007)

9.17 As Table 13 shows, the majority of assessment and treatment conditions were paired with community work (70.5 per cent), supervision (65.4 per cent), or some other condition (68.5 per cent). This four-condition combination was present in just over one in five (21 per cent) of CBOs. Almost all CBOs with alcohol and drug testing (97.4 per cent) also had an assessment and treatment condition.

9.18 Supervision was most often paired with assessment and treatment (83.3 per cent), other (75.5 per cent) and community work (69.6 per cent). Community work was most often paired with assessment and treatment (54.0 per cent), other (46.9 per cent) and supervision (41.9 per cent).

Table 13: The percentage of people commencing a CBO with a given condition type by other condition types attached to the order, 2006–07

<table>
<thead>
<tr>
<th>Condition</th>
<th>ATR (%)</th>
<th>CWK (%)</th>
<th>EDU (%)</th>
<th>JUP (%)</th>
<th>OTH (%)</th>
<th>SUP (%)</th>
<th>TES (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assessment and treatment (ATR)</td>
<td>n.a</td>
<td>54.0</td>
<td>76.7</td>
<td>38.8</td>
<td>80.4</td>
<td>83.3</td>
<td>97.4</td>
</tr>
<tr>
<td>Community work (CWK) (%)</td>
<td>70.5</td>
<td>n.a</td>
<td>71.2</td>
<td>23.3</td>
<td>71.9</td>
<td>69.6</td>
<td>67.7</td>
</tr>
<tr>
<td>Education program (EDU) (%)</td>
<td>6.2</td>
<td>4.5</td>
<td>n.a</td>
<td>6.8</td>
<td>4.7</td>
<td>7.9</td>
<td>10.4</td>
</tr>
<tr>
<td>Justice plan (JUP) (%)</td>
<td>1.1</td>
<td>0.5</td>
<td>2.4</td>
<td>n.a</td>
<td>1.5</td>
<td>2.8</td>
<td>1.9</td>
</tr>
<tr>
<td>Other (OTH) (%)</td>
<td>68.5</td>
<td>46.9</td>
<td>49.3</td>
<td>43.7</td>
<td>n.a</td>
<td>75.5</td>
<td>71.3</td>
</tr>
<tr>
<td>Supervision (SUP) (%)</td>
<td>65.4</td>
<td>41.9</td>
<td>76.4</td>
<td>74.8</td>
<td>69.7</td>
<td>n.a</td>
<td>80.2</td>
</tr>
<tr>
<td>Alcohol and drug testing (TES)</td>
<td>14.6</td>
<td>7.8</td>
<td>19.1</td>
<td>9.7</td>
<td>12.6</td>
<td>15.3</td>
<td>n.a</td>
</tr>
<tr>
<td>Total (no.)</td>
<td>3,525</td>
<td>4,599</td>
<td>288</td>
<td>103</td>
<td>2,771</td>
<td>3,001</td>
<td>529</td>
</tr>
</tbody>
</table>

Source: Fisher (2007)

9.19 The community work condition has a set number of hours a person is required to work, to a maximum of 500 hours. This quantity is determined by judges and magistrates, taking into account the maximum penalty for the offence.777

9.20 The average number of hours for CBOs with a community work condition was 100 (equal to 12.5 eight-hour days). Figure 28 presents the distribution of CBOs according to the number of hours of work. The most common category was 100–199 hours (40.8 per cent), followed by 50–99 hours (34.4 per cent). Only 1.5 per cent of people with a community work condition were required to work 300 hours or more (see Figure 28, below).

777 See further sections 109(3)(b) and 109(4) Sentencing Act 1991 (Vic).
The provisions of the Sentencing Act 1991 (Vic) provide a rough guide as to what period should be allowed for an offender to complete the hours of community work, depending on the number of hours ordered. Consistent with this, the number of community work hours is positively related to the duration of the CBO. As Figure 29 shows, the average number of hours of orders commenced in 2006–07 increased steadily with the duration of the order, with orders of 1–5 months in duration averaging 40 hours of community work and those 18–24 months averaging 173 hours.
The Management of Offenders on Community Sentences

9.22 In 1998, the Community Correctional Services Division of the Department of Justice released a strategic plan that reinforced the view of community orders as credible sentencing orders in their own right for offences of mid-level seriousness, rather than as alternatives to imprisonment. Under this plan, Community Correctional Services (CCS) signalled its intention to concentrate its efforts on the case management of offenders falling into the moderate to high-risk category through the use of program conditions attached to ICOs, CBOs with supervision conditions and combined custody and treatment orders. Low-risk offenders, in contrast, would be assigned to a ‘compliance management’ stream, particularly while serving out the final stages of their sentences.

9.23 A review of CCS undertaken by Arthur Andersen Business Consulting in 2000 endorsed the general approach advocated by CCS, and recommended the introduction of a ‘Differentiated Offender Management Framework’, which would contain four service streams:

- an administrative compliance stream—for offenders on fine default orders (FDOs) and community work only orders (CWO);
- an order compliance stream—for offenders other than FDO and CWO who were assessed as low to moderate risk;
- a risk management stream—for offenders other than FDO and CWO who were assessed as likely to cause serious harm to the community;
- an intensive case management stream—for offenders other than FDO and CWO who were assessed as most likely to reoffend seriously and whose behaviour was likely to change.  

This largely reflects the current strategy adopted by Corrections Victoria. Under this strategy, all offenders on CBOs (excluding offenders on CWOs and FDOs) are case managed according to their risk assessment, regardless of whether a specific supervision program condition has been attached. The core elements of case management is described as consisting of:

- an initial assessment of the risk of reoffending and associated needs for each offender;
- adherence to a supervision regime or reporting regime, based on this assessment;
- development of an Individual Management Plan (for medium and high-risk/profile/complex offenders), which is designed to reduce risk and attend to needs;
- periodic reassessment of supervision frequency and criminogenic needs;
- regular reviews to confirm, redefine or assess appropriateness of interventions and to respond to changes in risk and need; and
- appropriate intermediate sanctions or administrative actions in response to instances of non-compliance.

The minimum level of supervision for offenders subject to CBOs is dictated by their level of risk, with high-risk offenders being required to have more close contact with their supervising officer. Similarly, different responses to non-compliance may result, depending on an offender’s individual risk level. Responses to breach are discussed further in Chapter 11 of this Report.

781 Ibid.
782 Ibid 2/4.4.
The Corrections Victoria Strategic Plan for 2006–2007 identified a number of priority areas, including:
- the strengthening of supervision in community corrections of serious offenders;
- improvement in the management of sex offenders; and
- delivery of proven programs that target the causes of offending and are empirically supported.783


Issues and Recommendations

The Freiberg Sentencing Review identified a number of problems with the existing form of CBO, including:
- the lack of clarity concerning the aims of the order;
- insufficient resources to provide the rehabilitative components of the sentence;
- an inability to supervise offenders properly and deal with lapsing or breaching offenders;
- sentencers imposing too many conditions, making the order unworkable.784

The Review recommended that the Sentencing Act 1991 (Vic) should be amended to clarify that CBOs should only be used for more serious cases, rather than purely on the basis that the conditions may be of benefit to the offender.785 Under these proposals, a court would only be permitted to make a CBO in circumstances in which it was satisfied that:
- the offence was serious enough to warrant such a sentence;
- the restrictions on liberty imposed by the order would be commensurate with the seriousness of the offence; and
- the particular order was the most suitable for an offender.786

The Review further concluded that there was value in separating the existing CBO into three broad orders or ‘sub-orders’, some of which could be combined:
- a community work order;
- a supervision and treatment order—which could be combined with a community work order; and
- a drug and alcohol program order.787

The Review identified the need to align the structure of community based sanctions more closely with the needs of offenders and CCS practices as one of its central concerns in recommending reforms to these orders.788 It suggested that ‘[c]reating a better fit between the legal orders and their management may result in fewer breaches and hence fewer committals to prison’.789

The Review characterised some of the additional benefits of its recommendations to create three distinct forms of CBOs as ‘to make clearer to sentencers the differences between its components and to emphasise the policy that the number and range of orders for each offender should be limited’.790

784 Freiberg (2002), above n 16, 163.
785 Ibid 167, Recommendation 36.
786 Ibid.
787 Ibid 166, Recommendation 34.
788 Ibid 164.
789 Ibid.
790 Ibid 165.
Responses to the Proposals

9.32 The Review reported that there were mixed views as to whether the CBO should remain in its current form, or be separated into distinct orders.\(^{791}\) For example, while County Court consultees were reported to be ‘generally in support of the proposals’, the Criminal Bar Association was reported as having concerns that if the conditions imposed were too narrow, they may prove to be inappropriate, thereby creating a greater likelihood of breach.\(^{792}\) Victoria Legal Aid, while not opposed to such a move, cautioned that where combination orders were used, care should be taken to ensure that a person was not in breach of more than one order.\(^{793}\) The Magistrates’ Court supported the creation of a separate work order that was ‘separately and clearly delineated from the therapeutic, rehabilitative community-based order’.\(^{794}\) The Office of the Child Safety Commissioner was in favour of corrections having greater flexibility to determine an offender’s needs and more responsibility for the administration of sentences.\(^{795}\)

9.33 The reforms recommended by the Review to date have not been acted upon.

The Interim Report Proposals

9.34 As discussed in Chapter 4, in its Interim Report the Council recommended that, rather than creating more specific forms of community orders as the Sentencing Review had, the existing range of intermediate sentencing orders (home detention orders, ICOs, wholly suspended sentences and CBOs) should be replaced with a new form of generic, community-based order referred to in the Report as a correction and supervision order (CSO).

9.35 The Council’s proposals were consistent with the Council’s view that the use of substitutional orders, such as suspended sentences, ICOs and home detention, should be kept to a minimum and, wherever possible, sentencing orders should exist as sentences in their own right without the need to tie them to imprisonment. The Council argued that orders classed as ‘custodial’ orders should be limited to those that involved the offender serving time in prison.

9.36 The Council’s Interim Report was motivated by concerns about the proliferation of intermediate orders and the need to rationalise the range of existing orders into a simpler and more flexible range of orders. The Council suggested that these changes would not only increase the effectiveness of orders by allowing them to be tailored to the offence and the circumstances of the individual offender, but might contribute to better community understanding of the range of sentencing orders available in Victoria.

\(^{791}\) Ibid 165–6.
\(^{792}\) Ibid165.
\(^{793}\) Ibid 166.
\(^{794}\) Ibid.
\(^{795}\) Ibid.
Responses to the Interim Report

9.37 As discussed in Chapter 4, among those who supported some of the changes contemplated by the Council, there was strong support for any new orders to exist alongside the continued power of the courts to suspend a prison sentence.

9.38 There were specific concerns expressed about the possible effects of streamlining the sentencing hierarchy. For example, the Federation of Community Legal Centres (FCLC), while acknowledging the lack of flexibility in some of the current orders, identified a number of possible dangers of this approach, including:

- providing less guidance to the sentencing court;
- making more severe penalties available for less serious offences; and
- creating confusion for offenders and the broader community about progression through the sentencing hierarchy.796

9.39 Victoria Legal Aid, FCLC and Fitzroy Legal Service Inc were among those who supported the retention of the CBO as a separate sentencing order, including on the basis that the order ‘is generally well understood by the community’.797 The FCLC suggested that ‘any issues that do arise in relation to their effectiveness are substantially contributed to by problems associated with the design, availability and delivery of supports and services to assist rehabilitation’.798

9.40 The Criminal Defence Lawyer’s Association, while a strong advocate for suspended sentences, indicated broad support for the concept of replacing existing supervisory orders such as ICOs and CBOs with the proposed CSO, which they suggested ‘appears to be a hybrid order constructed to increase flexibility in tailoring conditions to the circumstances of individual offenders’.799

9.41 Among those who were opposed to the changes, there was a general view that, if introduced, there was a real danger that it would result in more punitive sentencing and despite the safeguards proposed by the Council, that courts would ‘load orders up’ with conditions that were unnecessary, and in some cases unreasonable.800

9.42 There has been some evidence that community penalties in the United Kingdom have become increasingly punitive, although little evidence that the introduction of a generic community order providing courts with more flexibility has contributed to this trend. A Home Office report found that despite patterns of less serious offending, the proportion of supervised offenders subject to at least one additional requirement (such as to participate in specified activities) increased from 24 to 33 per cent over a 10-year period.801 Community sentences imposed by the courts in 2006 had an average of 1.7 requirements, which suggests that greater flexibility has not resulted in a corresponding increase in the number of requirements imposed, although a different trend has been experienced with the use of suspended sentence orders in England and Wales—almost half of which have two requirements.802 Just under half of community sentences (47 per cent) had a single requirement, while a further 36 per cent of orders made had only two requirements.803 Only two per cent of community sentences had four or more requirements.804 This compares to

796 Submission 2.23 (Federation of Community Legal Centres).
797 Ibid. See also Submissions 2.12 (Victorian Legal Aid) and 2.22 (Fitzroy Legal Service).
798 Ibid.
799 Submission 2.18 (Criminal Defence Lawyers’ Association).
800 Submissions 2.15 (Victorian Aboriginal Legal Service), 2.20 (Youthlaw), 2.23 (Federation of Community Legal Centres) and 2.22 (Fitzroy Legal Service).
804 Ibid.
CBOs commencing in 2006–07 in Victoria, which had an average of 2.4 conditions attached and of which 27 per cent had four or more conditions (see above [9.11]).

9.43 Victoria Legal Aid (VLA) argued that, if introduced, the only ‘core condition’ of a CSO should be that the offender not commit another offence with all other conditions being treated as special conditions.805 It submitted that special conditions ‘should only be imposed as a last resort’ and considered it important that there be adequate safeguards against courts imposing more onerous special conditions. VLA argued that these protections would be ‘particularly important, given the potential for lengthy compliance periods and the serious consequences for breach under the proposed model’.806

9.44 VLA made the following comments on special conditions that might be available:

- reside at a specified place. The model should provide that the defendant’s address can be changed by consent with the Corrections Officer, without having to return to court. Offenders will need to find new accommodation after completing a residential treatment program.
- not associate with specified persons. Offenders may have little control over the presence of other people if they live in shared accommodation or work in a public place.
- participate in services specified in a justice plan. Justice plans currently apply only to non-custodial dispositions. It is inappropriate for offenders with significant disabilities to risk imprisonment for breach of a justice plan.807

9.45 FCLC, Fitzroy Legal Service Inc and Youthlaw were of the view that home detention, curfews, non-association orders and residence conditions ‘are more properly used as bail conditions’ and suggested that if these types of conditions were to be introduced, ‘careful consideration must be given to the circumstances in which they may be attached’.808

9.46 More recent consultations revealed strong support for the retention of CBOs as a distinct sentencing order.809 The Law Institute of Victoria, reflecting the views of many, submitted: ‘The LIV agrees that these orders are well-understood in the sentencing hierarchy and that it is important to retain them.’810

9.47 In discussions on possible reforms to conditions for CBOs, there was widespread approval for the Council’s proposal to reduce the maximum number of community work hours that a court can impose on an offender serving a CBO from 500 to 300 hours. VLA, Youthlaw, the Mental Health Legal Centre, Fitzroy Legal Service and FCLC all supported this proposal;811 however, VLA raised a concern about the possible impact of the reduction in hours on:

the conversion of large fines. VLA submits that the reduction to 300 hours should not mean that offenders who would otherwise have their fine converted into a CBO with between 300 to 500 hours of community work will now be punished by a term of imprisonment. They should instead be eligible for a CBO with the maximum number of hours of community work.812

805 Submission 2.12 (Victoria Legal Aid).
806 Ibid.
807 Ibid.
808 Submissions 2.20 (Youthlaw), 2.23 (Federation of Community Legal Centres) and 2.22 (Fitzroy Legal Service).
809 Submissions 3.5 (Victoria Legal Aid), 3.9 (Fitzroy Legal Service) and 3.10 (Federation of Community Legal Centres).
810 Submission 3.4 (Law Institute of Victoria).
811 Submissions 3.5 (Victoria Legal Aid), 3.7 (Youthlaw and the Mental Health Legal Centre), 3.9 (Fitzroy Legal Service) and 3.10 (Federation of Community Legal Centres).
812 Submission 3.5 (Victoria Legal Aid).
In the Council’s consultations on its final recommendations, there was also support for broader powers for the court to vary or cancel an order; for example, to reward good progress made by an offender under an order. The Office of Public Prosecutions submitted that:

… the effect of broadening the powers in relation to imposing/varying these orders remains to be seen but if the result is greater effectiveness then such changes are to be encouraged. A review would be recommended to assess the impact after a period of time.

The Council’s View

The Council initially proposed, in our Interim Report, that CBOs and ICOs should be amalgamated into a new, generic community order. However, after consideration of the potential risks of removing the discrete intermediate steps in the sentencing hierarchy, we believe that ICOs and CBOs should remain separate sentencing options. In this context, we note the strong support in consultations for the retention of the CBO in its current form.

As the Council is recommending that the ICO be recast as an order in its own right, rather than as a means of serving a prison sentence, this could be seen to have the effect of converting this order into a more intensive form of CBO. However, the ICO should still be regarded as a higher-level order appropriate for offenders with higher levels of risk/need convicted of more serious offences, and the CBO as designed to respond to offenders convicted of offences of low to medium seriousness and offenders whose level of risk and needs may range from low to high.

As discussed above at [6.128], there are a number of ways in which the reformed ICO can be distinguished from a CBO. One of these is the difference in the maximum number of community work hours that are available under the two orders. Our examination of the relevant data revealed that less than one per cent of offenders commencing a CBO in the period 2005–06 to 2006-07 had a community work condition attached to their order requiring them to complete more than 300 hours of community work. This would suggest that a 300-hour maximum would be appropriate for the cases that are currently coming before the courts in which a CBO is the sentence imposed. The Council recommends a reduction in the maximum number of hours that can be imposed on an offender on a CBO, which both recognises the current court practices and serves to differentiate the CBO from the reformed ICO, as the new form of ICO allows for the court to impose a maximum of 500 hours community work. We note that this change may necessitate consequential amendments to section 109 of the Sentencing Act 1991 (Vic) and provisions allowing for the conversion of fines into hours of community work either on the application of the offender, or on default of payment.

In the interests of creating more flexible, responsive orders, the Council is of the view that courts should have broader powers to vary or cancel a CBO, as recommended in relation to the new form of ICO. This would allow for the conditions of an order to be varied for the purpose of rewarding consistent compliance and/or an offender’s progress in rehabilitation.

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813 Submissions 3.5 (Victoria Legal Aid), 3.7 (Youthlaw and the Mental Health Legal Centre) and 3.9 (Fitzroy Legal Service).

814 Submission 3.12 (Office of Public Prosecutions).

815 Sentencing Act 1991 (Vic) s 63(2).
Recommendation 9–1
Community-based orders should be retained in their current form.

Recommendation 9–2
The order should be targeted at offences of low to medium seriousness and low to medium and medium to high-risk/needs offenders.

Recommendation 9–3
The maximum number of hours of unpaid community work permitted to be ordered for a CBO should be reduced from 500 to 300 hours.

Recommendation 9–4
In sentencing an offender for more than one offence in the same proceeding, a court should be permitted to make both an ICO and CBO.

The same broad principles that apply to the making of CBOs in respect of several offences as set out in section 42 of the *Sentencing Act 1991* (Vic) should apply to the making of both ICOs and CBOs. That is:

- if a court makes separate community orders (ICOs and/or CBOs) in respect of two or more offences committed by the offender, the conditions of those orders should be concurrent unless the court otherwise directs;
- the conditions of an order made in respect of an offender should be, unless the court otherwise directs, concurrent with those of any other community order in force in respect of that offender; and
- if making both a CBO and an ICO, a court may not give a direction that would result in the maximum number of community work hours permitted to be ordered under an ICO (500 hours) being exceeded.

Recommendation 9–5
In addition to the current powers of the court to vary or cancel a CBO under section 46 of the *Sentencing Act 1991* (Vic), a court should be permitted:

- to vary the order (including by cancelling, suspending or varying existing program conditions, imposing additional conditions or reducing the hours of community work required to be done under the order); or
- to cancel an order (and take no further action);

on the application of the offender, a prescribed person or member of a prescribed class of person, or the Director of Public Prosecutions, if having regard to any change in circumstances since the sentence was imposed and to the manner in which the offender has responded to the sentence:

(a) the rehabilitation and reintegration of the offender would be advanced by the remission, suspension, or variation of any special conditions, or the imposition of additional special conditions; or

(b) the continuation of the sentence is no longer necessary in the interests of the community or the offender.

Recommendation 9–6
In addition to the powers of the court on breach in section 47(3A) of the *Sentencing Act 1991* (Vic) the court should have the power to cancel the CBO and make no further order.
Chapter 10  Intermediate Sanctions for Young Adult Offenders
Chapter 10  Intermediate Sanctions for Young Adult Offenders

The Current Context

10.1 A ‘dual track’ system operates in Victoria for young offenders aged 18 at the time of offending, but under 21 years at the time of sentencing. This system, which was introduced in 1965, provides adult courts with the option to sentence a young person to be detained in a youth justice centre rather than an adult prison. A court can only make a youth justice centre order if it has received a pre-sentence report and is satisfied that:

- ‘a sentence involving confinement is justified’; and
- ‘there are reasonable prospects for the rehabilitation of the young offender’; or
- ‘that the young offender is particularly impressionable, immature or likely to be subjected to undesirable influences in an adult prison’.

10.2 The maximum period a young person may be ordered to be detained in a youth justice centre depends on the sentencing court. The Magistrates’ Court has a power to direct a young person to be detained for up to two years, while higher courts can order detention for a period of up to three years. There is no power for a court to fix a non-parole period. The Youth Parole Board may release a young person on parole at any time during the term of the order.

10.3 Adult courts also now have the power to order a young offender, on breach of a suspended sentence, to serve any restored portion of his or her sentence in a youth justice centre, rather than in prison. The Magistrates’ Court also has the power to defer the sentencing of an offender between the ages of 18 and 25 for a period of up to six months.
In 2006-07 in Victoria, there were 298 sentences of detention in a youth justice centre imposed in the adult courts. The number of sentences of detention imposed in the adult courts has been in decline since the period 1999–00, when 730 sentences of detention in a youth justice centre were imposed. There were also 246 sentences of detention in a youth justice centre imposed in the same period in the Children’s Court.

Youth justice centres are administered by Youth Justice, which is located in the Department of Human Services, rather than by the Department of Justice. These facilities are low to medium security facilities that have a developmental and rehabilitation focus.

While there are some specific non-custodial orders available for young offenders in Victoria, these are only available in the Children’s Court. There are no specific non-custodial sentencing options tailored to meet the needs of young offenders sentenced in adult courts. However, Community Correctional Services has developed a set of standards and guidelines designed to guide the management of young adult offenders who are subject to standard forms of community correctional orders. The Correctional Management Standards for Community Correctional Services 2005 outcome statement for young adult offenders provides:

Young adult offenders subject to case management are [to be] supervised in a manner that takes into account their specific needs and are provided with work placements and programs which will enhance their employability.

The Community Correctional Services Offender Management Manual, which is designed to guide the work of operational staff in community corrections, encourages use of the following strategies to enhance the supervision of young offenders:

- supervision arrangements that are flexible and allow staff to use outreach supervision such as home/community visits;
- a focus on community work sites that provide vocational and educational opportunities or are consistent with vocational education or training being undertaken;
- continuity of supervising officer;
- establishing and maintaining links with other agencies involved with young people and adherence to protocols with Juvenile Justice; and
- collaborative approaches to supervision where young offenders are case managed by Juvenile Justice or other service providers.

In addition to developing these broad operational guidelines, Community Correctional Services has piloted specific approaches designed to manage this group of offenders better. For example, in 2002, a project was developed to address the criminogenic needs of young adult offenders specifically. The project was part of the Victorian Community Correctional Services Redevelopment, arising out of the Community Correctional Review in 2000. The findings of the review suggested that ‘traditional methods of offender casework may not be as effective at engaging or sustaining a positive response from young adult offenders’. In order to address this, the project involved the introduction of a specialised young adult case worker and the development of a young adult offender program.
10.9 The Young Adult Offender Program involved three modules—Community Integration, Personal Care, and Management and Employment—spread over a period of ten weeks. Completion of these modules included such activities as a certificate course in Employment and Living Skills at Geelong Adult Training and Employment and community service, through which offenders could satisfy part of the community work component of the sentences imposed upon them. Offenders on this program were also assisted with preparation for the workforce post-sentence, and this support was to be available up to 12 months after the expiration of the order. A total of 37 young adult offenders participated in this program and 19 of those offenders completed it. Despite the limited sample size, it would seem that the program had a positive effect on those involved. Offenders who completed the program were reported as being less likely to breach their orders and those who completed the employment module were more likely to secure employment.830

10.10 Other initiatives have included:

- the Branching Out program, funded by Crime Prevention Victoria—a pilot program that provides life skills and vocational training to young offenders aged 17–25 years on CBOs;
- the Hand Brake Turn project, which provides TAFE-accredited training in the automotive industry, including relevant work experience to young offenders aged 15-20 years who are at risk of being incarcerated for motor vehicle offences, have a history of motor-vehicle related offending and who are on a supervised court order, or have been cautioned by police in relation to motor vehicle offending;831 and
- the Male Adolescent Program for Positive Sexuality, established as a community based intervention for offenders aged between 10–21 years convicted of sexual offences.832

10.11 Dedicated funding of $34.2 million was also provided in 2000 by the Victorian government to fund the implementation of a number of Juvenile Justice reforms, such as expanding programs to address offending behaviour and substance-abuse issues, and expanding post-release support services.833

10.12 One of the projects developed using this funding is the Adult Court Advice and Support Service (ACAS).834 The service is run by the Department of Human Services and is available to offenders between the ages of 18 and 20 years in all adult courts in Victoria. The main objective of ACAS is to provide the courts with assessments for offender suitability for a youth justice centre order.835 However, its other aims are to:

- minimise the involvement of young people in the justice system;
- maximise the young person’s chances of rehabilitation by facilitating a targeted court response through informed assessment; and
- minimise community risk, by facilitating an effective and targeted intervention that maximises prospects of rehabilitation.836

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830  Ibid 3–8. Ongoing funding for specialist case worker positions was discontinued eight months after appointments were made. Collaborative Institute for Research, Consulting and Learning in Evaluation at RMIT University, Evaluation of the Redevelopment of Community Correctional Services—Final Report (2005) 76.


836  Garton (2002), above n 834, 2.
These aims are achieved through the case management of offenders on bail and deferral of sentence.\(^{837}\)

One reform that was introduced in 2005–06 was the development of a model for engaging young offenders in alcohol, tobacco and other drug treatment services. The model was developed and implemented by Drugs Policy and Services, together with Juvenile Justice and Youth Services. The model provides "minimum assessment and maximum continuity of care by engaging young people before their release from custody … [and is] … expected to assist clients to maintain their drug treatment regime longer".\(^{838}\)

Another area in which there have been some recent reforms in juvenile justice is restorative justice. Three pilot programs have operated in Victoria from 2003. An evaluation of the pilot programs revealed that offenders who have been involved in restorative justice conferences had showed lower rates of reoffending. In 2005–06, the group conferencing program was incorporated into legislation and it is has been expanded across Victoria in conjunction with the new Children, Youth and Families Act 2005 (Vic).\(^{839}\)

There has been a pilot community conferencing project running in New South Wales since 2005, specifically targeted at young adult offenders.\(^{840}\) Tasmania, Western Australia South Australia and the Northern Territory all have provisions for juvenile restorative justice conferencing, as does New Zealand. The Australian Capital Territory has a program for adults generally. However, none of these programs is targeted at young adult offenders.\(^{841}\)

Jesuit Social Services released a report on the development of a Young Adult Restorative Justice Conferencing Proposal for Victoria in 2006. This report recommended extending the juvenile system to allow adult offenders between the ages of 18 and 25 years to participate in restorative justice conferences. The report describes two stages at which such conferencing could take place: as part of diverting the offender from court or during a period of deferral of sentence; or post-sentence.\(^{842}\)

In March 2008, the Attorney-General launched a Restorative Justice Young Adult Conferencing program at the Neighbourhood Justice Centre. The program is aimed at 18 to 25 years olds. Young adult offenders may be referred to the conferencing program by the Neighbourhood Justice Centre magistrate, through a diversion program, deferral of sentence or as part of a sentence. The program is to run as a two-year pilot. It will be available for offences such as property damage, theft and driving offences.\(^{843}\)

\(^{837}\) Magistrates’ Court of Victoria (2007), above n 835, 52. See also the section on this program in the chapter on deferral at [12.36]–[12.38].


\(^{839}\) Ibid 36.

\(^{840}\) Julie People and Lily Trimboli, An Evaluation of the NSW Community Conferencing for Young Adults Pilot Program (2007) 1.

\(^{841}\) Ibid 3.


\(^{843}\) Office of the Attorney–General, ‘Hulls Launches Young Adult Conferencing Program’ (Media Release, 4 March 2008).
Sentencing Principles

10.19 The following principles relevant in sentencing a young offender were recognised by Justice Batt of the Victorian Court of Appeal in the much-cited case of *R v Mills*:

i. Youth of an offender, particularly a first offender, should be a primary consideration for a sentencing court where that matter properly arises.

ii. In the case of a youthful offender, rehabilitation is usually far more important than general deterrence. This is because punishment may in fact lead to further offending. Thus, for example, individualised treatment focusing on rehabilitation is to be preferred. (Rehabilitation benefits the community as well as the offender).

iii. A youthful offender is not to be sent to an adult prison if such a disposition can be avoided, especially if he is beginning to appreciate the effect of his past criminality. The benchmark of what is serious as justifying adult imprisonment may be quite high in the case of a youthful offender; and, where the offender has not previously been incarcerated, a shorter period of imprisonment may be justified.

However, in *R v Giles*, it was recognised that these propositions cannot be applied in every case. Similarly, in *R v Tran*, Justice Callaway said:

> The rehabilitation of youthful offenders, where practicable, is one of the great objectives of the criminal law, but it is not its only objective. It is not difficult to cite cases where other objectives have had to prevail. It is true that, in the case of a youthful offender, rehabilitation is usually far more important than general deterrence, but the word I have italicised is there to remind us that there are cases where just punishment, general deterrence or other sentencing objectives are at least equally important.

The Court of Appeal has endorsed this view in a number of subsequent cases, including *R v Schneider*, in which Justice Ashley, referring to earlier authorities, stated:

> Much depends … upon the circumstances of the particular case, by which I mean both the circumstances of the offence and of the offender. All the circumstances will dictate, in the case of a youthful offender, whether, and the extent to which, the prospect of rehabilitation should be accounted a pivotal position in the sentencing process.

While each case will depend on its facts, the central importance of rehabilitation may suggest community sentences, rather than imprisonment, or suspension of part or all of the sentence, as the appropriate penalty in circumstances where the seriousness of the offence and other circumstances do not preclude this outcome.

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847 *R v Schneider* [2007] VSCA 103 (Unreported, Buchanan, Ashley and Neave JJA, 18 May 2007) [17].
Young Adult Offenders on Community Orders in Victoria

10.23 The use of different sentence types varies by age group. The youth justice centre order is only available for young adult offenders. Young adult offenders are also more likely to receive a CBO or have their case adjourned for a diversion plan.

10.24 Figure 30 shows the rate at which selected sentences were imposed on young adult offenders in the Magistrates’ Court in 2006-07. This shows that CBOs are imposed at a higher rate on young adult offenders than on older offenders in this court (6.4 per cent versus 5.8 per cent).

Figure 30: The percentage of people who received selected sentence types by age group, Magistrates’ Court, 2006–07

<table>
<thead>
<tr>
<th>Sentence type</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>IMP</td>
<td>2.7</td>
</tr>
<tr>
<td>PSS</td>
<td>0.4</td>
</tr>
<tr>
<td>WSS</td>
<td>4.5</td>
</tr>
<tr>
<td>ICO</td>
<td>1.6</td>
</tr>
<tr>
<td>YTC</td>
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</tr>
<tr>
<td>CBO</td>
<td>6.4</td>
</tr>
<tr>
<td>ADP</td>
<td>5.8</td>
</tr>
</tbody>
</table>

Acronyms: IMP = imprisonment; PSS = partially suspended sentence; WSS = wholly suspended sentence; ICO = intensive correction order; YTC = youth training centre order; CBO = community-based order; ADP = adjourned for diversion plan.

Source: Courts Statistical Services, Department of Justice (Victoria), unpublished data

10.25 Figure 31 shows the rate at which selected sentences were imposed on young adult offenders in the higher courts in 2006–07. Young adult offenders sentenced in the higher courts are much more likely to receive a community sentence than their older counterparts. Over one in four young adult offenders (26.3 per cent) were sentenced to a CBO compared with just one in ten offenders over the age of 25 years.
Figure 31: The percentage of people who received selected sentence types by age group, higher courts, 2006–07

<table>
<thead>
<tr>
<th>Sentence type</th>
<th>&lt;25 years (n = 567)</th>
<th>25 years and older (n = 1,483)</th>
</tr>
</thead>
<tbody>
<tr>
<td>IMP</td>
<td>52.8</td>
<td>33.9</td>
</tr>
<tr>
<td>PSS</td>
<td>3.9</td>
<td>6.7</td>
</tr>
<tr>
<td>WSS</td>
<td>22.6</td>
<td>19.9</td>
</tr>
<tr>
<td>ICO</td>
<td>4.1</td>
<td>2.6</td>
</tr>
<tr>
<td>YTC</td>
<td>9.9</td>
<td>0.0</td>
</tr>
<tr>
<td>CBO</td>
<td>26.3</td>
<td>9.6</td>
</tr>
</tbody>
</table>

Acronyms: IMP = imprisonment; PSS = partially suspended sentence; WSS = wholly suspended sentence; ICO = intensive correction order; YTC = youth training centre order; CBO = community-based order.

Source: Courts Statistical Services, Department of Justice (Victoria), unpublished data

Young Adult Offenders commencing CBOs

A total of 5,859 offenders commenced a CBO in 2006–07, of whom 36.1 per cent (2,115) were young adult offenders. Considering the underlying age-based populations, young adult offenders were overrepresented in the population of those sentenced to a CBO: 3.8 per 1,000 people aged 17 to 25 years commenced a CBO, compared with 1.1 per 1,000 aged 25 years and over.

The types of conditions set for young adult offenders also differed from those imposed on offenders aged 25 years and over. Figure 32 illustrates the rate at which different conditions were set in the case of both young adult offenders (under 25 years of age) and those 25 years or older who commenced a CBO in 2006–07. These data, however, do not take into account the seriousness of the offence or offences for which these offenders were sentenced or their prior convictions.

849 Sentence type represents each sentence type an offender received.

850 Australian Bureau of Statistics, Population by Age and Sex, Australian States and Territories, June 2006 (Cat. no. 3201.0) (2006)
Young adult offenders were more likely than offenders aged 25 years and over to have conditions imposed on them relating to supervision (61.1 per cent versus 39.4 per cent), community work (84.4 per cent versus 75.2 per cent), education (7.0 per cent versus 3.7 per cent) and justice plans (2.4 per cent versus 1.4 per cent). They were also more likely to have conditions imposed under the category of ‘other’ (56.5 per cent versus 48.1 per cent).

There also appear to be differences in the common combinations or ‘packages’ of conditions used by the courts depending on the age of the offender and offence type. Young adult offenders (under 25 years) were significantly more likely to receive a CBO with four conditions of assessment and treatment, community work, supervision and ‘other’ (32 per cent compared with 15.5 per cent of orders imposed on offenders aged 25 years or over), suggesting a need in the case of younger offenders for more intensive and complex models of supervision. Young adult offenders were also more likely to receive a CBO with community work combined with an assessment and treatment condition (10.5 per cent, compared with 1.7 per cent of offenders aged 25 years or over).

**Breach of CBOs by Young Adult Offenders**

CBO breach rates in the higher courts are higher for young adult offenders than older adult offenders. Figure 33 shows the CBO breach rate, one, two and three years after the original sentence by age group. The data are higher courts only and represent sentences imposed in the period 2000–01 to 2003–04.
10. Intermediate Sanctions for Young Adult Offenders

Figure 33: Breach rates at one, two and three-years of CBOs imposed between 2000–01 and 2003–04 by age group, higher courts

<table>
<thead>
<tr>
<th>Age Group</th>
<th>Breach Rate &lt;25 years</th>
<th>Breach Rate 25 years and older</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt;1 years</td>
<td>12.0</td>
<td>5.1</td>
</tr>
<tr>
<td>&lt;2 years</td>
<td>24.8</td>
<td>13.9</td>
</tr>
<tr>
<td>&lt;3 years</td>
<td>30.8</td>
<td>18.1</td>
</tr>
</tbody>
</table>

Source: Courts Statistical Services, Department of Justice (Victoria), unpublished data

At each reference point, the young adult offender breach rate was substantially higher than that of the 25 and over age group. After one year, the breach rate for young adult offenders (12.0 per cent) was more than double that for offenders aged 25 and over (5.1 per cent). The three-year breach rate for young adult offenders was 30.8 per cent, compared with 18.1 per cent of the 25 and over age group.

Breach of ICOs by Young Adult Offenders

Figure 34 shows the ICO breach rate, one, two and three years after the original sentence by age group. The data are higher courts only and represent sentences imposed between 2000–01 and 2003–04.

Figure 34: Breach rates at one, two and three-years of ICOs imposed between 2000–01 and 2003–04 by age group, higher courts

<table>
<thead>
<tr>
<th>Age Group</th>
<th>Breach Rate &lt;25 years</th>
<th>Breach Rate 25 years and older</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt;1 years</td>
<td>23.1</td>
<td>19.9</td>
</tr>
<tr>
<td>&lt;2 years</td>
<td>35.2</td>
<td>28.7</td>
</tr>
<tr>
<td>&lt;3 years</td>
<td>39.6</td>
<td>31.6</td>
</tr>
</tbody>
</table>

Source: Courts Statistical Services, Department of Justice (Victoria), unpublished data
As for CBOs, the breach rate for offenders under the age of 25 was consistently higher over time than the breach rate for older offenders.

**Breach of Suspended Sentences by Young Adult Offenders**

Figure 35 and Figure 36 show the breach rates for both people aged under 25 years and those aged 25 years or older in the Magistrates’ Court and higher courts, respectively.

For both courts, those people aged under 25 years had a higher breach rate than those aged 25 years or older. The difference between these two age groups was much greater for the higher courts (13.5 per cent and 6.7 per cent) than for the Magistrates’ Court (34.3 per cent and 26.9 per cent).

**Figure 35:** The breach rate of suspended sentences by months till breach and age group, Magistrates’ Court, 2000–01 and 2001–02

![Graph showing breach rates for Magistrates' Court](source)

**Figure 36:** The breach rate of suspended sentences by months till breach and age group, higher courts, 2000–01 and 2001–02

![Graph showing breach rates for higher courts](source)
10.36 Figure 37 and Figure 38 show the percentage of people who had breached a suspended sentence by the results of their breach hearing and age group for the Magistrates’ Court and the higher courts. The percentage of people who had their suspended sentence restored was similar for both age groups in the Magistrates’ Court (61.3 per cent of those aged under 25 years and 63.5 per cent of those aged 25 years or older).

10.37 In the higher courts, a higher percentage of people aged under 25 years had their suspended sentence restored (70.3 per cent, compared to 61.7 per cent of people aged 25 years or older).

Figure 37: The percentage of suspended sentences by the result of breach and age group, Magistrates’ Court, 2000–01 and 2001–02

Figure 38: The percentage of suspended sentences by the result of breach and age group, higher courts, 2000–01 and 2001–02

Source: Turner (2007)
The Need for Specialist Approaches

The Limitations of Age-Based Criteria

10.38 Increasingly, there is recognition that age-based cut-off points for youth-focused interventions are arbitrary and of limited value. The problems associated with youth offending do not conclude at ‘neat, age-specific points and therefore age-related policies... do not fit harmoniously with the realities of the extended transitions’ of young adults.851 A Report of the Barrow Cadbury Commission on Young Adults and the Criminal Justice System has advocated that the current: age-delineated approach to the criminal justice system should be replaced by a ‘life-course’ approach that would enable the best use of youth provision, as well as adult resources, according to need.852

10.39 There is evidence to support the existence of a neurological difference in the way young adults function when compared with older adults, strengthening the argument that an arbitrary age distinction does not reflect developmental reality. Research conducted by the National Institute of Mental Health and the University of California shows that ‘higher-order brain centres ... do not fully develop until young adulthood’.853 Dr Ruben C. Gur, a Professor in the Department of Psychiatry at the University of Pennsylvania argues that ‘the evidence is now strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgement, planning for the future, foresight of consequences and other characteristics’.854 Further, ‘brain development in the relevant areas goes in phases that vary in rate and is usually not complete before the early to mid-20s’.855 This would suggest that young adults ‘may think and react very differently’ from their older counterparts.856

10.40 Offenders just over the age of 18 can often ‘fall in the gap’ between the juvenile and adult correctional systems. In 2003, it was reported that Juvenile Justice was becoming involved with young offenders placed on a supervised period of deferral of service in order to allow the offenders to access targeted programs in the community, in order to show that they can manage their rehabilitation without the need for a custodial sentence.857

10.41 Previously, specialised services generally have been targeted at young offenders aged under 18 years, or up to the age of 21 years. An unpublished National Offender Management Service (NOMS) review of services for young adult offenders in the United Kingdom has proposed defining young adult offenders as those aged between the ages of 18 to 24, and has urged regional offender services managers to review the commissioning of programs for offenders on community sentences in the 18–24 years age group.858

851 Colin Webster, Donald Simpson, Robert MacDonald et al, Poor Transitions: Social Exclusion and Young Adults (2004) as cited in Independent Commission on Young Adults and the Criminal Justice System, Lost in Transition: A Report of the Barrow Cadbury Commission on Young Adults and the Criminal Justice System (2005) 9
852 Independent Commission on Young Adults and the Criminal Justice System, A Report of the Barrow Cadbury Commission on Young Adults and the Criminal Justice System (2005) 17.
855 Ibid.
856 National Institute of Mental Health (2004), above n 853. See also Social Exclusion Unit, Transitions: Young Adults with Complex Needs (2005) 35.
858 Stephen Stanley, The Use of the Community Order and the Suspended Sentence Order for Young Adult Offenders (2007) 11.
In Victoria, the Office of Youth (located in the Department of Planning and Community Development) is responsible for ‘policy advice, research and strategic planning in relation to government policies, programs and service delivery’ in relation to young people up to the age of 25, recognising that this group has distinct needs.859

In the same way, the particular needs of young adult offenders in Victoria are starting to be addressed. In 2000, the power to defer sentencing for offenders under the age of 25 sentenced in the Magistrates’ Court was introduced.860 In 2000, the Arthur Andersen review of Community Correctional Services in Victoria noted that the 18–24 age group required specialist services and intervention. Similarly, the Victorian Juvenile Justice Review undertaken in 2003 identified the need for specialist interventions for offenders falling into the older adolescent/young adult group.861

More recently, Youth Justice and Corrections Victoria have been working together to develop Outcomes for Young Offenders 2007–2010: A Framework for the Rehabilitation and Re-integration of Young Adult Offenders. This framework is being established for the management of offenders between the ages of 18 and 20 years who are the ‘shared client group’ that can be managed by either agency through the dual track system.862

Evidence of Different Needs

Calls for the development of separate strategies to manage offenders in the 18–25 years age group are generally tied to evidence that this group has greater and different needs from the general adult offender population.

An evaluation of the Intensive Control and Change Program pilots in the United Kingdom (a program targeted at young offenders aged 18–20 years) confirmed that young adults generally had different needs than adult offenders. More than three-quarters of young adult offenders (77 per cent) had an education, training or employment need, just under half (49 per cent) had housing needs, nearly half (46 per cent) were misusing alcohol, nearly a third (29 per cent) were misusing drugs, and more than a third (37 per cent) had basic skills needs.863

Similarly, information from two probation areas in England based on an analysis of data from the National Offender Management Service assessment tool (OASys) found that young adult offenders aged 18–24 years were most likely to be assessed as having needs in the areas of education, training and employment, thinking and behaviour, and lifestyle and associates (see Figure 39, below).864

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860 Section 83A of the Sentencing Act 1991 (Vic) was inserted by section 9 of the Sentencing (Amendment) Act 1999 (Vic). This provision commenced operation on 1 January 2000. See also Victoria, Parliamentary Debates, Legislative Assembly, 25 March 1999, C 193 (Jan Wade, Attorney-General).


862 Submission 3.8 (Confidential).


864 Ibid 12.
In Victoria, similar criminogenic factors were identified as contributing to reoffending by young adult offenders (aged 17–25) and making it difficult for these offenders to complete their sentences. These included mental health issues, the misuse of drugs and alcohol, homelessness, living skills, unemployment, education, financial issues, family issues, abuse and environment issues and peer pressure.

As the risk factors for young offenders can be complex and across a wide range of areas, the evidence suggests that the best programs are those that address a number of risk factors; there is a greater positive effect the more needs that are addressed in the one intervention. It has been suggested that ‘increasing educational attainment, enhancing labour market prospects and helping the offender reintegrate into the community more effectively should be incorporated into programs’. While it is difficult to establish a causal link between unemployment and crime, there is evidence that ex-prisoners and probationers are more likely to reoffend if they are unemployed.

Further, a targeted approach, which can be tailored to the individual needs of the young adult offender, is more likely to be effective, as are programs which work across the social systems of the young offender, such as their family, peers and their community.

Involvement of the offender’s family and peer groups in structures to address rehabilitation can also have a positive impact in reducing the risk of recidivism. There is a risk with older young adults that they may resent the continued involvement of their parents in their lives. However, according to a recent United Kingdom report, ‘the evidence is overwhelming, even if they are not keen to acknowledge it, young people are strongly influenced by their parents long into young adulthood’. Consistent with this evidence, the Arthur Andersen review of Community

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865 Humphries (2003), above n 829, 2.
867 Australian Institute of Criminology, above n 866, 43.
869 Social Exclusion Unit (2005), above n 856, 48.
Correctional Services in 2000 suggested the piloting of family/peer group counselling of young offenders to assist with the compliance of orders imposed on them.870

10.52 Changing the ‘thinking and behaviour’ of young adult offenders is also an area in which targeted intervention may be of use. After considering a wide range of programs as to what works in preventing and reducing reoffending in young people, the Australian Institute of Criminology concluded that one of the factors to consider when designing an effective intervention is that:

Offending behaviour is often linked to deficiencies in thought processes, poor problem solving and decision making abilities. Programs incorporating these components have to be proven to be effective in altering thinking patterns in a positive way.871

10.53 The Arthur Andersen review recommended the development of a youth-specific offender program, incorporating ‘life skills training and cognitive behavioural therapy’.872

Issues with the Use of Existing Orders

10.54 Because of the emphasis placed in the case of young offenders, on rehabilitation, as well as other factors such as more limited criminal histories, orders served in the community, including CBOs, ICOs and suspended sentences, may provide an attractive option for sentencers in sentencing young offenders.

10.55 This is supported by an examination of the relevant data, which show that courts are more likely to sentence offenders under 25 to sentences that can be served in the community. In particular, in the higher courts in the period 2006–07, 26.3 per cent of offenders under 25 years received a CBO, compared with only 9.6 per cent of offenders aged over 25 years.873 The higher courts are also more likely to impose an ICO or wholly suspended sentence on this age group than their older adult counterparts. While the intention may be to increase the offender’s prospects for rehabilitation and reintegration, the high breach rate for those under 25 years would suggest that these orders are not necessarily fulfilling their intended purpose.874

10.56 One of the particular criticisms of the use of CBOs for young adult offenders is that the ‘chaotic lifestyle’ of many of these offenders, particularly those with drug dependencies, makes it difficult to comply with the ‘highly structured, appointment-based’ CBO.875 This may account for the high breach rate of CBOs by young adult offenders.

10.57 Further, while the current CBO has some conditions that could be used to assist offenders in addressing the criminogenic factors that lead to their offending, it does not seem that these conditions are used with any great frequency. For example, increasing a young offender’s level of education has been seen to have a positive effect on the offender’s prospects for rehabilitation; however, conditions requiring the offender to attend educational programs were only imposed in 7 per cent of CBOs imposed on offenders under the age of 25 in the period 2006–07. While this percentage is higher than that for offenders over the age of 25 sentenced to a CBO in the same period (3 per cent), it could be said that a valuable opportunity to reduce the likelihood of reoffending is not being taken up. On the other hand, forcing a young adult offender to attend an educational program by way of a court order may not always necessarily be conducive to that offender actually benefiting from such a program. The challenge is to devise an order that incorporates sufficient structure to guide rehabilitation and retains enough flexibility so that it can adapt to the changing needs of the offender.

871 Australian Institute of Criminology (2002), above n 866, 43.
872 Arthur Andersen (2000), above n 611, 44.
873 See Figure 31.
874 See Figure 33, Figure 34, Figure 35 and Figure 36.
One of the particular criticisms of the use of suspended sentences with young offenders is that they may in many cases set up a young person to fail due to the lack of structure and support provided under the order. The young person may have needs that are not being met and this may contribute to his or her reoffending behaviour. A social worker in the United Kingdom commented that:

If you take the needs of the young person, if their basic needs aren't being met, their welfare needs how on earth can they actually concentrate on not offending? If they are homeless, they are not going to address that offending behaviour because as far as they are concerned they have a priority need that they have to sort out before they are going to sit and listen to anything you have to say.\(^\text{876}\)

Further, when probable net-widening effects are taken into account, the outcome of imposing suspended sentences on young adult offenders is exposing young people who might not otherwise have gone to prison to the very real risk of serving time in prison (or a youth detention facility, if eligible). This risk is exacerbated when the high breach rate for suspended sentences for those under the age of 25 is taken into account; 13.5 per cent in the higher courts and 34.3 per cent in the Magistrates’ Court for the period 2000–01 and 2001–02.

### Barriers to Service Provision

A report commissioned by the National Youth Affairs Research Scheme on barriers to service provision for young people, while focused specifically on issues for young people with substance misuse and mental health problems, suggested a number of useful elements in developing a stronger youth focus within services, including correctional services, which could include:

- effective engagement;
- flexibility;
- the provision of non-appointment-based services; and
- where appointments are necessary, following up with young people and issuing reminders by contacting the young person, or meeting with them prior to the appointment to assist with organising time and transportation.\(^\text{877}\)

### Developments in Other Jurisdictions

There are few jurisdictions in which specialist sentencing responses to young adult offenders have been developed. Even where specialist interventions have been introduced, such as in the United Kingdom, they have often been limited to offenders aged younger than 21 years.

#### United Kingdom

The Intensive Control and Change Programme (ICCP) was an intensive community sentence of up to 12 months in duration, designed as a direct alternative to short custodial sentences for offenders aged 18–20 years. The program was introduced in April 2003 and ran until March 2004 in 11 pilot probation areas. The key elements of the program were:

- 25 hours of intervention per week for first three months, reduced to 12 hours per week for second three-month period;
- higher levels of control than other community sentences via a mandatory curfew with electronic monitoring;

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877 Tricia Szirom, Debbie King and Kathy Desmond (National Youth Affairs Research Scheme), Barriers to Service Provision for Young People with Presenting Substance Misuse and Mental Health Problems (2004) 5.1.
higher levels of intervention than other community sentences provided through five core programs:
  o offender supervision;
  o offending behaviour programs;
  o community punishment;
  o education, training and employment (ETE) interventions; and
  o mentoring; and
• increased partnership work with agencies such as JobCentre Plus, the police, mentoring providers and the Connexions service. 878

10.63 Eligible offenders were defined as young offenders at medium to high risk of further offending, but excluded offenders who had committed violent or sexual offences. During the first year of operation, orders were imposed on 433 offenders, who:
• were white and male (90 per cent and 93 per cent respectively);
• had been convicted mainly of acquisitive and driving offences (such as car theft and driving while disqualified);
• had an average of 27 previous convictions; and
• had a medium to high risk of continuing their offending patterns. 879

10.64 While offenders on these orders had high rates of breach (47 per cent), the findings suggested that mentoring may play a statistically significant role in reducing breach rates. 880

10.65 The findings of a survey of sentencers on the ICCP included that:
• sentencers considered the ICCP as a good alternative to custody for young offenders, and in particular offenders with ‘chaotic lifestyles’;
• the mentoring scheme was praised highly, while views on electronic tagging were mixed; and
• judges, in particular, wanted feedback on how offenders had fared on orders. 881

10.66 Following the introduction of a generic community order in England and Wales, the ICCP no longer exists as a separate program order. However, model combinations of conditions (referred to as ‘intensive control’) can be packaged to achieve the same purpose. 882

10.67 There is one program condition under the generic community sentence that can only be imposed on an offender under the age of 25. This is the requirement that the offender attend an attendance centre for between 12 and 36 hours per week. 883 Attendance centres are geared at younger offenders and engage the offenders in physical training and constructive work, as well as other activities. 884

878 Partridge, Harris, Abram et al (2005), above n 863, v.
879 Ibid 47.
880 Ibid viii.
881 Ibid ix.
883 Criminal Justice Act 2003, s 214 and 177(1).
Australian Capital Territory

10.68 There has been significant work undertaken by the ACT government in relation to addressing the needs of young people. One of the projects undertaken was mapping those services that were available to youth between the ages of 12 and 25 who could be considered at risk, including offenders.

10.69 One of the findings of that project was that there was a need for age-specific support for young adults between the ages of 18 and 25 involved in the justice system. While these offenders can access programs geared towards the general offender population, there are no projects tailored towards their specific needs. The report suggested that age specific support for young adult offenders in this age group should be reviewed, as these individuals may have different needs to older adults.885

10.70 There is one program specifically targeted at offenders between the ages of 16 and 25. ‘Pathways to Employment Program—Fresh Start’ is available to young adult offenders who are undertaking community service orders or are in custody. The program provides counselling, referrals and access to other services. It includes training, work experience, resume and interview skills.886

New South Wales

10.71 In NSW a community conferencing pilot has been in operation since 2005 for young adult offenders between 18 and 24 years in the local courts.887 Participation in a conference is an alternative sentencing option available to magistrates and is only available where the offender is deemed suitable to participate in the process and he or she consents to participate.888

10.72 The conference involves the offender meeting with a facilitator and other interested parties (for example, the police informant) to try and work out a way in which the offender can repair the damage caused by his or her offending behaviour. The victim may or may not be present. The offender and the victim (if he or she attends) are entitled to have support people present with them to assist in the process and help develop options for reparation. A plan is then drawn up which identifies actions to be taken by the offender. This plan must be approved by a magistrate.

10.73 Some examples of action agreed to be undertaken by the offender include making an apology to the victim, reimbursing the victim for costs incurred as a result of the offence, undertaking community work or addressing underlying issues relating to the offending (such as drug treatment, anger management or traffic offender programs).889

10.74 The majority of offences (46.6 per cent) for which community conferencing has been imposed are driving offences, including driving while disqualified and driving an uninsured motor vehicle.890 These offences did not involve a specific victim; therefore the conferences took place without a victim present.

885 Chief Minister’s Department, Mapping ACT Government Funded Programs for Young People at Risk (2003), 28.
886 Ibid 27.
887 People and Trimboli (2007), above n 840, 1. The pilot is being carried out in one metropolitan local court and one non-metropolitan local court circuit.
888 Ibid 7. The commission of certain offences would make an offender ineligible to participate in community conferencing, including malicious wounding or infliction of grievous bodily harm, sexual assault, child prostitution, pornography, stalking or intimidation with the intent to cause fear of physical or mental harm, domestic violence offences, offences involving the use of a firearm, offences related to supplying drugs, riot, affray and some assault police offences.
889 Ibid 8, 34.
890 Ibid 19.
There were insufficient data to establish the effect that participation in community conferencing had on reoffending rates. However, there was a survey conducted with participants to gauge their levels of satisfaction with the process. According to the survey, 73 per cent of offenders felt they had been treated ‘very fairly’ and a further 24.6 per cent felt they had been treated ‘somewhat fairly’. Similarly, 72.7 per cent of victims who participated in conferences felt that they had been treated ‘very fairly’ at the conference and a further 25 per cent felt they had been treated ‘somewhat fairly’.

A New Youth-Specific Community Order for Victoria?


The Sentencing Review, which reported in 2002, recommended that a youth-specific, non-custodial order should be created and that a specialist youth section should be established within Community Correctional Services to supervise young offenders. It was recommended that this order should be for a period of one year (similar to an ICO) and be available to young offenders aged 18–25 years.

In support of this proposal, the Review pointed to a number of problems that had been identified with the current CBOs, and the flow-on effects this was having in terms of the profile of young offenders made subject to youth training centre (YTC) orders. Referring to a report prepared on future demand for YTC places, the Review noted that CBOs generally were viewed as inappropriate for young offenders, and particularly those with a serious substance dependence, and that an increasing number of young offenders were entering a YTC with one or more breaches of CBOs, or being sentenced directly to YTC without being tested on a CBO.

The Review noted the broad support for this approach during consultations and suggested: ‘The creation of a special youth order should serve an important symbolic and practical function in relation to the provision of services to young offenders.’

The Interim Report Proposals

During consultation on the Suspended Sentences: Discussion Paper, the Council found widespread support for the introduction of a non-custodial order, which would operate as a form of youth probation order and would be tailored to the needs and circumstances of young offenders. Core conditions of the youth order, it was suggested, might include being required to attend a Community Corrections office, report to a juvenile justice officer and comply with other program conditions. On breach, it was proposed, the offender could be ordered to serve the sentence in a YTC or receive a gaol sentence.

In line with these suggestions, and the earlier recommendations of the Sentencing Review, the Council proposed in its Interim Report that a new youth order—a Youth Correction and Supervision Order (YCSO)—should be made available to offenders aged under 25 that would be half the duration of the adult version of the order; that is, up to 12 months if the offender is sentenced in the Magistrates’ Court and 18 months if sentenced in one of the higher courts.

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894 Ibid 160.
897 Ibid 160.
898 Roundtable—Young Offenders (16 June 2005).
Like a CSO, it was suggested, the order should be available when the court contemplates imposing a period of detention, but also in circumstances in which it might previously have made a CBO or an ICO.

The core conditions, the Council proposed, might be similar to those for adult offenders, with some of the special conditions also available. Additional conditions could also be attached, with their focus on the need to respond to the circumstances of young offenders. The Council supported the Sentencing Review’s recommendation that consideration should be given to establishing a youth division in Community Corrections to manage these orders.

The Council suggested that a court’s powers on breach of a YCSO should be as for breach of a CSO (see further [11.71]–[11.74]), including where appropriate the power to order an offender to serve a sentence in detention in a YTC (now Youth Justice Centre) if the young person has breached the order by committing another offence and is under the age of 21.

Submissions and Consultations

Creation of a New Youth-Specific Community Order

The Council has continued to find broad support for the introduction of a youth-specific community order in Victoria.

A joint submission by the Honourable Alastair Nicholson and Mr Danny Sandor suggested that the proposals would not only have value for Victoria, but would also give effect to Rule 3.3 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (‘The Beijing Rules’) adopted by General Assembly resolution 40/33 of 29 November 1985, which provides that: ‘Efforts shall also be made to extend the principles embodied in the Rules to young adult offenders’.

Youthlaw in its submission, supported the retention of suspended sentences as a sentencing option and expansion of the range of sentencing options available for young offenders:

[...] given the significant number of young people in our prison system with mental health issues and drug and alcohol issues, we support an expanded range of sentencing options that divert these offenders from the prison system into therapeutic options. As such, we strongly oppose any changes to suspended sentences and the sentencing regime that could result in a further increase in incarceration rates.

However, it was suggested that:

the introduction of more non-custodial options is worthy of consideration as long as the dispositions are not too onerous, particularly for young, mentally impaired and intellectually disabled offenders, and will not set them up for failure.

In consultations on the Interim Report, it was suggested that age should not be the sole qualifying factor, but rather a young person’s level of vulnerability, needs and ability to self-manage. The effective screening of offenders suitable for this order, through the pre-sentencing report process, was viewed by many as critical in order to avoid offenders being inappropriately assigned to this resource-intensive model of management. The delays that might result from instituting a more thorough assessment process were an issue of concern for some.

899 Submission 2.10 (A. Nicholson and D. Sandor).
900 Submission 1.41 (Youthlaw).
901 Ibid.
902 Roundtable—Young Offenders (30 November 2005).
903 Ibid
904 Ibid.
10.88 A professional counsellor with experience working in the legal system, fully supported the creation of a specific young adult offender order, because:

young people in this age bracket are at the greatest risk and require the most support. At an age where they perceive themselves to be immortal and engage in high-risk activities, the use and enforcement of such an order, gives them a greater chance of turning things around and succeeding in life.905

10.89 During the Council’s more recent consultations on its final recommendations, there has continued to be widespread support for the introduction of a youth-focused order.906

10.90 The Law Institute of Victoria, in supporting the introduction of a youth CBO, submitted:

We hope that they will build on the success of current outreach and case-management programs such as the Court Integrated Services Program (CISP). We suggest that for certain categories of offences, YCBOs could include conditions based on therapeutic justice programs.

The LIV supports the proposed outreach and case management approach as set out in the Draft Proposals. We recommend that YCBOs are not administered by Corrections and suggest that they could be managed by either Youth Justice or a newly established specialist unit. We strongly emphasise that the success of YCBOs will depend on how well the unit is resourced.

The LIV supports the proposal that YCBOs should be available as a sentencing option for young offenders up to the age of 25 years. We submit that they should have a maximum term of 12 months, although given the intensive nature of the proposed order we consider that a six-month period would be optimal. We propose that courts could also have the power to combine a YCBO with a suspended Youth Training Centre sentence, where this is appropriate.907

Purpose

10.91 A number of those consulted identified the need for clear criteria or principles guiding the use of the new order as critical to its success. It was suggested that the underlying principles should be about rehabilitation and propensity for rehabilitation. This would distinguish it as a youth order, consistent with the approach Victorian courts have taken in relation to young offenders.908

10.92 While there was general acceptance that rehabilitation should be the principal or primary consideration, it was equally acknowledged that other purposes and factors relevant to sentencing, such as the impact of the offence on the victim and the need for denunciation, just punishment and community protection also needed to be taken into account.

10.93 Some of those consulted were critical of the current legislative criteria that guide the assessment of suitability for a youth justice order. These criteria have been criticised by some as being too vague, leading to the absence of a clearly targeted population within the relevant age group. As a consequence, it has been suggested, there has been a disjunction between what youth justice orders can actually provide and the specific needs of those young people placed on such orders.909

905 Submission 2.1 (Confidential).
906 Submissions 3.7 (Youthlaw and the Mental Health Legal Centre), 3.5 (Victoria Legal Aid), 3.10 (Federation of Community Legal Centres) and 3.12 (Office of Public Prosecutions); Law Institute of Victoria (Meeting 19 November 2007).
907 Submission 3.4 (Law Institute of Victoria).
908 Roundtable—Young Offenders (30 November 2005).
909 Ibid.
Age Limit/Eligibility Criteria

10.94 There were mixed views as to the appropriate age limit for the new order. While some strongly supported the age limit of 25 years, others felt age 25 might be too high and suggested a lower cut-off (such as 21 years, to accord with the upper limit for YJC orders).910

10.95 Some consulted felt the key concern should be the offender’s developmental age, rather than his or her physical age.911 It was suggested that if the young person becomes involved in the legal system for the first time at 23 or 24 years, the chances are that he or she will not need a youth-specific order. However, if the offender has been in the system already, such an order may be appropriate. Some young people at 22, 23 and 24 years can be still quite vulnerable, and just as vulnerable as they were at 17 or 18 years old.

10.96 Others supported the idea that the criteria for eligibility should be determined by reference to a young person’s ability to ‘self-manage’. If a young adult offender experienced a number of related issues such as homelessness, lack of family support or chronic unemployment, he or she may need a more intensive approach. These are factors that could be identified as part of the preparation of the pre-sentence report.912

10.97 There was also some discussion as to whether the age limit should apply when the young adult is charged with an offence and proceedings are initiated against him or her, or whether it should apply at the time of sentence. It was suggested, for example, that if the age criteria were to apply at the time of sentencing, an offender who was under 25 years when charges were filed against him or her, but over 25 when sentenced, would be at a disadvantage.

10.98 Professor Nicholson and Mr Danny Sandor, in their joint submission, argued that courts should not be limited in their capacity to use the standard CBO for offenders in the relevant age group. There would be offenders in this age group who came before the adult courts and did not require the specialist intervention as available under the young adult offender CBO. These offenders should not be ‘at risk of unnecessary program intrusiveness and the risk of net-widening’ by being placed on a specialised order unnecessarily.913

Duration

10.99 Some of those we consulted were of the opinion that an 18-month order could be too onerous for a young adult offender.914 It was also suggested that if the objective of the order was to link young people into services that could assist their rehabilitation, this did not have to be under a correctional order. The initial relationships could be established while a young adult offender was on a shorter order and then he or she could continue to be involved with those services after the order had run its course.

Conditions

10.100 There was general support for any conditions attaching to orders to be flexible and tailored to the offender. It was felt that appropriate conditions should include therapeutic conditions that take into account issues such as mental health issues, drug and alcohol issues, homelessness and employment/educational status.915

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910 Ibid; Submission 2.8 (G.Leech).
911 Ibid.
912 Ibid.
913 Submission 2.10 (A. Nicholson and D. Sandor).
914 Youthlaw and the Mental Health Legal Centre (Meeting 14 November 2007).
915 Roundtable—Young Offenders (30 November 2005).
10.101 Consistent with the view the order should be structured for maximum flexibility, Professor Nicholson and Mr Sandor suggested that any conditions that would have an ‘intensive’ element ought to be treated as a special, rather than a core condition, of the order and that the conditions available should be the same as the proposed new CSO.916

10.102 In the context of considering the desirability of attaching conditions to suspended sentence orders, Youthlaw argued that special conditions should only be attached ‘if specially tailored to the needs and circumstances of the young offender’ to avoid setting up young people for failure.917 Fitzroy Legal Service also submitted that, if conditional suspended sentences were introduced, conditions imposed on young people should be ‘appropriate given their age’.918 It was suggested that: ‘[s]pecialist youth drug and alcohol and mental health services should be used exclusively for this age group’.919

10.103 In consultations on the possible introduction of a conditional form of suspended sentence, the kinds of conditions nominated by those consulted as suitable for young people were predominantly those focused on rehabilitation and treatment, rather than on punishment.920 Conditions felt to be appropriate included rehabilitative and therapeutic interventions such as drug and alcohol treatment, anger management, education and job training, mental health services and therapy and counselling. Linking young offenders into services was viewed as a particularly effective sentencing tool.

10.104 There were mixed views concerning the appropriateness of community service as a condition of a suspended sentence order.921 Some supported community work being ordered in appropriate cases. However, a number of those consulted were opposed to such a requirement being attached to a suspended sentence on the basis that the ‘punitive’ element was constituted by the fact the offender had a prison sentence hanging over his or her head.

10.105 Victoria Legal Aid suggested that a community work condition should only be imposed as part of a young adult offender order when the work could serve some rehabilitative or reintegrative purpose as opposed to punishment of the offender. It was argued that this would be consistent with the rehabilitative focus of the order.922 Corrections Victoria suggested that the ‘community work’ component could be fulfilled by the attendance at an educational or training facility.923

10.106 There was support for the maximum number of community work hours that could be imposed on an offender serving a youth-specific order to be less than the maximum available under the standard CBO taking into account the shorter time frame and principle purpose of the order.924

10.107 Particular concerns were expressed in relation to the use of place restriction conditions for young offenders.925 It was noted that these types of conditions could have significant implications for young people—for example, if told that they were not allowed to be in the area designated as postcode 3000. This could cause difficulties for young adults who use public transport as the public transport system is designed so that most services flow through the city of Melbourne. Any location or residence conditions, it was argued, should be special conditions to be used cautiously.

916 Submission 2.10 (A. Nicholson and D. Sandor).
917 Submission 1.41 (Youthlaw).
918 Submission 1.44 (Fitzroy Legal Service).
919 Ibid.
920 Roundtable—Young Offenders (16 June 2005).
921 Ibid.
922 Submission 3.5 (Victoria Legal Aid).
923 Submission 3.6 (Corrections Victoria).
924 Submission 3.7 (Youthlaw and the Mental Health Legal Centre).
925 Roundtable—Young Offenders (30 November 2005).
10.108 Abstinence conditions were also viewed as generally unhelpful and as setting up offenders to fail. A better condition, it was argued, is one requiring the offender to seek treatment.

10.109 Youthlaw submitted that factors such as family and relationship breakdown (which can lead to a change of address or to the young person having no fixed address) and other factors impacting on the ability of young people to comply with conditions should be taken into account by the court in reviewing and varying any conditions. It argued that ‘[c]ourts should be adaptable in their approaches to sentencing especially young people who should be given a realistic opportunity to “make it on the outside”’.

Resourcing and Administration of Orders

10.110 A range of views was expressed in submissions and consultations concerning who should be responsible for the sentence management of a youth order. There was some support for younger offenders (under 21 years) being managed by Youth Justice. A joint submission by Youthlaw and the Mental Health Legal Centre supported offenders up to 25 years of age being managed by Youth Justice. In the alternative, it was suggested, a youth division could be established within Community Correctional Services. The Fitzroy Legal Service submitted that specialist case workers employed to manage young offenders should, at least, be trained and monitored by Youth Justice.

10.111 It was generally agreed by those consulted that getting the service-delivery model right and ensuring it is resourced appropriately would be more important than who ultimately assumed responsibility for managing young people subject to these forms of orders. An outreach component was viewed by many as particularly critical. The comment was made that, on making an order, a sentencer should feel confident that the young person would be assigned to a youth division and would get chaperoning, be actively followed up, and receive proper linkages to mental health and other services.

10.112 Professor Nicholson and Mr Sandor argued that the Council’s Final Report: ‘should make it clear that it is the fact that YCSOs will be managed according to these baseline standard features which differentiates them from CSOs’ and for some form of external accountability to be built into the scheme, such as according the principle of reciprocal obligation formal recognition in the provisions setting out a court’s powers on breach. This submission also supported the development of separate guidelines on the procedures for handling breaches of the new order.

926 Ibid.
927 Submission 1.41 (Youthlaw).
928 Ibid.
929 Roundtable—Young Offenders (30 November 2005).
930 Ibid.
931 Submissions 3.1 and 3.7 (Youthlaw and the Mental Health Legal Centre). This was also raised in the Roundtable—Young Offenders (30 November 2005).
932 Submission 3.9 (Fitzroy Legal Service).
933 Roundtable—Young Offenders (30 November 2005).
934 Submission 2.10 (A. Nicholson and D. Sandor).
935 Ibid.
10. Intermediate Sanctions for Young Adult Offenders

Breach

10.113 There was some support for the option of a youth justice centre order being available on breach of the proposed new youth order—either through further offending, or breach of other conditions of the order. However, it was also suggested that an offender would still have be to assessed as suitable and it should not be assumed that simply because an offender was assessed as appropriate for a community based youth order, that they are suitable for detention in a youth justice centre.

10.114 Some participants expressed the view that breach procedures needed to be more flexible than the arrangements currently in place for CBOs.

The Council’s View

10.115 It is clear from the relevant literature and the Council’s consultations that young adult offenders have distinct needs from older offenders within the correctional system. Consistent with the emerging trend, both here and in other jurisdictions to recognise these needs and put into place arrangements that reflect and are able to respond to the dynamic nature of the transition into adulthood, the Council recommends the introduction of a new form of CBO—a Community-Based (Young Adult Offenders) Order—to be available to adult courts in sentencing young offenders.

10.116 The courts have made it clear that rehabilitation is a primary consideration when sentencing offenders in this age group. Accordingly, we support the views raised in consultations that the purpose of the proposed young adult offender order should be to facilitate the rehabilitation and reintegration of the offender.

10.117 At present, the rehabilitative focus on this age group largely manifests itself in the type of disposition courts impose. For example, young adult offenders are less likely to receive a custodial sentence than their adult counterparts. However, the high breach rate of community sentences by this age group would suggest that the current orders are not adequately providing the level of intervention and type of support that is required. While the criminogenic factors that can increase the likelihood of breaching orders/reoffending have been identified, it is not clear that the current orders available to the courts address these factors adequately.

10.118 The Council envisages that a young adult-specific order would have the same basic conditions as its adult equivalent, but with a greater focus on dealing with those factors linked to specific developmental needs. For example, the current CBO has a condition linked to education, which it seems is rarely used. Such a condition could be a powerful tool in assisting an offender to increase his or her opportunities for employment and therefore greater long-term stability. Additional conditions could also be attached that had as their focus the need to respond to the circumstances of young adult offenders.

10.119 In order to differentiate further the order from a standard CBO and reflect the focus on rehabilitation for this type of order, the Council recommends that the young adult offender order should be of shorter duration, with a lower maximum number of hours of community work that can be imposed. However, the Council envisions that the most important point of differentiation between the standard form of CBO and its young adult offender equivalent should be in the way offenders under these orders are managed. We suggest that, in the case of young offenders placed on a young adult offender CBO, there should be a greater emphasis on providing support and allowing flexibility in the way these young people are managed to respond to the issues they experience as they make the transition into full adulthood. In light of this, the Council recommends that the offenders on young adult offender orders should be managed by specialist case workers pursuant to a case management plan under separate arrangements to offenders on standard forms of orders.

936 Ibid.
937 Roundtable—Young Offenders (30 November 2005).
10.120 There was some debate in consultations as to the appropriate age group for a young adult offender order. Due to the different rates of maturity among young adults, in our view it is difficult to set a clear boundary as to which group of young adult offenders would most benefit from this type of intervention. The Council is mindful of the limitations of age-based criteria, and consistent with the views raised in consultations, believes that the focus should be on the ‘developmental’ age of the young person. However, in the interests of clarity and certainty, the Council believes that a ‘cut-off’ point is necessary to guide the courts’ use of the proposed new form of order.

10.121 Taking the above issues into account, the Council recommends that the proposed young adult offender order should be limited to offenders who are under the age of 25 years at the time of being sentenced. We note that this is broadly consistent with the approach to youth policy in Victoria, with the Victorian Office of Youth having responsibility for policy co-ordination, strategic planning and service delivery in relation to young people up to the age of 25.

10.122 It is not suggested that a youth-specific order would be the appropriate disposition for all offenders in the adult court system who fall within the defined age group. For many young people falling into the relevant age group, despite their offending behaviour they may not require the level of intervention such an order might involve. Further, those young people who are significantly low risk would be unlikely to benefit from this form of intensive intervention into their lives.

10.123 For these reasons, the Council recommends that the order should be restricted to offenders who have a high level of need and who are at a moderate to high risk of reoffending, as research suggests that ‘higher risk offenders benefit the most from rehabilitative interventions’.

10.124 The Council has not sought to develop detailed eligibility and screening criteria, because we consider that, if a commitment is made to implement our proposals, these criteria are best developed by the Department of Justice and Corrections Victoria in consultation with those with expertise and knowledge in the area of youth offending and the needs of young adults, including the Children, Youth and Families Division of the Department of Human Services and community support agencies working with young people. These might include some legislative criteria to guide the use of these orders, similar to those that exist in relation to the making of a youth justice centre order, as well as administrative guidelines and other screening tools to assess the particular support needs of the young person.

10.125 The Council further recommends that the Department of Justice and Corrections Victoria should carry responsibility for developing guidelines and standards for the management of young people on these orders, including action to be taken on breach. The Council suggests that the same principles for enhancing compliance discussed in Chapter 11 of this Report and earlier in relation to the use of ICOs and CBOs, including mechanisms to reward good progress made on orders, as well as to respond to non-compliance, should inform the development of these guidelines.

938  Roundtable—Young Offenders (30 November 2005).
941  Day, Howells and Rickwood (2003), above n 861, 3. See also pages 9–10 for discussion of graded levels of intervention based on risk.
RECOMMENDATION 10: Community-Based (Young Adult Offender) Order

Recommendation 10–1
A new form of CBO targeted at young adult offenders—a Community-Based (Young Adult Offender) Order—should be introduced in Victoria.

Recommendation 10–2
The particular purpose of the young adult offender order should be to facilitate the rehabilitation and reintegration of the young person.

Recommendation 10–3
The new young adult offender order should be targeted at young adult offenders sentenced in adult courts who are under 25 years old at the time of being sentenced. Use of this order should be confined to those young adult offenders who are assessed as having a high level of need and are at a moderate to high risk of reoffending. All other offenders in this age group should continue to be subject to the standard form of orders (such as CBOs and ICOs).

Recommendation 10–4
The same broad eligibility criteria that apply to the making of a CBO under section 36(1) of the Sentencing Act 1991 (Vic) should apply to the making of a young adult offender order, including that the court has received a pre-sentence report and that the offender agrees to comply with the order.

Recommendation 10–5
The conditions of the order should be as for the general form of CBO. However, a greater emphasis should be placed through the conditions imposed, and programs offered under those conditions, on responding to the rehabilitative and support needs of young people (particularly in relation to education/skills/supervision/drug and medium-level drug and alcohol interventions).

Recommendation 10–6
The maximum period of the order should be 18 months.

Recommendation 10–7
The maximum number of hours of unpaid community work that can be imposed under a Community-Based (Young Adult Offender) Order should be 200 hours. Consideration should be given to allowing hours spent attending training programs and other personal development programs to be credited towards the community work component of the sentence.

Recommendation 10–8
The same powers available on breach of a CBO under section 47 of the Sentencing Act 1991 (Vic) should apply on breach of a young adult offender order.

Recommendation 10–9
Offenders subject to young adult offender orders should be managed by specialist case workers in accordance with a case management plan. Dedicated funding should be provided to support the operation of this new program.
## RECOMMENDATION 10: Community-Based (Young Adult Offender) Order

### Recommendation 10–10

Specific eligibility and screening criteria, and guidelines and standards on the management of young adult offenders subject to these orders (including action to be taken on non-compliance) should be developed by the Department of Justice and Corrections Victoria in consultation with those with expertise and knowledge in the area of youth offending and the needs of young adults, including the Children, Youth and Families Division of the Department of Human Services and community support agencies working with young people.

### Recommendation 10–11

The operation of the new order should be monitored and evaluated by the Department of Justice to assess the benefits of, and ongoing need for, such an order following its introduction. The Council suggests three years following the introduction of the new order as an appropriate timeframe within which to initiate this review.
Chapter 11 Compliance Management and Breach Powers
Introduction

11.1 Broadly, offenders serving intermediate orders can breach conditional intermediate orders, such as intensive correction orders (ICOs) and community-based orders (CBOs), in one of three ways:

- by committing a new offence punishable by a term of imprisonment;
- by failing to comply with the conditions of the order, such as by failing to turn up to an appointment or for community work; or
- by a combination of the above.

11.2 A failure to comply with the conditions of an order can also vary in seriousness, ranging from a one-off failure to comply with a single condition to a persistent failure to comply with a number of conditions.942

11.3 Unconditional suspended sentences are a unique form of order in this respect, as they can only be breached by further offending.

11.4 One of the criticisms of intermediate orders intended to serve as alternatives to imprisonment is that:

many so-called alternative sentencing options may result in an offender ending up in prison through a sequence of default situations that might otherwise not have eventuated if the initial sentence had not been inextricably bound to the prison.

Where the fear of imprisonment lies behind any alternative, it is not in fact an alternative in any absolute sense. Employing alternative sentencing structures that rely on imprisonment as the consequence of default actually may endorse rather than diminish the ultimate status of imprisonment in the sentencing hierarchy.943

11.5 The Council’s proposals in this, and earlier reports, would result in breaking the nexus between a number of existing intermediate orders and imprisonment; however, if this approach is taken, it still leaves open the question of what consequences should follow on breach of these orders, including what powers should be available to a court once a breach has been proven. We discuss these issues below.

The Current Approach in Victoria

11.6 Under the current law, a breach of a CCTO, an ICO, a CBO and an adjourned undertaking (whether for failure to comply with a condition of the order or for committing a further offence) without a reasonable excuse (for example, that the offender was ill), amounts to a further offence, the maximum penalty for which is a Level 10 fine.944

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943 Findlay, Odgers and Yeo (2005), above n 198, 237.

944 Sentencing Act 1991 (Vic) ss 18W (CCTO), 26 (ICO), 47 (CBO) and 79 (adjourned undertaking). A Level 10 fine is equal to 10 penalty units (*Sentencing Act 1991* (Vic), s 109(2)). See above n 450 for the value of a penalty unit.
11.7 If an offender fails to comply with a condition of an order, it does not necessarily result in formal action for breach; whether formal breach proceedings are initiated is likely to depend on the nature and circumstances of the breach. In certain cases, it may be determined that it is appropriate to commence formal action for breach immediately (such as, for example, where the offender has absconded or demonstrated a lack of motivation or willingness to comply with the order). However, in many instances breaches are dealt with administratively, through the use of informal discussions with an offender, and the issuing of formal cautions and warnings.

11.8 The Community Correctional Services Offender Management Manual identifies five steps or sanctions that may be taken on breach:

- **Step 1**—Investigation of any absence and discussion with the offender within five working days of the absence. The offender must sign an absentee report acknowledging the unacceptability of the absence. This process must be followed for any subsequent absences. In some instances, the offender may be referred to a formal cautioning program.

- **Step 2**—Implementation of a compliance plan developed by the supervision officer in consultation with a Senior Community Corrections Officer.

- **Step 3**—If the offender’s behaviour deteriorates further, a formal and final warning is issued and the offender, Officer in Charge or Senior Community Corrections Officer, and supervising officer must sign a Formal/Final Warning form. This step may only be taken once during the term of an order.

- **Step 4**—A Location Manager Review is the final opportunity for an offender to demonstrate a commitment to comply with an order before formal breach action is initiated. This meeting is chaired by the Location Manager and includes the offender, supervising officer and Officer in Charge/Senior Community Corrections Officer. The Location Manager has discretion to determine the most appropriate sanction.

- **Step 5**—Commencement of formal breach action.

11.9 Consultation with an Officer in Charge or Senior Community Corrections Officer on the appropriate action for breach in an individual case is mandatory if an offender has incurred a certain number of unacceptable absences. This varies by the type of order and the offender’s risk level. For example, while consultation is only required after five absences by a low-risk offender on a CBO, in the case of a high-risk offender on an ICO, consultation must occur after only two absences.

11.10 Formal breach action is initiated by a charge being filed by people prescribed for this purpose (the DPP, Secretary to the Department of Justice, a legal practitioner or executive employed by the OPP, a Senior Prosecution Officer employed by CORE, or a community corrections officer). On a charge being filed, an application can be made to the registrar at any venue of the Magistrates’ Court for the issue of a summons to answer the charge or a warrant to arrest the offender. Breach proceedings can be commenced any time up until three years after the date on which the breach was alleged to have occurred. This means that breach proceedings can be commenced after an order has already expired.

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945 Corrections Victoria (2007), above n 780, 2/4.9.
946 Ibid.
947 Ibid.
948 Sentencing Act 1991 (Vic) ss 18W(1) (CCTO), 26(1) (ICO), 47(1) (CBO) and 79(1) (adjourned undertaking). Persons prescribed for the purposes of these sections are set out in reg 6 of the Sentencing Regulations 2002 (Vic).
949 Sentencing Act 1991 (Vic) ss 18W(3) (CCTO), 26(2) (ICO) and 47(2) (CBO) and 79(3) (adjourned undertaking).
950 Sentencing Act 1991 (Vic) ss 18W(2) (CCTO), 26(1A) (ICO), 47(1A) (CBO) and 79(2) (adjourned undertaking).
11.11 The powers of a court on breach in Victoria vary depending on the type of order and its positioning in the sentencing hierarchy. On breach of a CCTO, which sits just below immediate imprisonment, on failure by an offender to comply with any condition of the order (regardless of whether the offender has committed a new offence) there is a presumption that the offender should serve the whole part of the sentence that was to be served in the community in prison unless it ‘would be unjust to do so in view of any exceptional circumstances arising since the combined custody and treatment order was made’ (in which case the court can confirm the order originally made).\textsuperscript{951}

11.12 Slightly more flexibility is provided in the case of breaches of an ICO, which sits below CCTOs, DTOs and home detention, but above a suspended sentence. Similar to a CCTO, if an offender breaches an ICO by committing a new offence, the court must commit the offender to prison for the unexpired portion of the sentence (as at the date of breach), unless of the opinion that it would be unjust to do so in view of any exceptional circumstances that have arisen since the order was made (in which case the court may either vary or confirm the order).\textsuperscript{952} However, if the breach of the order is not due (in whole or in part) to the offender committing new offences but rather a failure to comply with other conditions of the order, the court’s discretion is not limited in this way. The court in such circumstances has the power to cancel, vary or confirm the order unencumbered by the ‘exceptional circumstances’ requirement.\textsuperscript{953} The power to vary an ICO includes the power to alter the term of imprisonment as well as any special conditions.\textsuperscript{954} The power to ‘vary’, however, does not allow the court to order the term of imprisonment be suspended as it has been held that ‘[t]his amounts to re-sentencing the offender by imposing a different sentence’.\textsuperscript{955}

11.13 Much more flexibility is provided to courts in the case of offenders who have breached a CBO. On breach, a court is permitted to vary the order, confirm the order, or cancel the order and resentence the offender.\textsuperscript{956} If a court decides to cancel a CBO and resentence the offender, it is required to take into account the extent to which the offender had complied with the order before its cancellation.\textsuperscript{957}

11.14 Breaches of suspended sentence orders fall into a different category to CCTOs, ICOs and CBOs, since they are not supervised by Community Corrections and can only be breached by the offender committing a new offence punishable by imprisonment during the operational period of the order. Breach proceedings for suspended sentences can be commenced in a number of ways. If a court has found an offender guilty of another offence punishable by imprisonment, provided the offender is present\textsuperscript{958} and an application has been made by a prescribed person (the Director of Public Prosecutions or informant), or member of a prescribed class of persons (a legal practitioner or executive employed by the OPP or a police officer),\textsuperscript{959} it is permitted to hear the breach proceedings (if the sentence was originally imposed in that court), or to transfer the matter to the court that imposed the sentence (in which case the offender can be granted bail or remanded in custody pending his or her appearance at that court).\textsuperscript{960} If such action is not taken, an application can be made to the registrar of the Magistrates’ Court for a summons to answer the breach of the suspended sentence or a warrant to arrest the offender.\textsuperscript{961}

\textsuperscript{951} Sentencing Act 1991 (Vic) ss 18W(5)–18W(6).
\textsuperscript{952} Sentencing Act 1991 (Vic) ss 26(3A)–26(3B).
\textsuperscript{953} Sentencing Act 1991 (Vic) ss 26(3A)–26(3B).
\textsuperscript{954} Dimitrovski v Jones (Unreported, Supreme Court of Victoria, 23 August 1994, Aitken v Moten-Connor (Unreported, Supreme Court of Victoria, 9 February 1995, Mandie J) 8.
\textsuperscript{955} Aitken v Moten-Connor (Unreported, Supreme Court of Victoria, 9 February 1995, Smith J).
\textsuperscript{956} Sentencing Act 1991 (Vic) s 47(3A).
\textsuperscript{957} Sentencing Act 1991 (Vic) s 47(4).
\textsuperscript{958} If the offender is not present, on finding the offender guilty of the breach offence the court may exercise any of the power the registrar can on breach: Sentencing Act 1991 (Vic) s 31(4E).
\textsuperscript{959} Persons prescribed for the purposes of s 31 of the Sentencing Act 1991 (Vic) are set out in regulation 6 of the Sentencing Regulations 2002 (Vic).
\textsuperscript{960} Sentencing Act 1991 (Vic) s 31(1).
\textsuperscript{961} Sentencing Act 1991 (Vic) ss 31(1A)–(2A).
11.15 The ‘exceptional circumstances’ requirement that limits a court’s discretion on breach of a CCTO and ICO also appears in the suspended sentence provisions. On breach of a suspended sentence a court must order the offender to serve all or part of the original gaol term ‘unless it is of the opinion that it would be unjust to do so in view of any exceptional circumstances’.\textsuperscript{962} If the court finds there are exceptional circumstances warranting an alternative course of action the court may:

- activate part of the sentence or part-sentence held in suspense;
- extend the period of the order suspending the sentence to not later than 12 months after the date of the order; or
- make no order with respect to the suspended sentence.\textsuperscript{963}

11.16 The ‘exceptional circumstances’ requirement was introduced in 1997. The stated rationale for introducing this requirement was that the courts were in many cases choosing not to activate suspended sentences of imprisonment on breach, thereby eroding the effectiveness of the order and bringing ‘the legal system into disrepute’.\textsuperscript{964} The inclusion of the same requirement in the provisions dealing with breaches of CCTOs and ICOs was primarily on the basis of their status as ‘prison sentences’ served in the community.\textsuperscript{965}

Breach Rates and Outcomes in Victoria

Suspended Sentences

11.17 As discussed in Chapter 2 of this Report, 27.5 per cent of suspended sentence orders handed down in Victoria by the higher courts and Magistrates’ Court over the two-year period 2000–02 were found to have been breached by further offending.\textsuperscript{966} As illustrated by Figure 40 (below), the breach rate of suspended sentences was significantly higher for sentences handed down in the Magistrates’ Court than for those imposed by the higher courts (29.1 per cent, compared to 8.6 per cent).

11.18 Although the data only represent the date at which formal breach proceedings were finalised, rather than the actual date of breach, most breaches appear to have taken place early on in the order. Around half of the orders breached were finalised within 12 months of the sentence being imposed, while nearly nine in ten of the breaches were finalised within two years.

\textsuperscript{962} Sentencing Act 1991 (Vic), s 31(5A).
\textsuperscript{963} Sentencing Act 1991 (Vic), s 31(5).
\textsuperscript{964} Victoria, Parliamentary Debates, Legislative Assembly, 24 April 1997, 874 (Jan Wade, Attorney-General).
\textsuperscript{965} Ibid.
\textsuperscript{966} The data referred to in this section are taken from Turner (2007), above n 22.
11.19 The limited powers of a court on breach of a suspended sentence under the *Sentencing Act 1991* (Vic) are reflected in the breach outcomes. Of those offenders found to have breached a suspended sentence by further offending, almost two out of three (62.8 per cent) offenders had their sentence wholly or partially restored and were committed to prison. In around 27 per cent of cases, the breach resulted in no order being made, while in just over 10 per cent of cases the operational period of the order was extended (see Figures 41 and 42, below).

Source: Turner (2007)
Community Sentences

11.20 Only limited information is available on the breach rates of specific community orders in Victoria; while some data are published by the Steering Committee for the Review of Government Service Provision, these data include offenders subject to community sentences, as well as offenders on post-sentence orders, such as parole.\textsuperscript{967} This makes it difficult to assess the breach rates of individual orders, or the nature of the breach (that is, whether the breach was of conditions only, by further offending, or a combination of the two).

11.21 Based on the data submitted for 2006–07, 61 per cent of community corrections orders with a supervision component in Victoria were successfully completed over 2006–07.\textsuperscript{968} This compares to a national average completion rate of 71 per cent. Tasmania had the highest rate of completion of orders with a supervision component (93 per cent), followed by the Australian Capital Territory (88 per cent), New South Wales (81 per cent) and South Australia (72 per cent).\textsuperscript{969}

11.22 A high proportion of orders with a reparation (unpaid work) component was completed in Victoria (75.5 per cent), compared to a national average completion rate of 70 per cent.\textsuperscript{970}

\begin{figure}
\centering
\includegraphics[width=\textwidth]{figure42.png}
\caption{The percentage of suspended sentences by the result of breach and court level, 2000–01 and 2001–02}
\end{figure}

Source: Turner (2007)

\begin{flushleft}
\textsuperscript{967} Data on the completion rate of community corrections orders for 2006–07 are reported on in the Productivity Commission’s \textit{Report on Government Service Provision: Steering Committee for the Review of Government Service Provision} (2008), above n 212, 8.27–8.28 and Table 8A.19.

\textsuperscript{968} Ibid Table 8A.19. ‘Community corrections orders’ include both sentencing orders (such as home detention, intensive correction orders, combined custody and treatment orders, drug treatment orders and community-based orders) as well as post-sentence orders (parole and home detention as a back-end option).

\textsuperscript{969} Ibid.

\textsuperscript{970} Ibid.
\end{flushleft}
The most comprehensive Victorian data produced on breach of community sentences in Victoria were published in the Final Report of the Review of Community Correctional Services conducted by Arthur Andersen Business Consulting in 2000. The review reported breach rates for community orders for 1999–2000, ranging from 29 per cent for CWOs to 45.8 per cent for CBOs. As illustrated in Table 14, the majority of breaches were breaches of conditions only, rather than breaches by further offending; 76 per cent of breaches of CWOs, 61 per cent of breaches of ICOs and 57 per cent of breaches of CBOs did not involve further offending, but rather a failure to comply with other conditions of the order.

Table 14: Breach rates by order type 1999–00

<table>
<thead>
<tr>
<th>Order Type</th>
<th>Breach Rate</th>
<th>Breach Rates by Type</th>
</tr>
</thead>
<tbody>
<tr>
<td>CBO</td>
<td>45.8%</td>
<td>Breach of conditions only 26.3% Further offending + breach conditions 13.4% Further offending only 6.1%</td>
</tr>
<tr>
<td>CWO</td>
<td>29.0%</td>
<td>Further offending only 21.9%</td>
</tr>
<tr>
<td>ICO</td>
<td>37.9%</td>
<td>Breach of conditions only 23.1% Further offending + breach conditions 10.4% Further offending only 4.5%</td>
</tr>
</tbody>
</table>

Source: Andersen (2000)

A later report prepared by Corrections Victoria which included data for 2000–01 confirmed that breaches of conditions of community corrections orders at that time continued to constitute the majority of breaches (approximately 74 per cent).

A recent analysis of higher courts data undertaken by the Council found that ICOs imposed in those courts had a higher breach rate than CBOs (35 per cent compared with 25 per cent), although the CBOs examined included CBOs with a community work condition only.

The most common outcome on breach of a CBO (49.6 per cent of cases) was for the order to be cancelled and the offender to be resanvased for the original offence or offences for which the order was made. In just under one in five cases, the order was confirmed, while in 17.4 per cent of instances the order was varied.

971 Arthur Andersen (2000), above n 611, 37.
972 Ibid.
974 Fisher (2007), above n 22.
Figure 43: The percentage of CBO breach hearings by outcome of hearing for CBOs imposed in the higher courts between 2000–01 and 2003–04

Source: Fisher (2007)

For ICOs, the most common outcome was for the offender to be ordered to serve the remainder of the sentence in prison (39.2 per cent of cases), followed by the order being varied (24.1 per cent) or confirmed (19 per cent) (see Figure 44, below).

Figure 44: The percentage of ICO breach hearings by outcome of hearing for ICO, imposed in the higher courts between 2000–01 and 2003–04

Source: Fisher (2007)
Comparison of Breach Rates

Based on the Arthur Andersen data, and taking into account the Council’s findings on the breach rates of suspended sentences, it seems that:

- based on the Council’s data for the higher courts only, ICOs had the highest breach rates (35.0 per cent), followed by CBOs (25.4 per cent), while suspended sentences had a breach rate of 8.6 per cent;
- overall, CBOs have the highest breach rates (45.8 per cent), followed by ICOs (37.9 per cent), CWOs (29.0 per cent) and suspended sentences (27.5 per cent);
- breach by further offending is most common for suspended sentences (27.5 per cent) followed by CBOs (19.5 per cent), ICOs (14.9 per cent) and CWOs (7.1 per cent); and
- offenders on CBOs are most likely to be breached solely on the basis of a failure to comply with the conditions of the order (26.3 per cent, versus 23.1 per cent for ICOs and 21.9 per cent for CWOs).

Issues and Consultation

Non-Compliance, Enforcement Practices and Community Confidence

Enforcement practices are likely to have a strong impact on sentencers’ confidence and, over time, community confidence, in community sanctions. However, as one commentator has suggested:

Whether tougher enforcement rates lead to lower reconviction rates remains an open question. The evidence … offers no grounds for thinking that the deterrent effect of enforcement ensures fuller compliance, and some grounds for thinking that tough enforcement can lead to low retention rates in programmes, which in turn lead to higher reconviction rates …

A number of studies have confirmed an association between program retention and reconviction rates. While these findings in some cases may be due partly to selection effects because those who are at low risk of reoffending are also more likely to complete programs, even where factors suggesting a higher risk of reoffending, such as previous convictions, have been controlled for, this association has been found. For example, an evaluation study of the Drug Treatment and Testing Order (DTTO) pilots in England and Wales established in three locations found that the location with a tougher approach to compliance (including abstinence conditions) had a higher revocation rate (76 per cent, compared to 64 per cent and 52 per cent in the other locations), and also a higher rate of reconvictions (91 per cent compared to 73 per cent and 65 per cent). These findings suggest that tougher enforcement practices may in fact be counterproductive in terms of reducing offenders’ longer-term risks of reoffending—particularly where action taken on breach has the result of disrupting an offender’s participation in programs.

The following principles have been suggested as useful in reconciling the interests of promoting community confidence in community penalties, and achieving lower rates of reoffending by retaining offenders on programs:

- having a graduated response to non-compliance (such as that adopted by Corrections Victoria)—from initial meetings, to formal warnings and finally the commencement of formal action for breach. Under this approach it is argued the substitution of a prison sentence on breach should be reserved for those offenders who have, despite the best efforts of Correctional Services and others, demonstrated an unwillingness to comply;
- engaging a range of strategies to enhance compliance;

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976 Ibid 153.
977 Ibid 162.
978 Hough et al.(2003), above n 666.
rewarding compliance, rather than simply punishing non-compliance, including through the introduction of a graduated system of rewards. It is suggested that ‘routes to positive rewards should be spelled out and operated even-handedly and transparently’ in order to avoid any perception of decisions being made in an arbitrary way;

putting in place organisational rewards to compliance, such as targets for the number of orders to be completed successfully.979

11.32 While closely interrelated with the issue of breach and enforcement of orders, little attention typically has been focused on the strategies that are effective in enhancing offenders’ compliance with community orders. The four main kinds of compliant behaviour and strategies have been characterised as follows:

1. Instrumental/prudential compliance—achieved by way of incentives and/or disincentives;
2. Normative compliance—which may result from acceptance/belief in a norm, attachment leading to compliance, and/or legitimacy;
3. Constraint-based compliance—including physical restrictions or requirements on an individual leading to compliance, restrictions on access to the target and/or structural constraints; and
4. Compliance based on habit or routine.981

11.33 Most criminal justice responses are focused on instrumental compliance (through rewards and sanctions) or constraint-based compliance (through, for example, imprisonment, and electronically monitored curfews and home detention) backed up by instrumental disincentives should the offender breach (such as the risk of imprisonment on breach). However correctional responses also have an element of seeking to achieve normative compliance and compliance based on habit and routine; for example, through offender programs that aim to change offenders’ thinking patterns, and in the way correctional officers interact with offenders through ‘pro-social’ modelling.983

11.34 Although there are a number of disincentives built into many Victorian community penalties (such as the threat of being imprisoned on breach), with the exception of specialist orders, such as the Drug Treatment Order, less emphasis has been placed on building in formal incentives designed to encourage offenders to comply. Corrections Victoria, in its Community Correctional Services Offender Management Manual, notes that while CCS staff can make use of positive reinforcement, through praise and pro-social modelling: ‘CCS has limited other incentives to offer those offenders who comply positively with the conditions of their order, apart from a reduction in the frequency of supervision.’984

979 Hedderman and Hough (2004), above n 975, 164–5.
983 The process of pro-social modelling is described as ‘the practice of offering praise and reward for … pro-social expressions and actions … the probation officer becomes a positive role model acting to reinforce pro-social or non-criminal behaviour’: Christopher Trotter, The Supervision of Offenders: What Works (1993).
984 Corrections Victoria (2007), above n 780, 2/4.11.
11.35 The legislative framework in some jurisdictions is more flexible in that it allows offenders to be rewarded for making good progress under orders. For example, under the *Crimes (Sentence Administration) Act 2005* (ACT), a court may amend or discharge an offender’s good behaviour order, including ‘if satisfied that the conduct of the offender makes it unnecessary that the offender continue to be bound by the order’.

Similarly, the *Criminal Justice Act 2003* (UK) allows for the revocation of a community sentence while the order is in force, including if the ‘offender is making good progress or is responding satisfactorily to supervision or treatment’. Around 6 per cent of suspended sentence orders and 13 per cent of community orders are terminated early in light of good progress.

11.36 New Zealand also is moving towards greater flexibility in how its orders are administered. Under the existing *Sentencing Act 2002* (NZ) a probation officer may remit up to 10 per cent from the number of hours of community work imposed by the court as part of a community work sentence if the offender has a good record of compliance with the order. Under the *Sentencing Act 2002* (NZ) courts have a power to vary or cancel orders (including supervision, community work, intensive supervision, community detention and home detention), if:

having regard to any change in circumstances since the sentence was imposed and to the manner in which the offender has responded to the sentence—

(i) the rehabilitation and reintegration of the offender would be advanced by the remission, suspension, or variation of any special conditions, or the imposition of additional special conditions; or

(ii) the continuation of the sentence is no longer necessary in the interests of the community or the offender.

11.37 The new form of home detention introduced in New Zealand further allows a probation officer to authorise an offender who has served at least three quarters of a sentence of home detention of six months or more to leave the residence for up to 4 hours a day without a specified purpose for any or all days remaining to be served under the sentence.

11.38 Reducing the restrictions and demands on an offender subject to a community order over time might also be facilitated by increasing the role of the courts in monitoring offenders’ progress while under orders. More active judicial supervision is recognised as a key feature of the ‘problem solving court’ approach, which has been embraced in Victoria through the establishment of specialist courts and lists, such as the Drug Court and Koori Court, the problem-solving practices adopted by the Magistrates’ Court of Victoria and other courts, including through initiatives such as the Neighbourhood Justice Centre and the Court Integrated Services Program.

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985 *Crimes (Sentence Administration) Act 2005* (ACT) s 112. The example provided is not legislatively prescribed, but is provided in the Act as one example of circumstances that might justify the order being discharged.


988 *Sentencing Act 2002* (NZ) s 67.

989 *Sentencing Act 2002* (NZ) ss 54(1)(c) (supervision), 54K(1)(c) (intensive supervision), 68(1) (community work), 69(1)(c) (community detention) and 80F(1)(d) (home detention).

990 *Sentencing Act 2002* (NZ), s 80C(5).


992 Freiberg (2005), above n 660, 198.

993 The Neighbourhood Justice Centre, located in Collingwood, was established by the *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic) passed in August 2006.

994 The Department of Justice states that: ‘The focus of CISP is on improving access to and coordination of, social services such as drug and alcohol treatment, housing, mental health and disability services: Department of Justice, *Court Integrated Service Overview* (2006) <http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebb33f085788e03/CISP_overview.pdf> at 12 February 2008.
In some court locations a formal cautioning scheme operates in circumstances in which an offender has failed to comply with the conditions of an order as an intermediary step before a decision is made to commence formal breach proceedings. There is some evidence from England and Wales that a formal cautioning system on breach that operates as a ‘final warning’ to offenders may result in a lower reconviction rate.995

11.39 The Halliday Report, referring to the then-sentencing and correctional environment in the United Kingdom, made specific reference to the need to improve sentence management, including through the more active involvement of sentencers post-sentence:

There is currently a sharp division of roles between sentencers who confine themselves to the immediate offences, and surrounding circumstances, and the prison and probation services who implement the sentences passed. There is no requirement to work collectively in managing the sentence as a whole, or to take account of the offender’s progress during sentence. Sentencers as a rule receive little or no “feedback” from their decisions. There is little flexibility during a community sentence and during the licence period of custodial sentences of 12 months or over, to reward an offender who is doing well by ‘lifting’ some of the penal measures in the sentence, or … to ‘toughen’ the sanctions where things are not going so well. Sentencers can, and sometimes do, order progress reports and the review has heard that where this happens, it improves the likelihood of successful completion of community orders. The Drug Treatment and Testing Order … involves the court throughout the term of the order through regular review hearings. These enable sentencers to consider the offender’s progress and to determine whether changes are needed to the requirements and provisions of the order. An 18-month evaluation of DTTOs … showed that the review process was welcomed by staff and offenders as making a positive contribution to the treatment process. A system which, like the DTTO, engages sentencers in the post-sentencing process and encourages them to focus more on the outcomes and implications of their sentences could help improve results, in terms of crime reduction and public confidence.996

11.40 England and Wales is one of a number of jurisdictions that has now adopted a more formal approach to judicial monitoring as it applies in a post-sentencing context. Under the Criminal Justice Act 2003 (UK), a court is permitted and in some cases required, to include provision for regular court reviews of community sentences.997 The Secretary of State also may enable or require a court making a community order to provide for the requirement to be reviewed periodically by that or another court.998 Similarly, whereas under Victorian orders it is possible for courts to attach a judicial monitoring condition to a CBO under the head of ‘any other condition that the court considers necessary, or desirable’, under changes to the Sentencing Act 2002 (NZ) in New Zealand specific provision is made for courts to attach a judicial monitoring condition to some orders, such as intensive supervision orders, in circumstances in which the court is satisfied that ‘because of the special circumstances of the offender, this is necessary to assist the offender’s compliance with the sentence’.999

995 Ian Hearnden and Andrew Millie, Investigating Links between Probation Enforcement and Reconviction (2003), 8. This study found that those who had breach proceedings initiated as a ‘final warning’ had a 58 per cent reconviction rate, compared to 77 per cent of offenders who did not go through this process, although neither group performed as well as those who completed their orders successful (35 per cent reconvicted) or whose orders were terminated early in light of good progress (23 per cent reconvicted). It should be cautioned that this study did not take into account the risk levels of offenders which may also have played an important part.

996 Home Office (2001), above n 46, [7.5].

997 Criminal Justice Act 2003 (UK) ss 178 (community orders) and 191 (suspended sentence orders). A community order or suspended sentence order imposing a drug rehabilitation requirement may (and must if the treatment and testing period is more than 12 months) provide for the requirement to be reviewed periodically at intervals of not less than one month at which time progress reports are provided to the court on the offender’s progress under the requirement: Criminal Justice Act 2003 (UK) s 210.

998 Criminal Justice Act 2003 (UK) s 178. Under section 178, the Secretary of State can also allow a court to amend a community order so as to include or remove a provision for review by a court, and make provision as to the timing and conduct of reviews and as to the powers of the court on a review.

999 Sentencing Act 2002 (NZ) s 54I(2).
Developing Effective Responses to Breach

Once a breach has occurred, it is important that the responses to the offender’s failure to comply with the order are appropriate. A number of principles have been suggested as properly guiding the development of strategies to respond to non-compliance:

- certainty—the perceived likelihood of detection and punishment of any violations of the order, and the likely consequences of breach;
- celerity—ensuring a swift response by reducing the time between the violation and the sanction;
- consistency—reaching similar decisions in similar situations and responding to breaches in a consistent way;
- parsimony—ensuring that sanctions for non-compliance are not more intrusive or severe than necessary;
- proportionality—the level of punishment or sanction should be commensurate with the seriousness of the offender’s behaviour;
- progressiveness—continued violations should be met with increasingly stringent responses; and
- neutrality—responses must be seen by offenders as applied impartially and consistently with existing rules, ethics and logic.1000

The principles of celerity (swiftness of response) and consistency could be viewed as particularly critical aspects of any breach strategies. While based on existing evidence, it seems that the strictness with which orders are enforced has little overall impact on reconviction rates;1001 strategies to ensure that any breaches of orders are detected and dealt with quickly and consistently may play an important role in enhancing compliance and in sentencers’ and community confidence in these orders.

A number of those the Council consulted raised concerns about the time taken to respond to breaches, including the time taken to bring breach matters back before the courts, and the importance of ensuring a consistent approach in responding to breaches. The delays in commencing proceedings for breach are largely a by-product of the current mechanisms for responding to offenders who have breached conditional orders. No distinction is made between breaches constituted in whole or in part by further offending and breaches of other conditions of the order. Regardless of the nature of the breach, a decision must first be made to charge an offender with breaching the order and the matter listed to be determined if it is the original sentencing court that must assess whether the offender has breached the order and what action should be taken.

The potential for inconsistent treatment of offenders who breach orders by failing to comply with the conditions of the order arises from the discretion given to those administering the order to determine when and what action to take on breach of an order (for example, whether an offender should be issued with a warning or a court proceeding initiated) and to the courts in determining the appropriate outcome on breach. The treatment of offenders may therefore vary depending on the individual correctional officer, regional manager and judicial officer who is charged with making these decisions.

The United States National Institute of Corrections has identified the need and desire to achieve a level of consistency and equity in responding to breaches, as one of the main drivers of reform in developing better responses to technical breaches of conditions:

In an agency with many probation or parole officers, there is the possibility that similar violations will be handled differently, even when everyone is operating in good faith. Differences in personal philosophy, supervision style, and interpretations of agency policy can generate unintentional disparities in violation responses. This is one of the most frequent reasons agency policymakers become interested in looking more closely at the violation process.


1001 See, for example, Hearnden and Millie (2003), above n 995.
Indeed, among those jurisdictions that looked empirically at the practice of responding to violations, it is common to find considerable disparity in their handling. One offender may have a record of numerous technical violations and still be on supervision, while another may have his or her parole or probation revoked after only one minor technical violation. This raises questions of fairness and, absent clear rationale for these differences, can often undermine the credibility of the supervising agency.1002

A range of approaches could be considered that might assist in reducing delays in responding to breaches and increasing consistency of treatment. For example, in addition to the kinds of administrative guidelines that guide the exercise of discretion of those supervising orders in Victoria, a broader range of intermediate sanctions could be identified that could be applied to offenders in lieu of a court hearing. This type of approach has been used in a number of US jurisdictions, including Arizona, Colorado, Indiana, Georgia and Oregon, where formal administrative processes have been developed that allow probation officers or supervisors to apply graduated intermediate sanctions for technical breaches of probation orders. These forms of sanctions generally are reserved for cases that would have warranted the initiation of court proceedings, but where it is likely the confirmation of the order ‘with increased sanctions’ would have been recommended.1003

Examples of intermediate sanctions that may be applied by a probation officer or supervisor under these administrative sanction schemes can include:

- counselling or the issuing of a formal warning;
- increased levels of supervision or reporting;
- removal of travel or other privileges;
- directing the offender to participate in counselling or treatment;
- commencing or increasing the frequency of drug/alcohol testing;
- directing the offender to participate in a program;
- ordering additional hours of community service (up to a maximum number of hours);
- applying a curfew condition (up to a maximum number of days); and
- requiring the offender to comply with electronic monitoring.1004

In some cases there is also a power for a probation officer or supervisor on breach to order the offender to be detained in custody up to a maximum number of days.

There are a number of protections that have been built into these administrative arrangements, designed to protect the rights of offenders. For example, under the Oregon structured intermediate sanctions program, an offender can only be made subject to the administrative sanction scheme if the court first makes an order to this effect, and an order can only be made with the offender’s consent. If an offender subject to this process commits a breach of the conditions of the order, the probation officer must prepare and present a report to the offender describing the alleged breach. He or she is also provided with a form notifying the offender of his or her rights to a court hearing and to be legally represented and describing the sanction that will be imposed if the offender chooses to waive his or her rights to a court hearing and chooses instead to be dealt with by the administrative sanctioning process. The offender therefore can elect at this point to have the matter dealt with by a court rather than through the administrative process. If an offender denies or contests the alleged breach or does not accept the administrative sanction proposed, court proceedings for breach can be initiated.1005

1004 Ibid 75.
1005 Oregon Administrative Rules, Department of Corrections, Division 58.
11.50 There are also safeguards in place for the prosecution and the courts to ensure breaches of conditions are dealt with appropriately. Under the arrangements in Oregon, the court and district attorney must be notified of breaches admitted by probationers and the sanctions imposed by the relevant community corrections agency. When a sanction involves modifying the condition of probation, the court must sign and return the request before the amended condition comes into effect, unless specific authority has been given to the community corrections agency by the sentencing court to do so. Prior to the imposition of the sanction or within four working days after receiving notice that a sanction has been imposed on a probationer, the court on its own initiative or on application by the district attorney can order the offender to be brought back before the court, at which time the court may revoke the order, modify the conditions of the order or impose other or additional sanctions on the offender for the breach.\(^\text{1006}\) No court action for breach can be commenced once the probationer has completed an intermediate sanction.\(^\text{1007}\)

11.51 The severity of the administrative sanction that may be ordered is guided by the use of a structured sanctioning grid and increases with the severity of the breach, the original offence(s) for which the sentence was imposed and the level of supervision.\(^\text{1008}\)

11.52 An evaluation of the Oregon scheme reported that offenders subject to administrative sanctions were more likely to participate in treatment (46 per cent compared to 39 per cent), more likely to have breaches detected (64 per cent compared to 52 per cent) and less likely to be reconvicted (8 per cent compared to 14 per cent).\(^\text{1009}\)

11.53 Other approaches to responding to breach of conditions of orders include:

- the establishment of specialist units to manage offenders at high risk of breaching;\(^\text{1010}\)
- the use of corrections review boards to deal with more serious technical breaches in lieu of a court hearing;\(^\text{1011}\)
- the introduction of specialist courts or lists.\(^\text{1012}\)

\(^{1006}\) ORS 137.593(2)(c).

\(^{1007}\) ORS 137.593(3).


\(^{1010}\) For example, Connecticut has established a Technical Violation Unit program, which manages probationers assessed at ‘imminent’ risk of committing a technical violation of their orders. Caseloads of officers managing these offenders are capped at 25 per officer and offenders are managed in accordance with detailed case plans. An early evaluation of this program has suggested the program may be having positive results. Despite the fact these offenders were assessed at high likelihood of breaching their orders, only around one third of program participants went on to breach their orders within the first 120 days of being in the program. The majority of these breaches were technical breaches rather than the commission of a new offence: Brian Hill, ‘Four-Point Strategy Reduces Technical Violations of Probation in Connecticut’ in US Department of Justice, National Institute of Corrections (2006), above n 1008, 26, 28–30.

\(^{1011}\) Madeline M. Carter and Ann Ley, ‘Making it Work; Developing Tools to Carry Out the Policy’, in US Department of Justice, National Institute of Corrections (2001), above n 1002, 51, 67. The membership of these boards in some cases is confined to senior level correctional staff, while the boards operating in other jurisdictions have a broader membership. Community Review Boards have been established in some states to review non criminal violations of supervision conditions and recommend appropriate responses for non-compliance.

\(^{1012}\) For example, Florida has established a Violation of Probation Court.
A Community Corrections Board for Victoria?

11.54 The high proportion of breaches of community corrections orders in Victoria that appear to be technical breaches rather than breaches by further offending, together with concerns raised in more recent consultations about delays in responding to breaches and consistency of these responses has led the Council to revisit the possibility of establishing a Community Corrections Board in Victoria.

11.55 The option of introducing a Community Corrections Board in Victoria to respond to failure to comply with the conditions of intensive correction orders (ICOs) and community-based orders (CBOs) was explored in the 2002 Sentencing Review’s Discussion Paper. It was suggested that such a board may have some advantages over the current system as breaches could be responded to more quickly and consistently. In terms of membership, it was suggested that the Board could be chaired by a serving judicial officer of the County Court or Magistrates’ Court, or by a senior legally qualified person or person distinguished in public service or service to the community. Such a board, it was envisaged, would have the court’s power to vary orders. However, the board’s powers would be confined to the ability to suspend, vary or confirm orders previously made by the court. If the Board were of the view that these powers are too limited to deal with the particular circumstances of the case before it, it should be able to refer the matter back to the court.

11.56 The Review abandoned this idea on the basis of limited support for the option and what it identified as ‘legal, logistical and practical impediments’ to its establishment, and instead recommended in favour of further investigation being undertaken as to whether an intermediate administrative or judicial process should be developed to deal with breaches of conditions of orders. Some of the concerns raised by stakeholders in response to the Sentencing Review’s original proposals were that such a process:

- would detract from the seriousness of the order and the importance of a court dealing with what is, in effect, a contempt of court through non-compliance;
- would reduce the accountability of the system;
- would raise issues of natural justice and whether offenders should be legally represented; and
- might lead to problems in respect of sentencing federal offenders if providing these powers to the Board was viewed as investing judicial functions in a non-judicial body, which is prohibited under Commonwealth law.

11.57 The Council does not believe these issues are insurmountable and supports further consideration being given to the possible establishment of such a Board to improve current responses to breach.

Powers on Breach

The Current Approach

11.58 In Victoria, the severity of the consequences that are intended to follow from breach are aligned with the intended severity of the sentence, taking into account the positioning of an order in the sentencing hierarchy. For example, while there is a presumption that a breach of a suspended sentence should result in the offender having to serve the whole period of suspended term of imprisonment in prison, in the case of breach of a CBO, which is a non-custodial sanction positioned lower in the hierarchy, the court has a broad discretion, including to confirm the order, to vary the order, or to cancel the order and resentenced the offender.

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1014 Ibid.
Presumably the seriousness of the breach consequences is not only intended to signal the appropriate positioning of an order in the sentencing hierarchy, but to deter offenders from reoffending. However, current evidence suggests that the severity of the consequences of breach of an order may be less important from a deterrence perspective than the certainty the breach will be detected and that consequences will follow.\textsuperscript{1017} The apparently higher breach rates of suspended sentences by reoffending compared to other orders, such as CBOs and ICOs, despite the more serious consequences of breaching a suspended sentence, could be viewed as consistent with deterrence research findings. Whereas offenders subject to a suspended sentence order, and who are under no formal supervision may consider the likelihood of further offences being detected as relatively low, offenders subject to community orders who are in regular contact with community corrections may well assess the risk of detection as much greater.\textsuperscript{1018}

There may be an argument, however for greater flexibility to be exercised in responding to breaches that do not involve the commission of new offences. A number of studies have confirmed that the existence of technical violations of orders is not necessarily associated with a higher likelihood that the person will reoffend,\textsuperscript{1019} although it may be of concern for other reasons (such as that the offender is not serving the sentence imposed as intended, thereby failing to satisfy the original purposes of sentencing).

Some jurisdictions have adopted a more flexible approach to breach of intermediate orders and have not tied breach consequences to the intended severity of the sentence. For example, in Western Australia, a court has the same powers on breach of an intensive supervision order (ISO) as it does on breach of other forms of community orders, such as CBOs.\textsuperscript{1020} Similarly, in New Zealand, which has introduced intensive supervision, home detention and community detention (a curfew with electronic monitoring) as sentencing orders, a broad range of powers are available to a court on breach. For example, on breach of a home detention order or ISO, a court is permitted to:

- remit, suspend, or vary any special conditions imposed by the court, or impose additional special conditions;
- cancel the sentence (and make no further order); or
- cancel the sentence and resentence the offender for the original offence (in which case the court must take into account that portion of the order that remains unserved at the time the order is made).\textsuperscript{1021}

A court may invoke breach powers to achieve one or more of a number of purposes, including:

- to respond to the changed circumstances of an offender, including for the purposes of enhancing the likelihood of compliance;
- to ensure that the punishment of the offender and/or the other purpose or purposes the court intended to achieve through the original sentence imposed (if still relevant) are satisfied; and

\textsuperscript{1017} von Hirsch et al (1999), above n 981.

\textsuperscript{1018} Of course, there are a number of alternative explanations for this. For example, CBOs may target offenders at overall lower risk of reoffending than suspended sentence orders. The higher levels of support provided to offender on CBOs and other conditional orders designed to address factors related to their offending also might decrease overall risks of reoffending. The fact that formal action for breach may be initiated based on breach of conditions only could also decrease the opportunity of an offender to reoffend. The impact of offenders originally sentenced to a CBO, or ICO and resented on breach to a suspended sentence also might have an impact on the overall breach rates for suspended sentence orders. Apart from property offences, offenders sentenced to a suspended sentence in the Magistrates’ Court for the offence category ‘other’ (including justice offences, such as breach of another form of order) had the highest rates of breach (34 per cent): Turner (2007), above n 22.

\textsuperscript{1019} See, for example, Petersilia and Turner (1993), above n 182.

\textsuperscript{1020} In circumstances where the order is still in force, the court is permitted to confirm the order, amend the order, or cancel the order and resentence the offender for the original offence. If the order is not still in force, the court may cancel the order and resentence the offender for the offence: Sentencing Act 1995 (WA) ss 130(1) (commission of a new offence), 133 (breach of a requirement).

\textsuperscript{1021} Sentencing Act 2002 (NZ) ss 54K(3) (intensive supervision); 80F(4) (home detention). In the case of a home detention order, the court is also permitted to vary the home detention residence: s 80F(4)(b).
through the action taken on breach (such as, for example, the substitution of a suspended sentence for a CBO) to further deter the offender from non-compliance.

11.63 In terms of the severity of the response taken to breach, some commentators have argued that breach of an order should result in a sanction that is only moderately more severe than the original penalty, and that imprisonment should be used sparingly as a breach sanction.\textsuperscript{1022} The basis for their argument is twofold:

1. While the failure to complete the original sentence may call for the uncompleted part to ‘be served in some different, more easily enforced form’, it does not call for any additional severity; and

2. The act of breach, while arguably, a reprehensible act, calling for some added punishment justifies only a modest increase.\textsuperscript{1023}

11.64 The approach taken in Victoria could be viewed as generally consistent with these principles; however, some might consider the number of substitutional sanctions, such as CCTOs and ICOs, and consequences of breaching these orders as overly punitive—particularly if there is some net-widening from other lower-level orders. Taking CCTOs and ICOs as an example, while the act of breach, which is an offence, only attracts a small fine, the presumption is that any breach of a CCTO, and further offending by an offender on an ICO will result in the offender serving the whole of that part of the sentence that was to be served in the community (in the case of a CCTO), or the period left remaining on the sentence as at the date of breach (in the case of an ICO) in prison. On the one hand, because these orders are treated at law as direct substitutes for imprisonment, the imprisonment of the offender on breach could be viewed as entirely appropriate. On the other, it could be argued that these orders are qualitatively different to imprisonment and not true equivalents in terms of severity and the purposes sought to be achieved, to immediate imprisonment; on this basis it could be argued the imprisonment of an offender on breach of these orders for the duration of the order results in a more severe sentencing outcome.

The Interim Report

11.65 The Council’s approach to breaches of the proposed new orders in its Interim Report aimed to strike an appropriate balance between the need to avoid injustice in individual cases and the need to provide a proper incentive (or deterrent) to offenders to comply with the terms of orders imposed.

Breach of an IRO

11.66 As the Council envisaged that an imprisonment plus release order would generally be made in the case of more serious offending, we suggested that if the order were breached by further offending or by failing to meet other conditions of the order, the appropriate course of action in most cases would be cancellation of the order and committing the offender to prison for the unexpired portion of the sentence. However, we suggested courts should have the discretion to take an alternative course of action where this was considered justified in the circumstances. This was consistent with the Council’s general position that a degree of flexibility beyond that which is possible under the current ‘exceptional circumstances’ provisions is necessary in order to avoid injustice in individual cases. Cases in which it may be inappropriate for the court to make one of the above orders, it was suggested, might include:

- where the breach was of a trivial nature; or
- where the breach was of a more serious nature (for example, the commission of another offence) but was committed in circumstances where the offender was acting out of a genuine concern for others (for example, driving a sick child to a doctor while unlicensed).


\textsuperscript{1023} Ibid.
The Council therefore advocated the adoption of a test similar to that which existed prior to 1997; that the court should cancel the order and require the offender to serve the remainder of his or her sentence in prison ‘unless it is of the opinion that it would be unjust to do so in the circumstances’, in which case the court should be permitted to vary or to confirm the order. The Council further suggested that there may be some benefit in articulating the sorts of considerations that should be taken into account by the court in its determination, such as:

- the nature of the breach, the circumstances in which it was committed and the offender’s motivation;
- the extent to which the offender had complied with the order;
- any evidence that the offender has made genuine efforts at rehabilitation since the original sentence was imposed;
- the seriousness of the original offence and (where relevant) the seriousness of the subsequent offences, including any physical or emotional harm done to a victim and any damage, injury or loss caused by the offender; and
- any special circumstance arising since the original sentence was imposed.

In terms of how the breach provisions should be framed, the Council recommended a similar approach should be adopted as that under the current ICO breach provisions. If a court was satisfied that the offender had breached the conditions of the release order without reasonable excuse, the Council recommended that the court should be permitted to:

- vary the release order (for example, by increasing the intensity or duration of the existing conditions of the order, imposing special conditions, or ordering the period of the release order be extended);
- confirm the order made originally; or
- cancel the release order (if it is still in force) and, whether or not it is still in force, commit the offender to prison for the portion of the sentence that was unexpired at the date of breach.

As discussed above, the Council supported there being a presumption that the order would be cancelled and the offender ordered to serve the unexpired term of the sentence in gaol unless the court determined that it would be unjust to do so in the circumstances (in which case the court could choose either to vary or confirm the order).

In determining the appropriate course of action, we recommended that courts should be required to take into account the extent to which the offender had complied with the release order prior to its breach.

**Breach of a CSO**

Under the Council’s Interim Report proposals, further offences committed during the period of a CSO would result in proceedings for breach. The Council recommended that a court should have the following options when dealing with an offender for breach of a CSO:

- to cancel the order (if it is still in force) and, whether or not the order is still in force, resentence the offender for the original offence. The court in this case could pass any sentence that originally would have been open to it; or
- if the order is still in force, to amend the terms of the order and impose more onerous requirements, including by extending the period the offender is required to comply with conditions under the order, by increasing the intensity of the existing conditions, and/or by ordering that the offender comply with additional conditions for a specified period of time.

These were modelled on factors set out in s 147(3) of the Queensland *Penalties and Sentences Act 1992* (Qld) which relate to breach of a suspended sentence.
11.72 The Council further proposed that the court should have the option of cancelling the order and dealing with the subsequent offence (including by making a new CSO) where the court determined that this course was desirable in the interests of justice.\textsuperscript{1025} At this stage the court would have to consider the status of the existing CSO and the appropriate sentence taking into account breach of the original order and the nature and seriousness of the subsequent offence.

11.73 In the case of breaches of conditions other than by further offending, the Council proposed that the courts should have a broader discretion. The Council recommended that the court should be able to review the conditions imposed and:

- if the order is still in force, to vary the order (for example by extending the period the offender is required to comply with the order, by changing the duration and/or intensity of existing conditions, removing conditions and/or by ordering that the offender comply with additional conditions);
- to confirm the order originally made; or
- to cancel the order (if it is still in force) and, whether or not it is still in force, to deal with the offender for the offence or offences in any manner the court could have dealt with the offender if it had just found him or her guilty of that offence or offences.

11.74 If cancelling an order, the Council recommended that the court should be required to take into account the extent to which the offender has complied with the order prior to its cancellation, and, where relevant, the portion of the order which was left to be served at the date of cancellation in resentencing the offender.

Submissions and Consultation

11.75 The majority of responses to the issue of breach initially received by the Council were on the appropriateness of the current breach provisions applying to suspended sentences. These responses are discussed in detail in the Council’s Part 1 Final Report.

11.76 The option of adding conditions to suspended sentence orders was identified by many as potentially problematic, as a suspended sentence order could be breached not only by the commission of another offence but also by the offender breaching other conditions of the order. Taking into account the high proportion of breaches of conditional orders constituted by breaches of conditions only and the more restrictive options on breach, the addition of conditions could potentially result in many more offenders on suspended sentences serving their sentences in prison; for this reason, many were in favour of maintaining a distinction, if conditions were to be attached, between breach of conditions (or particular type of conditions) and breach of the order by further offending. For example, VAADA recommended that if therapeutic support were introduced as a condition of a suspended sentence (such as treatment conditions for offenders with drug and alcohol issues) breach of this condition should not constitute a formal breach of a suspended sentence.\textsuperscript{1026}

11.77 The Federation of Community Legal Centres (FCLC) proposed that failure to comply with conditions should result in the first instance in a review by the supervising agency of the reasons for non-compliance, including of the supports in place to assist the offender and whether different or additional supports are required. If the supervising agency believes no further attempts at compliance will be successful, FCLC recommends that the matter should be referred back to court, with the court having the power to review and vary conditions, or as a last resort, to impose a fine.\textsuperscript{1027}


\textsuperscript{1026} Submission 1.42 (VAADA). See also Submission 1.39 (Federation of Community Legal Centres) and 1.44 (Fitzroy Legal Service).

\textsuperscript{1027} Submission 1.39 (Federation of Community Legal Centres).
11.78 Related to this issue were concerns that many breaches (of both conditions and breaches by further offending) of existing conditional orders are attributable to failings in services and supports available to offenders, rather than to the offender. In the case of many offenders with a mental illness, the Mental Health Legal Centre suggested:

... breach is almost inevitable when support services are inadequate or fluctuate in their availability, or are unable to prioritise a person until there is repeated breaching conduct.1028

11.79 In some cases, it was argued, ‘the breach ought to rest with the service system and not with the person’ subject to the order.1029

11.80 One of the criticisms of the proposed IRO was the possible issue of inequity if the second part of the order were treated as a ‘non-custodial’ part but the offender breaches and is ordered to serve the remaining time under the sentence in prison. It was suggested that this could result in the offender spending substantially longer in prison than would be warranted in the circumstances, particularly in circumstances in which the order was breached early on.1030

11.81 In contrast, a CCTO is treated as a term of imprisonment and, regardless of when a breach of the community part of the sentence occurs, the offender is liable to serve that whole period in prison.

11.82 Combination orders, such as a CBO or ICO (under the reforms recommended) combined with a short term of imprisonment, might be viewed as a better alternative to the proposed IRO, since, while the court can use these orders to achieve a short term of imprisonment followed by an extended period of supervision, the community sentence part of the order is not treated as part of a substitutional ‘imprisonment’ order. Consequently, on breach of the community part of the sentence, the court would have the same broad powers as it has, for example, on breach of a CBO—including to cancel the order and to resentence the offender for the offence taking into account any period already served under the order.

11.83 Victoria Police supported the retention of an ‘exceptional circumstances’ standard for the IRO rather than its replacement with ‘unjust in the circumstances’ on the basis that:

Victoria Police recognises that the law is settled in relation to the meaning of ‘exceptional circumstances’ and is concerned that ‘unjust in the circumstances’ is not only less onerous than the current test, but also introduces a concept which is not codified or supported by any authority.1031

11.84 During the Council’s more recent consultations on its draft recommendations, those consulted were generally supportive of a more flexible approach to breach of an ICO. In particular, Victoria Legal Aid supported:

the removal of the need to demonstrate ‘exceptional circumstances’ following breach by further offending to avoid automatic re-sentencing. The more flexible approach that is recommended, including the options to vary, confirm or cancel the ICO, would allow judges more appropriate ways to deal with particular offenders.1032

1028 Submission 1.45 (Mental Health Legal Centre)—supplementary comments.
1029 Submission 1.45 (Mental Health Legal Centre).
1030 Submissions 2.11 (Law Institute of Victoria), 2.22 (Fitzroy Legal Service) and 2.23 (Federation of Community Legal Centres).
1031 Submission 2.16 (Victoria Police).
1032 Submission 3.5 (Victoria Legal Aid).
11.85 This approach was also generally supported by the County Court of Victoria, Youthlaw and the Mental Health Legal Centre and the Fitzroy Legal Service. The LIV viewed it as important that if a decision were made to resentence an offender on breach, the court should be required to take into account time already served by the offender on the ICO.

11.86 The Law Institute of Victoria was among those who felt that the current three year limit for initiating breach proceedings was too generous, and suggested in the alternative that breach proceedings should be initiated within 12 months of the relevant authority being made aware of the breach. During more recent consultations, a number of those consulted expressed the view that the current time limit of three years from the date of the breach was unfair on the offender and that one year after the end of the order would be more appropriate. In particular, Fitzroy Legal Service supported a new one-year limitation period as it ‘provides closure, certainty and finality for clients’.

11.87 The Office of Public Prosecutions had concerns about the implications of reducing the time in which an action for breach can be brought because of the current delays in bringing these matters before the court.

The Council’s View

11.88 The Council accepts that enforcement practices have a strong impact on sentencers’ and community confidence in community sanctions. Strategies that allow breaches of orders to be detected and dealt with quickly and consistently are important to the credibility of orders as they ensure that offenders must complete their orders as intended, or face the consequences. At the same time, a number of studies have confirmed an association between program retention and reconviction rates, suggesting that tougher enforcement practices may in fact be counterproductive in terms of reducing offenders’ longer-term risks of reoffending, and enhancing community safety.

11.89 Under the Council’s proposals, the courts would have slightly more flexibility in responding to breaches of intensive correction orders than is currently the case. However, because ICOs are directed at offenders who have engaged in more serious forms of offending, the Council believes it is appropriate that there be a presumption in the case of breach by further offending that the order should be cancelled and the offender resentenced for the offence. Our recommendations in relation to powers on breach of an ICO are discussed at [6.157]–[6.161] of this Report.

11.90 The existence of incentives to comply with the conditions of orders, in our view, is an important means of enhancing compliance. With the exception of specialist orders such as the drug treatment order, the Council believes the current form of orders provides insufficient formal incentives to offenders to comply with orders. In line with this, as recommended earlier in this report, the Council recommends that the circumstances in which a court can vary an ICO or CBO should be expanded, and that a court should also be permitted to reward good progress by terminating orders early where appropriate.

11.91 The Council also acknowledges the importance of retaining a range of responses to non-compliance, from administrative sanctions through to the commencement of formal breach proceedings.

1033 Meeting with judges of the County Court of Victoria (27 November 2007); Submissions 3.7 (Youthlaw and the Mental Health Legal Centre) and 3.9 (Fitzroy Legal Service).
1034 Submission 3.4 (Law Institute of Victoria).
1035 Ibid.
1036 Submissions 3.5 (Victoria Legal Aid), 3.7 (Youthlaw and the Mental Health Legal Centre), 3.9 (Fitzroy Legal Service) and 3.10 (Federation of Community Legal Centres).
1037 Submission 3.9 (Fitzroy Legal Service).
1038 Submission 3.12 (Office of Public Prosecutions).
11.92 One of the advantages of the proposed recasting of ICOs and home detention orders as orders in their own right rather than as forms of ‘prison sentences’ would be that more options would be available to respond to breaches of orders. For example, on breach of an ICO by further offending there would be a presumption in favour of the cancellation of the order, which would result in resentencing rather than the offender being ordered to serve the remainder of the sentence in prison. A court would also be permitted to vary the order (including by extending or reactivating the ‘supervision period’ of the order), or to confirm the original order made.

11.93 Some concerns were expressed in consultations that with greater flexibility (at either a court or administrative level) comes the greater potential for inequitable treatment. Consistency of response, whether related to the way in which offenders are managed, the rewarding of good progress made under orders or responses to non-compliance, was viewed by a number of those consulted as critical to counter decisions being made (or being perceived as being made) in an arbitrary way and to ensure orders operate fairly.

11.94 Greater consistency could be achieved in part through the development of more detailed guidelines on how community orders are to be managed and/or how courts are to apply their powers to vary or cancel orders or respond to breaches. However, in the case of Community Correctional Services, the guidelines would be limited by the powers currently available to correctional officers in administering orders. The development of guidelines alone also would fail to address one of the most serious problems identified in responding to breaches—the delays in commencing formal breach proceedings and responding to breaches.

11.95 In response to these concerns the Council believes that serious consideration should be given to the establishment of a Community Corrections Board, which, among other things, could respond to technical breaches of orders and apply administrative sanctions. Although the Council has not formally consulted on this proposal, the initial response by Corrections Victoria and the courts to the proposal has been generally positive and suggests that further consideration should be given to whether it might provide a possible means of resolving some of the current challenges faced in managing offender compliance with community orders.

11.96 If established, a Community Corrections Board might have a number of roles including contributing to the development of more detailed guidelines around the management of offenders on community sentences, monitoring the administration of sentences and, in particular, higher-risk offenders, and providing a formal intermediate step between Community Correctional Services and the courts in responding to breaches of conditions and rewarding good progress under orders.

11.97 Because the Board would be an administrative body, its powers would necessarily properly be confined to those powers related to the administration of orders. For example, on failure to comply with the conditions of a community sentence the powers of such a board might include powers to issue an official warning to the offender about the need to comply with the conditions of his or her order, to give Community Corrections Officers directions about the offender’s supervision (for example, the frequency of reporting), and to make changes to other lawful instructions or directions issued to the offender by community corrections officers. Consideration might also be given to requiring the Board to remit a certain number or proportion of hours of community work ordered by the court to reward good behaviour, similar to the powers that exist in New Zealand. Other powers extending beyond the administration of the order, such as cancelling the order or varying its conditions, however, would need to be exercised by a court.

1039 Under s 67 of the Sentencing Act 2002 (NZ) if a probation officer is satisfied that the offender has a good record of compliance with a sentence of community work, the probation officer is permitted to remit up to 10 per cent from the number of hours of community work imposed by the court. In some jurisdictions there is also a power to respond to non-compliance of orders by imposing additional hours of community work. For example, in New South Wales section 113 of the Crimes (Administration of Sentences) Act 1999 (NSW) permits the Commissioner increasing the number of hours of unpaid community work an offender must perform by up to 10 hours if the offender has failed, without a reasonable excuse, to comply with his or her obligations under the order and the Commissioner is of the opinion that the offender’s failure to comply with those obligations was trivial in nature or that there are good reasons for excusing the offender’s failure to comply with those obligations. A local court, on the application of the offender, is permitted to review such a direction and, following the review, to confirm or revoke the direction.
11.98 The extent of a Community Corrections Board’s powers would depend in part on the level of flexibility built into the conditions of community sentences. For example, prescribed conditions requiring an offender to report ‘as directed by a Community Corrections Officer’ or not to associate with any person, or with persons of any specified class, with whom a Community Corrections Officer has directed the offender not to associate would provide those administering these orders, including a Board, with much greater flexibility concerning how individual offenders are to be managed than those mandating the frequency of reporting or only allowing a court to issue directions concerning with whom an offender is prohibited from associating.

11.99 The Council’s recommendations concerning the core, program and special conditions of the ICO and drug and alcohol ICO have been developed on the basis that the existing supervision regime will continue to apply. In the event that a Community Corrections Board is established, it may be appropriate to provide those supervising orders with a greater level of discretion concerning how the conditions set by the court are to operate in practice.

11.100 In the case of offenders subject to ICOs, one option that would provide a Community Corrections Board with a more significant role would be for the ‘supervision period’ set by the court to operate in a similar way to a non-parole period. Once the mandatory supervision period had expired, the Board would have responsibility for determining whether the offender should remain subject to supervision and the other program and special conditions of the order, or in light of their good progress, should be subject to the core conditions only for the remainder of the sentence. The Board might also have the power to reactivate the supervision period if there were particular concerns about an offender’s behaviour.

11.101 Finally, the Council recommends that the time limit for initiating breach proceedings should be limited to one year after the order ceases to be in effect, rather than within three years of the breach occurring. In the Council’s view, in order for responses to breach to have value as a means of giving force to sentencing, these responses need to be reasonably proximate to the breach itself. We are further concerned that issues of fairness may arise in circumstances in which an offender has breached an order near the end of the sentence if the possibility of breach proceedings being commenced remains for a further three-year period, as is the situation currently. While we accept that there are currently significant delays in commencing breach proceedings, we believe that structural factors such as these should not compromise the underlying fairness of the system.

**RECOMMENDATION 11: Compliance and Breach**

**Recommendation 11–1**

The current requirement for breach proceedings to be commenced within three years of the breach occurring should be replaced with a provision allowing breach proceedings to be commenced any time up to one year after the order ceases to be in force.

**Recommendation 11–2**

Consideration should be given to the creation of Community Corrections Review Board to deal with more serious technical breaches of orders in lieu of a court hearing. Further consultation should take place to gauge support for the establishment of such a board. The role, powers and membership of the Board, if established, should be determined in consultation with Corrections Victoria and the courts.
Breach of a Sentencing Order as a Separate Offence

The Current Position in Victoria

11.102 Under the current law, a breach of a CCTO, an ICO, a CBO and an adjourned undertaking (whether for failure to comply with a condition of the order or for committing a further offence) amounts to a further offence,\textsuperscript{1040} the maximum penalty for which is a Level 10 fine.\textsuperscript{1041}

11.103 Suspended sentences are unique in that the offence of breach can only be committed if the offender commits another offence punishable by imprisonment, rather than by breach of other conditions of the order. Until recently, breach of a suspended sentence order also constituted a separate offence.

The Approach in Other Jurisdictions

11.104 A number of jurisdictions, like Victoria, designate breach of conditions as a separate offence, but adopt a slightly different approach to Victoria to breach by further offending. For example, in Western Australia and New Zealand community sentences (such as the ISO and CBO in WA and the new sentences of intensive supervision and community detention in NZ) do not have a separate core condition, as Victoria does, that requires the offender not to commit any new offences punishable by imprisonment; rather, the commission of a new offence simply provides a ground for the order to be amended (or in the case of NZ, the conditions remitted, varied or suspended), cancelled (NZ only), confirmed, or the order cancelled and the offender resentedenced.\textsuperscript{1042}

11.105 While in most jurisdictions that retain a separate offence of breach, breach is only punishable by a fine,\textsuperscript{1043} in some jurisdictions breach is an offence punishable by imprisonment. For example, in NZ breach of the conditions of intensive supervision or community detention is an offence punishable by a term of imprisonment of up to six months, or to a fine of up to $1,500,\textsuperscript{1044} while breach of home detention conditions carries a penalty of up to 12 months’ imprisonment, or a fine of up to $2,000.\textsuperscript{1045}

11.106 On one hand, punishing the act of breach by a term of imprisonment could be viewed as an extreme response; on the other, such a power could be viewed as useful in the case of higher-level intermediate orders because it allows a court to impose a short period of imprisonment, while permitting the offender to continue on the order in the community on his or her release. This could be viewed as achieving a better result in some cases to cancelling the order and, for example, substituting an immediate term of imprisonment for the original offence—which could result in the offender serving a longer time in prison and not having the benefit of continuing with the programs or treatment in which he or she was engaged prior to breaching the order. As discussed above, successful completion of orders has been found to be associated with lower risks of reoffending.

\textsuperscript{1040} Sentencing Act 1991 (Vic) ss 18W (CCTO), 26 (ICO), 31 (suspended sentence), 47 (CBO) and 79 (adjourned undertaking).

\textsuperscript{1041} A Level 10 fine is equal to 10 penalty units (Sentencing Act 1991 (Vic), s 109(2)). See above n 450 for the value of a penalty unit.

\textsuperscript{1042} In relation to Western Australia, see Sentencing Act 1995 (WA) ss 69(4)(b) and pt 18, div 4 for the powers of the court where an offender on an ISO commits a further offence; in relation to New Zealand, see Sentencing Act 2002 (NZ) ss 54K(2)–(3).

\textsuperscript{1043} For example, in Western Australia, breach of an ISO is an offence punishable by a fine of up to $1,000: Sentencing Act 1995 (WA) s 131–132.

\textsuperscript{1044} Sentencing Act 2002 (NZ) ss 69G (community detention) and 70A (intensive supervision).

\textsuperscript{1045} Sentencing Act 2002 (NZ) s 80S.
11.107 A number of jurisdictions do not have separate offences of breach but rather provide alternative mechanisms that allow an offender to be brought back before a court. For example, in New South Wales, if a court suspects that an offender may have failed to comply with any of the conditions of a good behaviour bond it may issue a summons to appear, and in circumstances in which the offender fails to appear, issue a warrant for the offender’s arrest or authorise a warrant to be issued for the offender’s arrest.1046 If it is clear that the offender’s whereabouts are unknown at the outset, the court does not have to issue a summons to appear and can proceed straight to issuing a warrant for the offender’s arrest.1047 Similarly, the ACT legislation provides for a police officer who believes, on reasonable grounds, that an offender has breached any of the offender’s good behaviour obligations, to arrest the offender without a warrant, in which case the offender must be brought ‘as soon as practicable’ before the sentencing court, or a magistrate,1048 as well as powers for the court to issue a summons to appear or a warrant for an offender’s arrest.1049 In circumstances in which a court is dealing with an offender for committing a new offence, the court is also permitted to deal with the offender for breach of his or her good behaviour obligations.1050 This is the approach recently taken in Victoria to breach of a suspended sentence.

The Interim Report

11.108 A majority of the Council agreed with the Sentencing Review’s conclusions that the existing breach provisions are an unsatisfactory way to deal with what is essentially a procedural issue. It therefore endorsed the approach recommended by the Sentencing Review, to bring an offender suspected of breaching an order back before the court.

11.109 However, a minority of Council members were in favour of retaining the offence of breach. The offence of breach, it was argued, is an important means of signifying that a breach has occurred and of encouraging courts to respond to breaches in a way that takes into account the seriousness of the original offence and the sentencing order originally imposed; this might be particularly important in circumstances where action for breach is taken after an order has expired. It was further felt that the existence of a separate offence serves an important symbolic purpose that promotes public confidence by clearly signalling that there are consequences for non-compliance.

The Final Report—Part 1

11.110 In its Final Report the Council recommended against the retention of a separate offence of breach. This recommendation was implemented by the Sentencing (Suspended Sentences) Act 2006 (Vic) enacted in October 2006.

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1046 Crimes (Sentencing Procedure) Act 1999 (NSW) ss 98(1)–(1A).
1047 Crimes (Sentencing Procedure) Act 1999 (NSW) ss 98(1B).
1048 Crimes (Sentence Administration) Act 2005 (ACT) s 103.
1049 Crimes (Sentence Administration) Act 2005 (ACT) ss 104, 106.
1050 Crimes (Sentence Administration) Act 2005 (ACT) s 107. However, if the Magistrates’ Court finds an offender guilty of an offence committed during the term of the offender’s good behaviour order, and the order was made or changed by the Supreme Court, the Magistrates’ Court must, in addition to dealing with the offender for the offence, commit the offender to the Supreme Court to be dealt with for breach of the offender’s good behaviour obligations. In these circumstances the court may remand the offender in custody until he or she can be brought before the Supreme Court: Crimes (Sentence Administration) Act 2005 (ACT) s 107(2)–(3).

11.111 The Freiberg Sentencing Review confirmed that the breach offence appears to serve primarily a procedural rather than punitive purpose and recommended that breach of orders should no longer constitute a separate criminal offence.1051 As an alternative means of ensuring that offenders could be brought back before the courts in cases of suspected breach, the Review suggested the introduction of a provision enabling a ‘prescribed person’ or a member of a prescribed class of persons to apply to the court and bring the offender before it, in circumstances in which it appears that an offender has breached the conditions of the order without reasonable excuse.1052

Submissions and Consultations

11.112 In the Council’s consultations on its final recommendations, we found support for removing the offence of breach for ICOs and CBOs, consistent with our recommendations for suspended sentences.1053

The Council’s View

11.113 Consistent with its recommendations in relation to suspended sentences in its Part 1 Final Report, the Council recommends that breach of a sentencing order should no longer constitute a separate offence. The Council continues to endorse the Sentencing Review’s conclusions that the existing breach provisions are an unsatisfactory way to deal with what is essentially a procedural issue of bringing an offender back before a court to be dealt with for the breach. We note that should this recommendation be implemented, it will be necessary for proper records to be kept concerning whether or not a breach has been proven; this will ensure an offender’s history of compliance or non-compliance with past orders made is readily available in circumstances where an offender is being sentenced for a new offence.

RECOMMENDATION 12: Breach of a Sentencing Order

Recommendation 12–1

Breach of a sentencing order—either by the commission of a new offence or offences punishable by imprisonment, or a failure to comply with other conditions of the order—should no longer constitute a separate offence.

Recommendation 12–2

The procedures for bringing an offender before the court on breach of a CBO, ICO or home detention order should be broadly consistent with those that currently apply under section 31 of the Sentencing Act 1991 (Vic) relating to breach of suspended sentences.

1052 Ibid 119.
1053 Submissions 3.5 (Victoria Legal Aid), 3.7 (Youthlaw and the Mental Health Legal Centre) and 3.10 (Federation of Community Legal Centres).
Chapter 12  Deferral of Sentencing
12. Deferral of Sentencing

Suspended Sentences and Intermediate Sentencing Orders
Chapter 12  Deferral of Sentencing

What is Deferral of Sentencing?

12.1 Deferral of sentencing is not a sentencing order; rather, it is a power provided to the courts following a finding of guilt to adjourn the matter for a set period. Deferred sentencing is intended to provide offenders with an opportunity to address issues that have contributed to their offending and to demonstrate to the court that they are taking serious steps to get their lives back on track.1054

The Current Legal Framework

12.2 A formal power to defer sentencing was first introduced in the Children’s Court under section 190 of the Children and Young Persons Act 1989 (Vic), and in 2000 was extended to the Magistrates’ Court for offenders aged under 25 years. Prior to this a power existed at common law for a court to order an adjournment and require the offender to enter into a recognizance to be of good behaviour until called upon to be sentenced. The deferral of sentence under this common law power is often referred to as a ‘Griffiths bond’ or a ‘Griffiths remand’.1058

12.3 Under the Children, Youth and Families Act 2005 (Vic), the maximum period of deferral is four months, while in the Magistrates’ Court under the Sentencing Act 1991 sentencing may be deferred for a maximum period of six months. The offender’s behaviour during the deferral period must be taken into account by the Court in sentencing the offender at the end of the deferral period.1059

12.4 Under the Courts Legislation (Neighbourhood Justice) Act 2006 (Vic), the power to defer sentencing under section 83A of the Sentencing Act 1991 (Vic) has been extended to offenders of all ages. These changes apply only to the Neighbourhood Justice Division of the Magistrates’ Court. The extension of this power in the Neighbourhood Justice Centre is to allow older offenders to have the ‘opportunity to demonstrate their rehabilitation and to stabilise any issues relating to their offending behaviour’.1061

1054 Victoria, Parliamentary Debates, Legislative Assembly, 22 April 1999, 561 (Rob Hulls, Shadow Attorney-General).
1055 This Act has been repealed and replaced by the Children, Youth and Families Act 2005 (Vic).
1056 Section 83A of the Sentencing Act 1991 (Vic) was inserted by section 9 of the Sentencing (Amendment) Act 1999 (Vic). This provision commenced operation on 1 January 2000.
1057 Griffiths v R (1977) 137 CLR 293, 320–3 (Jacobs J); 338 (Aickin J).
1060 Section 4Q(3) of the Courts Legislation (Neighbourhood Justice) Act 2006 (Vic), which provides the Neighbourhood Justice Division with the power to defer the sentencing of offenders aged 25 years or over, came into operation on 31 March 2007: Courts Legislation (Neighbourhood Justice) Act 2006 (Vic) s 2.
1061 Victoria, Parliamentary Debates, Legislative Assembly, 7 June 2006, 1773 (Rob Hulls, Attorney-General).
Deferral in Other Australian Jurisdictions

12.5 A formal power to defer sentencing (as an order made prior to sentencing, rather than an order made by way of sentence) exists in a number of jurisdictions including the Australian Capital Territory, New South Wales, South Australia and Victoria. In Western Australia, the court has the power to impose a pre-sentence order, which acts as a means of deferring the sentence to a later date.

12.6 The Australian Law Reform Commission (ALRC) has made recommendations that federal sentencing legislation should provide courts with the power to make a deferred sentencing order in relation to federal offenders for a period of up to 12 months.

The Purposes of Deferral

12.7 While there are no stated purposes of deferral in the Victorian legislation, other jurisdictions specify the purposes for which deferral may be considered, in order to guide the use of this power. For example, in South Australia and New South Wales the purposes for which a court may defer sentencing are:

- to assess the offender’s capacity and prospects for rehabilitation;
- to allow the offender to demonstrate that rehabilitation has taken place;
- to assess the offender’s capacity and prospects for participation in an intervention program (or, in the case of the South Australian legislation, to assess the defendant’s eligibility for participation in an intervention program such as programs providing for supervised treatment, rehabilitation, behaviour management and access to support services);
- to allow the defendant to participate in an intervention program; or
- for any other purpose the court considers appropriate in the circumstances.

12.8 In NSW a court may defer sentencing for the purposes of allowing the offender to participate in an intervention program ‘if the court is satisfied that it would reduce the likelihood of the person committing further offences by promoting the treatment or rehabilitation of the person’.

12.9 In the ACT, a court is permitted to 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’. A court is not permitted to make a deferred sentence order unless it considers that:

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1062 Crimes (Sentencing) Act 2005 (ACT) Ch 8.
1063 Crimes (Sentencing Procedure) Act 1999 (NSW) s 11.
1064 Criminal Law (Sentencing) Act 1988 (SA) s 19B.
1065 Sentencing Act 1991 (Vic) s 83A.
1066 Sentencing Act 1995 (WA) s 33B.
1068 Intervention programs are defined as ‘a program that provides—(a) supervised treatment; or (b) supervised rehabilitation; or (c) supervised behaviour management; or (d) supervised access to support services; or (e) a combination of any one or more of the above, designed to address behavioural problems (including problem gambling), substance abuse or mental impairment’: Criminal Law (Sentencing) Act 1988 (SA).
1069 Crimes (Sentencing Procedure) Act 1999 (NSW) s 11(1); Criminal Law (Sentencing) Act 1988 (SA) s 19B(1).
1070 Crimes (Sentencing Procedure) Act 1999 (NSW) s 11 (2A).
1071 Crimes (Sentencing) Act 2005 (ACT) s 27(1)(d).
12.10 The ACT legislation specifically provides that a court may make a deferred sentence order whether or not it considers that the seriousness of the offence justifies a sentence of imprisonment. A court that makes a deferred sentence order in the ACT is required to give an indication in general terms of both the penalty the offender might receive if he or she complies or, alternatively, does not comply with the order and any bail conditions set. Presumably, the intention of this provision is to operate as an incentive to offenders to comply with the conditions of the order, and to ensure that courts do not defer sentencing unless the offender would be likely to receive some benefit in terms of the sentencing outcome, by complying with the conditions of the order.

12.11 In Western Australia deferred sentences are in the form of a pre-sentence order (a PSO). The court is permitted to make a PSO if sentencing an offender for one or more imprisonable offence(s), none of which is an offence with a statutory penalty that is, or includes, mandatory imprisonment or is an offence under section 79 of the Prisons Act 1981 and the court considers:

- that the seriousness of the imprisonable offence or offences warrants the imposition of a term of imprisonment;
- that a PSO would allow the offender to address his or her criminal behaviour and any factors that contributed to the behaviour; and
- that if the offender were to comply with a PSO the court might not impose a term of imprisonment for the offence or offences.

12.12 The ALRC, in proposing the introduction of a statutory power to defer sentencing for federal offenders, has recommended that the court be authorised to release offenders under this power ‘for the purpose of assessing the offender’s prospects of rehabilitation or for any other purpose the court thinks fit’.

Need for a Pre-Sentence Report

12.13 In Victoria, if the Magistrates’ Court defers sentencing, it may order a pre-sentence report. However, a pre-sentence report is not required for the purposes of making a decision about whether a matter should, or should not, be adjourned.
12.14 Similarly, in the ACT a pre-sentence report is not required, but in deciding whether to make a pre-sentence order, the court must consider any pre-sentence report prepared about the offender, any evidence given by the person who prepared a pre-sentence report for the offender, and any evidence given by a corrections officer about the offender. A court is required to record the reasons for its decisions to make, or not to make, a deferred sentence order if it acts contrary to the advice in the pre-sentence report.

Maximum Period of Deferral

12.15 Most jurisdictions provide for a longer period of deferral than the six-month maximum permitted under Victorian legislation. In the ACT and NSW, the maximum period for which matters may be deferred is 12 months. South Australia has adopted a ‘usual maximum’ period of deferral (whether by a single adjournment or a series of adjournments) of 12 months. However, a court is permitted to adjourn proceedings for a longer period in circumstances in which the defendant is, or will be, participating in an intervention program if the court is satisfied that:

(a) the defendant has, by participating in, or agreeing to participate in, the intervention program, demonstrated a commitment to addressing the problems out of which his or her offending arose; and

(b) if the proceedings were not adjourned for such a period—

(i) the defendant would be prevented from completing, or participating in, the intervention program; and

(ii) the defendant’s rehabilitation would be prejudiced.

12.16 In Western Australia, the maximum period of a PSO is two years. A court, however, is not prevented from sentencing an offender who was subject to a PSO more than two years after the PSO was made.

12.17 The ALRC has recommended that the maximum period of deferral of sentencing for federal offenders should be 12 months.

Conditions of Deferral

12.18 In Victoria, if a court defers sentencing it may release the offender on his or her undertaking to appear before the Magistrates’ Court on the date fixed for sentence, release the offender on bail or extend his or her bail to the date to which proceedings have been adjourned. Therefore, while an offender may be required as a condition of his or her bail to comply with conditions imposed under the Bail Act 1977 (Vic), no formal requirements are imposed on him or her as a result of the deferral of sentence.

1079 Crimes (Sentencing) Act (ACT) s 117(1).
1080 Crimes (Sentencing) Act (ACT) s 117(4).
1081 Sentencing Act 1991 (Vic) s 83A(1).
1082 Crimes (Sentencing Procedure) Act 1999 (NSW) s 11(2); Crimes (Sentencing) Act 2005 (ACT) s 122(1).
1083 Criminal Law (Sentencing) Act 1988 (SA) s 19B(2).
1084 Criminal Law (Sentencing) Act 1988 (SA) s 19B(3).
1085 Sentencing Act 1995 (WA) s 33B(2).
1086 Sentencing Act 1995 (WA) s 33K(4).
1089 However, should an offender be found guilty of an offence during the period of deferral, the court may re-list the adjourned proceeding to a day earlier than the date to which it was originally adjourned: Sentencing Act 1991 s 83A(4)(a).
12.19 The ACT legislation, while maintaining flexibility around the types of conditions that may be set by allowing a court to include in the order ‘any condition the court considers appropriate’, taking into account the purposes of the order,\(^{1090}\) sets out the specific powers of a court on an offender’s failure to comply with the conditions of the deferred sentence order. These powers are similar in nature to those available on breach of sentencing orders, and include: to take no further action; to issue a warning to the offender about the need to comply with the offender’s deferred sentence obligations; to amend any of the conditions of the deferred sentence order; or to cancel the order.\(^{1091}\) There are also statutory requirements for a court to document its reasons for the decision to amend or to cancel the order, and the date this is to take effect.\(^{1092}\)

Review Powers

12.20 In the ACT, the power to review an offender’s progress on deferral has been formalised.\(^{1093}\) The sentencing court may set regular intervals at which an offender’s progress is to be reviewed and to review the offender’s progress at any time, including for the purposes of considering whether the offender has breached, or may breach, the offender’s deferred sentence obligations.\(^{1094}\) The court may review the order on its own initiative, or on application by the offender, the chief executive or the director of public prosecutions.\(^{1095}\)

12.21 A court has the power on reviewing an offender’s deferred sentence order to:

- take no further action;
- give the offender a warning about the need to comply with the offender’s deferred sentence obligations (including any bail conditions);
- amend any of the deferred sentence order’s conditions; or
- cancel the deferred sentence order if the offender has applied for its cancellation or the court is satisfied that the offender has breached the offender’s deferred sentence obligations.\(^{1096}\)

12.22 On cancelling the deferred sentence order, the court must sentence the offender.\(^{1097}\)

Sentencing Powers

12.23 In Western Australia, a court sentencing an offender who has been subject to a PSO must take into account the offender’s behaviour while subject to the PSO.\(^{1098}\) The court is permitted to use any sentencing option available under Part 5 of the Act.\(^{1099}\)

\(^{1090}\) Crimes (Sentencing) Act 2005 (ACT) s 27(5).

\(^{1091}\) Crimes (Sentencing) Act 2005 (ACT) s 128.

\(^{1092}\) Crimes (Sentencing) Act 2005 (ACT) ss 129–30.

\(^{1093}\) Under section 119 of the Crimes (Sentencing) Act 2005 (ACT) a court may require an offender to appear before it specified times as set out in the order for the purpose of reviewing the offender’s compliance with the order. A court also has a broad discretion under section 126(1) to review the offender’s progress at any time.

\(^{1094}\) Crimes (Sentencing) Act 2005 (ACT) s 126(2).

\(^{1095}\) Crimes (Sentencing) Act 2005 (ACT) s 126(3).

\(^{1096}\) Crimes (Sentencing) Act 2005 (ACT) s 128.

\(^{1097}\) Crimes (Sentencing) Act 2005 (ACT) s 131(3).

\(^{1098}\) Sentencing Act 1995 (WA) s 33K(1)(a).

\(^{1099}\) Sentencing Act 1995 (WA) s 33K(1)(b). Part 5 of the Act sets out all the available sentencing options under the Act including releasing the offender unconditionally, imposing a conditional release order, imposing a fine, making a community-based order, imposing an intensive supervision order, imposing a suspended sentence of imprisonment, imposing a conditional suspended imprisonment and imposing a term of imprisonment.
12.24 While in the ACT a court is required to state on making a deferral order the penalty that the offender might receive if he or she does, or does not, comply with the order and any bail conditions.\textsuperscript{1100} There is no specific requirement for a court to take an offender’s compliance into account when it comes to sentencing the offender.

Pre-Sentence Programs in Victoria

The CREDIT/Bail Support Program

12.25 The CREDIT (Court Referred Evaluation, Drug Intervention Treatment) Program was established in 1998 in response to a perceived need for an early intervention and treatment program for drug-dependent persons coming before the Court.\textsuperscript{1101} As originally established, the program aimed to: provide treatment to defendants when first arrested and while the defendant was on bail; encourage defendants to commit to rehabilitation; divert defendants with substance-abuse issues from prison; reduce the risks of reoffending; and minimise the harm to offenders and the community by addressing factors relevant to their substance abuse.\textsuperscript{1102}

12.26 The Bail Advocacy Service (later referred to as the Bail Support Program) was established as a pilot program in January 2001 with the goal of increasing the likelihood of defendants being granted bail and successfully completing their bail period. The Bail Advocacy Service performed a range of roles, including assessing the accommodation, treatment and support service needs of people in custody eligible for release on bail, assisting clients to access housing service, employment and training programs and other services, providing fortnightly supervision/support to clients in a case management role for a period of up to four months, and providing links and referrals to treatment providers.\textsuperscript{1103}

12.27 The CREDIT Program merged with the Bail Support Program in December 2004. The program is targeted at persons who are ‘arrested for non-violent offences who have a demonstrable drug problem and are at risk of committing further offences while on bail’. The stated objectives of the CREDIT/Bail Support Program are to:

- provide early treatment and access to drug treatment/rehabilitation programs;
- provide access to accommodation, welfare, legal and other community supports;
- provide clients and the court with monitoring and support of clients on the program for a period of three to four months;
- minimise harm to clients and the community by addressing substance-abuse issues; and
- reduce risks of further reoffending.\textsuperscript{1104}

12.28 There are a number of avenues for referral to the program, including through a magistrate, the police, the defendant’s legal representative, a court nominee and family members.\textsuperscript{1105} Clients may also self-refer. In 2006–07, 1,535 people were referred to the CREDIT program and 665 were referred to the Bail Support Program.\textsuperscript{1106}

\textsuperscript{1100} Crimes (Sentencing) Act 2005 (ACT) s 118.


\textsuperscript{1105} Ibid 55.

\textsuperscript{1106} Magistrates’ Court of Victoria (2007), above n 835, 48.
Court Integrated Services Program

12.29 The Court Integrated Services Program (CISP) has been in operation since January 2007. A range of court based diversion initiatives have been implemented in the Magistrates’ Court in recent years, in response to the needs of defendants presenting before the courts. CISP, as part of a continuous improvement process, aims to consolidate and build on these existing initiatives and other support initiatives in order to facilitate the delivery of a more targeted and comprehensive response to offenders from backgrounds of marginalisation and disadvantage. It features a coordinated, multidisciplinary team based approach that provides for an efficient and effective response to both the Court and defendants.\(^{1107}\)

12.30 The CISP is targeted at defendants who are assessed as being at moderate to high risk of reoffending and who have multiple issues related to their offending, such as drug and alcohol dependency and misuse, mental health and disability issues or inadequate social, family and economic supports. It is a multidisciplinary, specialised approach that aims to:

- provide short-term assistance for defendants with health and social needs before sentencing;
- work on the causes of offending through individual case management support;
- provide priority access to treatment and community support services where possible; and
- reduce rates of reoffending.\(^{1108}\)

12.31 A defendant can be referred to the program at a number of points of engagement in the criminal justice system. They can be referred when charged on summons, arrested and bailed or arrested and held in custody.\(^{1109}\)

12.32 Referrals can be made to CISP by a number of people/agencies, such as police, the judiciary, court staff and family and friends of the offender. However, most referrals are currently made by legal representatives (80 per cent).\(^{1110}\) From January to December 2007, there were 1,689 referrals to the CISP program. Of these, 1,205 engaged with CISP.\(^{1111}\)

12.33 Once a defendant is referred to the program he or she is assessed. Based on this assessment, the defendant will be directed to the relevant level of intervention. There are three levels of intervention, the highest being Intensive, then Intermediate and finally, Community Referral. Should a defendant be returned to court after assessment, the court has the option of making the attendance at CISP a condition of bail.\(^{1112}\)

12.34 A case management plan is then developed, outlining any referrals to community and or/treatment agencies to which the defendant has been linked. Each defendant has a case manager who oversees his or her progress, and the court also has the option of monitoring the defendant’s progress.\(^{1113}\)

\(^{1107}\) Melbourne Centre for Criminological Research and Evaluation (2008), above n 652, 9.
\(^{1108}\) Department of Justice, Court Integrated Services Program (Pamphlet, October 2006).
\(^{1109}\) Melbourne Centre for Criminological Research and Evaluation (2008), above n 652, 9.
\(^{1110}\) Ibid.
\(^{1111}\) Ibid.
\(^{1112}\) Ibid.
\(^{1113}\) Department of Justice (2006), above n 9.
12.35 An evaluation of the implementation of the CISP has shown that defendants who are referred to the program have a number of issues. As discussed previously, 83.5 per cent of people referred to CISP were identified as having problems with illicit drug use and 43 per cent as having problems with alcohol. Other reasons for referral included lack of appropriate support (41.4 per cent), mental health issues (30.8 per cent) and problems with housing (30.7 per cent).

Adult Court Advice and Support Service

12.36 The Adult Court Advice and Support Service (ACAS) operates in all Victorian adult courts to assist young offenders aged 18–20 years appearing in criminal court matters. Referrals can be made through the court or by legal representatives, supporting agencies or family members. A young adult offender may also self-refer.

12.37 While the primary focus of this program is to provide the court with pre-sentence reports, it can also become involved in case managing young offenders who have been placed on bail or have had their sentence deferred. This could include:

- case management for young offenders on bail or who have had their sentence deferred, which may include challenging offending behaviour, supervision and support;
- linking in young people with appropriate support agencies including accommodation, drug and alcohol treatment, mental health treatment and assessments and counselling services;
- liaising with judicial officers, legal and court personnel and court services’ staff to develop appropriate responses to young people’s needs; and
- providing detailed reports to the court or attending court to give evidence in relation to the offender’s progress while on bail or deferral of sentence.

12.38 The supervision of a young offender while on bail or the deferral of sentence is not based in legislation; however, ACAS provides services within the framework of the existing law. At the Northern Region ACAS, case management of offenders on bail or deferral of sentence can include minimum weekly supervision (which can be increased if necessary) and the monitoring of compliance with any conditions imposed.

Group Conferencing

12.39 Another program that is currently available in Victoria, but is limited to juvenile offenders sentenced in the Children’s Court, is group conferencing. Under the Children, Youth and Families Act 2005 (Vic), sentencing may be deferred for the purpose of a young person’s participation in a group conference if the court of the opinion that the child is suitable to participate in a group conference. The purpose of such a conference is to increase the child’s understanding of the effect of their offending on the victim and the community; to reduce the likelihood of further offending and to negotiate an outcome plan that is agreed to by the child in question.

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1114 Melbourne Centre for Criminological Research and Evaluation (2008), above n 652.
1115 Ibid.
1116 Magistrates’ Court of Victoria (2007), above n 835, 52.
1117 Garton (2002), above n 834, 4.
1118 Magistrates’ Court of Victoria (2007), above n 835, 52.
1119 Garton (2002), above n 834, 3.
1120 Ibid 5.
1121 Children, Youth and Families Act 2005 (Vic) s 414(1)(c).
1122 Children, Youth and Families Act 2005 (Vic) s 415(4).
A group conference must be attended by the child, his or her legal representative, the informant or other member of the police force, and the convenor. The victim, or his or her representative, can participate in the process if he or she wishes to do so, as may members of the child’s family and other people permitted to by the convenor.

12.40 A community conferencing pilot has been in operation in New South Wales since 2005 for young adult offenders between 18 and 24 years in the local courts. Community conferencing is a sentencing option in its own right in the pilot; however, the offender must consent to participation. The operation of the scheme is otherwise similar to that which has been proposed by Jesuit Social Services.

12.41 In 2006, Jesuit Social Services produced a report on the extension of such a program to young adult offenders in the higher courts. One of the options in the report was to allow for the Magistrates’ Court to defer sentencing for offenders under 25 years of age, for the purpose of attending a restorative justice conference. The conference would be attended by the offender, the victim, police, legal representatives and any other support people for the offender or the victim. A reparation agreement would be drawn up, detailing activities that the offender agrees to undertake.

12.42 A new pilot program in the Neighbourhood Justice Centre was announced in March 2008, which would allow for offenders between the ages of 18 and 25 to participate in group conferencing. The program is to run as a two year pilot, and one of options it will give to the magistrate on sentencing is to defer sentence and refer the offender to group conferencing.

The Relationship between Deferral and Bail Conditions

12.43 The major difference between deferral and bail conditions is the purpose for which deferral and bail conditions are made. The purposes of bail conditions are generally to ensure that the offender does not commit any further offences and complies with any requirements to appear in court or surrender him or herself into custody. Deferral conditions, however, are generally aimed at allowing the offender to address the contributing causes of his or her criminal behaviour and to demonstrate his or her rehabilitation before the court sentences him or her for an offence.

12.44 The power to impose conditions in granting bail in Victoria is provided under section 4(5) of the Bail Act 1977 (Vic). The conditions set must be imposed in accordance with section 5 of the Act. Section 5(1) requires a court to consider the release of the offender on the least onerous form of conditions. A court must not make the conditions for the accused’s entry into bail any more onerous for the accused person than the nature of the offence and the circumstances of the accused person appear to the court to be required in the public interest. A court may also require the accused person to comply with special conditions, where the court considers that this is necessary to secure that the accused person:

- appears in accordance with his or her bail and surrenders himself or herself into custody;
- does not commit an offence while on bail;

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1123 Children, Youth and Families Act 2005 (Vic) s 415(6).
1124 Children, Youth and Families Act 2005 (Vic) s 415(7).
1125 People and Trimboli (2007), above n 840, 1. The pilot is being carried out in one metropolitan local court and one non-metropolitan local court circuit.
1126 Ibid 7. The commission of certain offences would make an offender ineligible to participate in community conferencing, including malicious wounding and grievous bodily harm, sexual assault, child prostitution, pornography, stalking or intimidation with the intent to cause fear of physical or mental harm, domestic violence offences, offences involving the use of a firearm, offences related to supplying drugs, riot, affray and some assault police offences.
1127 For further details of the NSW scheme see [10.70]-[10.74].
1129 Office of the Attorney–General, ‘Hulls Launches Young Adult Conferencing Program’ (Media Release, 4 March 2008).
• does not endanger the safety or welfare of members of the public; or
• does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or herself or any other person.  

12.45 The Victorian Law Reform Commission in its recent Consultation Paper noted that common special conditions imposed in Victoria include:

• requiring the accused person to live at a certain address (residence requirement);
• requiring the accused person to report regularly to a police station (reporting requirement);
• prohibiting contact with certain individuals (non-association condition);
• requiring him or her to surrender a passport;
• curfew conditions; and
• prohibiting the offender from going to certain areas (geographical exclusion zones).  

12.46 A suggestion was made by some during the VLRC’s consultations that the Bail Act 1977 (Vic) should make reference to the use of support services, such as offered through the CREDIT/Bail Support Program, as a special condition of bail. In doing so, it was argued, it would give services such as the CREDIT/Bail Support Program greater legitimacy and encourage greater use of the services offered by courts, police and bail justices.  

12.47 The VLRC, while recognising the possible benefits of such an approach, has acknowledged that this was seen by some as ‘stretching’ the purposes for which a special condition can be imposed under the Act. There was concern that allowing bail support conditions to be attached as a special condition of bail placed an involuntary obligation on people who had not yet been found guilty of a crime and that this obligation could be significantly burdensome. Ultimately, the VLRC concluded that all bail conditions should be appropriately limited to the fulfilment of the purposes of bail: ensuring accused people appear at court, promoting community safety through the prevention of reoffending and maintaining the integrity of the justice system by ensuring that people accused of offences do not interfere with prosecution witnesses.  

12.48 In NSW under section 36A of the Bail Act 1978 (NSW), a court may impose additional conditions in circumstances in which the authorised officer, or court to which an application for the granting of bail is made, is of the opinion that the defendant would benefit from either undergoing an assessment for, or participating in, an intervention program or other program for treatment or rehabilitation. The defendant must consent in writing to the assessment or agree to participate in the program and to comply with any intervention plan arising out of the program or to participate in any other program for treatment or rehabilitation. These conditions may be imposed in addition to, or instead of, any other condition imposed.  

12.49 Similarly, in Western Australia, the Bail Act 1982 (WA) allows judicial officers on a grant of bail to order a defendant to comply with certain conditions. Where a judicial officer is satisfied that the defendant is suffering from alcohol or drug abuse and is in need of care or treatment, he or she is permitted to impose any condition considered desirable for the purpose of ensuring that the defendant receives care or treatment for alcohol or drug abuse, including that the defendant lives in, or from time to time attends at, a specified institution or place to receive such care or treatment.  

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1130 Bail Act 1977 (Vic) s 5(2).
1132 Ibid, 104-05.
1133 Ibid.
1135 Bail Act 1978 (NSW) s 36A(2).
1136 Bail Act 1982 (WA) Sch 1, Pt D, cl 2.

12.50 The Freiberg Sentencing Review in its review of sentencing in Victoria recommended that:
   - the power to defer should be extended to the higher courts;
   - the maximum period of deferral under the Sentencing Act 1991 (Vic) should be increased from six months to 12 months; and
   - the current age restrictions should be removed.\(^{1137}\)

12.51 The Review further recommended:
   That the purposes of deferring sentence be expanded to include obtaining information regarding prospects of rehabilitation, the outcome of medical or other treatment, the outcome of diversion or restorative justice or similar programs.\(^ {1138}\)

12.52 The Victorian Attorney-General referred to these recommendations when introducing the bill to remove the current age restrictions on deferral in the Neighbourhood Justice Centre.\(^{1139}\) However, this limited extension of the existing power is the only part of these recommendations that has been acted upon.

Responses to the Discussion Paper

12.53 As the focus of the Council’s initial Discussion Paper was on the operation of suspended sentences, it did not discuss the current operation of deferral in Victoria. However, the issue of deferral was raised by many of those consulted following the release of the Discussion Paper as a useful sentencing tool. Deferral was reported as having very positive results in the Magistrates' Court when used for offenders with significant cognitive disabilities.\(^ {1140}\) Once the offender’s condition had stabilised, it was suggested that a community-based order or a suspended sentence may be an appropriate disposition.

12.54 Some support was expressed during these consultations for extending deferral of sentencing to the higher courts and extending the maximum period of deferral to 12 months.\(^ {1141}\) Some concerns were raised, however, about who would provide services and whether additional resources for the community sector would be required.\(^ {1142}\) The comment was made that while deferral tends to work well with offenders who have many resources at their disposal, it can put those who do not at a disadvantage.\(^ {1143}\) It also was suggested by some that the concept of deferral does not take into account time spent out on bail, which operates as a form of de facto deferral. As is the case with a deferral, when offenders are on bail they have an opportunity to undertake treatment or other programs to demonstrate their rehabilitation.

12.55 The usefulness of deferral as an option in the higher courts was also questioned.\(^ {1144}\) It was suggested that as the County Court and Supreme Court deal with serious offences that generally warrant a term of imprisonment, it is unlikely that any action an offender might take during the period of deferral would influence the sentence ultimately imposed. Deferral therefore risks creating unrealistic expectations on the part of offenders as to the sentence they will receive if they undertake the activities suggested during the deferral period. The New South Wales Court of Criminal Appeal has rejected the argument that deferral is inappropriate if a sentence of

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\(^{1137}\) Freiberg (2002), above n 16, 184, Recommendations 44–46.

\(^{1138}\) Ibid, Recommendation 47.

\(^{1139}\) Victoria, Parliamentary Debates, Legislative Assembly, 7 June 2006, 1774 (Rob Hulls, Attorney-General).

\(^{1140}\) Roundtable—Offenders with a Mental Illness and/or Intellectual Disability (12 May 2005).

\(^{1141}\) Roundtable—Legal Issues (23 May 2005).

\(^{1142}\) See, for example, Submission 3.10 (Federation of Community Legal Centres).

\(^{1143}\) Roundtable—Legal Issues (23 May 2005). See also Submission 3.10 (Federation of Community Legal Centres).

\(^{1144}\) Roundtable—Young Offenders (16 June 2005).
imprisonment is inevitable;\textsuperscript{1145} although it has held that a court should clearly inform the offender that he or she will be ordered to serve a period of full-time imprisonment when eventually sentenced.\textsuperscript{1146} Deferral might still be useful, for example, in fixing the length of the sentence or the non-parole period.\textsuperscript{1147}

12.56 Another danger of deferral identified was that where the offender fails to undertake programs during deferral the court will order a harsher sentence.

12.57 A view was expressed that the role of courts is to sentence, not to be rehabilitative agents or to manage sentences. It should not be left to the courts to ensure an offender’s rehabilitation. If there is a need for rehabilitation programs, it was argued, this should be taken into consideration at sentencing.\textsuperscript{1148}

The Interim Report

12.58 In its Interim Report the Council supported the changes to deferral recommended as part of the 2002 Sentencing Review. The Council suggested the advantages of making deferral more widely available by extending the maximum period of deferral and by making it available in all courts and to all offenders could include:

- allowing courts more time to assess the appropriate sentence for an offender including, in the case of conditional orders, the best mix of conditions;
- giving offenders an opportunity to demonstrate their rehabilitation and/or the genuineness of their commitment to rehabilitation;
- allowing time for the offender’s condition to be stabilised if an offender has other issues, such as a mental illness; and
- providing for alternative processes to take place, such as restorative justice conferences, and where appropriate, to take these into account in sentencing.

12.59 The Council was sensitive to concerns that deferral should not be used inappropriately—for example, when the court is unlikely to impose a less severe sentence regardless of any efforts an offender might make at rehabilitation during the period of deferral. Partly on this basis, the Council expressed support for the general approach to deferral adopted in the ACT under the \textit{Crimes (Sentencing) Act 2005} (ACT), including providing for a general power of review, and allowing the court to give an indication of the penalty the offender might receive if he or she complies, or does not comply with the order. However, the Council recommended that the power to indicate the penalty the offender might receive should be exercised at the discretion of the court.

12.60 We also endorsed views expressed in an article on pre-sentence orders by Freiberg and Morgan—and shared by some roundtable participants\textsuperscript{1149}—that ‘onerous conditions (such as curfews, supervision requirements and programs), should be part of a formal sentence’, rather than form part of a ‘conditional non-sentence’ (such as a deferral order).\textsuperscript{1150} Accordingly, if conditions require the involvement of Community Correctional Services (CCS), we suggested, these conditions are properly imposed as part of a conditional sentencing order rather than as a condition of deferral. This would also ensure that an appropriate distinction is maintained between conditional sentences (properly so called) that quite legitimately may require the involvement of CCS, and deferral, which is intended to give offenders the opportunity to address issues that have contributed to their offending by accessing counselling and other services in

\begin{itemize}
\item R v Trindall (2002) 133 A Crim R 119, 131 (Smart AJ).
\item R v Trindall (2002) 133 A Crim R 119, 131 (Smart AJ).
\item Roundtable—Young Offenders (16 June 2005).
\item Roundtable—Young Offenders (16 June 2005). See further [12.54]–[12.56].
\end{itemize}
the community on their own initiative. We noted that this proposal would impose extra burdens on the courts in that they will have to schedule more than one hearing to finalise a matter. However, the Council argued that the beneficial outcomes for offenders were likely to outweigh the administrative costs and burdens of these changes to the courts.

12.61 The Council further recommended the retention of the current requirement under section 83A of the *Sentencing Act 1991* (Vic) that the consent of the offender is required before sentencing can be deferred. This was viewed as necessary to protect against courts deferring sentencing in cases in which offenders have expressed a preference to have the matter disposed of without a period of deferral, or the court imposing conditions with which the offender has no willingness to comply.

**Submissions and Consultations**

12.62 A number of those who made submissions supported the extension of deferral including the Mental Health Legal Centre, Youthlaw, the Criminal Bar Association, the Criminal Defence Lawyers' Association, Victoria Legal Aid (VLA), the Law Institute of Victoria, the Federation of Community Legal Centres (FCLC) and the Office of Public Prosecutions. VLA considered that a court should only be permitted to defer sentencing with the consent of the offender, consistent with the current provisions.

12.63 FCLC, while supporting the proposed extension, expressed some concerns about the 'lack of support or assistance from government agencies during the deferral period'. Similar concerns were expressed by the Law Institute of Victoria, who submitted:

> Although we agree that a benefit of deferral is ‘for offenders to address the causes of their offending and demonstrate their rehabilitation prior to sentencing’, the LIV wishes to query how programs will be funded to allow offenders to undertake rehabilitation. We are concerned that a lack of funding could create a divide between those with means to assist their rehabilitation and those who have no means.

12.64 Youthlaw felt that, while the power to defer should be available in all courts and to offenders of all ages, it should be limited to six months due to concerns that:

> … young people, mentally impaired, intellectually disabled, drug and alcohol and other special needs/high risk offenders may be set up to fail if there was a longer maximum deferral period of 12 months.

12.65 The Fitzroy Legal Service also preferred limiting the period of deferral to six months. However, it submitted that, were a 12-month limit to be applied, it was supportive of frequent reviews by the court.

12.66 Victoria Police was opposed to any extension of deferral on the grounds it could cause further delays in sentencing and disadvantage victims:

> Victoria Police believes any further delay in the sentencing process would be undesirable. In particular, Victoria Police is concerned about how any further delay will affect victims. There is already little assistance given to victims to keep them informed about when their matters will be dealt with and it is believed that this proposal would further disadvantage their position.

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1151 Submissions 2.11 (Law Institute of Victoria), 2.18 (Criminal Defence Lawyers' Association), 2.20 (Youthlaw), 2.21 (Criminal Bar Association), 2.23 (Federation of Community Legal Centres), 2.24 (Mental Health Legal Centre), 3.2 (Victoria Legal Aid) and 3.12 (Office of Public Prosecutions).

1152 Submission 3.2 (Victoria Legal Aid).

1153 Submissions 2.23 (Federation of Community Legal Centres).

1154 Submission 3.4 (Law Institute of Victoria).

1155 Submission 2.20 (Youthlaw).

1156 Submission 3.9 (Fitzroy Legal Service).
12.67 Similar concerns about bringing a resolution of the matter for both the victims and offenders were raised in submissions and consultations.\textsuperscript{1157} It was suggested that an extension of deferral to the higher courts would be unfair to victims who have experienced the ordeal of a trial, only to have the offender’s sentence deferred once he or she is found guilty.\textsuperscript{1158}

12.68 The New South Wales Court of Criminal Appeal has suggested for this reason the power to defer sentencing should be exercised only where ‘the delay in the sentencing of the offender is essential in order to ensure a just result’:

> The exercise of the power given under s 11 will inevitably result in delay in the finalisation of the prosecution of the offender. On many occasions, as in the present case, that delay will be substantial. Unless the further delaying of the sentencing of the offender is wholly justified in order to ensure that the sentencing discretion is properly exercised, there will be a miscarriage of justice. Time and again sentencing courts are asked to have regard to the delay in sentencing an offender as a matter of mitigation because of the adverse effects of delay upon the well-being of the offender and the disruption it causes to his or her everyday life. Delay unavoidably results in unfairness: unnecessary delay results in injustice. Steps have been taken throughout the criminal justice process to eliminate unnecessary delay wherever possible. Unless delay in the sentencing of the offender is essential in order to ensure a just result, the court has failed in its duty both to the offender and the community.\textsuperscript{1159}

12.69 As with views expressed during earlier consultations, in consultations on the Interim Report there continued to be mixed views about the desirability of extending the availability of deferral. It was suggested that deferral could be extremely useful in managing offenders with complex needs and was increasingly being used in the Magistrates’ Court.\textsuperscript{1160} It was noted that assessments on the day of sentencing or when the person appears in court are often difficult, particularly if the aim is to link the person into community treatment, because the offender may not be presenting in a way that would lead those preparing the assessment to recommend them for this option at that time.\textsuperscript{1161}

12.70 Deferral was also viewed by a number of those consulted as working well in the Children’s Court.\textsuperscript{1162} The comment was made that many of the young people who appear in the Children’s Court are quite unsettled when they come to the court and at that time are not in the position to deal with a longer and more complex order.\textsuperscript{1163} A period of deferral allows the court to see whether their lives can be stabilised with the assistance of Youth Justice, so the court can feel more confident that a longer order might work. There was some support for continuing to limit the availability of a formal power to defer to offenders under 25 years of age.\textsuperscript{1164}

\textsuperscript{1157} Roundtable—Young Offenders (30 November 2005); Submission 2.9 (R. Thomas).
\textsuperscript{1158} Submission 2.8 (G. Leech).
\textsuperscript{1160} Roundtable—Offenders with a Mental Illness or Cognitive Impairment (17 November 2005).
\textsuperscript{1161} Ibid.
\textsuperscript{1162} Ibid.
\textsuperscript{1163} Ibid.
\textsuperscript{1164} Roundtable—Offenders with Drug and Alcohol Issues (22 November 2005).
While some continued to see deferral as inappropriate on the basis that courts should not be managing offenders but rather sentencing them, others felt that the inability of courts to monitor an offender’s progress during the period of deferral was one of the shortcomings of deferral. Concerns also were raised about the capacity of the service system to respond should deferral lead to an increase in those seeking to access services, where responsibility for monitoring compliance should lie and in defining the accountabilities and responsibilities of those working with offenders. In some cases, it was suggested, deferring sentencing may set up an offender for failure, and possibly risk the offender accumulating additional offences and charges or even act as a disincentive to take any action until they are called on to be sentenced.

The usefulness of extending deferral to the higher courts was again questioned in consultations on the Interim Report. Early concerns were repeated that in cases in which the person is facing a substantial period in prison, and it is the only appropriate sentence, deferral could set up unrealistic expectations that they will receive some other form of order. Others identified the failure of courts in some cases to take into account the offender’s progress and effort made during the period of deferral in sentencing an offender as a problem but on the basis that this should be factored into the ultimate sentence imposed.

It was also felt by some that deferral should not be used as a means of putting off finalising the matter. There should be some parameters put in place. There was some support for the ACT model that requires the court to indicate what sentence an offender can expect should they consent to the deferral and comply with the conditions ordered. While some argued this indication should be mandatory, others felt it should be at the discretion of the court.

During the Council’s more recent consultations, there was general support for this option. The Mental Health Legal Centre and Youthlaw, however, repeated earlier concerns that: … the proper resourcing of both the NGO and government sectors to effectively supervise and assist offenders to complete their deferrals of sentence is vital for this and other options for reform to work successfully for both the offenders and the community.

This was echoed by the Federation of Community Legal Centres, who “reiterate[d] [their] previous calls for adequate resourcing to supervise and assist offenders whose sentence has been deferred”.

The view was also expressed that it would be useful to extend the power to defer sentence to the County Court. In discussions with judges of the County Court, it was suggested that, at present, some offenders may put off pleading guilty in order to be able to present better plea material—they effectively ‘manufacture delay’, prolonging the process to allow them to be able to provide real evidence of rehabilitation. It would be preferable if the court had the power to defer sentence, in appropriate circumstances. This would encourage defendants to plead as early as possible while still providing the option that sentencing does not have to immediately follow the plea. It was also raised that CISP is working very well in the County Court. The power to defer sentence would increase the potential to link more defendants into this service.

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1165 Roundtable—Young Offenders (30 November 2005).
1166 Roundtable—Offenders with Drug and Alcohol Issues (22 November 2005).
1167 Ibid.
1168 Ibid.
1169 Roundtable—Young Offenders (30 November 2005).
1170 Roundtable—Offenders with a Mental Illness or Cognitive Impairment (17 November 2005).
1171 Submissions 3.5 (Victoria Legal Aid), 3.7 (Youthlaw and the Mental Health Legal Centre), 3.10 (Federation of Community Legal Centres) and 3.11 (Law Institute of Victoria); Meeting with judges of the County Court of Victoria (27 November 2007) and Meeting with the Magistrates’ Court of Victoria (5 December 2007).
1172 Submission 3.1 (Youthlaw and the Mental Health Legal Centre).
1173 Submission 3.10 (Federation of Community Legal Centres).
1174 Meeting with judges of the County Court of Victoria (27 November 2007).
The Council’s View

12.77 The Council believes that the deferral of sentence 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, which can only ever provide an educated guess about an offender’s likely future behaviour. A period of deferral also may allow an offender time prior to sentencing to stabilise those factors in his or her life that may have contributed to his or her offending behaviour, such as drug or alcohol, housing and mental health issues.

12.78 Accordingly, the Council recommends that, consistent with the recommendations in the 2002 Sentencing Review, the power to defer sentencing should not be limited to offenders under the age of 25 or offenders who have their matters dealt with by the Neighbourhood Justice Centre, but rather should be extended to offenders of all ages sentenced in either the Magistrates’ Court or County Court.

12.79 While there was some support for limiting the period of deferral to six months, the Council remains of the view that a 12-month maximum term is appropriate in order to allow offenders the best opportunity to undertake programs and demonstrate their rehabilitation. The 12 month-maximum will operate as an upper limit only, and in most cases we envisage a shorter period will be sufficient to meet the purposes of deferral.

12.80 We acknowledge some concerns that were raised in consultations and submissions about the potential injustice for both victims and offenders that might result from delaying the sentencing of the offender, particularly if the courts can defer sentence for a longer period than is currently possible. The requirement that an offender must consent to deferral is one safeguard against the improper use of this power. As an additional safeguard, the Council recommends that a statement outlining the intended purposes of deferral should be inserted in the Sentencing Act 1991 (Vic). It is envisioned that this statement will assist the courts in using this option only when it will be of most benefit and also help to ensure that deferral is not used by defendants as a means of unnecessarily prolonging proceedings.

12.81 In addition, the Council recommends that the court should have the explicit power to review an offender’s progress during the period of deferral to ensure that the purpose for which the sentence was deferred is being fulfilled. In line with the current legislation in the ACT, the Council recommends that the court have the power to set a timetable to review the offender’s progress. However, the Council does not support courts being permitted to impose formal obligations on the offender as a condition of deferral. If the court is of the view that conditions are required to ensure an offender’s compliance with the order, then in our view it should proceed straight to sentencing.

12.82 The Council carefully considered the extension of the power to defer sentencing to the higher courts. We are mindful of concerns that when a very serious offence has been committed, deferring sentencing may prolong the resolution of the case, adding to the potential trauma experienced by a victim. However, following our discussions with judges of the County Court, we believe that deferral may in fact encourage offenders to plead guilty earlier in the process. This is because in the absence of a formal power to defer, which can only be exercised after a finding of guilt, defendants in the County Court may delay entering a plea of guilty until shortly prior to trial to buy themselves additional time to demonstrate their rehabilitation.

12.83 The Council does not, however, recommend that the power to defer sentencing be extended to the Supreme Court due to the nature of the offences dealt with in that court.

12.84 The Council notes that the changes to deferral as outlined above are broadly consistent with the position in a number of other Australian jurisdictions and with the recommendations of the Australian Law Reform Commission on the sentencing of federal offenders.1175

1175 See further [12.6].
In its Interim Report, the Council suggested that courts should be permitted to give a sentence indication prior to the deferral of sentence, consistent with the ACT legislation. Since that time, the Council has released its Final Report on Sentence Indication and Specified Sentence Discounts. As that report contained a comprehensive discussion of the issues relating to sentence indication, from which a number of recommendations were developed, the Council recommends that at this stage sentence indication should only be available in the manner and circumstances as detailed in those recommendations.

The Council is supportive of the principles of restorative justice and, consistent with the proposals of the Jesuit Social Services, believes that deferral of sentencing could provide a useful means by which the court could encourage participation in such programs. From a victim’s perspective, the use of restorative justice could result in greater satisfaction with the process, while for the offender it may lead to a better understanding of the impact of his or her offending behaviour on those directly affected by it. The Council suggests that this should be recognised by specifying that participation in a restorative justice program is one of the purposes for which a sentence may be deferred. However, prior to deferring sentencing for this purpose, a court should be satisfied that the offender would be willing to participate in such a process.

**RECOMMENDATION 13: Deferral of Sentencing**

**Recommendation 13–1**
The current age restrictions that apply to the power to defer sentencing in the Magistrates’ Court under section 83A of the *Sentencing Act 1991* (Vic) should be removed and the maximum period of deferral increased from 6 months to 12 months.

**Recommendation 13–2**
The power to defer sentencing should be made available in the County Court. As for the Magistrates’ Court, the County Court should be permitted to defer the sentencing of an offender of any age, up to a maximum period of 12 months.

**Recommendation 13–3**
The purposes of deferral should be:
- to assess the offender’s capacity for and prospects of rehabilitation;
- to allow the offender to demonstrate that rehabilitation has taken place;
- to allow the offender to participate in restorative justice or other programs; or
- for any other purpose the court considers appropriate in the circumstances.

**Recommendation 13–4**
The court should be permitted to set regular intervals at which an offender’s progress is to be reviewed and/or review the offender’s progress at any time. The court should be permitted to review the order on its own initiative, or on the application of the offender or the prosecution. The court should have the power on review of the deferral order to:
- take no further action; or
- cancel the deferral order and proceed to sentence.
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The Impact of Reforms on Offenders

13.1 Just as the range of sentencing orders available to the courts in sentencing may impact differently on different types of offenders, so too are any reforms likely to result in different outcomes for offenders depending on their individual circumstances. For example, if limited alternatives are available to immediate imprisonment, this may have a greater impact on offenders who are employed and/or who are the principal carers for children or other family members. While courts have generally accepted that possible hardship to third parties caused by the imprisonment of an offender may only be relevant in mitigation of sentence in exceptional circumstances, if a range of different sentencing dispositions, including imprisonment, is available, all of which might achieve a just and proportionate sentence, a court has greater latitude to impose a sentence that does not involve immediate imprisonment.

13.2 The types of conditions a court may impose, as well as the types of orders, also are likely to affect offenders in different ways, depending on their individual circumstances. For example, one of the criticisms made of conditions such as drug and alcohol treatment conditions and mental health treatment conditions is that while conditions are often imposed by courts with the aim of assisting offenders to rehabilitate rather than for punishment purposes, this can result in offenders with these issues receiving far more onerous orders and intrusive forms of interventions than other offenders who do not have these issues, which in turn may increase their chances of breaching the order. This effect could be viewed as a form of net-widening as it subjects offenders to higher levels of control. A number of those consulted expressed concerns about courts loading up orders with these kinds of ‘helpful’ conditions—particularly in the absence of appropriate services—and felt that the best outcome for some offenders with these issues, in terms of minimising their chances of breaching orders, was a disposition that would not require the person to comply with too many conditions.

13.3 Offenders living in rural and remote areas were also felt to be disadvantaged by some sorts of conditions, such as those requiring offenders to travel to report personally. Other criticisms made concerned the lack of availability of certain types of dispositions, such as home detention, to offenders living outside metropolitan Melbourne.

13.4 In the context of discussions concerning Indigenous offenders, it was felt important that any conditions requiring the provision of services or programs be culturally appropriate. The process of sentencing, rather than simply the structure of orders and legislative powers, was also emphasised as an important component to increasing levels of compliance with orders. The Koori Court was pointed to as an example of how higher rates of compliance could be achieved by using mechanisms such as providing offenders with clear explanations of the implications of particular types of orders and the court’s expectations in terms of compliance with conditions.

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1177 Roundtable—Offenders with a Mental Illness and/or Cognitive Impairment (17 November 2005); Roundtable—Offenders with a Drug and/or Alcohol Addiction (22 November 2005).

1178 Ibid.

1179 Meeting with Victorian Aboriginal Legal Service (9 December 2005).

1180 Ibid.

1181 Submission 1.43 (Victorian Aboriginal Legal Service).
13.5 The Council views the initial reforms to the structure of intermediate orders proposed in this Report as an important first step in improving the operation of sentencing orders in Victoria. However, equally we acknowledge the importance of exploring the particular impacts and reforms that may be necessary to respond to the needs and issues that offenders of different backgrounds face and their individual circumstances. While we have identified some broad issues for different groups of offenders, such as Indigenous offenders, offenders with drug and alcohol and mental health issues, offenders living in rural and remote areas and those with caring responsibilities who may require a specialised response, a range of factors may impact on the sentencing response that is appropriate in a given case (including the type of offence, whether the offender has a cognitive impairment, and the age and cultural background of the offender). In most cases a number of these factors will be present in a given case.

13.6 The type of guidelines recommended for use pre-sentence may provide one avenue for encouraging greater consideration to be given to the particular impacts of orders and conditions on individual offenders and for better tailoring orders to address the purposes of sentencing and those factors contributing to an offender’s offending behaviour. The Community Correctional Services Offender Management Manual and other standards and guidelines on the management of offenders also provide an important means of addressing potential challenges that some offenders may meet in complying with the conditions of their orders. The Council suggests that external agencies and organisations with experience in working directly with offenders should be consulted wherever possible in the development and updating of these types of guidelines.

Implementation Challenges

Introduction

13.7 The reforms recommended in this report are significant and far-reaching, and raise complex implementation and transitional issues.

13.8 As the Halliday review of sentencing in England and Wales has recognised, a number of preconditions are necessary in order to achieve successful implementation of sentencing reform projects, and to protect against unintended outcomes, including:

- sufficient understanding of, and commitment to the main elements of the reform programme, including its goals and how it is expected to work, amongst all those directly involved, and a wider public (the ‘hearts and minds’ aspect of implementation);
- comprehensive assessment of needs for investment in infrastructure and services, including completing necessary policy development; constructing essential systems;
- obtaining necessary human and financial resources;
- enacting legislation;
- adequate planning for the change process, and
- a comprehensive plan that recognises the needs of all concerned and commands a sufficient level of confidence across all agencies.

1182 The Department of Justice’s Correctional Management Standards: Community Correctional Services (2005) identifies specific outcomes and outputs in relation to offenders with specific needs, including young adult offenders, women offenders, offenders with a disability, offenders from culturally and linguistically diverse backgrounds and Indigenous offenders. The Offender Management Manual developed by Corrections Victoria also provides guidance on the management of offenders with specific needs, including those identified in the standards, sex offenders, offenders with substance misuse issues and those with multiple and complex needs: Corrections Victoria, Community Correctional Services (2005), above n 780, 2/8 ‘Supervising Different Offender Groups’.
The Council does not underestimate the investment of time and resources across the criminal justice system that will be required to support the implementation of its proposals, should the Government choose to adopt them.

Resourcing Issues

The Office of Public Prosecutions (OPP) was one of many of those consulted in more recent consultations who identified the need for additional funding to be provided should the reforms recommended by the Council be implemented. The OPP raised concerns that an increase in conditional orders and in the conditions available to the courts would translate into more offenders breaching their orders, and a consequential rise in the number of proceedings for breach. The OPP identified the availability of additional funding as critical to avoid delays in commencing these proceedings.1183

In part, the Council hopes that the introduction of a Community Corrections Board might address the issue of delay by providing another avenue for responding to breaches of conditions, although the establishment of such a board will require some commitment of additional ongoing funding. Equally there is a need, if the reforms recommended are to be successful, to ensure an adequate level of funding across the system to ensure that appropriate supports are available to offenders and that services are delivered as intended, and to ensure the adequate administration of orders.

It is inevitable that if more conditional community orders result from the changes recommended, greater demands will be placed on Community Correctional Services (CCS). Further, because the intermediate orders proposed will be targeted at offenders who are at higher risk of reoffending than offenders on standard forms of community-based orders, these offenders will require more assistance and intensive supervision, both to minimise the risks of reoffending and to monitor their compliance with other conditions of their orders. In order to perform these functions properly, Community Correctional Officers will not only require appropriate training, but also additional time to devote to the supervision of these offenders.

The Council is aware that CCS already faces a number of challenges, including addressing workforce issues and planning for the management of offenders with complex needs. In a research paper released in 2006 the State Services Authority identified the current profile of community services officers as ‘the most significant challenge within the corrections workforce’ from a workforce planning perspective, noting that this segment of the workforce ‘has a high proportion of young, tertiary qualified females that, as a demographic group, tend toward high turnover rates and a preference for part-time work arrangements’.1184 ‘An increasing number of offenders with complex profiles (such as social, physical or intellectual disabilities) that require additional services or effort’ was identified as another factor that might increase workforce demands over the next 5–10 years.¹¹⁸⁵

While it is true that any increase in community sentencing orders will place greater demands on CCS, equally they have the potential to prevent offenders ending up in prison, thereby resulting in potential cost savings. The extent of any savings that might eventuate will depend on a number of factors, including the costs involved in administering the new orders and the numbers of offenders entering prison as a result of breach.

1183 Submission 3.12 (Office of Public Prosecutions).
1185 Ibid.
13.15 Prior to implementing any of the reforms to the existing range of sentencing orders recommended in this Report, the Council therefore believes it is critical that the Department of Justice review the need for new recurrent funding, and system reforms to support the implementation of the proposals. In our view, any reforms to existing orders or new orders proposed should not come into operation until such time as funding and resources have been secured, and other measures put in place by the courts and Corrections Victoria to support these changes. We believe this will be critical not only to the successful operation of these orders, but also to encourage confidence on the part of sentencers and the broader community in the use of these orders.

13.16 In our view, regardless of whether the recommendations in this Report are adopted, the level of existing funding of CCS 1186 and non-government organisations providing treatment, accommodation and other services to offenders under orders should be reviewed as a matter of priority. We repeat the concerns expressed by many of those organisations and individuals with whom we consulted that the failings of community sentences and lack of confidence in some orders is at least partly attributable to resourcing and workforce issues. Additional investments in drug and alcohol treatment, mental health services and sex offender treatment programs, as well as in ensuring the quality of, and continuity in, staff overseeing the supervision of offenders on orders, to name but a few issues, not only are likely to reduce rates of breaches of existing orders, but also are likely to result in significant cost savings to the community by reducing the risks of reoffending, and sparing potential victims the financial and psychological costs of victimisation (see further [3.62]–[3.64]).

RECOMMENDATION 14: Implementation Issues

Recommendation 14–1

Prior to implementing any of the reforms recommended in this Report, the Department of Justice should review the need for new recurrent funding, and system reforms to support the implementation of the proposals.

1186 We note that there has already been an increase in the level of funding of community corrections in Victoria. While in 2005–06, the expenditure in Victoria on offenders supervised by Community Correctional Services was $13.30 per offender per day, translating to around $4,855 a year per offender, by 2006–07 this had risen to $17.00 (or $6,205 a year per offender). Western Australia was the only jurisdiction which had a higher level of expenditure on community corrections in 2006–07 ($20.7 per offender per day, or $7,555 per year per offender): Steering Committee for the Review of Government Service Provision (2007), above n 178, Corrective Services Attachment, Table 7A.7; Steering Committee for the Review of Government Service Provision (2008), above n 212, Corrective Services Attachment, Table 8A.7.
Transitional Issues

13.17 The question of whether the reforms we recommend should operate prospectively (that is, should be applicable only in sentencing offenders for offences committed after the date they commenced operation) or retrospectively (and be available in sentencing all offenders, regardless of when the offence was committed) is another issue that will need to be addressed should our recommendations be adopted. The relevant principle recognised in the *International Covenant on Civil and Political Rights 1966* is that no person is to be subjected to a heavier penalty than was applicable at the time when the offence was committed.1187 This principle is reflected in section 27 of the *Victorian Charter of Human Rights and Responsibilities*, which provides that:

(2) A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.

(3) If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the reduced penalty.

13.18 Under the *Interpretation of Legislation Act 1984* (Vic) legislation is not to be construed retrospectively where the consequence would be that the rights of a person existing at the date of notification are prejudicially affected or liabilities are imposed in relation to actions prior to the notification, or would affect any penalty, forfeiture or punishment incurred in respect of an offence committed against that Act or provision.1188

13.19 Whether the reforms we suggest should operate prospectively or retrospectively may therefore depend on whether the new and reformed orders are viewed as providing more or less severe forms of penalties than the existing range of intermediate orders.1189 While our own view is that the package of reforms recommended will ultimately benefit offenders and the broader community by making a more flexible range of orders available, the possibility of longer orders in some cases (such as the reformed version of the ICO) could be viewed as exposing offenders to the risk of receiving a more severe sentence than they otherwise might have prior to the introduction of these reforms. On the other hand, the increase in the maximum duration of orders could potentially benefit offenders should these orders be used in place of immediate imprisonment where they previously might not have been (for example, under the current law, due to the limited duration of these orders). Ultimately, we consider this decision is best made at the time the legislation is drafted, taking into account the specific form of the new and reformed orders.

1187 *International Covenant on Civil and Political Rights* (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) art 15:

(1) ‘No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

(2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.’


1189 There is authority to support the proposition that references to the penalty that would have applied at the date of the offence refer to the maximum penalty, rather than the individual sentence that might have been imposed on an individual offenders (see, for example, *Morgan v Superintendent of Rimutaka Prison* [2005] NZSC 26 (Unreported, McGrath, O’Regan and Hammond JJ, 7 March 2005). In New Zealand, in considering the compatibility of legislation introducing the new forms of community sentences with the *Bill of Rights Act 1990* (NZ) and the *Sentencing Act 2002* (NZ), the view was expressed that in addition to protections requiring an offender’s consent to an order imposed, if the imposition of the sentence were to result in a harsher penalty than that available at the time of commission of the offence, then that sentence could not be imposed: Val Sim and Joanna Davidson (Crown Counsel), *Legal Advice: Consistency with the New Zealand Bill of Rights Act 1990: Criminal Justice Reform Bill* (20 November 2006) [31] <http://www.justice.govt.nz/bill-of-rights/bill-list-2006/c-bill/criminal-justice-reform-bill.html> at 18 February 2008.
Informing the Community About Sentencing

13.20 There is substantial evidence that community confidence in sentencing, including specific forms of sentencing orders, can be enhanced through the provision of better information about sentencing. While the Council believes that the changes it proposes will result in a range of intermediate orders that are more transparent and make more intuitive sense than the current range of orders, there is still a risk of these orders being misunderstood, thereby undermining community confidence in their use.

13.21 An important function of the Council is to provide statistical and other information to the government, judiciary and members of the public on sentencing trends and matters. Should the reforms recommended be introduced, the Council intends to play a central role in facilitating the provision of information to the community about the nature and purposes of the new forms of orders, and the impetus for reform.

13.22 Other criminal justice agencies, including the courts and Corrections Victoria, also will continue to perform an important role in making information about sentencing and the management of offenders on orders available to members of the community in an easily accessible format.

Improving Information Exchange and Enhancing Transparency

13.23 In recent consultations some issues were raised about the need to improve the level of communication between the courts, corrections and other agencies involved in the delivery of services to offenders. Communication is important not only from the perspective of ensuring orders operate effectively and meet their intended objectives, but also of building sentencers’ confidence in sentencing orders and those whose responsibility it is to manage these orders.

13.24 The Council supports a range of measures to support better information exchange and to encourage dialogue between key stakeholders in the system. Pre-sentence reports remain an important mechanism for providing sentencers with information concerning offenders’ eligibility and suitability for community sentences as well as program conditions that may be useful in addressing their needs and reducing the risks of reoffending. In our view, good pre-sentence advice is critical to support the role of the sentencer in deciding upon the appropriate sentence and taking into account the nature and seriousness of the offence, and the individual circumstances of the offender.

13.25 If the structure of existing intermediate orders is reformed, and new orders such as the drug and alcohol ICO and CBO targeted at young adult offenders are introduced, it is likely that the demands placed on CCS will increase due to the rise in the use of conditional forms of orders. Because some of these orders are targeted at offenders with specific criminogenic needs and risk profiles, the complexity of pre-sentence reports may also increase, which may require additional staff to be employed to prepare these assessments and training to be provided on the new forms of assessments. Taking these considerations into account, the Council recommends that additional funding and resources should be provided to support the preparation of comprehensive pre-sentence reports, including in the case of more specialist orders, assessments of the suitability of offenders for these orders and the specific needs that should be targeted post-sentence.

1190 Sentencing Act 1991 (Vic) ss 108C(1)(b)–(c).
13.26 The Council believes there may also be some value in developing more detailed guidelines to assist in the preparation of pre-sentence reports and for use by courts in sentencing to ensure a consistent approach to sentencing and that sentencing orders are targeted at those offenders for whom they are most likely to be effective. Similar to the forms of guidance developed by the National Probation Service for England and Wales, such guidelines might include information on:

- the specific purposes of available sentencing orders;
- the specific purposes of individual conditions of orders;
- the orders, packages of conditions and duration of orders that might be suitable in a given case, taking into account the seriousness of the offence(s), the level of risk posed by the offender to the community and the personal circumstances and rehabilitative needs of the offender.

These forms of guidelines might also address issues such as the recommended minimum term of orders, taking into account the purposes of sentencing, such as rehabilitation.

13.27 The Council also acknowledges the importance of avenues to provide feedback to sentencers on an offender’s progress once an order has been made. This type of feedback is not only valuable from the perspective of allowing sentencers to determine what types of interventions work with which kind of offenders, but also may perform a critical role over the longer term in enhancing confidence in community orders. Under the current arrangements in Victoria, the Court Services Unit of CCS provides information to Magistrates on request concerning the status of offenders serving community-based orders. In some jurisdictions this process has been formalised. For example, the National Probation Service for England and Wales allows sentencers to request individual completion and progress reports during the term of a community sentence and/or following its completion, and also provides for the regular provision of probation area summary completion reports with data on the number of orders completed and terminated.

13.28 There are a number of additional strategies that could usefully be considered to facilitate the exchange of information between the courts and corrections. For example, in England and Wales provision is made for regular meetings to be convened of the National Offender Management Service, the probation service and judiciary. Guidance in relation to these meetings is provided in the form of a protocol that sets out the intended purpose of these meetings, information on how these meetings are to be organised and direction on mechanisms that should be used to resolve issues concerning resourcing. In Queensland, a Judicial Liaison Unit has been established by Corrective Services, which is intended to improve the level of dialogue between the courts and corrections. This unit provides a central point of contact for judicial officers on operational and strategic issues and 'provides a link between the work of corrective services and the courts'.

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1191 See, for example: National Probation Service for England and Wales (2005), above n 610; and National Probation Service for England and Wales and National Offender Management Service (2007), above n 256.


1193 See National Probation Service for England and Wales, Probation Circular 78/2005—Community Order Completion and Progress Reports to Court (2005). However, the guidelines suggest progress reports should be request by Magistrates only in exceptional cases (such as where an immediate custodial sentence was initially considered, but a community sentence was made).


1195 Meeting with Corrections Victoria (23 November 2007). For more information on this unit, see <http://www.correctiveservices.qld.gov.au/About_Us/Judicial_Liaison_Unit/>.

13.29 The Council also believes there is value in improving the accessibility of the guidelines and standards concerning the management of offenders subject to community sentences. While Corrections Victoria has developed detailed guidelines and instructions relating to the assessment and management of offenders on community correctional orders, this information is currently not published. In contrast, a number of jurisdictions both in Australia and overseas have moved to make their operational guidelines available more widely. For example, in Queensland, relevant policies and procedures governing the management of offenders are reproduced in full on the Corrective Services website.\footnote{Offender Management (2008) Queensland Corrective Services, <http://www.dcs.qld.gov.au/Resources/Procedures/Offender_Management/index.shtml> at 12 February 2008.} In New Zealand the Department of Corrections also publishes its Community Probation and Psychological Services (CPPS) Operations Manual on its website.\footnote{CPPS Operations Manual (Undated) Department of Corrections (NZ) <www.corrections.govt.nz/public/policyandlegislation/cpps/index.html> at 12 February 2008.}

13.30 The availability of information guiding how offenders subject to community orders are managed, we believe, is important to improve the level of understanding of how offenders subject to community sentences are managed and overall levels of community confidence in the justice system. Given the significant impact these policies and guidelines may have on how sentences are administered, we further regard it as appropriate that these policies should be subject to public scrutiny. We therefore recommend that consideration should be given to publishing this information online on the Department of Justice’s website.

### RECOMMENDATION 15: Improving Pre-Sentence Advice and Enhancing Transparency

**Recommendation 15–1**

Additional resources and funding should be provided to support the preparation of pre-sentence assessments and comprehensive pre-sentence reports to guide the courts in assessing the appropriate sentence and mix of conditions.

**Recommendation 15–2**

Consideration should be given to the development of more detailed guidelines to assist in the preparation of pre-sentence reports and for use by courts in sentencing. Such guidelines might include information on:

- the purposes of available sentencing orders;
- the purposes of individual conditions of orders;
- the orders, packages of conditions and duration of orders that might be suitable in a given case, taking into account the seriousness of the offence(s), the level of risk posed by the offender to the community and the personal circumstances and rehabilitative needs of the offender.

**Recommendation 15–3**

Consideration should be given to publishing policies and procedures relating to the management of offenders on community sentences on the Department of Justice’s website.
Evaluating the Impacts of the Proposed Reforms

13.31 Any changes to the range of existing sentencing orders are likely to have impacts across the criminal justice system in Victoria. The Council has recommended that the appropriate use of the power to suspend a prison sentence in Victoria should be reviewed once the other reforms recommended in this Report have been implemented and there has been sufficient time to evaluate their impact properly (see Recommendation 2).

13.32 Over the period prior to the review, ongoing monitoring will be critical to identify and seek to remedy any unintended consequences of the reforms. As part of this process, the Council intends to continue to monitor sentencing trends and to maintain its dialogue with the courts, Corrections, the legal community, victims of crime and the broader community on possible improvements to sentencing law and practice in Victoria.
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Appendices
## Appendix 1—Meetings on Final Report—Draft Recommendations

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## Appendix 2—List of Submissions

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## Interim Report

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<td>06/12/05</td>
<td>Chief Commissioner Christine Nixon APM</td>
<td>Victoria Police</td>
</tr>
<tr>
<td>2.17</td>
<td>07/12/05</td>
<td>Kate McMillan (Chairman)</td>
<td>The Victorian Bar</td>
</tr>
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<td>2.18</td>
<td>12/12/05</td>
<td>Sarah Westwood (Vice-President)</td>
<td>Criminal Defence Lawyers’ Association</td>
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<tr>
<td>2.19</td>
<td>12/12/05</td>
<td>Yehudi Blacher (Secretary)</td>
<td>Department for Victorian Communities</td>
</tr>
<tr>
<td>2.20</td>
<td>15/12/05</td>
<td>Paula Grogan (Director)</td>
<td>Youthlaw</td>
</tr>
<tr>
<td>2.21</td>
<td>16/12/05</td>
<td>Stephen Shirrefs SC (Vice Chairman)</td>
<td>Criminal Bar Association</td>
</tr>
<tr>
<td>2.22</td>
<td>19/12/05</td>
<td>Stan Winford (Solicitor/Policy and Project Officer)</td>
<td>Fitzroy Legal Service Inc</td>
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<tr>
<td>2.23</td>
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<td>Anthony Kelly (Policy Officer)</td>
<td>Federation of Community Legal Centres (Vic) Inc</td>
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<td>10/01/06</td>
<td>Vivienne Topp (Lawyer/Policy Worker)</td>
<td>Mental Health Legal Centre Inc</td>
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<tr>
<td>2.25</td>
<td>18/01/06</td>
<td>Wendy Tabor (Acting Director, Legal Services Branch)</td>
<td>Department of Human Services</td>
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</tbody>
</table>
## Final Report—Draft Recommendations

<table>
<thead>
<tr>
<th>No.</th>
<th>Date</th>
<th>Name</th>
<th>Organisation</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.1</td>
<td>23/02/07</td>
<td>Vivienne Topp and Anna Radonic (Principal Lawyer)</td>
<td>Mental Health Legal Centre Youthlaw</td>
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<td>Tony Parsons (Managing Director)</td>
<td>Victoria Legal Aid</td>
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<td>Sarah Nicholson (Policy Officer)</td>
<td>Federation of Community Legal Centres</td>
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<td>Geoffrey Provis (President)</td>
<td>Law Institute of Victoria</td>
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<td>3.5</td>
<td>29/11/07</td>
<td>Tony Parsons (Managing Director)</td>
<td>Victoria Legal Aid</td>
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<td>3.6</td>
<td>03/12/07</td>
<td>Kelvin Anderson (Commissioner)</td>
<td>Corrections Victoria, Department of Justice</td>
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<td>3.7</td>
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<td>Vivienne Topp and Anna Radonic (Principal Lawyer)</td>
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<td>Belinda Lo and William Crawford</td>
<td>Fitzroy Legal Service Inc.</td>
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<td>3.10</td>
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<td>Dr Chris Atmore (Policy Officer)</td>
<td>Federation of Community Legal Centres</td>
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<td>Geoffrey Provis (President)</td>
<td>Law Institute of Victoria</td>
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<td>3.12</td>
<td>17/01/08</td>
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<td>Office of Public Prosecutions</td>
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### Appendix 3—Sentencing Orders Under the Current and Proposed New Sentencing Hierarchies (Interim Report and Final Report)

<table>
<thead>
<tr>
<th>CURRENT POSITION (Sentencing Act 1991 (Vic))</th>
<th>INTERIM REPORT PROPOSALS</th>
<th>FINAL REPORT RECOMMENDATIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Custodial Orders</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Imprisonment</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Presumption that a non-parole period (NPP) will be fixed if sentence of imprisonment of two years or more</td>
<td>Imprisonment</td>
<td>Imprisonment</td>
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<tr>
<td>Discretion to fix a NPP for sentences of between 12–23 months</td>
<td>Imprisonment + Release Order (IRO)</td>
<td>Permitted imprisonment combinations for a single offence:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Imprisonment + fine</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Imprisonment (up to three months) + community-based order</td>
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<tr>
<td></td>
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</tr>
<tr>
<td>Permitted imprisonment combinations for a single offence:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Imprisonment + fine</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Imprisonment (up to three months) + community-based order</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Combined Custody and Treatment Order</strong> (maximum term: 12 months)</td>
<td>Remove as a sentencing option</td>
<td>Remove as a sentencing option</td>
</tr>
<tr>
<td><strong>Drug Treatment Order</strong> (maximum term: two years)</td>
<td>Drug Treatment Order (maximum term: two years)</td>
<td>Drug Treatment Order (maximum term: two years)</td>
</tr>
<tr>
<td><strong>Home Detention Orders</strong> (maximum term: 12 months)</td>
<td>Home detention as a sentencing order abolished</td>
<td>Home Detention (new form) (maximum term: 12 months)</td>
</tr>
<tr>
<td></td>
<td>Replaced with the use of curfew orders with electronic monitoring as a condition of a new order (correction and supervision order)</td>
<td>Recast as a sentencing order in its own right (rather than a means of serving a prison sentence)</td>
</tr>
<tr>
<td><strong>Intensive Correction Order</strong> (maximum term: 12 months)</td>
<td>Replace with correction and supervision order</td>
<td>Reform and recast into a non-custodial form of order (see below)</td>
</tr>
<tr>
<td><strong>Suspended Sentences</strong> (maximum term: three years higher courts and two years Magistrates Court)</td>
<td>Suspended Sentences Phase out</td>
<td>Suspended Sentences (maximum term: three years higher courts and two years Magistrates’ Court)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Availability for serious offences (as defined in s 3 of the Act) restricted and guidelines on factors relevant to the decision to suspend.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Continued availability subject to an evaluation of the operation of the reforms recommended following implementation</td>
</tr>
</tbody>
</table>
| CURRENT POSITION  
(Sentencing Act 1991 (Vic)) | INTERIM REPORT  
PROPOSALS | FINAL REPORT  
RECOMMENDATIONS |
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-Custodial Orders</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
| | Intensive Correction Order  
(maximum term: two years) | |
| | Recast as a non-custodial order rather than as a means of serving a prison sentence | |
| | Order combining up to 500 hours community work with supervision and other conditions | |
| | Intensive Correction (Drug and Alcohol) Order  
(maximum term: two years) | |
| | Specialist form of ICO targeted at offenders with a drug or alcohol dependency | |
| | Order combining supervision and program conditions (including residential treatment) with option of unpaid community work | |
| Community-Based Order  
(maximum term: two years) | Correction and Supervision Order  
(maximum term: three years higher courts and two years Magistrates’ Court) | Community-Based Order  
(maximum term: two years) |
| | Single community sentence replacing ICOs, CBOs and suspended sentences | Reforms to maximum number of hours of unpaid community work (capped at 300 hours) |
| Young Adult Offenders Correction and Supervision Order  
(maximum term: 18 months) | Specialised form of order for high risk/needs young offenders under 25 years of age | Community Based (Young Adult Offenders) Order  
(maximum term: 18 months) |
| | Specialised form of order for high risk/needs young offenders under 25 years of age | Specialised form of order for high risk/needs young offenders under 25 years of age |
| Fines | Fines | Fines |
| Dismissals, Discharges and Adjournments | Dismissals, Discharges and Adjournments | Dismissals, Discharges and Adjournments |
### Table 15: Custodial and part-custody orders available in Australian jurisdictions (excluding the power to suspend a term of imprisonment)

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Legislation</th>
<th>Custodial Orders</th>
</tr>
</thead>
</table>
| Commonwealth                      | **Crimes Act 1914**                       | s 20AB(1)—access to state and territory based sentencing options (community service orders, community work orders, periodic detention, attendance centre orders, weekend detention and attendance orders). A court also is permitted to pass or make a similar sentence or order or a sentence or order that is prescribed for the purposes of this section (CBO made under Part 3 Division 3 of the **Sentencing Act 1991** (Vic); a CBO made under Part 9 of the **Sentencing Act 1995** (WA); and an ISO made under Part 10 of the **Sentencing Act 1995** (WA)).  

Australian Capital Territory (ACT) | **Crimes (Sentencing) Act 2005** | • Imprisonment  
• Periodic detention: (if term of imprisonment imposed not less than three months or more than two years)  

Combination sentences are permitted under Ch 3, Part 3.6 if an offence is punishable by imprisonment. Permitted combinations including imprisonment = an order sentencing the offender to imprisonment (permitted combination = full-time detention, periodic detention or a combination of these kinds of imprisonment), a suspended sentence order, a good behaviour order, a fine, a driver licence disqualification order, a reparation order, a non-association order, a place restriction order, a treatment order under the **Drugs of Dependence Act 1989** (ACT) and an order (however described) imposing another penalty available under any other territory law.  

New South Wales (NSW) | **Crimes (Sentencing Procedure) Act 1999** | • Imprisonment  
• Compulsory drug treatment detention (Drug Court only)  
• Periodic detention (if term of imprisonment imposed of not more than three years)  
• Home detention (if term of imprisonment imposed of not more than 18 months)  

Northern Territory | s 40(2) **Sentencing Act 1995** | • Imprisonment  
• Home detention (a court is permitted to suspend a term of imprisonment on an offender entering into a home detention order of up to 12 months)  

Queensland | **Penalties and Sentences Act 1992** | • Imprisonment  
• Intensive correction order (if term of imprisonment imposed of 12 months or less)  

South Australia | **Crimes (Sentencing) Act 1988** | • Imprisonment |
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Legislation</th>
<th>Custodial Orders</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tasmania</td>
<td>Sentencing Act 1997</td>
<td>• Imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Section 8 of the Act provides for combination sentences to be imposed. A court that orders that an offender serve a term of imprisonment may also: make a community service order; make a probation order; order the offender to pay a fine; make a rehabilitation program order; or make a driving disqualification order in respect of the offender.</td>
</tr>
<tr>
<td>Victoria</td>
<td>Sentencing Act 1991</td>
<td>• Imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Combined custody and treatment orders (if term of imprisonment imposed of not more than 12 months)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Drug treatment orders (Drug Court only)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Home detention (if term of imprisonment imposed of not more than 12 months and the offender is found to be suitable to serve the sentence by way of home detention)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Intensive correction orders (if term of imprisonment imposed of not more than 12 months)</td>
</tr>
<tr>
<td>Western Australia</td>
<td>Part 11 Sentencing Act 1995</td>
<td>• Imprisonment</td>
</tr>
</tbody>
</table>

The ALRC has recommended that federal sentencing legislation and regulations should specify exhaustively which state or territory sentencing options may be picked up and applied in sentencing a federal offender and that the proposed Office for the Management of Federal Offenders (OMFO) should monitor the effectiveness and suitability of sentencing options for federal offenders and provide advice to the Australian government regarding those options that should be made available for federal offenders: ALRC (2006), above n 1058, Recommendations 7–13 and 7–14. In monitoring state and territory sentencing options the ALRC has recommended that the OMFO should; ‘(a) review the maximum number of hours of community service and the maximum time within which such service must be completed in each state and territory; and (b) advise the Australian government about appropriate national limits in relation to community-based orders and other sentencing options available under state and territory law’: Ibid Recommendation 7–15.
Table 16: Non-custodial conditional orders: Australia

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Legislation</th>
<th>Non-Custodial Conditional Orders</th>
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</thead>
<tbody>
<tr>
<td>Commonwealth</td>
<td>Crimes Act 1914</td>
<td>s 20AB(1)—Access to state and territory based sentencing options (including community service orders and community work orders). Court also permitted to pass or make a similar sentence or order or a sentence or order that is prescribed for the purposes of this section (CBO made under Part 3 Division 3 of the Sentencing Act 1991 (Vic); a CBO made under Part 9 of the Sentencing Act 1995 (WA); and an ISO made under Part 10 of the Sentencing Act 1995 (WA)).</td>
</tr>
</tbody>
</table>
| Australian Capital Territory (ACT) | Crimes (Sentencing) Act 2005 | Good behaviour order (maximum term of three years)  
Non-association order and place restriction order (maximum term of 12 months)  
Combination sentences are permitted under Ch 3, Part 3.6 if offence is punishable by imprisonment (combinations permitted = an order sentencing the offender to imprisonment (permitted combination = full-time detention, periodic detention or a combination of these kinds of imprisonment), a suspended sentence order, a good behaviour order, a fine, a driver licence disqualification order, a reparation order, a non-association order, a place restriction order, a treatment order under the Drugs of Dependence Act 1989 and an order (however described) imposing another penalty available under any other territory law). |
| New South Wales (NSW)   | Crimes (Sentencing Procedure) Act 1999    | Community service order (up to 500 hours)  
Good behaviour bond (maximum term of five years)  
Non-association order and place restriction order (maximum term of 12 months) |
| Northern Territory      | s 40(2) Sentencing Act 1995               | Community work orders (up to 480 hours)  
Release on bond (maximum term of five years)  
Non-association order and place restriction order (maximum term of 12 months) |
| Queensland              | Penalties and Sentences Act 1992          | Probation (term of six months to three years and may be combined with a term of imprisonment of not more than 12 months)  
Community service order (40–240 hours to be completed within one year or other period specified)  
Non-contact order (maximum term of two years) |
| South Australia         | Crimes (Sentencing) Act 1988              | Community service (16–320 hours) (as separate order or as a condition of a bond, with or without supervision)  
Release on bond (maximum term of three years) |
| Tasmania                | Sentencing Act 1997                       | Community service order (up to 240 hours)  
Probation (maximum term of three years)  
Rehabilitation program order (may be imposed for a ‘family violence offence’, with or without recording a conviction)  
Adjourned undertaking (maximum term of five years) |
| Victoria                | Sentencing Act 1991                       | Community-based order (maximum term of two years, unpaid community work up to 500 hours)  
Adjourned undertaking (maximum term of five years) |
| Western Australia       | Sentencing Act 1995                       | Intensive supervision order (term of six to 24 months, unpaid community work 40–240 hours)  
Community-based order (term of six to 24 months, unpaid community work 40–120 hours)  
Conditional release order (maximum term of two years) |
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Legislation</th>
<th>Non-Imprisonment Intermediate Orders</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canada</td>
<td>Criminal Code</td>
<td>• Probation order (maximum term of three years—may be combined with up to two years’ imprisonment)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Conditional discharge (discharge used in conjunction with a probation order)</td>
</tr>
<tr>
<td>England and Wales</td>
<td>Part 12, Criminal Justice Act 2003</td>
<td>• Community order (maximum term of three years)</td>
</tr>
<tr>
<td>New Zealand</td>
<td>Sentencing Act 2002 (NZ) (as amended by the Sentencing</td>
<td>• Home detention (term of 14 days to 12 months and offender may be subject to post-detention conditions for an additional six to 12 months)</td>
</tr>
<tr>
<td></td>
<td>Amendment Act (No.3) 2007)</td>
<td>• Community detention (maximum term of six months)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Intensive supervision (term of six to 24 months)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Supervision (term of six to 24 months)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Community work (40–400 hours)</td>
</tr>
</tbody>
</table>

Permitted sentence combinations:
• supervision can be combined with any sentence except intensive supervision, home detention, or imprisonment;
• community work may be combined with any sentence except imprisonment, subject to s 20(2) (a court may only combine community work with a sentence of supervision or intensive supervision if satisfied that (a) a sentence of community work is appropriate; but (b) the offender requires the imposition of standard conditions or any of the special conditions available under a sentence of supervision or intensive supervision to address the causes of his or her offending);
• community detention may be combined with any sentence except home detention or imprisonment;
• intensive supervision may be combined with any sentence except supervision, home detention, or imprisonment;
• home detention may be combined with a sentence of reparation, a fine, or community work.