Suspended Sentences

Interim Report

Sentencing Advisory Council—Victoria
October 2005
Submissions

Make a Submission

The Sentencing Advisory Council invites you to make a submission on the Council’s interim recommendations. Submissions can be made in writing by mail, email or fax, or orally by phone or in person.

If your submission is in writing, there is no need to follow a particular format. You may choose to address each interim recommendation in this paper, respond to a particular recommendation or discuss other options for reform not covered in this paper. If you prefer, you can also make a general comment concerning suspended sentences.

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SUBMISSIONS DUE DATE: 11 NOVEMBER 2005
Preface

In August 2004 the Attorney-General, the Honourable Rob Hulls MP, requested the Council’s advice on the use of suspended sentences in Victoria and possible reform options.

The Council published a Preliminary Information paper on suspended sentences in March 2005. We then released a comprehensive Discussion Paper in April 2005 that invited submissions on a range of issues raised in the paper. The paper was intended to provide the foundation for informed community debate and consultation about the role of suspended sentences in Victoria.

Release of the paper was followed by an extensive consultation process which all Council members found invaluable. The responses to our Discussion Paper and the consultation processes led the Council to believe that merely tinkering with the problems of suspended sentences would not resolve some of the key concerns which emerged. The sentencing structure is intricate and inter-connected and changes to one order have consequences for others. This necessitated a broader examination of the sentencing structure and the relationships between the existing orders. In the end, the Council took the view that a more radical response to reform is required in order to simplify and modernise Victoria’s sentencing system. Acceptance of the Council’s recommendations will require changes in approach and attitude from all those concerned with the criminal justice system: courts, corrections, the legal profession, service agencies, victims and the public.

We put this Interim Report forward to allow a final round of discussion and consultation, recognising that our recommendations are far-reaching and could be seen by some as controversial.

I would like to thank all those who gave their time and energy to preparing submissions and attending the various forums, roundtables, workshops and focus groups. The Council has carefully considered the submissions and comments made so far, all of which were constructive and thought provoking. I hope that in this next stage of the review all those with an interest in sentencing in Victoria will actively consider the Council’s Interim proposals and let the Council know their views.

This Report was primarily drafted by Victoria Moore, with statistical data analysis and input provided by Kelly Burns. Production of the document was a team effort and I acknowledge the assistance of Sarah Spencer, Julie Bransden, Jenny Baker and Felicity Stewart.

Finally, I thank the members of the Council for their commitment to an inclusive and consultative approach to this significant project. They have been extremely generous with their time and expertise, and have ably supported Council staff in the development of the Interim Recommendations and preparation of this Report.

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Abbreviations

A Crim R Australian Criminal Reports
AC Appeal Cases (United Kingdom)
ABS Australian Bureau of Statistics
ACT Australian Capital Territory
AJA Acting Justice of Appeal
ALJR Australian Law Journal Reports
All ER All England Law Reports
ALR Australian Law Reports
ALRC Australian Law Reform Commission
CCS Community Correctional Services
CCTO Combined Custody and Treatment Order
CB0 Community Based Order
CJ Chief Justice
CLR Commonwealth Law Reports
CSO Correction and Supervision Order
Cth Commonwealth
DPP Director of Public Prosecutions
DTO Drug Treatment Order
FCR Federal Court Reports
ICO Intensive Correction Order
IRO Imprisonment Release Order
J Justice (JJ plural)
JA Justice of Appeal (JJA plural)
NSW New South Wales
NSWCCA New South Wales Court of Criminal Appeal
NSWSC New South Wales Supreme Court
NT Northern Territory
P President (judicial office)
QB Law Reports, Queen’s Bench
QC Queens Counsel
Qld Queensland
s section (ss plural)
SA South Australia
SASC South Australian Supreme Court
SASR South Australian State Reports
SCR Canada Supreme Court Reports
SECASA South Eastern Centre Against Sexual Assault
Tas R Tasmania Reports
UK United Kingdom
VAADA Victorian Alcohol and Drug Association Inc
VALS Victorian Aboriginal Legal Service Inc
Vic Victoria
VR Victorian Reports
VSC Supreme Court of Victoria
VSCA Supreme Court of Victoria Court of Appeal
WA Western Australia
WAR Western Australian Reports
YAO Youth Attendance Order
YCSO Youth Correction and Supervision Order
YTC Youth Training Centre
YRC Youth Residential Centre
# Glossary of Sentencing Terms

**Combined custody and treatment order**  
(ss 18Q-18W Sentencing Act 1991)  
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 1 year)

**Community-based order**  
(ss 36-48 Sentencing Act 1991)  
Supervised non-custodial sentence, with or without recording a conviction, with conditions including supervision, treatment and/or unpaid community work. (Maximum 2 years)

**Deferral of sentencing**  
(s 83A Sentencing Act 1991)  
The Magistrates' Court may defer sentencing a young offender aged 18 or over, but under 25 years and adjourn the proceedings for up to six months to enable the offender to demonstrate his or her rehabilitation.

**Discharge**  
(s 73 Sentencing Act 1991)  
After convicting a person of an offence a court may discharge that person.

**Dismissal**  
(s 76 Sentencing Act 1991)  
After finding someone guilty of an offence a court may dismiss the charge without recording a conviction.

**Drug treatment order**  
(ss 18X-18ZS Sentencing Act 1991)  
[Drug Court Division of the Magistrates' Court only - Pilot program]  
The Drug Court may impose a drug treatment order 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 2 years)

**Fine**  
(ss 49-69 Sentencing Act 1991)  
Monetary penalty (can be in addition to or instead of another order and with or without recording a conviction).

**Home detention order**  
(ss 18ZT-18ZZR Sentencing Act 1991)  
A term of imprisonment served by 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 1 year)

**Imprisonment**  
(ss 9-18P Sentencing Act 1991)  
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.

**Indefinite sentence**  
(ss 18A-18C Sentencing Act 1991)  
The Supreme and County Courts may impose an indefinite sentence on offenders deemed a serious danger to the community who are convicted of specified serious offences (e.g. murder, manslaughter, armed robbery, rape, sexual penetration of a child under 16).

**Intensive correction order**  
(ss 19-26 Sentencing Act 1991)  
A term of imprisonment served in the community, combining intensive supervision and/or personal development programs and including conditions such as treatment and unpaid community work. (Maximum 1 year)
### Life imprisonment

The Supreme Court can impose life imprisonment for the most serious offences (e.g. murder, treason, 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)) have a mandatory prison sentence. This means that a judge must impose a term of imprisonment as part of the sentence.

### Parole

*(s 11 Sentencing Act 1991)*

Parole is 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 2 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 2 years it may set a non-parole period. In both cases the non-parole period must be at least 6 months less than the term of the sentence.

### Suspended sentence

*(ss 27-31 Sentencing Act 1991)*

A specified prison term which is suspended wholly or in part for a specified time, subject to conditions to be of good behaviour (i.e. not re-offend). (Maximum 2 years (Magistrates’ Court), 3 years (County and Supreme Courts))

### Undertaking

*(ss 72-79 Sentencing Act 1991)*

Release (unsupervised) with or without recording a conviction, for a period of up to five years, with conditions.

### Youth training centre and youth residential centre orders

*(ss 32-35 Sentencing Act 1991)*

A sentence requiring a young offender (less than 21 years old) to be detained in a youth training centre (15 years or older) or youth residential centre (less than 15 years old). (Maximum 2 years (Magistrates’ Court), 3 years (Supreme and County Courts))
Summary: Interim Recommendations

1. Suspended sentences should be abolished as a sentencing option in Victoria and a new range of intermediate sentencing orders introduced. .......................................................... 25

2. Combined custody and treatment orders and partially suspended sentences should be replaced with a new form of order—an imprisonment plus release order .......................................................... 45

3. An imprisonment plus release order should be available where the court: .......................................................... 46
   • is considering sentencing an offender to a term of imprisonment of three years of less (in the higher courts) or two years or less (in the Magistrates’ Court); and
   • is satisfied that it is desirable to make an IRO in the circumstances.

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   • 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;
   • not possess or have in control any prohibited or controlled weapon;
   • notify any change 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.

7. In making a Release Order, the court should also be permitted (but not required) to attach one or more special conditions, provided a pre-sentence report has first been received. Special conditions might include that the offender: ................................................................................................................. 48
   • observe a curfew for the release period;
   • report to a Community Corrections Officer as directed and receive visits from a Community Corrections Officer;
   • reside at a specified place for a specified period/reside at approved premises;
   • not associate with specified person/s;
   • comply with any reasonable direction re association with specified persons;
   • attend vocational, education, employment or other 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 Correctional Services;
   • participate in services specified in a justice plan (where applicable);
   • submit to drug or alcohol testing as directed; or
   • observe any special conditions imposed by the court.

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    • 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.

11. In the case of any serious breaches (such as breach by further offending), there should be a presumption that the order will be cancelled and the offender committed to prison for the unexpired portion of the sentence as at the date of breach. However, the court should have the discretion to take one of the
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- it has convicted the offender or found the offender guilty of an offence or offences punishable on conviction by a term of imprisonment or a fine of more than 5 penalty units; and
- the offender agrees to comply with the order.

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- not commit another offence punishable by imprisonment in or outside Victoria during the period of the order;
- appear before the court if called on to do so during the period of the order;
- report to a Community Corrections Centre within two working days after the order is made/comes into force;
- obey all lawful instructions and directions of a community corrections officer;
- notify any change 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.

22. A correction and supervision order must have all core conditions attached, and may also have one or more special conditions attached. .................................................................................................................. 63

23. Special conditions which require the supervision or involvement of Community Correctional Services should only be permitted to be attached to the order once the court has ordered and received a pre-sentence report providing the court with advice on the offender’s suitability, and advising the court on the most appropriate mix of conditions. .................................................................................................................. 63

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- restrictions on liberty (such as home detention or curfew orders);
- community work;
- treatment conditions (such as drug and alcohol treatment and mental health treatment and counselling);
- program conditions (such as drink driving programs, family violence programs, sex offender treatment programs and other life skills programs);
- activity conditions (such as vocational and employment programs and participating in victim-offender conferences);
- supervision by Community Correctional Services, including reporting to and receiving visits from a Community Corrections Officer;
• a non-association condition (prohibiting an offender from being with, attempting to be with or communicating, or attempting to communicate with a named person) and/or place restriction condition (prohibiting an offender from being in or within a stated distance of a named place or area); or
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• if the order is still in force, to amend the terms of the order to impose more onerous requirements, including by extending the period the offender is required to comply with the condition of the order, by increasing the intensity of the existing conditions, and/or by ordering that the offender comply with additional conditions.

32. If the court determines in the interests of justice, it is desirable to do so, the court should have the option of cancelling the order and dealing with the subsequent offence (including by making a new CSO). ................................................................. 65
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• 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, 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, 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 (in which case the court should take into account the extent to which the offender had complied with the order prior to its cancellation).

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Chapter 1: Background

Scope of the Inquiry

1.1 The Attorney-General wrote to the 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
   • should be subject to any conditions (for example, conditional upon treatment orders).

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

Our Approach

1.2 The Council published a Preliminary Information Paper in March 2005 and a more detailed Discussion Paper was released in April 2005 outlining issues and options. The release of the Discussion Paper was followed by an extensive public consultation process which included:

- six community forums held in Melbourne, Ballarat, Geelong, Wodonga, Warragul and Shepparton;
- a series of specialist roundtables focusing on legal issues, issues for offenders with a mental illness and/or intellectual disability, offenders with drug and alcohol problems, young offenders, and offenders convicted of a sexual offence;
- focus groups with victims of crime hosted in partnership with the Victims’ Assistance and Counselling Program in Ringwood, Wodonga and Geelong;
- a workshop with victims of crime representatives held in Melbourne to discuss issues of particular concern to victims and their families; and
- individual meetings.

1.3 The Council also invited submissions on the issues raised in the Discussion Paper. A total of 54 submissions were made.

1.4 Feedback received during consultations and in submissions has informed the Council’s deliberations on possible options for reform. The Council has now reached a set of interim recommendations, which are outlined in this Report and which the Council anticipates will form the basis of our Final Report to be released later this year.
Preliminary Views

1.5 For reasons detailed more fully later in this Report, a majority of the Council has reached the view that any recommended modifications to the use and operation of suspended sentences—such as the addition of conditions—will fail to address more fundamental problems with these and other intermediate sentencing orders. These problems include:

- the nature of suspended sentence orders, and other ‘top-end’ or intermediate sentencing orders, which are used as substitutes for actual prison time and are treated at law as terms of imprisonment—which, we believe, carries with it an unacceptable risk of penalty inflation and has contributed to decreasing levels of public confidence in the justice system; and
- the lack of flexibility in how the number of already existing intermediate sentencing orders, such as combined custody and treatment orders (CCTO) and intensive correction orders (ICOs) are constructed and managed, including in the range of conditions available under individual orders and breach provisions, which has impaired the ability of courts to tailor appropriately sentences imposed for offences, and on offenders, and has limited their options on breach.

1.6 This Report presents the Council’s provisional views as to how these issues might be addressed. Changes proposed include the abolition of suspended sentence orders and rationalisation of existing sentencing orders. Under the changes proposed the number of intermediate orders would be reduced from six (CCTOs, home detention, drug treatment orders (DTOs), ICOs, suspended sentences and community-based orders) to three (DTOs and two new orders—an imprisonment plus release order (IRO) and a correction and supervision order (CSO)). Importantly, under the changes proposed, intermediate sentencing orders will exist as orders in their own right removing the nexus with a sentence of imprisonment and the fiction that they are forms of ‘prison’ sentences.

1.7 A minority of the Council—while supporting many of the changes recommended in this Report—is in favour of retaining suspended sentences without conditions in certain circumstances. Suspended sentences are seen as occupying an important place in the sentencing hierarchy for those small number of cases where a term of imprisonment is the only appropriate sentence (for example, due to the seriousness of the offence) but where there are exceptional circumstances justifying the offender being released under no further obligations (apart from the general requirement that the offender should not commit another offence punishable by imprisonment during the operational period of the order).

1.8 The model for reform outlined in this Report is conceptual rather than detailed. In the next stage of the review the Council will be conducting further work to identify how its proposals might operate in practice, including what arrangements should be put in place to allow for effective administration of the orders proposed, what the appropriate use of the new orders might be for different categories of offences and offenders, and any additional legislative provisions that might be necessary to support the proper management of the new orders.

1.9 The Council acknowledges that its recommended changes will have resource implications. The Council is in the process of examining the likely impact of the changes proposed, for the purpose of formulating its final recommendations.

1.10 The Council now invites submissions on the model it has developed with a view to identifying any unintended and unforeseen consequences of its recommendations.
Chapter 2: Issues and Options

Introduction

2.1 The Suspended Sentences Discussion Paper discussed a number of issues with suspended sentences including:

- the disjuncture between the treatment at law of a suspended sentence as a severe penalty, and community perceptions of a suspended sentence as a ‘let-off’ or as no punishment at all;
- the use of suspended sentences for serious crimes of violence (such as rape, indecent assault and intentionally or recklessly causing serious injury); and
- the risks of net-widening and sentence inflation, which may result in offenders receiving harsher sentences on breach and increase their risk of receiving a prison sentence if they commit further offences in the future.\(^1\)

2.2 The Report also outlined a number of possible options in relation to suspended sentences, including making no changes to the current law, reforming the operation of suspended sentences and abolishing them altogether. Options for reform considered in the Report included:

- providing courts with a power to attach conditions to suspended sentence orders in appropriate cases to increase the punitive content of these orders and/or better provide for an offender’s rehabilitation;
- restricting or limiting the use of suspended sentences for specified offences;
- making changes to the operational period or the maximum term of imprisonment which can be suspended; and
- reforming the current breach provisions, either by increasing the level of discretion available on breach, or tightening up the current ‘exceptional circumstances’ requirement.\(^2\)

Submissions and Consultations: Overview

2.3 Overwhelmingly, those who made submissions\(^3\) and participated in consultations favoured the retention of suspended sentences. However, a small number of those consulted\(^4\) and those who made submissions supported the abolition of suspended sentences\(^5\) as part of a call for mandatory sentences or harsher punishments,\(^6\) or on the basis that other sentencing options, such as home detention, could appropriately be used in their place.\(^7\)

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\(^2\) Ibid Chapter 8.

\(^3\) Submissions 2 (B Abeyesinghe), 4 (C Moore), 5 (Y Zole), 6 (M Douglas), 9 (J Hemmerling), 11 (Emmanuel College—C Peddie, C Finnigan), 13 (Ballarat Catholic Diocese Justice, Development and Peace Commission), 15 (Anonymous) [for offenders under the age of 18 years only who had a mental illness or a drug addiction], 20 (W Atkinson), 23 (L Francis) [only where there are ‘extenuating circumstances’], 24 (County Court of Victoria), 31 (J Bignold), 32 (Anonymous1), 33 (J Black), 35 (G Anderson), 36 (Magistrates’ Court of Victoria), 37 (A Avery), 38 (Victoria Legal Aid), 39 (Federation of Community Legal Centres), 40 (S Rothwell) [only where there are ‘extenuating circumstances’], 41 (Youthlaw), 42 (VAADA), 43 (Victorian Aboriginal Legal Service), 44 (Fitzroy Legal Service) and 45 (Mental Health Legal Centre), 51 (Law Institute of Victoria).

\(^4\) 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.

\(^5\) Submissions 8 (S Mehanni), 11 (Emmanuel College—M Azzopardi and A Symons), 17 (F and A Waites), 26 (R Thomas) [wholly suspended sentences only], 27 (D A Paul) [wholly suspended sentences only, with partially suspended sentences retained for cases involving exceptional circumstances].

\(^6\) Submission 8 (S Mehanni).

\(^7\) Submission 11 (Emmanuel College—M Azzopardi and A Symons).
2.4 Suspended sentences were seen by many to occupy an important place in the sentencing hierarchy—permitting the seriousness of the offences to be recognised while allowing for the offender’s individual circumstances to be taken into account,\(^8\) providing for an offender’s rehabilitation in the community,\(^9\) allowing for ‘appropriate leniency where there are mitigating factors’\(^{10}\) and/or the exercise of mercy,\(^{11}\) and allowing for greater sentencing flexibility.\(^{12}\) The Magistrates’ Court of Victoria, which argued in favour of the retention of suspended sentences, commented:

The removal of suspended sentences or the limiting of their availability for imposition would remove an important arrow from the quiver of sentencing dispositions available to the Court.\(^{13}\)

2.5 The County Court of Victoria suggested that because orders such as combined custody and treatment orders and home detention (and to a lesser extent intensive correction orders) are not often made in the County Court, the abolition of suspended sentences would create too wide a gap between an actual prison term and a community-based order.\(^{14}\)

2.6 Concerns were expressed about the possible financial implications of abolishing or restricting the use of suspended sentences (in terms of net-widening and an increase in prison numbers) and the unintended consequences of such a move.\(^{15}\) For example, if suspended sentences were no longer available for some or all offences, it was suggested, offenders may be less willing to plead guilty, which could possibly result in lower conviction rates, court delays and additional costs associated with a higher number of cases proceeding to trial.\(^{16}\) The possible effect on offenders convicted of offences with mandatory minimum terms of imprisonment (such as repeat offences for driving while disqualified and driving while authorisation is suspended under the Road Safety Act 1986 (Vic))\(^{17}\) was also raised.\(^{18}\)

2.7 Despite the strong support for the retention of suspended sentences, there is clearly a level of dissatisfaction with their current status and operation. Some of the criticisms of suspended sentences expressed during consultations and in submissions have included that:

- a wholly suspended sentence of imprisonment as a ‘custodial order’ or as a ‘term of imprisonment’ is a fiction—‘prison’ should mean ‘prison’ (i.e.—a straight term of immediate imprisonment);
- the gap between an offender ordered to serve a straight term of imprisonment and an offender sentenced to an equivalent term of imprisonment which is wholly suspended is too wide—a suspended sentence should have more of a punitive element;\(^{19}\)
- courts should be permitted to attach conditions to suspended sentence orders;

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\(^8\) Submissions 39 (Federation of Community Legal Centres), 41 (Youthlaw), 44 (Fitzroy Legal Service) and 45 (Mental Health Legal Centre).

\(^9\) Submissions 13 (Ballarat Catholic Diocese Justice, Development and Peace Commission), 24 (County Court of Victoria), 39 (Federation of Community Legal Centres), 44 (Fitzroy Legal Service) and 45 (Mental Health Legal Centre).

\(^10\) Submission 38 (Victoria Legal Aid).

\(^11\) Submissions 12 (A English), 34 (S Tudor), 38 (Victoria Legal Aid) and 41 (Youthlaw).

\(^12\) Submission 42 (VAADA).

\(^13\) Submission 36 (Magistrates’ Court of Victoria).

\(^14\) Submission 24 (County Court of Victoria).

\(^15\) Submissions 2 (Bandula Abeysinghe), 24 (County Court of Victoria), 38 (Victoria Legal Aid), 39 (Federation of Community Legal Centres) and 44 (Fitzroy Legal Service).

\(^16\) Submission 2 (Bandula Abeysinghe).

\(^17\) Second and subsequent offences under section 30 of the Road Safety Act 1986 (Vic) attract a mandatory minimum period of imprisonment of one month.

\(^18\) Submissions 43 (VALS) and 44 (Fitzroy Legal Service), Roundtable (Legal Issues), 23 May 2005. VALS noted that Indigenous Australians commit a high rate of driving offences.

\(^19\) Submission 29 (Professor van Groningen) argued that ‘the imposition of a suspended sentence in a real way weakens the sentencing concept by not including a punitive element’. One submission argued there was a level of unfairness where an offender is held in custody on remand waiting for trial, while another offender receives a suspended sentence (and assuming they have not been held on remand, serves no time in custody); Submission 16 (Anonymous).
• 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’)—which has serious implications on breach;
• the current breach provisions are too inflexible and risk injustice in individual cases (which, it was suggested, has led to the practice by some judicial officers of finding ‘exceptional circumstances’ where the offender’s circumstances are merely changed rather than exceptional);
• suspended sentences put young people at risk of entering the adult correctional system, as on breach the young person must serve the sentence in an adult gaol unless transferred under the provisions of the Children and Young Persons Act 1989;20 and
• wholly suspended sentences are inappropriate for serious crimes of personal violence, including rape, sexual assault and intentionally or recklessly causing serious injury.21

2.8 While a number of issues were raised during consultations, 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’ was also identified as a priority issue by a number of those consulted.

2.9 For many people in the community, a suspended sentence is seen as no punishment at all, as a number of submissions confirmed:

I fail to see a suspended sentence as anything more than a good behaviour bond. The idea that [the offender] may be sent to prison is hard to fathom for those of us who never have and never will commit an offence. And it certainly involves no punishment...For many offenders, even being on bail is more of a punishment than a suspended sentence in the sense that they are often required to hand in their passports and to report to police on a regular basis. Yet these are people who are supposed to be innocent until proven guilty, and yet once proven guilty of a very serious and violent offence, we ignore them and let them do and be anywhere, so long as they don’t commit another offence.22

As an ordinary citizen observing the operation of the system I find the use of suspended sentences as the single most abhorrent factor in the administration of justice in Victoria...The community expends time, money and effort in the provision of a police service and justice system. That system investigates crime, presents evidence to the court and the court then finds that an offence punishable by imprisonment has been committed by the defendant. It then lets him or her go free. The community does not consider that to be justice. I do not consider that to be justice...A suspended sentence is not a penalty.23

Suspended sentences are not seen by the public as the next best thing to a gaol sentence, they are not seen as a penalty, nor as a deterrent. Particularly by victims of crime-against-the-person, they are seen to be a “slap on the wrist with a wet tissue paper”.24 [emphasis in original]

20 Children and Young Persons Act 1989 (Vic) s 244(1).
21 See, for example, Submissions 3 (Anonymous), 5 (Yanis Zole), 9 (J Hemmerling), 11 (Emmanuel College—C Peddle), 15 (Anonymous), 16 (Anonymous), 18 (T Heselwood) [sexual offences] and 23 (L Francis). This view was also expressed by those who attended community forums and victims’ focus groups. While 25 out of 112 responses received to the feedback forms distributed to participants at the forums and focus groups supported suspended sentences being available 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 support was provided for removing the power to suspend in the case of serious sexual offences (such as rape), with 72 respondents supporting this option. A further 9 respondents felt that the power to suspend was appropriate for the most serious sexual offences only in exceptional cases. Opinion was more divided concerning 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, only in exceptional cases. Opinion was similarly divided in the case of other (non-rape) sexual offenders, with 38 respondents favouring removal of the power to suspend in these cases, and 36 respondents favouring limiting the power to exceptional cases.
22 Submission 21 (Confidential).
23 Submission 26 (R Thomas).
24 Submission 27 (D A Paul).
2.10 During the focus groups held with victims and in submissions it was also confirmed that a suspended sentence in some cases can make victims feel as if the offender has ‘gotten off’, while the victim and victim’s family are left to deal with the consequences of what has occurred. 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’. At the sexual offences workshop it was suggested by some participants that as a general principle courts should not impose a suspended sentence for rape. Once a court has determined that a term of imprisonment should be imposed for serious sexual offences (such as rape), the court should not be permitted to suspend it. Others felt that particularly in the case of intrafamilial abuse, other community-based options should be available otherwise it may affect the willingness of victims and their families to report the abuse. At the Melbourne workshop held with victims of crime representatives, it was suggested that suspended sentences should not be available for crimes involving sexual and other forms of violence, but rather reserved for less serious forms of offending. Linking offenders into programs was also seen as important. A strong theme which emerged from all consultations held with victims of crime and from the sexual assault workshop was the need for the impact of the offence on the victim to be properly understood and taken into account at sentencing.

A Conditional Suspended Sentence?

The Current Situation

2.11 In Victoria the only condition of a suspended sentence order is that the offender does not commit another offence punishable by imprisonment during the operational period. An offender who breaches this condition risks the activation of the period of imprisonment that has been wholly or partially suspended.

2.12 A suspended sentence cannot be combined with other sentencing orders, apart from a fine, on a single charge. For example, if a person is convicted of one count of assault, the court can make a suspended sentence order but is not permitted to make a community-based order as well. A de facto form of conditional suspended sentence may, however, be created where the offender has been convicted of more than one offence, as the court may sentence an offender to a suspended sentence on one charge and a community-based order on another.

2.13 In some jurisdictions courts can attach additional conditions to suspended sentence orders. A form of conditional suspended sentence is available in the ACT, Northern Territory, New South Wales, South

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26 See, for example, Submissions 16 (Anonymous) and 52 (SECASA).
27 Submission 52 (SECASA).
28 Sexual Offences Workshop (16 June 2005).
29 Sexual Offences Workshop (16 June 2005).
30 Sexual Offences Workshop (16 June 2005). It was commented that there are particular challenges in unpacking victims’ issues. It is generally very difficult to determine what victims want. They are very upset. They want the abuse to stop, to be believed etc, but may not necessarily want the offender to go to gaol.
31 Victims of Crime Workshop (Melbourne), 27 May 2005. It was, however, suggested that there may be some exceptional cases where a suspended sentence may be warranted. It was also felt there was a need to better define what might count as ‘exceptional’.
32 Under section 49(1) of the Sentencing Act 1991 (Vic) a court may fine an offender in addition to any other sentence imposed—including a suspended sentence.
33 The making of a CBO by a court is expressly prohibited under s 36(2) of the Sentencing Act 1991 (Vic) where the term of imprisonment imposed has been wholly or partly suspended.
34 Crimes Act 1900 (ACT) s 403(1).
35 Sentencing Act 1995 (NT) s 40(2).
36 Crimes (Sentencing Procedure) Act 1999 (NSW) ss 12, 95 and 95A.
Australia\textsuperscript{37} and Tasmania.\textsuperscript{38} The Commonwealth ‘recognizance release order’ also allows a court in sentencing a federal offender to impose a term of imprisonment and direct the person to be released upon giving security to the court that he or she will comply with certain conditions.\textsuperscript{39} Conditions which may be imposed vary from jurisdiction to jurisdiction.

Submissions and Consultations

2.14 Those who participated in consultations and who made submissions gave strong support to providing courts with a power to attach conditions to suspended sentence orders.\textsuperscript{40} Some viewed the addition of conditions as desirable on the basis that it would add a punitive element to a wholly suspended sentence of imprisonment, which might well never be activated, and would address public perceptions and concerns of the community and victims of crime that a suspended sentence is ‘no punishment at all’.\textsuperscript{41} It was suggested that some offenders who breached community-based orders (CBOs) with work or other conditions and received a suspended sentence as a result, often viewed this as a good outcome. This is because being under a CBO made demands on their time but under a wholly suspended sentence they were free to go about their lives without any such requirements. The use of a suspended sentence in the case of breach of a CBO was viewed by many as inappropriate.\textsuperscript{42}

2.15 Also emphasised was the need for courts to have a range of flexible options at their disposal, including conditions aimed at assisting with an offender’s rehabilitation and increasing community safety through the provision of supervision, treatment services and programs. Many also referred to the value of offenders being required to do something under the order, whether this be performing community work or attending treatment or other programs.\textsuperscript{43} One submission suggested that a suspended sentence could be combined with home detention or made available as an option on breach, and that in the case of serious offences the offender should either be ordered to serve a prison sentence or put on a CBO.\textsuperscript{44} However, the majority of those who supported conditions felt it important that the existing form of unconditional suspended sentence be retained for cases in which conditions would serve no useful purpose—for example, where an offender has already been rehabilitated, is at low risk of re-offending and/or does not require any form of punishment apart from a conviction and the threat of serving the prison sentence on breach.

2.16 A number submissions specifically opposed adding conditions with a punitive purpose (such as unpaid community work), arguing that if conditions were attached to suspended sentence orders the focus should be on therapeutic and rehabilitative outcomes rather than on punishment.\textsuperscript{45} Others felt that, together with conditions focused on rehabilitation, the offender should be required to contribute something to the community, such as by performing community service\textsuperscript{46} or personal training or

\textsuperscript{37} Criminal Law (Sentencing) Act 1988 (SA) ss 38 and 42.
\textsuperscript{38} Sentencing Act 1997 (Tas) s 24.
\textsuperscript{39} Crimes Act 1914 (Cth) s 20(1)(b).
\textsuperscript{40} This option was supported in all consultations held, including the focus groups with victims of crime. A majority of submissions also supported this option: Submissions 5 (Y Zole), 9 (J Hemmerling), 11 (Emmanuel College—P Cho, S Hogan and C Finnigan), 12 (A English), 13 (Ballarat Catholic Diocese Justice, Development and Peace Commission), 15 (Anonymous), 20 (W Atkinson [treatment conditions], 22 (K Bryant), 23 (L Francis), 24 (County Court of Victoria), 26 (R Thomas), 33 (J Black), 34 (S Tudor), 35 (G Anderson), 36 (Magistrates’ Court of Victoria), 37 (A Avery), 38 (Victoria Legal Aid), 40 (S Rothwell) and 42 (VAADA).
\textsuperscript{41} Submissions 24 (County Court of Victoria) and 36 (Magistrates’ Court of Victoria).
\textsuperscript{42} Sentencing Advisory Council, ‘Summary of themes from community forums (April–May 2005)’.
\textsuperscript{43} See, for example, Submission 5 (Y Zole), Victims Focus Group (Ringwood), 27 May 2005 and Workshop (Melbourne), 27 May 2005. This view was also expressed in relation to sexual offenders at the Sexual Offences Workshop (16 June 2005).
\textsuperscript{44} Submission 11 (Emmanuel College—S Hogan).
\textsuperscript{45} See, for example, Submissions 38 (Victoria Legal Aid), 39 (Federation of Community Legal Centres), 41 (Youthlaw), 43 (VALS), 44 (VAADA), 45 (Mental Health Legal Centre). Victoria Legal Aid submitted that while ‘the use of conditions will inevitably have a punitive effect by significantly limiting the offender’s personal choices’, however conditions ‘should not be designed to achieve a punitive purpose’: Submission 38
\textsuperscript{46} Submission 9 (J Hemmerling) and 11 (Emmanuel College—P Cho).
development activities. Also emphasised was the need for courts to have a range of flexible options at their disposal which would allow judges to tailor the sentence more appropriately to the case, including conditions aimed at assisting with an offender’s rehabilitation and increasing community safety through the provision of supervision, treatment services and programs. Proper resourcing and provision of support services were also seen as essential to the success of any conditional order, particularly in the case of offenders with drug and alcohol addictions and/or mental health issues.

2.17 The Victorian Alcohol and Drug Association (VAADA), Victoria Legal Aid, the Federation of Community Legal Centres, and the Victorian Aboriginal Legal Service (VALS) were among those who supported the introduction of a conditional suspended sentence which would be targeted at drug and alcohol addicted offenders. There was also some support for this option during consultations. The Mental Health Legal Centre argued that such conditions should form part of a ‘conditional sentence, not a suspended sentence’.

2.18 Victoria Legal Aid suggested that such an order should replace the current combined custody and treatment order (CCTO), and would have a number of advantages over that order including:

- the lack of a prison term which might disrupt treatment and/or support services;
- access to the full range of community treatment and support services;
- it would apply to all offences and could be imposed by any court; and
- it would provide flexibility as to the type of conditions, length of sentence and the operational period.

2.19 Support by many for this option was conditional on ‘appropriate and sufficient supports and services [being] made available for rehabilitation in the community,’ and conditions not being of too onerous a nature:

Conditions should not be too onerous and should not include requirements of abstinence evidenced by urine testing. Conditions should be flexible enough to take into account the realities of rehabilitation. These realities include the likelihood of relapse on a number of occasions, the lengthy and difficult assessment process for residential rehabilitation programs and the significant waiting periods for entry into residential rehabilitation programs.

The availability of culturally appropriate and accessible services and programs for Indigenous offenders was a further issue of concern.

2.20 Youthlaw was opposed to the introduction of a conditional form of suspended sentence, arguing that it would replicate existing orders, such as CBOs, intensive correction orders (ICOs) and program orders, and would risk sentence escalation and an increase in incarceration rates. VALS also noted the

### Footnotes

47 Submission 9 (J Hemmerling).
48 Roundtable (Offenders with a Mental Illness and/or Intellectual Disability), 12 May 2005; Roundtable (Offenders with a Drug and/or Alcohol Addiction), 19 May 2005; Roundtable (Legal Issues), 23 May 2005; and Roundtable (Young Offenders), 16 June 2005. See also Submission 34 (S Tudor).
49 See, for example, Submissions 42 (VAADA), 44 (Fitzroy Legal Service) and 45 (Mental Health Legal Centre).
50 Submission 42 (VAADA).
51 Submission 38 (Victoria Legal Aid).
52 Submission 39 (Federation of Community Legal Centres).
53 Submission 43 (Mental Health Legal Centre).
54 Roundtable (Offenders with Drug and Alcohol Addictions), 19 May 2005.
55 Submission 45 (Mental Health Legal Service).
56 Submission 38 (Victoria Legal Aid).
57 Submissions 39 (Federation of Community Legal Centres), 44 (Fitzroy Legal Service) and 45 (Mental Health Legal Centre).
58 Submissions 39 (Federation of Community Legal Centres) and 44 (Fitzroy Legal Service).
59 Submission 43 (VALS).
60 Submission 41 (Youthlaw).
existence of other conditional orders and expressed concern that ‘the inclusion of conditions will also create additional triggers to breach’ leading to imprisonment.61

2.21 As the submissions of Youthlaw, VALS and others suggest, support for introducing a power to attach conditions to suspended sentence orders creates its own set of challenges including determining:

• what the relationship might be between a conditional suspended sentence, and other conditional orders already operating in Victoria such as CCTOs, ICOs, and CBOs;
• how the courts should determine which cases might justify conditions, and possible problems of sentence escalation where a suspended sentence was accompanied by conditions or other orders and/or a partially suspended conditional sentence order was made;
• whether breach of conditions should be distinguished from breach by the commission of a further offence; and
• what the consequences of breach should be.

2.22 Some who made submissions and participated in consultations argued that a conditional suspended sentence could be clearly distinguished from other conditional orders as the punitive element would be constituted by the term of imprisonment hanging over the offender’s head, while the conditions would focus on bringing about an offender’s rehabilitation.62 It was further argued that conditional suspended sentence orders could be distinguished from other sentencing orders by virtue of the sentencing hierarchy and the principle of parsimony.63 The maximum length of a suspended sentence, the aspect of an operational period, and the fact that a prison sentence had been imposed in the case of a suspended sentence (but not in the case of a CBO) were also suggested as possible points of distinction.64 Others were less clear about where the lines properly would be drawn. There was a general view that some latitude should be extended to offenders who breached conditions, and that should conditional suspended sentences be available, a wider range of options on breach would need to be open to the courts than is currently available for breach by further offending.

2.23 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,65 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.66 CCTOs, it was further argued, were not currently achieving their rehabilitative purpose due to the lack of adequate treatment services in prison and disruption of treatment due to time spent in prison.67

2.24 The Manager of Gippsland Community Correctional Services in his submission described ICOs as ‘overall, an administrative nightmare for CCOs [Community Correctional Officers]’.68 Due to cultural issues, it was further suggested, they are also an order which Indigenous offenders often find extremely difficult to comply with (even more so than CBOs). The positioning of a suspended sentence below an ICO was also thought by many to be illogical.69

61 Submission 43 (VALS).
62 See for example, Submission 39 (Federation of Community Legal Centres).
63 Submissions 39 (Federation of Community Legal Centres) and 44 (Fitzroy Legal Service).
64 Submissions 38 (Victoria Legal Aid), 39 (Federation of Community Legal Centres) and 44 (Fitzroy Legal Service).
65 See also Submissions 24 (County Court of Victoria) and 38 (Victoria Legal Aid).
66 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.
67 Submissions 38 (Victoria Legal Aid) and 39 (Federation of Community Legal Centres).
68 Submission 33 (J Black).
69 See, for example, Roundtable (Young Offenders), 16 June 2005.
Suspended Sentences and Imprisonment

The Current Situation

2.25 Suspended sentences are one of the six ‘custodial’ sentencing orders available to Victorian courts in sentencing adult offenders 21 years or over under the Sentencing Act 1991 (‘the Act’). 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.70

2.26 Orders classed as ‘custodial’ in Victoria under the Act are:
- imprisonment;
- combined custody and treatment orders (CCTOS);
- drug treatment orders (DTOs);
- home detention orders;
- intensive correction orders (ICOs);
- suspended sentences of imprisonment; and
- youth training centre orders (for offenders aged under 21 years).

2.27 Of the six custodial orders available under the Act for adult offenders, only three (imprisonment, CCTOs and partially suspended sentences of imprisonment) involve actual prison time, provided the offender complies with the conditions of the order. In the case of a wholly suspended sentence, the prison sentence is imposed but not activated, and the offender is free to go about his or her life back in the community. In the case of home detention orders and ICOs, a prison sentence of up to 12 months is imposed and ordered to be served at home (in the case of a home detention order)71 or in the community (under an ICO)72 under conditions.

Submissions and Consultations

2.28 During consultations on the Discussion Paper and in submissions a call was made for greater transparency and for sentences to ‘mean what they say’.73 As one submission put it: ‘[Truth in sentencing] is not rocket science—we simply want to believe that someone given three years in gaol might actually be incarcerated for three years!’74

2.29 The labels that are attached to sentencing orders were seen as serving an important symbolic function that should not be overlooked. The label ‘prison’, it was argued, should be reserved for an immediate term of custody in a correctional centre and other orders which are treated as substitutes for actual terms of imprisonment, such as suspended sentences, should be recast as sentences in their own right. The adoption of more meaningful sentencing orders and greater transparency in the sentencing process was seen as an important means of increasing community understanding of, and confidence in, sentencing. Dr Steven Tudor, who supported this general contention, argued:

Regardless of one’s views about how or how severely people should be sentenced, the nature of the sentence that is imposed should be reflected as accurately as possible in the language used to refer to it. The public perception of the law suffers when the law’s language goes against what would appear to most people to be a matter of plain fact. It may well be necessary in terms of various administrative consequences, to treat a person under a suspended sentence order “as if”

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71 Sentencing Act 1991 (Vic) s 18ZT(1).
72 Sentencing Act 1991 (Vic) s 19(1).
73 See, for example, Victims Focus Group (Ringwood), 27 May 2005 and Workshop (Melbourne), 27 May 2005.
74 Submission 26 (R Thomas).
they were in prison. That, however, would not require describing the sentence as a kind of custodial order.  

2.30 Many thought it was time to move away from the legal fiction of a suspended sentence as a ‘custodial’ sentence and to acknowledge that a suspended prison sentence is very different in substance to a sentence served in prison. The view was expressed by some that if sentencers are imposing a term of imprisonment solely on the basis that it will be wholly suspended (i.e. knowing that the offender will not serve any time in prison), then sentencing an offender to prison becomes a somewhat disingenuous exercise. Suspended sentences may be seen as providing a convenient compromise for sentencers who accept that the seriousness of the offence or the offending behaviour in a particular case justifies a sentence of imprisonment being imposed but believe that, given the offender’s circumstances, immediate imprisonment is not warranted. If the intention of courts is that offenders under a suspended prison sentence should go free, then, some argued, our sentencing system should be structured to encourage courts to be honest about this, rather than permitting them to achieve this outcome under the protective cloak of a suspended prison sentence.

2.31 Similar views were expressed during the recent Freiberg Sentencing Review in Victoria. In its final report the Review—making reference to the ambiguous nature of substitutional sentences and the attendant risk of penalty escalation—reiterated views expressed in its earlier discussion paper that the use of substitutional orders should be abolished. As a general principle, the Review recommended, sentencing orders should ‘be presented in [their] own right with a clear set of prescriptions and punitive or therapeutic values which are self-referential and not linked, other than in the broadest fashion, with a sanction of a different form’.  

2.32 While a number of those consulted supported changes to achieve greater transparency in sentencing, some suggested that the label itself—‘a suspended sentence of imprisonment’—is accurate; the problem is rectifying the current community perceptions of what a suspended sentence is. That is, the difficulty is not with the label applied to suspended sentences, or that a term of imprisonment is imposed but not activated, but rather the level of community understanding about what a suspended sentence is.

2.33 The need for better community understanding and education about sentencing was also emphasised in a number of submissions. For example, Victoria Legal Aid, in supporting the retention of suspended sentences, argued:

It appears that the real issue is community misconception about the punitive effect of suspended sentences. We believe that this can and should be addressed by a properly funded education campaign.

Fitzroy Legal Service expressed similar views, suggesting:

FLS regards further education of the community as to the role played by suspended sentences and their place in the sentencing hierarchy as being vital to address misconceptions about this sentencing option, and its importance in the interests of individual offenders and the community generally.

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75 Submission 34 (S Tudor).
76 For example, this view was expressed by some at the Legal Issues Roundtable (23 May 2005).
78 This view was expressed, for example, by some participants at the Legal Issues Roundtable (23 May 2005).
79 See, for example, Submissions 38 (Victoria Legal Aid), 41 (YouthLaw), 43 (VALS) and 44 (Fitzroy Legal Service).
80 Submission 38 (Victoria Legal Aid).
81 Submission 44 (Fitzroy Legal Service).
The Council’s View

2.34 The Council is persuaded that the criticisms of suspended sentences provide compelling arguments for reform. We are also sympathetic to views that allowing the courts to add conditions would address many of the apparent community concerns, particularly in relation to wholly suspended sentences, that a suspended sentence is no punishment at all. However, the Council is concerned that grafting a new conditional suspended sentence order onto the existing sentencing hierarchy, which in our view is already well-provisioned with conditional sentencing orders, risks creating more problems than may be solved. For example, many of the existing conditional orders, such as CCTOs and ICOs, might serve the function of a conditional suspended sentence, but are regarded by many in the legal profession as inflexible and of limited use. Introducing another conditional order as a ‘quick fix’ solution will not resolve more fundamental problems with the overall mix and structure of intermediate orders in Victoria. Attaching conditions to suspended sentences also would have major resource implications.

2.35 The Council further believes that allowing courts to attach conditions would fail to fix existing problems of net-widening and sentence inflation and would itself carry with it an unacceptable risk of sentence escalation (increasing the overall severity of the sentence imposed), with serious implications on breach.

2.36 Although the Council has only undertaken preliminary analysis of the available data, early findings suggest that suspended sentences sometimes result in net-widening in Victoria’s Magistrates’ Court, and almost certainly result in significant net-widening in the higher courts. In the case of offenders sentenced in the Magistrates’ Court, while it appears that suspended sentences are, for the most part, being used as intended—that is, they are usually imposed on defendants who would have otherwise received an immediate sentence of imprisonment—it also appears that the majority of defendants who have their imprisonment terms suspended in that court are given longer sentences than those ordered to serve their prison sentence immediately. This is especially apparent in the case of suspended imprisonment terms of between one and six months, which account for the majority of all suspended sentences (72 per cent, or approximately 3,500 defendants, compared to 54 per cent for immediate imprisonment) This pattern is consistent with some penalty escalation at the point of initial sentencing. The methodology and findings of our research will be published at a later date.

2.37 The Council considers that the high number of prisoners sentenced to short prison terms is a matter of concern. There is some evidence to suggest that short gaol sentences have a significant negative impact on offenders and the community which outweighs any potential benefits (in terms of punishment and deterrence). For example, UK research has shown that those who serve short terms of 12 months or less have a high rate of reconviction. As recognised in a recent report by the Australian Institute of Criminology, even a short period spent out of the community may have an impact on offenders in terms of family and workplace relationships, and may lead to loss of accommodation and employment. Short-term prisoners may also have difficulty accessing in-prison programs and are unlikely to be subject to post-release supervision (due to, for example, the absence of parole as an option) which may increase their likelihood of re-offending. A sentence of imprisonment, whether immediate or suspended, is a sentence of last resort (Sentencing Act 1991 s 5(2)). Under the sentencing legislation, imprisonment should only be used when all other options have been considered and rejected. However, in Victoria, sentences of imprisonment of between one and six months make up the large majority of prison sentences in the Magistrates’ Court (77 per cent of all prison sentences or approximately 5,500 people), many of these being suspended (approximately 64 per cent or 3,500 people).

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83 National Association for the Care and Resettlement of Offenders (NACRO), The Forgotten Majority: The Resettlement of Short Term Prisoners (2000). NACRO reports that 61 per cent of males and 52 per cent of female short term prisoners are reconvicted within two years of release.
84 Australian Institute of Criminology, Interventions for Prisoners Returning to the Community (2005) 53.
2.38 We note that Western Australia recently abolished prison sentences of six months and under.\(^{86}\) In NSW, the Sentencing Council recommended that the abolition of short prison sentences should be considered, but not until alternatives to full-time custody are uniformly available throughout NSW, the impact of abolition of short sentences in Western Australia has been evaluated and exceptions to abolition have been settled.\(^{87}\) The Council also recommended that abolition be trialled in NSW for Indigenous women.\(^{88}\)

2.39 Although the Council does not wish to prohibit short prison sentences altogether, it is of the view that their use should be discouraged and that the sentence of imprisonment should be used only in cases where the seriousness of the offence, the offender’s past record and response to previous court orders indicates that no other sentence is appropriate. The significant use by the Magistrates’ Court in particular of suspended sentences of imprisonment of under six months indicate that they may not truly be regarded either as ‘real’ sentences of imprisonment or as sentences of last resort.

2.40 After careful consideration of all the relevant issues, the Council has reached the view that rather than reforming the operation of suspended sentences, the community would be better served by the abolition of suspended sentences, the rationalisation of existing orders and the adoption of a more flexible approach to how these orders are constructed and managed. The package of reforms we recommend will maintain the substance of existing orders while changing their form.

2.41 Broadly, the changes recommended are aimed at providing courts with better custodial and community-based alternatives where the court considers it appropriate for an offender to serve the whole of the sentence in the community, or part of the sentence in prison and part in the community. The changes we propose are also aimed at simplifying what we believe has become an increasingly, and unnecessarily, complex range of sentencing orders. In streamlining the current range of intermediate orders, the Council’s aim is to create a suite of orders that is credible, will make sense to the general community, and will provide courts with the necessary flexibility to tailor sentences to offences and offenders.

2.42 We agree with views expressed during consultations that community education about the complexities of sentencing is important. But having a range of credible sanctions which are consistent with community understandings of the purposes of sentencing is also critical to improving current levels of community confidence in the sentencing process. A sentence lower down the hierarchy (such as a CBO) is seen to have more consequences for an offender than a wholly suspended sentence which is treated at law as a more severe sentence. In our view criticisms that the categorisation of a suspended sentence as a ‘custodial sentence’ is a fiction, and concerns that suspended sentences lack substance as a sentencing order (whether the aim of such an order is punishment, rehabilitation, or a combination of purposes) are well justified.

2.43 The Council sees a particular need to re-evaluate the usefulness of sentences which are used as substitutes for actual prison time. We are concerned that the framing of suspended sentences and other substitutional orders as ‘prison sentences’ has contributed to a general lack of understanding in the broader community about what these orders are and has affected community confidence in sentencing more generally. In the public mind, a prison sentence (or a custodial sentence) is a sentence that offenders serve in prison—not something which is imposed, but not activated, or served at home or in the community under intensive supervision. Further, the suggestion that one sentence can simply be substituted for another ignores the significant practical differences for an offender in serving his or her sentence under these orders.

2.44 As noted in the Discussion Paper, the particular value of suspended sentences and other substitutional orders is seen to lie in the fact that they allow the court to recognise the seriousness of an offence through the imposition of a prison sentence, while allowing the court to substitute another option which does not require the offender to serve that time in prison.\(^{89}\) It is argued that the formal imposition of a prison sentence serves an important symbolic function in communicating to the offender and the

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\(^{88}\) Ibid.

\(^{89}\) Sentencing Advisory Council (2005), above n 1, [7.7] and [8.20]–[8.22].
community the seriousness of the offence, and in censuring his or her behaviour. By removing the power to impose and then suspend a prison sentence, it is suggested, courts will be forced to choose between a prison sentence—which may be considered appropriate given the seriousness of the offence, but inappropriate in the circumstances—and a non-custodial sentence—which may leave the court open to criticisms that the seriousness of the offence has not been adequately recognised.

2.45 This view appears to operate from the assumption that in sentencing an offender, it is only by saying ‘prison’ that the seriousness of the offence or offences will be recognised, and the offender and others will be deterred from engaging in similar conduct in the future. Although a number of those consulted and who made submissions\(^90\) defended the usefulness of suspended sentences as an effective deterrent to re-offending, the Council believes that it is the offender’s knowledge of the likely consequences of re-offending (that the prison sentence will be activated), rather than the fact of having received a ‘prison sentence’—albeit suspended—which is the critical factor. The Council also notes comments made by the Mental Health Legal Centre that for those with a mental illness ‘the prospect of likely imprisonment on breach may be more likely to precipitate breach than deter it’.\(^91\) The findings of the Council’s research on breach rates reported in the Discussion Paper were that around a third of all offenders who receive a suspended sentence (36% in the higher courts and 31% in the Magistrates’ Court) breach the order by committing a further offence.\(^92\) This compares with breach rates involving breach by further offending reported by the Andersen Review of Community Correctional Services in 1999–2000 of 19.5 per cent for CBOs, 15 per cent for ICOs and 15 per cent for parole.\(^93\)

2.46 Further, in our view the symbolic value of imposing a prison sentence may well be overstated. As one submission argued: ‘The denunciatory effect [of treating a suspended sentence as a custodial sentence] will most often be blunted once someone appreciates that the offender is not actually in custody’.\(^94\)

2.47 If current custodial orders such as ICOs and suspended sentences are accepted by the courts and by the community as credible alternatives to prison—even for quite serious offences—and the consequence of breaching such orders is a risk of the offender being ordered to serve time in prison, then from the Council’s perspective there appears to be no need to maintain the nexus between these orders and prison. On the other hand, if these orders are not regarded as credible alternatives, but rather as lower-level forms of order for less serious forms of offending, no amount of legislative manoeuvring or judicial pronouncements is likely to result in these orders being accepted by the community as alternatives to imprisonment.

2.48 Provided the package of reforms the Council recommends in this Report is adopted, we consider it unnecessary that suspended sentences be retained as a separate sentencing option and/or a form of conditional suspended sentence introduced. This is because the options available to the courts under the proposed reforms will be far more flexible than those which are currently available, thereby allowing courts to balance better the range of relevant concerns—including censuring the offender’s conduct, protecting the community and providing for the offender’s rehabilitation—in arriving at an appropriate sentence.

2.49 The retention of suspended sentences would also be contrary to our general position that the use of substituted sentences should be minimised. If a sentence of imprisonment is appropriate in all the circumstances, it should be served. If an order served in the community is appropriate a prison sentence should not be imposed, although on breach prison may become a possibility.

2.50 Under the changes proposed, while courts will no longer have the option of a suspended sentence, there will be a number of options available in sentencing an offender including:

- prison without a non-parole period;
- prison with the possibility of release on parole for prison sentences of two years or more;

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\(^90\) See for example, Submissions 2 (B Abeysinghe) and 28 (Mal Ryan and Glen).
\(^91\) Submission 45 (Mental Health Legal Centre)—supplementary comments.
\(^92\) See further Sentencing Advisory Council (2005), above n 1, [4.59]–[4.91].
\(^94\) Submission 34 (S Tudor).
• prison plus a period on release in the community on general supervisory or more intensive conditions (up to a maximum of 3 years); and
• a sentence served in the community under conditions such as community work conditions, program and treatment conditions and supervision conditions and including, where appropriate, restrictions on liberty (such as curfew conditions and home detention conditions) (up to a maximum of 3 years).

2.51 The Council believes the proposed changes have the potential to contribute to increased community understanding and confidence in sentencing. The reforms would remove the fiction of a suspended sentence as a ‘custodial’ or prison sentence, while still allowing the court to exercise mercy or impose what may seem a lenient sentence in appropriate cases. However, under our reforms sentencers will be required to be more frank about the basis for the sentence imposed—that despite the objective seriousness of the offence or offences, for a range of other reasons they do not believe the offender should serve a prison sentence. Provided the sentence is justified, we believe the community will support it.

2.52 In this context we believe it is worth noting that during consultations with community members held as part of the review, the overwhelming majority of participants supported the use of suspended sentences in cases that on their face appeared problematic—including that of a homicide by culpable driving. The Council thinks it likely that there would be a number of other circumstances in which the community would support a sentence other than prison, even for serious offences. For example, if an elderly person assisted his or her terminally ill partner to commit suicide, or a woman after years of being victimised killed a violent partner, the Council believes that the courts, and the broader community, would accept that despite the gravity of the offence, a sentence other than prison would be just. A suspended sentence, in our view, is not required simply for the purpose of acknowledging the seriousness of the offences committed. If these changes require us to readjust our thinking that ‘prison = serious offence’, while an order served in the community does not, then such a change is warranted and will promote a sentencing system which operates with a greater degree of honesty, integrity and transparency.

INTERIM RECOMMENDATION(S)

1. Suspended sentences should be abolished as a sentencing option in Victoria and a new range of intermediate sentencing orders introduced.
Chapter 3: A New Sentencing Model—Overview

Introduction

3.1 In the following chapters of this Report we set out the Council’s vision for a new range of sentencing orders for Victoria. In developing this model, the Council has been guided 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 where a prison sentence might also have been justified;
- sentencing orders served in the community on conditions should be of a realistic length 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.

The New Sentencing Hierarchy

3.2 The Council’s proposed restructuring of the existing sentencing hierarchy in Victoria is represented in Figure 1. Under the changes recommended, courts would have the following sentencing options available in sentencing adult offenders (25 years or over):

- imprisonment of two years or more (with or without a non-parole period) for serious offences;
- a term of straight imprisonment (i.e. without parole) of under 2 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 3 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 conditions, discharging the offender, or dismissing the charge.

Other orders, such indefinite sentences of imprisonment, hospital orders and hospital security orders, available under the Sentencing Act 1991 (Vic) also would continue to be available.

3.3 In line with common public perceptions that custody means ‘detention in prison’, in conceptualising this new model the Council has sought to make a clearer distinction between sentences involving actual
prison time and those served in the community. In adopting this approach we have aimed to develop a
range of orders that will make sense to the community, including those people who are likely to be most
affected by any changes—offenders. While the traditional divisions between custodial and non-custodial
orders have been of only secondary importance, for convenience the following discussion has grouped
orders as either custodial or non-custodial options.

3.4 We have also sought to streamline what has become an increasingly complex sentencing structure, while
adding a greater level of flexibility. Since the Sentencing Act 1991 first came into force, there has 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). Under the Council’s model, the IRO would replace partially suspended sentences,
CCTOs and community-based orders (CBOs) where combined with short terms of imprisonment, while
intensive correction orders (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).

3.5 Other changes recommended include the introduction of a new order for young offenders—a youth
correction and supervision order (YCSO)—and expanding the current provisions for deferral of sentencing
(see further Figure 2). The YCSO would be tailored to meet the needs and circumstances of young
offenders, and would replace CBOs and suspended sentences for offenders aged 18–24 years. Under
the changes recommended, the power to defer sentencing would be extended 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. Some amendments also have been
recommended to the power to order a non-parole period to make a clearer distinction between when a
non-parole period should be set, and when an IRO might be appropriate.

3.6 The Council believes that expanding the availability of deferral will have a number of possible benefits,
including allowing time for offenders to access treatment and other services prior to sentencing, and
providing greater scope for the use of diversionary programs and alternative responses, such as victim-
offender conferencing programs. Jesuit Social Services recently released a discussion paper
recommending that the current Juvenile Justice Group Conferencing Program available to young offenders
in the Children’s Court be extended to young people 18–25 appearing in the adult courts. As the report
recognises, group conferencing can achieve a number of outcomes not possible within the traditional
criminal justice system including:

- the young person accepting responsibility for the harmful impact of his/her offending actions
  on victims and their families and communities;
- the opportunity [for the young person] to express genuine remorse and make an apology
  directly or indirectly to the victim and his/her community of concern;
- the opportunities for victims and their supporters to explain in person or indirectly the full
  impact of the offences on their lives and to suggest ways in which the offender may make
  amends for some of the harm caused by their actions.

3.7 Deferral, together with the introduction of the YCSO tailored to the needs and circumstances of young
offenders, the Council believes, will allow for a more effective and responsive approach by the criminal
justice system to young offenders. The changes proposed to deferral will also allow for restorative justice
approaches to be expanded over time to adult offenders.

3.8 The Council’s focus has been on reviewing the range of intermediate sentencing orders as we believe
that it is this range of orders that is in most need of rationalisation and reform. Other orders available
under the Sentencing Act 1991 (Vic), including the power to order an indefinite sentence of imprisonment
for serious offences, DTOs, youth training centre orders, youth residential centre orders, fines,

95 Under section 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 3 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.
96 Jesuit Social Services, A Policy Discussion Paper on the Development of a Young Adult Restorative Justice Conference Program
97 Ibid 6.
dismissals, discharges, adjournments, hospital orders and hospital security orders would be unaffected by these changes.

3.9 The changes proposed are also consistent with moves in other jurisdictions, including the Australian Capital Territory (ACT) and England, to increase the flexibility in sentencing orders. The ACT Crimes (Sentencing) Bill 2005 currently before parliament would provide courts with the power to order ‘combination sentences’ allowing a court to combine two or more sentencing orders for a single offence.98 The changes introduced in England under the Criminal Justice Act 2003 (UK) include the introduction of a new order, ‘custody plus’, for terms of imprisonment of under 12 months which allows for a supervised period of release in the community,99 and a single generic community sentence which may operate up to a maximum period of three years with a number of conditions that may be combined, and ordered to operate for the whole or part of the order, for offences falling within a low to high sentencing range.100

3.10 In the interests of clarity, the change from the current sentencing hierarchy for adult and young offenders to the Council’s proposed new sentencing hierarchy is represented in Figures 1 and 2. However, the Council supports the conclusions of the recent 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.101 The Council suggests that under the new model there will be three principal sentencing pathways:

- a punishment/restitution pathway;
- a punishment/rehabilitation pathway; and
- a rehabilitation pathway. (see Figure 3 below)

The overarching goal of all three pathways will be community protection.

3.11 While under our model the sentencing pathway would be determined by the principal purpose or purposes of sentencing in an individual case, the matching of an appropriate sentence (with or without conditions) to the offence and the offender would be guided by a range of relevant considerations such as:

- the nature and gravity of the offence and its impact on the victim;
- the level of risk the offender poses to the community and how this risk can best be managed;
- the degree of responsibility taken by the offender for the offending behaviour (such as, for example, by pleading guilty, showing remorse for his or her conduct and a desire to address the causes of his or her offending);
- the individual circumstances of the offender—both at the time of the offence and at sentencing; and
- those issues related to the offender’s criminal behaviour (such as drug and/or alcohol problems, unemployment, homelessness, family violence, intellectual impairment and/or mental health issues).

The Council believes that increasing the level of flexibility in how orders are constructed and managed will improve the effectiveness and responsiveness of the current system.

3.12 The Council acknowledges that there are a number of factors likely to affect the success of the model proposed including:

- 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

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100 Criminal Justice Act 2003 (UK) s 177.
• 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).

3.13 The current mandatory one month minimum sentence that attaches to second and subsequent offences under section 30 of the Road Safety Act 1986 (Vic) (drive while disqualified or authorisation suspended) also presents a possible barrier to the introduction of the changes proposed. In 2003–2004, 829 of the 3,316 defendants (25 per cent) who received a suspended sentence for their most serious offence in the Magistrates’ Court had been convicted of an offence under section 30 of the Road Safety Act. Should suspension of a prison sentence no longer be possible, and without the issue being addressed in some other way, the courts would be left with no other alternative than to sentence the offender to an immediate term of imprisonment. This would lead to a significant increase in prison receptions. The Council considers that other sentencing orders recommended in this Report, such as a CSO with tailored conditions, may provide a more appropriate response to this type of offending than a short straight term of imprisonment.

3.14 Despite these challenges, the Council believes that provided the reforms we recommend are properly implemented and adequately resourced, the potential benefits to the Victorian community would be significant. Clearly it is important that sentencing options should not be just about punishing offenders but also about reducing long-term re-offending and increasing community safety through addressing some of the contributing causes of offending. We believe the development of more flexible options that allow sentences to be better tailored to the purposes of sentencing and the needs and circumstances of offenders will be a step towards achieving that objective.

3.15 The Council has modelled sentencing outcomes under the proposed new sentencing hierarchy (see Table 1 below). This exercise has been performed under the assumption that sentencing trends relating to existing orders retained under the changes proposed would not change. The Council realises the difficulty of anticipating what the effect of our proposed changes would be on sentencing patterns and therefore has not attempted to forecast the impact of these changes at this stage.

**Table 1: Sentencing Outcomes under Current and Proposed Sentencing Hierarchy**

<table>
<thead>
<tr>
<th>Existing Orders (2003–04)</th>
<th>Number</th>
<th>Proposed Orders</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Imprisonment</td>
<td>4,948</td>
<td>Imprisonment</td>
<td>4,948</td>
</tr>
<tr>
<td>Partly suspended sentence</td>
<td>751</td>
<td>core conditions</td>
<td>751</td>
</tr>
<tr>
<td>CCTO</td>
<td>42</td>
<td>core and special conditions</td>
<td>58</td>
</tr>
<tr>
<td>3 months’ imprisonment + CBO</td>
<td>16</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Subtotal</strong></td>
<td>809</td>
<td><strong>Subtotal</strong></td>
<td>809</td>
</tr>
<tr>
<td>Home detention order</td>
<td>26</td>
<td>Correction and supervision order</td>
<td>4,107</td>
</tr>
<tr>
<td>Intensive correction order</td>
<td>1,331</td>
<td>core conditions</td>
<td>4,107</td>
</tr>
<tr>
<td>Wholly suspended sentence</td>
<td>5,476</td>
<td>core and special conditions</td>
<td>8,083</td>
</tr>
<tr>
<td>CBO</td>
<td>5,357</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Subtotal</strong></td>
<td>12,190</td>
<td><strong>Subtotal</strong></td>
<td>12,190</td>
</tr>
<tr>
<td>Fine</td>
<td>41,951</td>
<td>Fine</td>
<td>41,951</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>59,898</td>
<td><strong>Total</strong></td>
<td>59,898</td>
</tr>
</tbody>
</table>
### CURRENT HIERARCHY

<table>
<thead>
<tr>
<th>Current Order</th>
<th>Revised Order</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indefinite Sentence of Imprisonment</td>
<td>Indefinite Sentence of Imprisonment</td>
</tr>
<tr>
<td>The Supreme Court and County Court may impose an indefinite sentence on offenders deemed to be a serious danger to the community who are convicted of specified serious offences.</td>
<td>The Supreme Court and County Court may impose an indefinite sentence on offenders deemed to be a serious danger to the community who are convicted of specified serious offences.</td>
</tr>
<tr>
<td>Imprisonment + Non-Parole Period</td>
<td>Imprisonment + Non-Parole Period</td>
</tr>
<tr>
<td>Non-Parole Period</td>
<td>Non-Parole Period</td>
</tr>
<tr>
<td>Court has a discretion if 12 months–23 months, presumptive if 2 yrs or &gt;.</td>
<td>To be set only if sentence of 2 yrs or &gt;.</td>
</tr>
<tr>
<td>Combined Custody and Treatment Order</td>
<td>Imprisonment + Release Order</td>
</tr>
<tr>
<td>Max Term: 12 months</td>
<td>[Replacing CCTO, partially suspended sentence and 3 months’ imprisonment + CBO]</td>
</tr>
<tr>
<td>Available if drunkenness or drug addiction contributed to commission of the offence and is considering sentencing the offender to a term of imp of no &gt; 12 months.</td>
<td>Max Term: 3 yrs (higher courts), 2 years (Magistrates’ Court)</td>
</tr>
<tr>
<td>Not &lt; 6 months served in custody, with balance served in community. There are a number of core conditions supervised by Community Corrections.</td>
<td>(1) a maximum term of imprisonment of 12 months; (2) remainder of period of the order in the community on core general conditions or corel + special/intensive conditions. Intensive conditions must run no &gt; 12 months.</td>
</tr>
<tr>
<td>Home Detention Order</td>
<td>Drug Treatment Order</td>
</tr>
<tr>
<td>Max Term: 12 months</td>
<td>[Pilot – Drug Court only]</td>
</tr>
<tr>
<td>Available if offender sentenced to term of imprisonment 12 months or &lt;. There are a number of conditions. Consent of other residents required. Not available for some offences (e.g. offences of sexual nature, breach of IVO, stalking).</td>
<td>Max Term: 2 yrs</td>
</tr>
<tr>
<td>Drug Treatment Order</td>
<td>[Pilot – Drug Court only]</td>
</tr>
<tr>
<td>Max Term: 2 yrs</td>
<td>(1) treatment and supervision; (2) sentence of imprisonment of up to 2 yrs (not served, unless order breached).</td>
</tr>
</tbody>
</table>
### CURRENT HIERARCHY

- **Intensive Corrections Order**  
  **Max Term:** 12 months  
  Term of imprisonment served in the community on conditions, including a condition the offender attends a community corrections centre for 12 hrs/week.

- **Suspended Sentence of Imprisonment**  
  **Max Term:** 3 yrs (higher courts), 2 yrs (Magistrates’ Court)  
  Term of imprisonment held wholly or partially in suspense for a period of up to 3 yrs (or 2 yrs in the Magistrates’ Court). No conditions.

- **Community-Based Order (+ up to 3 months prison)**  
  **Max Term:** 2 yrs  
  Order served in the community with a number of core conditions and must have at least one program condition.

- **Fine**  
  **Max: as prescribed under the relevant offence provision**  
  With or without conviction, following a finding of guilt. May be imposed in addition to or instead of any other sentence to which the offender may be liable.

- **Dismissal, Discharges and Adjournments**  
  **Adjournments – Max Period:** 5 yrs  
  Conditional Adjournment/Unconditional Discharge (with conviction).  
  Unconditional Adjournment/Unconditional Dismissal (without conviction).

### REVISED HIERARCHY

- **Correction and Supervision Order**  
  **Max Term:** Adult Offenders (over 25 yrs) 3 yrs (higher courts), 2 yrs (Magistrates’ Court);  
  Supervised non-custodial sentence, served in the community, with or without recording a conviction, with conditions. Conditions may include:
  - restraint (e.g. home detention/curfew);
  - unpaid community work;
  - reporting/notification;
  - activity requirement (including those with a restorative purpose);
  - treatment (drug/alcohol, mental health);
  - program condition (educational, vocational etc);
  - non-association and/or exclusion condition;
  - residence condition;
  - other (e.g. participate in services specified in a justice plan).

- **Partially Suspended Sentences**  
  **Max Term:** Up to 3 yrs (or 2 yrs in the Magistrates’ Court). No conditions.

- **Wholly Suspended Sentences**  
  **Max Term:** Up to 3 yrs (or 2 yrs in the Magistrates’ Court). No conditions.

- **CBO + IMP REPLACED BY IRO (see above)**

- **Fine**  
  **Max: as prescribed under the relevant offence provision**  
  With or without conviction, following a finding of guilt. May be imposed in addition to or instead of any other sentence to which the offender may be liable.

- **Dismissal, Discharges and Adjournments**  
  **Adjournments – Max Period:** 5 yrs  
  Conditional Adjournment/Unconditional Discharge (with conviction).  
  Unconditional Adjournment/Unconditional Dismissal (without conviction).
Figure 1 (cont.): Current and Revised Hierarchy for Adult Offenders under the *Sentencing Act 1991* (Vic)

<table>
<thead>
<tr>
<th>OTHER POWERS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>CURRENT</strong></td>
</tr>
<tr>
<td><strong>Deferral of Sentencing [Magistrates’ Court only]</strong></td>
</tr>
<tr>
<td>Max Period: 6 months</td>
</tr>
<tr>
<td>For offenders aged 18–24 yrs.</td>
</tr>
<tr>
<td>Following a finding of guilt, proceedings adjourned for up to 6 months.</td>
</tr>
</tbody>
</table>

| **REVISED**  |
| **Deferral of Sentencing [all courts]**  |
| Max Period: 12 months  |
| For all adult offenders.  |
| Following a finding of guilt, proceedings adjourned for up to 12 months. Court must be satisfied that if the offender were to comply with the order and conditions of deferral, the court might impose a less severe sentence. Court may also indicate the penalty offender might receive if he/she complies/does not comply with the order.  |

**EXTENSION OF DEFERRAL TO HIGHER COURTS, REMOVAL OF AGE RESTRICTION AND INCREASE IN MAXIMUM PERIOD**
Figure 2: Current and Revised Hierarchy for Young Offenders (<25 years) under the Sentencing Act 1991 (Vic)

**CURRENT HIERARCHY**

**Imprisonment + Non-Parole Period**
- **Non-Parole Period**
  - Court has a discretion if 12 months–23 months, presumptive if 2 yrs or >.

**Combined Custody and Treatment Order**
- **Max Term: 12 months**
  - Available if drunkenness or drug addiction contributed to commission of the offence and is considering sentencing the offender to a term of imprisonment of no > 12 months.
  - Not < 6 months served in custody, with balance served in community. There are a number of core conditions supervised by Community Corrections.

**Home Detention Order**
- **Max Term: 12 months**
  - Available if offender sentenced to term of imprisonment 12 months or <. There are a number of conditions. Consent of other residents required. Not available for some offences (e.g. offences of sexual nature, breach of IVO, stalking).

**Drug Treatment Order**
- **Max Term: 2 yrs**
  - (1) treatment and supervision;
  - (2) sentence of imprisonment of up to 2 yrs (not served, unless order breached).

**REVISED HIERARCHY**

**Imprisonment + Non-Parole Period**
- **Non-Parole Period**
  - To be set only if sentence of 2 yrs or >.

**Imprisonment + Release Order**
- **Max Term: 3 yrs (higher courts), 2 years (Magistrates’ Court)**
  - (1) a maximum term of imprisonment of 12 months;
  - (2) remainder of the period of the order in the community on general conditions or general + intensive conditions. Intensive conditions must run no > 12 months.

**CHANGE HOME DETENTION (AS A SENTENCING ORDER) TO A CONDITION OF A YCSO (see below)**

**Drug Treatment Order**
- **Max Term: 2 yrs**
  - (1) treatment and supervision;
  - (2) sentence of imprisonment of up to 2 yrs (not served, unless order breached).
CURRENT HIERARCHY

**Suspended Sentence of Imprisonment**
Max Term: 3 yrs (higher courts), 2 yrs (Magistrates’ Court)
Term of imprisonment held wholly or partially in suspense for a period of up to 3 yrs (or 2 yrs in the Magistrates’ Court). No conditions.

**Intensive Corrections Order**
Max Term: 12 months
Term of imprisonment served in the community on conditions, including a condition the offender attends a community corrections centre for 12 hrs/week.

**Community-Based Order (+ up to 3 months prison)**
Max Term: 2 yrs
Order served in the community with a number of core conditions and must have at least one program condition.

**Youth Training Centre / Youth Residential Centre Orders**
Max Term: 3 yrs (higher courts), 2 yrs (Magistrates’ Court)
Available to offenders under 21 yrs. Sentence served in a YTC or YRC where confinement justified.

FINES AND DISMISSAL, DISCHARGES, ADJOURNMENTS AS FOR ADULT OFFENDERS (NO CHANGES)

REVISED HIERARCHY

**Youth Correction and Supervision Order**
(offenders < 25 yrs)
Max Term: 12 months (Magistrates’ Court); 18 months (higher courts)
Supervised non-custodial sentence, served in the community, with or without recording a conviction, with conditions.
Conditions could include:
- supervision;
- reporting/notification;
- treatment (drug/alcohol, mental health);
- program (educational, vocational etc); and
- other.

**PARTIALLY SUSPENDED SENTENCES REPLACED BY IRO (see above)**

**WHOLLY SUSPENDED SENTENCES REPLACED BY YCSO**

**REPLACE WITH YCSO**

**CBO + IMP REPLACED BY IRO (see above)**

**YCSO AN ALTERNATIVE (see above)**

**Youth Training Centre / Youth Residential Centre Orders**
Max Term: 3 yrs (higher courts), 2 yrs (Magistrates’ Court)
Available to offenders under 21 yrs. Sentence served in a YTC or YRC where confinement justified.
Figure 2 (cont.): Current and Revised Hierarchy for Young Offenders (<25 years) under the Sentencing Act 1991 (Vic)

### OTHER POWERS

<table>
<thead>
<tr>
<th>CURRENT</th>
<th>REVISED</th>
</tr>
</thead>
</table>
| **Deferral of Sentencing [Magistrates’ Court only]**  
Max Period: 6 months  
For offenders aged 18–24 yrs.  
Following a finding of guilt, proceedings adjourned for up to 6 months. |  
Deferral of Sentencing [all courts]  
Max Period: 12 months  
For all offenders.  
Following a finding of guilt, proceedings adjourned for up to 12 months. Court must be satisfied that if the offender were to comply with the order and conditions of deferral, the court might impose a less severe sentence. Court may also indicate the penalty offender might receive if he/she complies/does not comply with the order. |

**EXTENSION OF DEFERRAL TO HIGHER COURTS, REMOVAL OF AGE RESTRICTION**  
AND INCREASE IN MAXIMUM PERIOD
Figure 3: Proposed Sentencing Pathways under the Sentencing Act 1991 (Vic)\(^\text{102}\)

<table>
<thead>
<tr>
<th>Less serious offences</th>
<th>More serious offences</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fewer prior convictions</td>
<td>More prior convictions</td>
</tr>
</tbody>
</table>

**PUNISHMENT/RESTITUTION PATHWAY**

<table>
<thead>
<tr>
<th>Action</th>
<th>Fine</th>
<th>Correction and Supervision Order</th>
<th>Youth Correction and Supervision Order</th>
<th>Youth Training Centre Order</th>
<th>Imprisonment + Release Order</th>
<th>Imprisonment (+ Non-Parole Period)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adjourned undertaking</td>
<td></td>
<td>with restricted movement condition and/or work condition (+ fine)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Fine</td>
<td></td>
<td>Youth Correction and Supervision Order</td>
<td>Youth Training Centre Order</td>
<td></td>
<td></td>
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<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**MIXED PUNISHMENT/REHABILITATION PATHWAY**

<table>
<thead>
<tr>
<th>Deferred Sentence +</th>
<th>Adjourned undertaking</th>
<th>Fine</th>
<th>Correction and Supervision Order</th>
<th>Youth Correction and Supervision Order</th>
<th>Youth Training Centre Order</th>
<th>Drug Treatment Order</th>
<th>Imprisonment + Release Order</th>
<th>Imprisonment (+ Non-Parole Period)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>with restricted movement condition and/or work condition + supervision, program and/or treatment conditions (+ fine)</td>
<td></td>
<td></td>
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<td></td>
<td></td>
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<tr>
<td></td>
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<td></td>
</tr>
</tbody>
</table>

**REHABILITATION PATHWAY**

<table>
<thead>
<tr>
<th>Deferred Sentence +</th>
<th>Adjourned undertaking</th>
<th>Correction and Supervision Order</th>
<th>Youth Correction and Supervision Order</th>
<th>Youth Training Centre Order</th>
<th>Drug Treatment Order</th>
<th>Imprisonment + Release Order</th>
<th>Imprisonment (+ Non-Parole Period)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>with supervision, program and/or treatment conditions</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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102 This model is based on the sentencing pathways model developed by Professor Arie Freiberg as part of the recent Sentencing Review: Freiberg (2002), above n 77, 40. Under the original model three pathways were proposed: ‘punishment/restitution’, ‘program/rehabilitation’ and ‘drug and alcohol’. 
Chapter 4: Custodial Orders

Introduction

4.1 While Victoria has a number of custodial orders for adult offenders, only three of these involve the offender serving actual prison time: imprisonment, combined custody and treatment orders (CCTOs) and partially suspended sentences. 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 1999–2000 to 2003–04, only 16 defendants were sentenced in the higher courts to a CBO combined with a term of imprisonment under section 36(2) of the Sentencing Act 1991 (Vic) (‘the Act’). In the case of home detention orders and intensive correction orders (ICOs)—which are treated under the Act as ‘custodial’ orders—a prison sentence of up to 12 months is imposed and ordered to be served at home (in the case of a home detention order) or in the community (under an ICO) under conditions.

4.2 The reforms recommended in this and the following chapter would reduce the number of ‘custodial’ options available in sentencing adult offenders to three:

• imprisonment (with or without a non-parole period);
• imprisonment plus release order (IRO)—a new order, which would replace CCTOs, partially suspended sentences and CBOS combined with a short prison term. An IRO would consist of a combination of up to 12 months in prison, with the remaining period of the order (up to a total of two years in the Magistrates’ Court or three years in the higher courts) spent in the community on conditions (cf partially suspended sentences, which involve release from prison into the community without conditions); and
• drug treatment orders (DTOs).

The higher courts would also continue to have the option available under section 18A of the Act to impose an indefinite sentence of imprisonment in relation to a serious offence where satisfied ‘to a high degree of probability’ that the offender is a serious danger to the community (due to his or her character, past history, age, health or mental condition, the nature and gravity of the offence, or any special circumstances).

4.3 ICOs and home detention orders, under the changes proposed, would be absorbed into a new form of order—a correction and supervision order (CSO). The features of the new CSO and the rationale for its introduction are discussed in Chapter 5.

4.4 With the exception of DTOs, all ‘custodial orders’ in Victoria would be sentences involving a period of detention in prison (see Table 2 below). Under a DTO, provided an offender complies with the conditions of the order, he or she will not spend any time in prison. 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.

103 Sentencing Act 1991 (Vic) s 36(2).
104 Sentencing Act 1991 (Vic) s 18ZT(1).
105 Sentencing Act 1991 (Vic) s 19(1).
106 Sentencing Act 1991 (Vic) s 18B(1).
### Table 2: Release and Supervision Arrangements for Custodial Orders under the New Sentencing Hierarchy (excluding Drug Treatment Orders)

<table>
<thead>
<tr>
<th>Period of the order</th>
<th>Disposition</th>
<th>Release from Prison</th>
<th>Supervising Authority while in the community</th>
</tr>
</thead>
<tbody>
<tr>
<td>36 months or &gt;</td>
<td>Prison (with or without non-parole period)</td>
<td>Release at the discretion of the Adult Parole Board</td>
<td>Community Correctional Services</td>
</tr>
<tr>
<td>24–36 months</td>
<td>Prison (with or without non-parole period)</td>
<td>Release at the discretion of the Adult Parole Board</td>
<td>Community Correctional Services</td>
</tr>
<tr>
<td></td>
<td>Prison (up to 12 months) + Release Order</td>
<td>Automatic release at the end of the prison term on conditions</td>
<td>Community Correctional Services</td>
</tr>
<tr>
<td>&lt;24 months</td>
<td>Prison (without a non-parole period) + Release Order</td>
<td>Automatic release at the end of the prison term on conditions</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>Prison (up to 12 months) + Release Order</td>
<td>Automatic release at the end of the prison term on conditions</td>
<td>Community Correctional Services</td>
</tr>
</tbody>
</table>

### The Need for Reform

#### Introduction

4.5 Apart from immediate imprisonment, the only other two custodial sentences in Victoria that involve a period of time spent in detention in prison are CCTOs and partially suspended sentences. Each of these sentencing orders is problematic for different reasons.

#### Combined Custody and Treatment Orders (CCTOs)

4.6 CCTOs have been almost universally criticised 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.

4.7 Over the period 1997–98 to 2001–02 less than 0.5 per cent of all defendants sentenced by Victorian criminal courts received a CCTO. The courts have, however, been making more use of CCTOs in recent years. From 1997 to 2002 the proportion of all defendants proven guilty who received a CCTO increased slightly, from 0.1 per cent to 0.2 per cent, with a 14 per cent increase in the total number of CCTOs handed down by the courts from 1997–98 to 2001–02 (up from 90 to 103).

4.8 Rather than seeking to fix an order in which the courts have clearly lost confidence, the Council considers 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 new order, 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 discarded.

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108 Freiberg (2002), above n 77, 361.
109 See, for example, Submissions 38 (Victoria Legal Aid) and 39 (Federation of Community Legal Centres). Judge Anderson (Submission 35) also noted there are significant limitations with CCTOs.
110 Roundtable (Legal Issues), 23 May 2005.
111 Freiberg 2002, above n 77, 361.
112 See further Sentencing Advisory Council (2005), above n 1, Appendix 4. This increase is largely attributable to the greater use of these orders made in recent years in the Magistrates’ Court. Over the period 1997–98 to 2001–02 there has been a 13 per cent increase in CCTOs handed down by the Magistrates’ Court—up from 85 in 1997–98 to 96 in 2001–02.
**Partially Suspended Sentences**

4.9 The Council further recommends that partially suspended sentences be absorbed into the new order. Partially suspended sentences currently occupy an uncertain place in the sentencing hierarchy. A partially suspended sentence is classed as a suspended sentence and therefore is positioned below the ICO and CCTO. However, because it involves a period spent in detention, which theoretically might be any period under three years, and the offender is under sentence until the operational period has expired, it could be argued that a partially suspended sentence is in fact more onerous than a 12 month ICO or even a 12 month CCTO.

4.10 Partially suspended sentences currently constitute only a small proportion of all sentencing orders in Victoria. In 2003–04, 146 defendants, or 7 per cent of all defendants proven guilty in the higher courts received a partially suspended sentence. Over the same period in the Magistrates’ Court, 404 defendants received a partially suspended sentence, representing only 1 per cent of all defendants proven guilty.\(^{113}\)

4.11 Under section 11 of the *Sentencing Act 1991*, 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’.\(^{114}\) 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.\(^{115}\) Parole is not possible for sentences of less than 12 months.

4.12 Due to the current maximum term of imprisonment able to be suspended (three years in the higher courts and two years in the Magistrates’ Court), partially suspended sentences appear to be used as a way of imposing a de facto non-parole period where the court has set a term of imprisonment of under 12 months, and in some cases as an alternative to a straight term of imprisonment with a non-parole period where the sentence is between 12–36 months. In the higher courts over the period 1999–2000 to 2003–2004, 94 per cent of defendants who received a partially suspended prison sentence served a prison sentence of 12 months or less prior to release. Of those who received a partially suspended sentence, 49 per cent were sentenced to a total period of imprisonment of between 12–23 months, and 32 per cent received a term of imprisonment of between 24–36 months. Where an offender has spent time on remand, a partially suspended sentence also has the benefit of allowing a court to recognise in a formal way the time the offender has already spent in custody.

4.13 Just as a partially suspended sentence may be considered in some circumstances more punitive than an ICO or CCTO, it may also be seen as more onerous than a straight prison sentence with parole. This is because on breach of a partially suspended sentence by the commission of another offence, the offender is at risk of serving the whole unserved term of imprisonment imposed, regardless of whether this breach occurs shortly after release or close to when the operational period is due to expire. This may result in offenders being ‘under sentence’ for a longer period of time than if they had received a straight prison sentence, with or without release on parole.

4.14 However, unlike a prison sentence with a non-parole period which requires the Parole Board to determine the offender’s suitability for release, the partially suspended sentence has the advantage of automatic release once the unsuspended portion has been served. Unlike offenders under parole, offenders released on a suspended sentence are released unsupervised, and without additional conditions, to serve the remainder of their sentence in the community.

**Benefits of an Imprisonment Plus Release Order**

4.15 The changes the Council recommends will provide for a new sentence—an IRO—to be imposed which includes a period in prison and a period in the community, while requiring the offender to be under supervision and other conditions on release and increasing the level of flexibility on breach.

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\(^{113}\) Number of defendants proven guilty sourced from Australian Bureau of Statistics, *Criminal Courts Australia 2003–04* (cat. 4513.0) Table 1.

\(^{114}\) *Sentencing Act 1991* (Vic) s 11(1).

\(^{115}\) *Sentencing Act 1991* (Vic) s 11(2).
4.16 The IRO is modelled loosely on the ‘custody plus’ order recently introduced in England and Wales. The Council notes that the NSW Sentencing Council recently recommended that consideration be given to introducing a form of ‘custody plus’ for short prison sentences ‘subject to considerations of cost effectiveness and other resource and supervision issues’.116

4.17 ‘Custody plus’ consists of a short prison sentence of 28–51 weeks, with 2–13 weeks served in prison and the remainder supervised in the community under licence.117 The period under licence must be at least 6 months.118 ‘Custody plus’ is intended to replace short terms of imprisonment of under 12 months.119 The ‘custody plus’ provisions were introduced along with conditional suspended sentences for terms of imprisonment of 28–51 weeks, as part of a package of sentencing reforms following the release of the Halliday Report in 2001.120 and the government’s white paper in 2002 (Justice for All).121 One of the advantages of such an order is to allow for a period of supervision and support to offenders in making the transition from prison back into the community which has not previously been possible (for example, due to the unavailability of parole for short prison sentences).

4.18 Like a ‘custody plus’ order, under the proposed IRO the court will set the period to be spent in prison prior to release, after which time the offender will be automatically released on conditions. However, the IRO is not intended to replace short straight terms of imprisonment where a court considers this option to be appropriate. While the release order will form part of the sentence, unlike a ‘licence period’ it will not be treated at law as part of the term of imprisonment. This is consistent with the Council’s position that sentencing orders should ‘mean what they say’ and exist as orders in their own right.

4.19 An IRO will also allow for greater flexibility than ‘custody plus’ orders in terms of how the orders may be served. No minimum period will be placed on the term of imprisonment the court may order, and up to 12 months may be ordered to be served in prison. As the overwhelming majority of defendants who currently receive a partially suspended sentence serve a prison sentence of 12 months or less prior to release, the IRO should provide a viable alternative option for courts in cases where a partially suspended sentence might previously have been ordered. Under the IRO, the courts will 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. Some discretion will be vested in Community Corrections Officers to scale down the intensity of these conditions over time (see further [4.31]–[4.32]). Different arrangements will also be put in place for breach.122

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117 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).
118 Criminal Justice Act 2003 (UK) s 181(6).
119 Section 181(1) of the Criminal Justice Act 2003 (UK) 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.
120 Home Office, Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales (‘the Halliday Report’) (2003). The Halliday Report did not recommend the broader availability of suspended sentences, arguing that ‘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’: at [5.16].
121 Home Office, Justice for All (2002).
122 Under a ‘custody plus’ sentence, an offender is released from prison on licence and is subject to recall to prison by the Secretary of State, with the Parole Board having the power to review this decision and order the offender’s immediate release on licence (Criminal Justice Act 2003 (UK) s 254). As a release order will exist as an order in its own right (i.e. not part of the ‘prison’ component of the sentence), under the Council’s proposals breach of a release order would fall to be dealt with by the court which originally made the order. See further [4.45]–[4.48].
4.20 The Council believes 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, should be retained. For this reason the maximum period of an IRO recommended by the Council is three years for defendants sentenced in the higher courts, and two years for those sentenced in the Magistrates’ Court.

4.21 An offender who breaches an IRO will no longer have the uncertainty that attaches to a partially suspended sentence of being ‘under sentence’ for the operational period, and on breach (regardless of when this has occurred) being liable to serve the whole suspended portion. However, an offender subject to an IRO will know that on breach he or she is at real risk of serving the unexpired part of the sentence in gaol.

4.22 Other potential benefits of an IRO would include:
- allowing courts to make orders which 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;
- providing for different levels of supervision for offenders on release based on the level of risk to the community and the offender’s needs; and
- allowing 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.

4.23 As noted above, such an order would also have similar advantages to a partially suspended sentence for administering short prison sentences, as release by the court would be automatic once the period set by the court was served. However, additional resources may need to be assigned to Community Correctional Services to administer the orders and ensure that where conditions include treatment or programs these services are properly funded.

**INTERIM RECOMMENDATION(S)**

2. Combined custody and treatment orders and partially suspended sentences should be replaced with a new form of order—an imprisonment plus release order.

**The Imprisonment Plus Release Order (IRO)**

**How would an Imprisonment Plus Release Order operate?**

4.24 An IRO would be a two-part order consisting of:
- a term of imprisonment (the custodial part or the order) of up to 12 months; and
- a release order which would consist of a sentence served in the community on conditions of a less or more intensive nature.

4.25 Unlike a partially suspended sentence, offenders would be subject to some form of conditions following their release from gaol. However, like a suspended sentence, offenders would be ‘at risk’ of being returned to prison if they breached the order prior to the expiration of the release order.

4.26 An IRO could be made by a court if it was considering sentencing an offender to a term of imprisonment of three years or under (in the case of the higher courts) or two years or under (in the case of the Magistrates’ Court), and was satisfied that it was desirable to do so in the circumstances. IROs could be imposed for one or more offences, provided the total period of imprisonment the court was considering imposing was less than three years (or two years in the case of the Magistrates’ Court). In making the order the court would be required to set a custodial period of up to 12 months’ imprisonment, with the balance of the sentence (up to a total period of two years in the Magistrates’ Court or three years in the higher courts) to be spent in the community.

4.27 If, on a preliminary assessment, the offender was judged at low risk of re-offending 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.
making 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.

**INTERIM RECOMMENDATION(S)**

3. An imprisonment plus release order should be available where the court:
   - is considering sentencing an offender to a term of imprisonment of three years or less (in the higher courts) or two years or less (in the Magistrates’ Court); and
   - is satisfied that it is desirable to make an IRO in the circumstances.

4. If the court makes a standard IRO with only the core conditions attached, the court should have a discretion to decide whether or not to order a pre-sentence report.

5. Before the court can make an IRO with one or more special conditions attached, a pre-sentence report should be requested and taken into account.

**Conditions of an Imprisonment Plus Release Order**

**Core Conditions**

4.28 Core conditions 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;
   - not possess or have in control any prohibited or controlled weapon;
   - 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.

**Special Conditions**

4.29 If a pre-sentence report was received, the court could make an order requiring the offender to comply with one or more of a number of special conditions on release in addition to the core conditions set out above. Such conditions might include a requirement that the offender:
   - observe a curfew;
   - reside at a specified place for a specified period/reside 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.

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123 A justice plan is a statement prepared by the Department of Human Services for offenders with an intellectual disability which specifies services which are recommended for the offender and which are designed to reduce the likelihood of re-offending.
Range of Conditions and Sentence Management

4.30 In the next stage of this review the Council would be interested in hearing views on whether the program and other conditions outlined above would be appropriate conditions under an IRO and what other conditions might usefully be considered. A number of options around the setting and management of conditions that might apply equally to conditions under a release order are discussed in the following chapter (see further [5.24]–[5.35]).

The Period of the Order and Conditions

4.31 Under an IRO the total period of the sentence would be set by the court, as would the period to be spent in custody prior to release and, if relevant, the duration of special conditions. The Council proposes 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.

4.32 In a similar way to the DTO, as a reward or incentive for compliance and to recognise an offender’s progress under the order, Community Correctional Services would also have the ability to vary core and special conditions, for example by changing directions to an offender with the effect of reducing:

- the frequency of treatment;
- the degree of supervision; or
- the frequency of drug or alcohol testing.  

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4.33 To ensure consistency of approach, it is recommended that this be dealt with through the adoption of guidelines at an administrative level rather than be included in any formal sense in the legislation.

INTERIM RECOMMENDATION(S)

6. Core conditions of a Release Order could 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;
- not possess or have in control any prohibited or controlled weapon;
- notify any change 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.

124 Under a Drug Treatment Order, it is the Drug Court, rather than Community Correctional Services, which has the power to vary the supervision and treatment part of an order. Under section 18ZJ(2) Sentencing Act 1991 (Vic) the treatment and supervision part of the order may be varied by adding or removing program conditions, or by varying one or more of the core conditions or program conditions.
### INTERIM RECOMMENDATION(S)

7. In making a Release Order, the court should also be permitted (but not required) to attach one or more special conditions, provided a pre-sentence report has first been received. Special conditions might include that the offender:

- observe a curfew for the release period;
- report to a Community Corrections Officer as directed and receive visits from a Community Corrections Officer;
- reside at a specified place for a specified period/reside at approved premises;
- not associate with specified person/s;
- comply with any reasonable direction re association with specified persons;
- attend vocational, education, employment or other 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 Correctional Services;
- participate in services specified in a justice plan (where applicable);
- submit to drug or alcohol testing as directed; or
- observe any special conditions imposed by the court.

8. Core conditions of an IRO should operate for the whole period of the release order. Special conditions may be ordered to run for a shorter period if appropriate.

9. Guidelines should be developed by Corrections Victoria to assist in the management of release orders and encourage consistency of approach.

## Consequences of Breach

### Breach of a Suspended Sentence and Other Orders

4.34 Under the current law, a breach of a CCTO, an ICO, a suspended sentence, 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, the maximum penalty for which is a Level 10 fine.\(^{126}\)

4.35 On breach of a suspended sentence the 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’.\(^{127}\) Other actions the court can take on breach are:\(^{128}\)

- to activate part of the sentence or part sentence held in suspense;
- to extend the period of the order suspending the sentence to not later than 12 months after the date of the order; or
- to make no order with respect to the suspended sentence.

The ‘exceptional circumstances’ requirement, which is intended to limit a court’s discretion on breach, is also contained in the breach provisions relating to CCTOs\(^{129}\) and ICOs.\(^{130}\)

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\(^{125}\) Sentencing Act 1991 (Vic) ss 18W (CCTO), 26 (ICO), 31 (suspended sentence), 47 (CBO) and 79 (adjourned undertaking).

\(^{126}\) A Level 10 fine is equal to 10 penalty units (Sentencing Act 1991 (Vic), s 109(2)). The value of a penalty unit as fixed by the Treasurer in accordance with s 11(1)(b) of the Monetary Units Act 2004 (Vic) for the financial year commencing 1 July 2005 is $104.81: Victorian Government Gazette 14 April 2005, 722. The maximum fine that currently may be imposed is therefore $1,048.10.

\(^{127}\) Sentencing Act 1991 (Vic), s 31(5A).

\(^{128}\) Sentencing Act 1991 (Vic), s 31(5).

\(^{129}\) Sentencing Act 1991 (Vic), s 31(5) s 18W(6).

\(^{130}\) Sentencing Act 1991 (Vic) s 26(3B).
Submissions and Consultations

4.36 While a majority of those who participated in community forums and focus groups considered the current breach provisions to be ‘fair and appropriate’, 131 a number of those who made submissions 132 and participated in the specialist roundtables believed that the current breach provisions relating to suspended sentences were too inflexible and onerous. Criticisms of the breach provisions included that in determining whether the original sentence should be activated the exceptional circumstances provision does not adequately allow for factors such as the relative seriousness of the offence constituting the breach and the original offence for which the suspended sentence was ordered, 133 how far into the order the second offence was committed, 134 changes in the offender’s circumstances, 135 or other issues such as where breach has occurred due to an offender’s mental illness or intellectual disability. 136 It was suggested that increasing flexibility on breach would allow for just outcomes in individual cases 137 and reflect current practices of the courts. 138

4.37 Breach of suspended sentences was seen by some to impact unfairly on disadvantaged offenders, particularly when considered in light of possible net-widening and sentence inflation effects and the lack of appropriate supports. For example, the Victorian Aboriginal Legal Service Inc (VALS), while noting that Indigenous offenders appear less likely to be given a suspended sentence, submitted that there is anecdotal evidence to suggest that a majority of Indigenous offenders on suspended sentences breach these orders. 139 Reasons for breach suggested by VALS include a lack of appropriate and culturally sensitive services, the absence of mechanisms to assist offenders to comply with the orders, a failure to communicate properly to Indigenous offenders what a suspended sentence is or the implications for them of re-offending, and the particular patterns of offending of Indigenous offenders. 140 The Koori Court, however, was reported as having more success with fewer breaches. VALS attributed this to proper targeting of suspended sentence orders to offenders who ‘have got their lives on track and/or have support mechanisms in place that enable them to break out of a cycle of crime’, the linking of defendants on suspended sentence orders with appropriate services, and court processes which allow participants to participate more easily and understand what is going on due to more informal procedures and the time spent determining the appropriate sentence. 141

4.38 There was support for a return to the previous provision that the sentence be activated ‘unless unjust in view of all the circumstances’, 142 and for giving courts a power to re-sentence on breach (to the full range

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131 Those who participated in community forums and focus groups were asked to complete feedback forms on the options contained in the Suspended Sentences Discussion Paper. Of the 108 responses received, 67 agreed with the statement that current breach provisions were ‘fair and appropriate’, while 14 thought they were too tough and 27 too lenient.

132 See, for example, Submissions 24 (County Court of Victoria), 36 (Magistrates’ Court of Victoria), 38 (Victoria Legal Aid), 39 (Federation of Community Legal Centres), 42 (VAADA), 43 (VALS), 44 (Fitzroy Legal Service) and 45 (Mental Health Legal Centre).

133 Submission 38 (Victoria Legal Aid): ‘minor breach offences may not justify imprisonment’ and Submission 44 (Fitzroy Legal Service).

134 Victoria Legal Aid (Submission 38) suggested that the current provisions provided a disincentive for offenders to attempt to comply with the order, as a breach that occurred one week after the order was made would attract the same consequences as one which occurred after two years of good behaviour. See also Submission 5 (Y Zole).

135 Submission 44 (Fitzroy Legal Service) and 38 (Victoria Legal Aid).

136 Submission 45 (Mental Health Legal Centre)—supplementary comments.

137 Submissions 34 (S Tudor), 36 (Magistrates’ Court of Victoria), 39 (Federation of Community Legal Centres), 41 (Youthlaw), 44 (Fitzroy Legal Service) and 45 (Mental Health Legal Centre).

138 Submission 41 (Youthlaw). Submission 34 (S Tudor) argued: ‘we should not legislatively countenance the imposition of sentences specifically regarded as “unjust”; nor should judges skew the facts to fit the legislation (if this is what is happening)’.

139 Submissions 43 (VALS).

140 Submissions 43 (VALS).

141 Submissions 24 (County Court of Victoria), 34 (S Tudor) 38 (Victoria Legal Aid) and 44 (Fitzroy Legal Service), Victoria Legal Aid favoured spelling out relevant issues such as the nature and circumstances of the original and breach offences, the personal circumstances of the offender, and the extent of the defendant’s compliance since the original sentence.
of sentencing options, or to one of the available custodial orders.\textsuperscript{143} The Federation of Community Legal Centres also argued that the threshold for breaches (the commission of another offence ‘punishable by imprisonment’) was too low and that only re-offending that constituted “serious [and related] offending” should constitute a breach of the order.\textsuperscript{144}

4.39 Others who made submissions supported the current breach provisions as being fair and appropriate,\textsuperscript{145} arguing that as the offender had received a significant advantage in having their prison term suspended the original sentence should be served on breach by further offending if there were no exceptional circumstances. There was also some support for tightening up the current breach provisions, for example by requiring mandatory activation of the sentence imposed for the first and any type of breach,\textsuperscript{146} and removing the power of the court to make no order.\textsuperscript{147} Supporting this general position, one submission argued:

A person who does not take up the generous offer of a second chance given by the court has no right to another chance and should be further punished for showing no remorse and no respect for the court.\textsuperscript{148}

4.40 The finding of ‘exceptional circumstances’ in cases involving merely ‘changed’ rather than ‘exceptional’ circumstances was also seen by many to be a matter of concern.\textsuperscript{149} As one forum participant suggested: ‘Exceptional circumstances should in fact be EXCEPTIONAL’ [emphasis in original].\textsuperscript{150} Some also felt that judges needed to be more selective as to who received a suspended sentence\textsuperscript{151} and saw the issue of poor targeting of offenders as related to current breach rates.\textsuperscript{152}

4.41 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. As one submission suggested:

...any reforms in this particular area must tread warily because increasing the number and kinds of conditions a person is under can increase the chances of breach. In effect, one could be “setting someone up for a fall” by placing them among a greater number of “trip wires” when one was really intending, for example, to increase his or her chances of rehabilitation.\textsuperscript{153}

4.42 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 was introduced as a condition of a suspended sentence (such as treatment conditions for offenders with drug and alcohol issues) breach of these conditions should not constitute a formal breach of a suspended sentence.\textsuperscript{154} The Federation of Community Legal Centres proposed that failure to comply with conditions should result in the first instance with a review by the supervising agency of the reasons for non-compliance, including 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, the Federation recommends, the matter should be

\textsuperscript{143} Submission 36 (Magistrates’ Court of Victoria), 38 (Victoria Legal Aid), 39 (Federation of Community Legal Centres), 44 (Fitzroy Legal Service) and 45 (Mental Health Legal Centre).

\textsuperscript{144} Submission 39 (Federation of Community Legal Centres). See also Submission 38 (Victoria Legal Aid).

\textsuperscript{145} Submissions 23 (L Francis) and 40 (S Rothwell).

\textsuperscript{146} Submissions 6 (M Douglas) and 25 (M Roach).

\textsuperscript{147} Submission 27 (D A Paul).

\textsuperscript{148} Submission 25 (M Roach).

\textsuperscript{149} On the issue of exceptional circumstances generally, and a discussion of findings of the Council’s study of outcomes on breach in the higher courts and Magistrates’ Court, see Sentencing Advisory Council (2005), above n 1, [4.45]–[4.47] and [4.59]–[4.91].

\textsuperscript{150} Response to Feedback Form —Community Forum.

\textsuperscript{151} Submission 7 (C Murphy).

\textsuperscript{152} Submission 9 (J Hemmerling).

\textsuperscript{153} Submission 34 (S Tudor).

\textsuperscript{154} Submission 42 (VAADA). See also Submission 39 (Federation of Community Legal Centres) and 44 (Fitzroy Legal Service).
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{155}

4.43 Related to this issue were concerns that many breaches (of both conditions and breaches by further offending) are attributable to failings in services and supports available to offenders, rather than to an 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.\textsuperscript{156}

In some cases, it was argued, ‘the breach ought rest with the service system and not with the person’ subject to the order.\textsuperscript{157}

\textbf{The Council’s View}

4.44 There is an inherent tension between seeking to respond to breaches in a flexible way, and communicating clearly to offenders and the community that breaches will be dealt with seriously. Some balance must be struck, in our view, 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.

4.45 As an imprisonment plus release order will generally be made in the case of more serious offending, we suggest that if the order is breached by further offending or by failing to meet other conditions of the order, the appropriate course of action in most cases will be cancellation of the order and committing the offender to prison for the unexpired portion of the sentence. However, courts should have the discretion to take an alternative course of action where this is considered justified in the circumstances. This is 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 to avoid injustice in individual cases. Cases in which it may be inappropriate for the court to make one of the above orders might include, for example:

- where the breach is of a trivial nature; or
- where the breach is 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).

4.46 The Council therefore advocates 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 suggests 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.\textsuperscript{158}

4.47 In terms of how the breach provisions are framed, we recommend a similar approach to that under the current ICO breach provisions be adopted. If a court is satisfied that the offender has breached the

\textsuperscript{155} Submission 39 (Federation of Community Legal Centres). This position was also supported by the Fitzroy Legal Service.

\textsuperscript{156} Submission 45 (Mental Health Legal Centre)—supplementary comments.

\textsuperscript{157} Submission 45 (Mental Health Legal Centre).

\textsuperscript{158} These are modelled on factors set out in s 147(3) of the Queensland Penalties and Sentences Act 1992 which relates to breach of a suspended sentence.
conditions of the release order without reasonable excuse, the Council recommends 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 presumption should be that the order will be cancelled and the offender ordered to serve the unexpired term of the sentence in gaol unless the court determines 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).

4.48 In determining the appropriate course of action, we recommend that courts should be required to take into account the extent to which the offender has complied with the release order prior to its breach. The Council further recommends that action for breach should be required to be commenced within three years of the date of the alleged breach.\(^{159}\) This is consistent with the current period that applies to action taken for breaches of CCTOs,\(^{160}\) ICOs,\(^{161}\) suspended sentences,\(^{162}\) CBOs\(^{163}\) and conditional adjournments.\(^{164}\)

### INTERIM RECOMMENDATION(S)

10. If a court is satisfied that the offender has breached the conditions of the release order without reasonable excuse, 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.

11. In the case of any serious breaches (such as breach by further offending), there should be a presumption that the order will be cancelled and the offender committed to prison for the unexpired portion of the sentence as at the date of breach. However, the court should have the discretion to take one of the alternative courses of action (i.e. to vary or confirm the original order made) if it considers that requiring the offender to serve the unexpired portion would be ‘unjust in the circumstances’.

12. In considering what action to take on breach, a court should be required to take into account the extent to which the offender had complied with the release order prior to its cancellation in re-sentencing the offender.

13. Action for breach should be required to be commenced within three years of the date of the alleged breach.

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\(^{159}\) We note that some submissions (see for example, Submission 38 (Victoria Legal Aid)) considered that the period action for breach could be taken for suspended sentences and other orders (three years) is too long and should be reduced to 12 months.

\(^{160}\) *Sentencing Act 1991 (Vic)* s 18W(2).

\(^{161}\) *Sentencing Act 1991 (Vic)* s 26(1A).

\(^{162}\) *Sentencing Act 1991 (Vic)* s 31(2).

\(^{163}\) *Sentencing Act 1991 (Vic)* s 47(1A).

\(^{164}\) *Sentencing Act 1991 (Vic)* s 79(2).
Suspended Sentences of Imprisonment

4.49 Under the revised hierarchy, courts would no longer have the option of wholly or partially suspending a term of imprisonment. Once the court determined that the appropriate sentence was imprisonment then it would have the options of imposing a straight term of imprisonment (with or without setting a non-parole period) or making an IRO. Where the court would otherwise have imposed a partially suspended sentence, the court could either sentence the offender to an IRO or might consider sentencing him or her to a combination of restraint in the community—such as curfew or home detention—and other conditions under a CSO.

4.50 If a court considered that but for the particular circumstances of the offence and/or the offender it would have ordered the offender to serve a term of imprisonment, but considers that prison is not the appropriate option, the court also would have the option of making a CSO. However, on breach the offender would risk being re-sentenced for the original offence to a term of imprisonment.

Changes to Power to Order a Non-Parole Period

4.51 As discussed above at [4.11], under section 11 of the Sentencing Act 1991 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’.165 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.166 Parole is not possible for sentences of less than 12 months.

4.52 So as to minimise possible confusion concerning when an IRO is appropriate and when a prison sentence with a non-parole period may be appropriate, and in the interests of consistency in the management of prison orders, the Council recommends that the Sentencing Act 1991 be amended to remove the power of the courts to set a non-parole period where the sentence of imprisonment imposed is under two years. This will provide a clearer demarcation between situations where it is appropriate to make a release order and those where the court should instead fix a non-parole period.

4.53 Following the adoption of these changes, a court sentencing an offender to prison for 24 months or over would continue to have the power to fix a non-parole period, while for sentences of under 24 months the court could order either a straight term of imprisonment or a combination of up to 12 months’ imprisonment with the remainder served in the community under a release order with conditions. Should other imprisonment options such as periodic detention be introduced in Victoria, these also might be used in combination with a release order as an alternative to straight imprisonment, provided that the total period of the order is under three years (in the case of the higher courts) or two years (in the case of the Magistrates’ Court).

INTERIM RECOMMENDATION(S)

14. Section 11(2) of the Sentencing Act 1991 (Vic) should be repealed to remove the discretionary power of a court to fix a non-parole period on sentencing an offender to prison for a period of 12 months or more, but under 24 months.

15. Courts should continue to have the option of ordering offenders sentenced to a custodial term of less than two years to serve the sentence by way of a straight term of imprisonment.

165 Sentencing Act 1991 (Vic) s 11(1).
166 Sentencing Act 1991 (Vic) s 11(2).
Chapter 5: Non-Custodial Orders

Introduction

5.1 In this Chapter we recommend changes to the range of sentencing orders available in Victoria that are able to be served in the community. In particular, the Council recommends that home detention orders (as a sentencing order), intensive correction orders (ICOs), wholly suspended sentences and community-based orders (CBOs) should be absorbed into a new form of order to be known as a correction and supervision order (CSO)—a conditional order to be served in the community of up to three years (in the case of the higher courts) or two years (in the case of the Magistrates’ Court).

5.2 As noted above at [3.8], the Council has focused its attention on intermediate sanctions rather than lower-level penalties (such as fines, dismissals, discharges and adjournments), as we consider it is these sanctions that are in most need of rationalisation and reform.

The Current Situation

5.3 While under the current Sentencing Act 1991 courts have at their disposal a number of custodial orders, non-custodial options for adult offenders are limited to:
- community-based orders;
- fines; and
- dismissals, discharges and adjournments.

5.4 ICOs, although served in the community, are currently deemed to be sentences of imprisonment served in the community. Similarly, home detention orders—which are served by offenders in their own home—are considered a means of serving a prison sentence and cannot be ordered unless a term of imprisonment is first imposed.

The Need for Reform

5.5 As discussed at [2.43]–[2.47], the Council is generally opposed to the use of substitutional orders, such as suspended sentences, ICOs and home detention, on the grounds that these sentencing orders are more constructively thought of as sentences in their own right and should not be tied to imprisonment. The Council is also concerned that sentencing orders should make sense to the general community. In our view, unless a sentence involves an actual period of detention in a prison or other correctional facility (such as, in the case of a young offender, a youth training centre (YTC) or youth detention centre) it should not be classed as a ‘custodial’ order.

5.6 The new correction and supervision order (CSO) would include a form of ‘custody’, but not detention in prison. Under a CSO, courts would be empowered to attach ‘custodial conditions’ or restrictions on an offender’s liberty such as home detention, a curfew condition, or even periodic detention (should such an option be introduced in Victoria). Custodial conditions could also be combined with other conditions tailored to the offence and the offender, including supervision, treatment and other program conditions. By strengthening the range of community penalties, including providing for a tougher form of community sentence, the Council believes it is possible to create true alternative sanctions which do not rely on maintaining the fiction of a sentence served in the community or at home as a ‘prison’ sentence.
5.7 The Council also feels that there is a need to rationalise the number of orders that currently exist in Victoria. This would not only simplify and streamline the existing hierarchy but would also provide courts with much needed flexibility. Consistent with our approach, we recommend that the current home detention order, ICO and CBO be combined into a new generic community sentence—a CSO. The order will retain elements of the existing orders, while allowing courts to mix and match conditions more easily to shape a sentence that is appropriate to the offence and to the offender.

5.8 We recommend that the appropriate length of the order should be three years in the higher courts, and two years in the Magistrates’ Court, with more intensive conditions, such as those involving restrictions on liberty, as a general principle operating for a shorter period of time, while those which are less onerous extending for the full term of the order. This means that while some offenders may initially be under quite intensive conditions, their obligations under a CSO could be scaled back over time. This would introduce an added layer of flexibility and responsiveness to the way orders are managed.

5.9 With the removal of suspended sentences as a sentencing option, courts would be forced to make a decision between whether an offender is ‘in’ or ‘out’ (of prison). The creation of the new correction and supervision order, we believe, will facilitate this transition, providing a viable intermediate sanction.

5.10 The new sanction would also retain many of the perceived advantages of suspended sentences referred to in submissions,\(^{167}\) 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.

5.11 In this context we note that while a number of those who made submissions and who participated in public consultations expressed concern in relation to the use of suspended sentences for crimes involving violence against the person, such as rape and other forms of sexual assault,\(^{168}\) the South Eastern Centre Against Sexual Assault indicated that in discussions with its workers and the coordinators of the metropolitan Centres Against Sexual Assault there was ‘considerable support for a wider range of penalties [for sexual offences], including the possibility of conditions being attached to a suspended sentence and a sophisticated form of home detention’.\(^{169}\) There was also cautious support expressed for these types of options by some participants of the workshop on sexual offences.\(^{170}\) Under the model proposed, in many cases courts are likely to continue to consider it appropriate to order the offender to serve a term of imprisonment, or an imprisonment plus release order. However, because of the increased severity of orders served in the community and the added flexibility that would be provided to courts under a CSO, courts may also consider it appropriate in some cases to make a CSO with conditions such as restricted movement conditions and treatment conditions.

5.12 We acknowledge that a potential risk in what we are advocating is sentencing inconsistency. However, we would argue that this risk is no greater than that which already exists, with some offenders who receive a prison sentence being ordered to serve their time in full-time detention, while others who have their sentence suspended are permitted to go about their lives back in the community—albeit with a prison sentence on their criminal record and the possibility of it being activated on breach. Further, the Council considers inconsistency can be effectively guarded against through 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. The use of guidelines is discussed at [5.33]–[5.35].

\(^{167}\) See, for example, Submissions 39 (Federation of Community Legal Centres), 41 (Youthlaw) and 43 (VALS).

\(^{168}\) See above n 21.

\(^{169}\) Submission 52 (SECASA).

\(^{170}\) Sexual Offences Workshop (16 June 2005). It was suggested that if suspended sentences are retained for sex offenders, they should include alcohol and drug treatment, a requirement to participate in a sex offender treatment program, and some form of surveillance and a prohibition on the offender working with young children.
The Correction and Supervision Order

How Would a Correction and Supervision Order Operate?

5.13 The Council recommends that the following principles apply to guide the making of a CSO:

- unless only a prison sentence or an imprisonment release order would meet the need for denunciation and just punishment, courts should consider imposing a CSO;
- as is the current situation for CBOs, a court would only be empowered to make a CSO 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 a term of imprisonment or a fine of more than 5 penalty units; and
  b) the offender agrees to comply with the order;
- however, unlike a CBO, a court would not need to have first requested and received a pre-sentence report, provided the court makes an order with only the core conditions attached or attaches a single special condition which does not require the supervision or involvement of Community Correctional Services (see further [5.19]); and
- courts should have the power to fine an offender in combination with making a CSO to increase the punitive weight of the sentence (if necessary).

5.14 It is envisaged that CSOs would be available for a wide range of offending behaviour—including circumstances in which a court might be considering a prison sentence or, in the case of a young offender (under 25 years), is considering sending him or her to a YTC (on the possible introduction of a new youth correction and supervision order (YCSO), see [5.53]–[5.55]).

5.15 It is recommended that some form of legislative guidance also should be provided which expressly states that a CSO may be an appropriate sentence even where a term of imprisonment or some other form of detention may have been warranted. This will make clear that a CSO may be an appropriate disposition even for offences which are objectively quite serious, where there are other circumstances justifying the offender remaining in the community. By providing courts with the ability to attach conditions such as restraints on movement (such as curfew conditions) and other forms of supervision and requirements to attend treatment and programs, the Council believes that community-based sanctions will provide a better alternative to imprisonment than do current orders.
Conditions of a Correction and Supervision Order

Core Conditions

5.16 Core conditions of a CSO could include that the offender:
- not commit another offence punishable by imprisonment in or outside Victoria during the period of the order;
- appear before the court if called on to do so during the period of the order;
- report to Community Corrections Centre within two working days after the order is made/comes into force;
- obey all lawful instructions and directions of a community corrections officer;
- notify any change 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.

5.17 Although all offenders would be required to report initially to Community Corrections, any future contact would be regulated by Corrections Victoria. Therefore, provided Community Corrections was satisfied that the offender was at low risk of re-offending, no further contact would be required.

5.18 The Council understands that the process of requesting pre-sentence reports can often result in delays due to the time required for a report to be prepared. A pre-sentence report currently must be prepared if the court is considering making one of a number of orders, including a CCTO, ICO or a CBO.171 During consultations it was suggested to the Council that one of the attractions of a suspended sentence to a sentencer is that a pre-sentence report is not required and the offender can therefore be dealt with without the need for an adjournment.

5.19 Under the changes proposed, a pre-sentence report may not be required where the court’s intention is simply to make a standard CSO (i.e. a CSO with only the core conditions) or to attach a single special condition which does not require the supervision or involvement of Community Correctional Services. The Council therefore recommends that courts have a discretion whether to order a pre-sentence report in such cases to allow cases to be dealt with as efficiently and expeditiously as possible.

5.20 It is suggested that circumstances in which a CSO without special conditions might be considered appropriate would include cases in which:
- the offence, or offences are not of a serious nature and where the offender has no prior offences, or only a limited prior history of offending;
- rehabilitation is a more important consideration in the circumstances than punishing the offender, and the offender has already demonstrated his or her rehabilitation and/or does not require a program intervention; and/or
- despite the seriousness of the offence and the need for deterrence, there are special circumstances which justify the court exercising mercy.

5.21 This form of CSO might therefore be appropriate in many instances in which a court might previously have considered imposing a wholly suspended sentence. As is the case with a suspended sentence, the offender would be at risk of serving a prison term on breach of the order—which under a CSO could be breached not only by the commission of another offence but also by a breach of other conditions of the order. The most significant differences between a standard CSO and a wholly suspended sentence would be that:
- an offender subject to a CSO would be required not only to comply with a general requirement not to commit another offence but also with a number of other reporting and notification conditions; and
- the court could make a CSO without first imposing a prison sentence, as a CSO would be a sentence in its own right.

171 Sentencing Act 1991 (Vic) s 96(2).
Special Conditions

5.22 The court would also have the power to attach one or more special conditions to a CSO. Special conditions which required the supervision or involvement of Community Correctional Services could only be imposed once the court had ordered and received a pre-sentence report providing the court with advice on the offender’s suitability, and advising the court on the most appropriate mix of conditions. In setting conditions, courts should also be required to take into consideration the conditions most suitable for the offender, and that where two or more special conditions are imposed they are compatible.

5.23 Special conditions which might be attached to a CSO could include:
- restrictions on liberty (such as home detention, curfew conditions and/or periodic detention);
- community work;
- treatment conditions (such as drug and alcohol treatment, mental health treatment and counselling);
- program conditions (such as drink driving programs, family violence programs, sex offender treatment programs and other life skills programs);
- activity conditions (such as vocational and employment programs and participating in victim-offender conferences);
- supervision by Community Correctional Services, including reporting to and receiving visits from a Community Corrections Officer;
- a non-association condition (prohibiting an offender from being with, attempting to be with or communicating, or attempting to communicate with a named person) and/or place restriction condition (prohibiting an offender from being in or within a stated distance of a named place or area);172
- a residence condition;
- a drug and alcohol testing condition; or
- any other condition the court considers necessary or appropriate.

Range of Conditions and Resourcing Issues

5.24 In the next stage of this review the Council will be inviting views on whether the program and other conditions available under existing conditional orders would be appropriate conditions under a CSO, what other conditions usefully might be considered and what types of conditions might be appropriate for different categories of offences and offenders. For example, the Mental Health Legal Centre has recommended in its submission the possible introduction of plans, similar to justice plans (which provide for services for people with an intellectual disability), designed specifically to cater for people with mental illness.173 The Victorian Aboriginal Legal Service Inc in its submission emphasised the need in the case of Indigenous offenders, including in terms of minimising the likelihood of breach, that conditions ordered requiring the provision of services or programs be culturally sensitive.174 Fitzroy Legal Services and others175 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).176 It was suggested that this was 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.177 The Council recognises that the success of any conditional order, including in preventing re-offending, is likely to depend on a range of issues including the availability of appropriate and properly resourced programs and services in the community and supports provided to offenders.

172 These types of conditions might be useful where, for example, there is a history of family violence and/or the offender has committed offences of a sexual nature.
173 Submission 45 (Mental Health Legal Service).
174 Submission 43 (VALS).
175 See, for example, Submission 45 (Mental Health Legal Service).
176 Submission 44 (Fitzroy Legal Service).
177 Submission 44 (Fitzroy Legal Service).
5.25 Proposals for additional conditions and applying conditions to a greater number of sentencing orders (even where these are only the basic reporting and notification requirements outlined above) clearly will have a number of resourcing implications, both in terms of delivery of services and offender management. For example, unlike suspended sentence orders, action for breach would in most cases fall to be dealt with by Community Correctional Services rather than Victoria Police (as is currently the case). In considering any possible changes to the current system the Council is cognisant of the need to take these sorts of implications into account. The Council is committed to working closely with Corrections Victoria and others who will be affected by these changes to determine their likely impact, prior to finalising its recommendations.

5.26 The Council further believes that some of the draft recommendations made, particularly the expansion of the power to defer sentencing, may operate to alleviate possible additional pressure placed on the correctional system to deliver services. We note, however, that the alternative model, for which there was a great deal of support, namely the addition of conditions to suspended sentences, would have the same resource implications, but with the added danger that those who breached the conditions would be more likely to be sentenced to imprisonment—a far more expensive option.

5.27 In considering the resource issues, the Council is also concerned that an appropriate balance be found between resources devoted to corrections on the one hand, and to services provided in the community on the other. We recognise that while there is a need for corrections to be properly resourced to support offenders on sentencing orders, prevent re-offending and protect the community, there is also a need for mental health, drug and alcohol and other services (such as employment, training and accommodation support) to be provided to those in the community who are in most need of them. In this context, the Council notes concerns that services and programs should be delivered on the basis of need, rather than whether or not a person is under a correctional order. As suggested at one of the roundtables, if treatment services are funded for offenders under a court order but not for others in the community it might lead to the perverse situation of providing an incentive to offend for those who cannot otherwise access treatment.¹⁷⁸

5.28 The Council does not wish to diminish the importance of adequate funding being provided for treatment and support services in the community, along with services for those who come into contact with the criminal justice system. However, the Council’s focus is on improving responses to offenders who come before the courts to be sentenced. The Council believes that some additional investment in improving services and the management of offenders in the short term may reap significant rewards in the longer term by reducing re-offending and the overall impact of crime on the community.

**Pre-Sentence Reports**

5.29 The Council regards the preparation of pre-sentence reports and their use by the courts as critical to the effective operation of both the IRO and the CSO. In the case of special conditions attaching to an order, such as supervision and treatment, Community Correctional Services clearly are best placed to make an assessment of what level of supervision or additional program or treatment conditions are considered appropriate in the circumstances. This process, if managed effectively, may assist in ensuring that resources are directed in the most efficient way possible and that where treatment and other programs are concerned they are delivered to offenders who have the greatest need for these services and to those who are most likely to benefit from such interventions.

5.30 There is always a risk that courts will not follow the recommendations in a pre-sentence report, but will instead choose to make a sentencing order or apply conditions that Community Correctional Services or others preparing such reports consider inappropriate. For example, where Community Correctional Services assess an offender as having a low risk of re-offending, the pre-sentence report is unlikely to recommend conditions or rehabilitative programs. The Council notes however that in sentencing offenders, the courts are balancing a broader range of considerations. The Council therefore endorses the view that a sentencer should retain the right to make an order or attach the conditions that he or she considers necessary to satisfy the aims of the sentence in an individual case. At the same time, however, the Council also believes that the courts should treat pre-sentence reports and assessments as providing valuable information on the sorts of conditions that are appropriate to the particular offender and that can be supported.

¹⁷⁸ Roundtable (Offenders with a Mental Illness and/or Intellectual Disability), 12 May 2005.
5.31 One approach that has been suggested to ensure that courts only deviate from recommendations made in pre-sentence reports with good reason are the provisions requiring courts to provide written reasons for doing so. For example, provisions which appear in the ACT Crimes (Sentencing) Bill 2005 require a court to record reasons for its decision either to decline to include a particular condition or make a particular order where a pre-sentence report has recommended an offender is suitable for such a condition, or to order or include such a condition where an offender has been assessed as unsuitable for the order made or condition imposed. Ultimately, however, effective use of pre-sentence reports is likely to depend on the confidence sentencers have in the quality of the advice and recommendations they receive.

5.32 The Council also recognises a risk that sentences may be inflated if offenders are ordered to comply with a greater range and number of conditions. To minimise the risk of sentence escalation by the court loading orders up with conditions, it is further recommended that courts be expressly directed not to impose any more special conditions than are necessary to achieve the purpose or purposes for which the order is made. A similar restriction currently applies in relation to the setting of program conditions under a CCTO, DTO and CBO. The use of guidelines may also perform an important function (see further below [5.33]–[5.35]). As CSOs will deal with a broad range of offending behaviour, it is recommended that the guiding principle should be that the combination of conditions set should be commensurate with the seriousness of the offence. This will be particularly important where conditions involving restrictions to liberty are concerned.

Guidelines

5.33 A possible approach to assist courts in setting conditions, which might also reduce the risk of sentence escalation and sentencing disparities, is suggested by the recent UK Sentencing Guidelines Council’s guideline on the operation of the community sentence introduced under the Criminal Justice Act 2003. 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. In this way sentencers may provide those charged with preparing the report with information required to determine what level of conditions should be recommended and, for example, whether those conditions should be aimed at punishing the offender, protecting the community, rehabilitation, deterrence or a combination of these purposes.

5.34 The National Probation Service for England and Wales has also prepared a Bench Book to assist sentencers and put in place guidelines to assist with the effective management of these new orders. The Bench Book provides 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). The Council considers that a similar approach could usefully be adopted in Victoria.

179 Crimes (Sentencing) Bill 2005 (ACT) s 78(6) (periodic detention), 89(6) (community service conditions), 97(5) (rehabilitation program conditions) and 117(4) (deferred sentence orders).
180 Sentencing Act 1991 (Vic) s 18S(3).
181 Sentencing Act 1991 (Vic) s 18ZG(2).
182 Sentencing Act 1991 (Vic) s 38(3).
5.35 In line with this approach, Table 2 (below) sets out how some of the special conditions outlined above might be used by the courts.186

**Length of Operation of Special Conditions**

5.36 While the core conditions of a CSO would operate for the total period of the order (up to three years if the order is made in the higher courts, or two years if made in the Magistrates’ Court), special conditions could be ordered to operate for a shorter period of time. In the case of more onerous conditions, such as those involving restrictions on liberty, an upper limit would be set on the period such conditions could run. For example, a home detention or curfew requirement might have an upper limit of 12 months, while a residence requirement might apply for up to 36 months (the maximum term of the order).

5.37 The Council suggests that there may be some value in giving Community Correctional Services a limited discretion to vary conditions in certain circumstances to reward an offender for positive progress made under the order, with guidelines put in place to structure how this discretion should be exercised. This will operate both as an incentive to offenders to comply with the conditions of the order, and ensure that correctional resources can be managed effectively by allowing conditions that are no longer considered necessary (such as treatment) to be scaled back over time. Core conditions, however, would generally operate until the expiration of the order.

**Table 3: Possible Program/Special Conditions under a Correction and Supervision Order**

<table>
<thead>
<tr>
<th>Offence Seriousness</th>
<th>Principal Sentencing Purpose(s)</th>
<th>Punitive</th>
<th>Rehabilitative</th>
<th>Mixed</th>
</tr>
</thead>
<tbody>
<tr>
<td>HIGH</td>
<td>Community Work 250 to 500hrs for a maximum period of 24 months</td>
<td>Drug and Alcohol Treatment including residential—12 to 36 months</td>
<td>Combination of punitive and rehabilitative conditions and/or Intensive supervision (e.g. report to or receive visits at least twice per week)—maximum 12 months</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Restricted movement (e.g. home detention or curfew requirement of up to 12 hrs per day for 4–6 months)</td>
<td>Drug and alcohol testing—maximum 36 months</td>
<td>Activity requirement (e.g. attendance at specified Community Corrections Centre, participate in educational and vocational training and counselling, participate in a conference with the victim of crime)—maximum set number of days</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Prohibited activity requirement [+ fine]</td>
<td>Mental health treatment—maximum 36 months</td>
<td>Non-association and place restriction order—maximum 24 months [+ fine]</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Program (examples might include anger management, programs to address drink driving, family violence programs)—requirement to complete</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Residence requirement (up to 36 months)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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Table 3 (cont): Possible Program/Special Conditions under a Correction and Supervision Order

<table>
<thead>
<tr>
<th>Offence Seriousness</th>
<th>Principal Sentencing Purpose(s)</th>
<th>Moderation of Punitive and Rehabilitative Conditions and/or Supervision by a Community Corrections Officer</th>
</tr>
</thead>
<tbody>
<tr>
<td>MODERATE</td>
<td>Community Work 120–240hrs for a period of 12–18 months Restricted movement (e.g. home detention or curfew requirement of not more than 12 hrs per day for 2–3 months) Prohibited activity requirement</td>
<td>Drug and Alcohol Treatment including residential—12–36 months Mental Health Treatment—maximum 36 months Program—requirement to complete Residence requirement (up to 36 months)</td>
</tr>
<tr>
<td></td>
<td>[+] fine</td>
<td>Combination of punitive and rehabilitative conditions and/or Supervision by a Community Corrections Officer</td>
</tr>
<tr>
<td>LOW</td>
<td>Community Work (10–110 hrs) – 3 to 6 months Restricted movement (e.g. curfew requirement of not more than 12 hrs per day for a few weeks)</td>
<td>Drug and alcohol treatment including residential—up to 6 months</td>
</tr>
<tr>
<td></td>
<td>[+] fine</td>
<td>Supervision by a Community Corrections Officer</td>
</tr>
</tbody>
</table>

INTERIM RECOMMENDATION(S)

21. Core conditions of a correction and supervision order should include that the offender:
   - not commit another offence punishable by imprisonment in or outside Victoria during the period of the order;
   - appear before the court if called on to do so during the period of the order;
   - report to a Community Corrections Centre within two working days after the order is made/comes into force;
   - obey all lawful instructions and directions of a community corrections officer;
   - notify any change 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.

22. A correction and supervision order must have all core conditions attached, and may also have one or more special conditions attached.

23. Special conditions which require the supervision or involvement of Community Correctional Services should only be permitted to be attached to the order once the court has ordered and received a pre-sentence report providing the court with advice on the offender’s suitability, and advising the court on the most appropriate mix of conditions.

24. In setting special conditions, courts should be required to take into consideration the conditions most suitable for the offender, and that where two or more special conditions are imposed they are compatible.
25. Special conditions which might be attached to a CSO could include:
   - restrictions on liberty (such as home detention or curfew orders);
   - community work;
   - treatment conditions (such as drug and alcohol treatment and mental health treatment and counselling);
   - program conditions (such as drink driving programs, family violence programs, sex offender treatment programs and other life skills programs);
   - activity conditions (such as vocational and employment programs and participating in victim-offender conferences);
   - supervision by Community Correctional Services, including reporting to and receiving visits from a Community Corrections Officer;
   - a non-association condition (prohibiting an offender from being with, attempting to be with or communicating, or attempting to communicate with a named person) and/or place restriction condition (prohibiting an offender from being in or within a stated distance of a named place or area); or
   - a residence condition.

26. Courts should be directed not to impose any more special conditions than are necessary to achieve the purpose or purposes for which the order is made.

27. Guidelines around the setting of appropriate conditions should be developed and adopted to ensure consistency of approach.

28. Core conditions should operate for the total period of the order. Special conditions may be ordered to operate for a shorter period of time.

29. In the case of more onerous conditions, such as those involving restrictions on liberty, an upper limit should be set on the period such conditions can run.

### Powers of a Court on Breach

**The Council’s General Position**

5.38 The Council’s approach to breaches of CSOs is set out at [5.42]–[5.44]. Broadly, the approach we advocate aims 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. In the case of the new CSO, the Council believes it will be important to make a distinction between:

   - serious breaches, which involve breach by the commission of a further offence punishable by imprisonment, and/or persistent and deliberate breaches of conditions without reasonable excuse; and
   - a one-off breach of conditions, trivial breaches and/or breaches for which a reasonable excuse can be provided.

5.39 Corrections Victoria already has guidelines in place to deal with procedures for managing breaches, which are consistent with these general principles. However, the Council sees some benefit in procedures for breach being formalised so that these orders can be managed more transparently. Outlining steps to be taken on breach would allow offenders and other members of the public to understand how breaches would be responded to and the options available to both those supervising such orders and a court hearing breach proceedings.

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5.40 The procedures introduced in England and Wales under the *Criminal Justice Act 2003* (UK) for breach of a community order provide one possible model for managing more serious breaches of conditions. Under Schedule 8 of the *Criminal Justice Act 2003*, if an offender fails, without reasonable excuse, to comply with one or more requirements of the order, the ‘responsible officer’ can either give the offender a formal warning or initiate proceedings for breach. If the offender fails to comply for a second time within a 12-month period, the ‘responsible officer’ has no discretion and must initiate breach proceedings.

5.41 The Council notes concerns expressed in submissions that breach of conditions (particularly those with a therapeutic focus) should be dealt with differently than breach of conditions involving further offending and that some breaches are due to a lack of supports and services available in the community (see discussion above [4.42]–[4.43]).

**Breach by Further Offending**

5.42 Commission of an offence during the period of a CSO would result in proceedings for breach. The Council recommends a similar approach be adopted to that taken in the UK under the *Criminal Justice Act 2003* for breaches of community orders. Broadly, we recommend 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, re-sentence 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 to 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.

5.43 The Council recommends 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 determines that this course is desirable in the interests of justice. 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.

**INTERIM RECOMMENDATION(S)**

| 30. | Procedures for managing breach should be formalised. |
| 31. | On breach, by commission of a further offence or offences punishable by imprisonment, the court should be required to either: |
| | • cancel the order (if it is still in force) and, whether or not the order is still in force, re-sentence the offender for the original offence; or |
| | • if the order is still in force, to amend the terms of the order to impose more onerous requirements, including by extending the period the offender is required to comply with the condition of the order, by increasing the intensity of the existing conditions, and/or by ordering that the offender comply with additional conditions. |
| 32. | If the court determines in the interests of justice, it is desirable to do so, the court should have the option of cancelling the order and dealing with the subsequent offence (including by making a new CSO). |

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188 ‘Responsible officer’ is defined in section 197 of the Act. Who qualifies as a ‘responsible officer’ varies depending on the nature of the conditions imposed, and the age of the offender.

189 *Criminal Justice Act 2003* (UK) Schedule 8, Para 5.


Breach of Conditions

5.44 In the case of breaches of conditions other than by further offending, the Council recommends that the courts should have a broader discretion. The Council recommends 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, re-sentence 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. The court should 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 re-sentencing the offender.

A Youth Correction and Supervision Order (YCSO)

Submissions and Consultations

5.45 Youthlaw in its submission supported the retention of suspended sentences as a sentencing option and expanding the range of sentencing options available for young offenders:

[Gi]ven 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.\(^{193}\)

5.46 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.\(^{194}\)

\(^{193}\) Submission 41 (Youthlaw).

\(^{194}\) Submission 41 (Youthlaw).
5.47 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 young people up for failure.195 Fitzroy Legal Service also submitted that if conditional suspended sentences were introduced, conditions imposed on young people should be ‘appropriate given their age’.196 It was suggested that: ‘[s]pecialist youth drug and alcohol and mental health services should be used exclusively for this age group’.197

5.48 During consultation on the Discussion Paper198 there was support for the introduction of a non-custodial order which would operate as a form of youth probation order and which 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 suggested, the offender could be ordered to serve the sentence in a YTC or receive a gaol sentence.

5.49 In the context of a discussion about appropriate conditions for young offenders, should a form of conditional suspended sentence be introduced, the kinds of conditions nominated as suitable for young people 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 seen to be an effective sentencing tool. 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.

5.50 It was further suggested 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.199 It was 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”’.200

5.51 Support for an intensive youth order was also expressed during the recent Freiberg Sentencing Review.201 The Review recommended that a youth specific non-custodial order be created and that a special youth section be established in Community Corrections to supervise young offenders.202 The Review suggested the conditions of the order might include:

- extensive supervision with multiple contacts (random and prearranged);
- focused supervision;
- a concentration on specific behavioural regulations such as curfews, drug use, travel, employment, community service;
- graduated progress;
- strict enforcement; and
- coordinated monitoring by specially selected and trained staff who form part of a larger, specialised unit.203

5.52 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.204

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195 Submission 41 (Youthlaw).
196 Submission 44 (Fitzroy Legal Service).
197 Submission 44 (Fitzroy Legal Service).
198 Roundtable (Young Offenders), 16 June 2005.
199 Submission 41 (Youthlaw).
200 Submission 41 (Youthlaw).
201 Freiberg (2002), above n 77, 15.
202 Ibid 15, Recommendation 32.
203 Ibid 158.
The Council’s View

5.53 Consistent with our general approach that greater flexibility is required to allow conditions to be better tailored to offences and offenders, the Council recommends the introduction of a youth form of CSO. This order would be available to offenders aged under 25 and 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. Like a CSO, the order would be available where the court was contemplating imposing a YTC order, but also where it might previously have made a CBO or an ICO.

5.54 The core conditions might be similar to those for adult offenders, with some of the special conditions also available. Additional conditions could also be attached which had as their focus the need to respond to the circumstances of young offenders. A recent 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, suggests a number of useful principles 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.

5.55 The Council recommends that a court’s powers on breach of a YCSO should be as for breach of a CSO (see above [5.42]–[5.44]), including ordering the offender to serve a sentence in detention in a YTC if the young person has breached the order by committing another offence and is under 21 years.

<table>
<thead>
<tr>
<th>INTERIM RECOMMENDATION(S)</th>
</tr>
</thead>
<tbody>
<tr>
<td>34. A Youth Community and Supervision Order (YCSO) should be introduced in Victoria for offenders aged 18 or over and under 25.</td>
</tr>
<tr>
<td>35. The maximum period of a YCSO should be 12 months in the Magistrates’ Court, and 18 months in the higher courts.</td>
</tr>
<tr>
<td>36. Consideration should be given to establishing a youth division in Community Corrections to manage these orders.</td>
</tr>
<tr>
<td>37. A court’s powers on breach of a YCSO should be as for breach of a CSO (see above Recommendations 31–33), including ordering the offender to serve a sentence in detention in a YTC if the young person has breached the order by committing another offence and is under 21 years.</td>
</tr>
</tbody>
</table>

Breach of a Sentencing Order as a Separate Offence

The Current Position

5.56 Under the current law, a breach of a CCTO, an ICO, a suspended sentence, 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, the maximum penalty for which is a Level 10 fine.\(^{207}\)

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\(^{204}\) Ibid 160.

\(^{205}\) 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.
**Submissions and Consultations**

5.57 There was little support for retaining the offence of breach of a suspended sentence order in submissions or during consultations.\(^{208}\) It was argued that treating breach of an order as a criminal offence risks sentence escalation and ‘double penalties’ being received by an offender.\(^{209}\) One submission commented that if the offence of breach was introduced simply as a means of initiating court proceedings, this seemed ‘a peculiarly heavy-handed way to deal with what is really an administrative problem in getting the person before the court’\(^{210}\). Concerns were also raised that the imposition of a fine on breach was ‘ineffective and merely an administrative burden’, particularly where the offender has no capacity to pay the fine.\(^{211}\)

5.58 The recent 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.\(^{212}\) 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 where it appears that an offender has breached the conditions of the order without reasonable excuse.\(^{213}\)

**The Council’s View**

5.59 A majority of the Council agrees with the Sentencing Review’s conclusions that the existing breach provisions are an unsatisfactory way to deal with what is essentially a procedural issue. We therefore recommend that the approach recommended by the Sentencing Review should be adopted to bring an offender suspected of breaching a CSO back before the court.

5.60 However, a minority of Council members are in favour of retaining the offence of breach. The offence of breach is regarded as being 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. It is also seen as important in terms of public confidence that there are consequences for non-compliance.

**INTERIM RECOMMENDATION(S)**

38. Breach of an IRO, CSO and YCSO should not constitute a separate offence under the **Sentencing Act 1991** (Vic).

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\(^{206}\) **Sentencing Act 1991** (Vic) ss 18W (CCTO), 26 (ICO), 31 (suspended sentence), 47 (CBO) and 79 (adjourned undertaking).

\(^{207}\) A Level 10 fine is equal to 10 penalty units (**Sentencing Act 1991** (Vic), s 109(2)). The value of a penalty unit as fixed by the Treasurer in accordance with s 11(1)(b) of the **Monetary Units Act 2004** (Vic) for the financial year commencing 1 July 2005 is $104.81: **Victorian Government Gazette** 14 April 2005, 722. The maximum fine that currently may be imposed is therefore $1,048.10.

\(^{208}\) This issue was discussed briefly at the Legal Issues Roundtable (23 May 2005). However, a few submissions supported the retention of the offence of breach of a suspended sentence order: Submissions 9 (J Hemmerling) and 15 (Anonymous).

\(^{209}\) Submissions 39 (Federation of Community Legal Centres) and 41 (Youthlaw).

\(^{210}\) Submission 34 (S Tudor).

\(^{211}\) Submission 39 (Federation of Community Legal Centres).

\(^{212}\) Freiberg (2002), above n 77, 116–119.

\(^{213}\) Ibid 119.
Chapter 6: Deferral of Sentencing

The Current Situation

6.1 Deferral of sentencing is not a sentencing order but rather it is a power provided to the courts following a finding of guilt to adjourn the matter for a set period. 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, and in 1999 was extended to the Magistrates’ Court for offenders aged under 25 years.214 Prior to this a power existed under the common law for a court to order an adjournment and require the offender to be of good behaviour until called upon to be sentenced.215

6.2 Under the Children and Young Persons Act 1989 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 can be taken into account by the Court in sentencing the offender at the end of the deferral period.216

6.3 Deferred sentencing is intended to provide offenders with an opportunity to address issues which have contributed to their offending, and to demonstrate to the court that they are taking serious steps to get their lives back on track. In 2003–04 the Magistrates’ Court used the power to defer sentencing in the case of 101 young offenders, representing 0.39 per cent of all defendants under 25 years who were found guilty.217

Submissions and Consultations

6.4 Deferral was seen by many of those consulted as a useful sentencing tool. For example, deferral was reported as having very positive results in the Magistrates’ Court when used for offenders with significant cognitive disabilities.218 Once the offender’s condition had stabilised, it was suggested that a community-based order (CBO) or a suspended sentence may be an appropriate disposition.

6.5 Some support was expressed for extending deferral of sentencing to the higher courts and extending the maximum period of deferral to 12 months.219 However, some of those consulted and who made submissions raised concerns about who would provide services and whether additional resources for the community sector would be required.220 The comment was made that while deferral tends to work well with offenders who have a lot of resources at their disposal, it can put those who do not at a disadvantage.221 It also was suggested by some that the concept of deferral does not take into account

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214 Sentencing Act 1991 (Vic) s 83A.
215 Griffiths v R (1977) 137 CLR 293, 320–323, per Jacobs J, at 338 per Aickin J.
216 Children and Young Persons Act 1989 (Vic) s 190(3)(a); Sentencing Act 1991 (Vic) s 83A(3)(a).
217 The proportion of defendants who attract a deferred hearing in the Magistrates’ Court was expected by the Council to be substantially higher than the figures suggest. A possible explanation may be that Magistrates are adjourning matters without such adjournments being recorded as a ‘deferral of sentencing’ under section 83A of the Sentencing Act 1991 (Vic) despite the Magistrate referring to the matter in court as being deferred. As a result, formal deferral figures may underestimate the true prevalence of deferred hearings in the Magistrates’ Court.
218 Roundtable (Offenders with a Mental Illness and/or Intellectual Disability), 12 May 2005.
219 Roundtable (Legal Issues), 23 May 2005.
220 See, for example, Submission 39 (Federation of Community Legal Centres). The Federation commented that: ‘The current system of review of deferred sentences relies on the goodwill of community support agencies or the financial means of the defendant to pay for the provision of reports to court’. It was suggested that additional resources should be provided through the legal aid system to compensate lawyers and medical professionals for the additional work required in seeking and writing reports to the court.
221 Roundtable (Legal Issues), 23 May 2005. See also Submission 45 (Federation of Community Legal Centres).
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.

6.6 The usefulness of deferral as an option in the higher courts was also questioned. 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. There was also felt to be a danger that where the offender fails to undertake programs during deferral the court will order a harsher sentence.

6.7 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.


6.8 The Freiberg Sentencing Review in its recent 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* should be increased from six months to 12 months; and
- the current age restrictions should be removed.

6.9 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.

These recommendations have yet to be acted on.

**The Council’s View**

6.10 The Council believes that a range of flexible options should be available in Victoria to improve responses to offenders. The Council sees a strong argument for extending the availability of deferral to the higher courts, removing the current age restrictions and extending the maximum period of deferral to 12 months. The advantages of making deferral more widely available 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.

6.11 We note that while during consultations and in submissions concerns were expressed by some about the use of suspended sentences for serious offences against the person (including sexual offences), there

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222 Roundtable (Young Offenders), 16 June 2005.
223 Roundtable (Young Offenders), 16 June 2005.
224 Freiberg (2002), above n 77, 184, Recommendations 44–46.
225 Freiberg (2002), above n 77, 184, Recommendations 47.
was generally strong support for greater flexibility and a range of options to be available at sentencing. For example, during roundtables and in submissions, a call was made by many for therapeutic, rather than traditional criminal justice responses to deal with offenders with drug and alcohol issues, and offenders with a mental illness and/or cognitive impairment.

6.12 However, while we see merit in expanding the eligibility criteria, we are sensitive to concerns that deferral should not be used inappropriately—for example, where 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. We also see it as desirable to encourage the offender’s compliance with the order by providing offenders with some general indication of the sentence the court might impose if the offender either complies or does not comply with the order. This would also provide offenders with a greater level of certainty as to the likely outcome of deferral.

6.13 We also agree with the views expressed in a recent article on pre-sentence orders by Freiberg and Morgan—and shared by some roundtable participants—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). Accordingly, if conditions require the involvement of Community Correctional Services (CCS), we believe 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) which quite legitimately may require the involvement of CCS, and deferral, which is intended to give offenders the opportunity to address issues that have contributed to their offending by accessing counselling and other services in the community on their own initiative. We note that this recommendation will impose extra burdens on the courts in that they will have to schedule more than one hearing to finally determine a matter. However, we are of the view that the beneficial outcomes for offenders are likely to outweigh the administrative costs and burdens to the courts.

6.14 The Council has reviewed deferral provisions operating in Victoria and elsewhere and is of the view that the provisions in the ACT Crimes (Sentencing) Bill 2005, which is currently before the ACT Parliament, are for the most part consistent with changes we would like to see introduced in Victoria. Deferred sentence orders under the ACT Bill are available in all courts for a maximum period of 12 months with a power provided to the court to review the offender’s compliance with the order at any time during the period of the order. The court may defer sentencing if an offender is convicted or found guilty of an offence punishable by imprisonment, and the court considers the offender should be given an opportunity to address his or her criminal behaviour before the court sentences the offender for the offence. Before deferring the matter the court must be satisfied that if the offender were to comply with the order and conditions the court might impose a less severe sentence. In determining the offender’s suitability for deferral, the court may order a pre-sentence report and must take into account the report, any evidence given by the person who prepared the report and evidence given by a corrections officer about the offender. The court must also state in general terms the penalty the offender might receive if he or she complies with the order and any bail conditions, and the penalty the offender might receive if he or she does not comply with the order or a bail condition. On review of the order, the court may take no further action, give the offender a warning about the need to comply with the offender’s deferred sentence obligations, vary the conditions of the order or cancel the order.

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226 Roundtable (Young Offenders), 16 June 2005. See further [6.6]–[6.7].
228 Crimes (Sentencing) Bill 2005 (ACT) cl 122.
229 Crimes (Sentencing) Bill 2005 (ACT) cl 126. Under cl 126, a power is provided for the court to review the deferred sentence order on its own initiative or on application by the offender, the chief executive or the director of public prosecutions.
230 Crimes (Sentencing) Bill 2005 (ACT) cl 27(1). Other requirements are that: the court has not yet sentenced the offender for the offence; the offender is neither serving, nor liable to serve, a term of imprisonment for another offence; and the court is satisfied that it may release the offender on bail under the Bail Act 1992 (ACT).
231 Crimes (Sentencing) Bill 2005 (ACT) cl 116.
232 Crimes (Sentencing) Bill 2005 (ACT) cl 117.
233 Crimes (Sentencing) Bill 2005 (ACT) cl 118.
234 Crimes (Sentencing) Bill 2005 (ACT) cl 128.
However, the Council recommends that the power to indicate the penalty the offender might receive should be exercised at the discretion of the court. We further recommend 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 will protect against courts deferring sentencing where 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.

<table>
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<tr>
<th>INTERIM RECOMMENDATION(S)</th>
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<tr>
<td>39. The power to defer sentencing under section 83A of the Sentencing Act 1991 should be extended to the higher courts.</td>
</tr>
<tr>
<td>40. The maximum period of deferral should be increased from six months to 12 months.</td>
</tr>
<tr>
<td>41. The current age restrictions on deferral should be removed.</td>
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<tr>
<td>42. Courts should be permitted to order a pre-sentence report to assess an offender’s suitability for deferral, which if prepared should be taken into account in deciding whether to defer sentencing.</td>
</tr>
<tr>
<td>43. In deferring sentencing, the court should be permitted to state, in general terms, the penalty the offender might receive if he or she complies, or does not comply, with the conditions of deferral.</td>
</tr>
<tr>
<td>44. The sentencing court should be permitted to review the offender’s progress during the period of deferral on its own initiative or on application.</td>
</tr>
<tr>
<td>45. On reviewing the offender’s progress, the court should be permitted to give the offender a warning about the need to comply with the conditions of the order, amend the conditions of the order, make any order the court could have made if it had not deferred sentencing or take no action.</td>
</tr>
<tr>
<td>46. Should the offender be found guilty of committing another offence during the period of deferral, the court should be permitted to make any order that the court could have made if it had not deferred sentencing.</td>
</tr>
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</table>
References


Australian Institute of Criminology, *Interventions for Prisoners Returning to the Community* (A report prepared by the Australian Institute of Criminology for the Community Safety and Justice Branch of the Australian Government Attorney-General’s Department) (Canberra, 2005)


Appendix 1—Consultations

Community Forums

3 May 2005 6.30 – 9 pm  Shepparton
Venue: Shepparton Citizens Centre
Guest speaker: Brian Birrell, Criminal Law Specialist

5 May 2005 6.30 – 9 pm  Ballarat
Venue: Ballarat Lodge
Guest speaker: Jeremy Harper, Criminal Lawyer
Welcome to Country: Ted Lovett

10 May 2005 6.30 – 9 pm  Wodonga
Venue: Wodonga Reception and Conference Centre
Guest speaker: Greg Duncan, Criminal Lawyer

17 May 2005 6:00 – 8:30 pm  Melbourne
Venue: Victoria University (City Flinders Campus)
Guest speaker: Justin Hannebery, Barrister, Victorian Bar Council

18 May 2005 6.30 – 9 pm  Warragul
Venue: West Gippsland Arts Centre
Guest speaker: Jacqui Billings

24 May 2005 6.30 – 9 pm  Geelong
Venue: Geelong West Town Hall
Guest speaker: Peter Mellas, Criminal Lawyer and Chair, Geelong Community Legal Service

Victims’ Focus Groups and Workshop

Focus Groups

10 May 2005 1.00 – 3.00 pm  Albury/Wodonga
Victims’ Assistance Program Representative: Silvia Clottu
Sentencing Advisory Council Members (facilitators): Carmel Benjamin AM and Barbara Rozenes

24 May 2005 1.00 – 3.00 pm  Bethany Family Support
Victims’ Assistance Program Representative: Kate Barlow
Sentencing Advisory Council Members (facilitators): Carmel Arthur, Carmel Benjamin AM and Barbara Rozenes

27 May 2005 10.00 am – 12.00 pm  Eastern Access Community Health
Victims’ Assistance Program Representative: Liz Wrigley
Sentencing Advisory Council Members (facilitators): Carmel Benjamin AM and Barbara Rozenes
Workshop
27 May 2005  1.00 – 3.00 pm   Melbourne
Sentencing Advisory Council
Level 4 – 436 Lonsdale Street
Sentencing Advisory Council Members (facilitators):
Carmel Arthur and Barbara Rozenes

Roundtables
*Offenders with a Mental Illness/Intellectual Disability (12 May 2005)*

**Council Members (Facilitators):**
Bernie Geary, Andrew Jackomos and Barbara Rozenes

**Participants:**

<table>
<thead>
<tr>
<th>Name</th>
<th>Position</th>
<th>Organisation</th>
</tr>
</thead>
<tbody>
<tr>
<td>David Clark</td>
<td>Chief Executive Officer</td>
<td>Psychiatric Disability Services of Victoria (VICSERV)</td>
</tr>
<tr>
<td>Anne Condon</td>
<td>Disability Coordinator</td>
<td>Melbourne Magistrates’ Court</td>
</tr>
<tr>
<td>Nicole Langtip</td>
<td>Policy and Law Reform Worker</td>
<td>Villamanta Legal Service Inc</td>
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<tr>
<td>John Morkham</td>
<td>Executive Officer</td>
<td>ACROD Victoria</td>
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<tr>
<td>Brenda Boland</td>
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<tr>
<td>Kirsten Deane</td>
<td>Council Member</td>
<td>Disability Council of Victoria</td>
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<tr>
<td>Bruce Patterson</td>
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<tr>
<td>Liesl Oliver</td>
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<tr>
<td>Carmen Randazzo</td>
<td>Senior Public Defender,</td>
<td>Victoria Legal Aid</td>
</tr>
<tr>
<td>Sam Hickinbotham</td>
<td>Post-Release Support Worker</td>
<td>Bridging the Gap Program, The Brosnan Centre</td>
</tr>
<tr>
<td>Johnny King</td>
<td>Post-Release Support Worker</td>
<td>Juvenile Justice, Bridging the Gap Program, The Brosnan Centre</td>
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</table>
**Drug and Alcohol Roundtable (19 May 2005)**

**Council Members (Facilitators):**
Noel Butland, David Grace, QC and Barbara Rozenes

**Participants:**

<table>
<thead>
<tr>
<th>Name</th>
<th>Position</th>
<th>Organisation</th>
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<tbody>
<tr>
<td>Ron Blake</td>
<td>Resource Worker</td>
<td>Addictions Recovery Centre, Oxford Houses Australia</td>
</tr>
<tr>
<td>Loretta Zeeck</td>
<td>Team Leader</td>
<td>Anglicare Greater Eastern Drug and Alcohol Service</td>
</tr>
<tr>
<td>Vi Lotter</td>
<td>Assistant Manager</td>
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<tr>
<td>Annie Trainer</td>
<td></td>
<td>Australian Community Support Association</td>
</tr>
<tr>
<td>Her Honour Judge Elizabeth Curtain</td>
<td>Judge Alternate Chair</td>
<td>County Court of Victoria Youth Parole Board and Youth Residential Board</td>
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<tr>
<td>Ros Porter</td>
<td>Coordinator</td>
<td>Youth Legal Service, Victoria Legal Aid</td>
</tr>
<tr>
<td>Deb Homburg</td>
<td>CEO and Senior Clinician</td>
<td>The Buoyancy Foundation of Victoria</td>
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<tr>
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<tr>
<td>Jo Beckett</td>
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<td>Robin Francis</td>
<td>Case Manager</td>
<td>Drug Court</td>
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<tr>
<td>Kath Allison</td>
<td>Counsellor</td>
<td>Mary of the Cross Centre</td>
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<tr>
<td>David Crosbie</td>
<td>Chief Executive Officer</td>
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<td>Michael Pruscino</td>
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<tr>
<td>Janine Bush</td>
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<td>Carol Nikakis</td>
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**Legal Issues Roundtable (23 May 2005)**

**Council Members (Facilitators):**
Professor Arie Freiberg, Professor Jenny Morgan, Jeremy Rapke QC and Barbara Rozenes

**Participants:**

<table>
<thead>
<tr>
<th>Name</th>
<th>Position</th>
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<tbody>
<tr>
<td>Greg Byrne</td>
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<td>Sarah Nicholson</td>
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<td>Father Peter Norden SJ</td>
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<td>His Honour Chief Judge Michael Rozenes</td>
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<tr>
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<td>Brodie Woodland</td>
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</table>
**Young Offenders Roundtable (16 June 2005)**

**Council Members (Facilitators):**
Bernie Geary and David Grace QC

**Participants:**

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<tr>
<th>Name</th>
<th>Position</th>
<th>Organisation</th>
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<tbody>
<tr>
<td>Colette Crehan</td>
<td>Secretary</td>
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<tr>
<td>His Honour Judge John Barnett</td>
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</tr>
<tr>
<td>The Reverend Jonathan Chambers</td>
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<td>Leon O’Neill</td>
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<tr>
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</tr>
<tr>
<td>Anna Rodonic</td>
<td>Principal Solicitor</td>
<td>Youthlaw Victoria</td>
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**Sexual Offences Workshop (16 June 2005)**

**Council Members (Facilitators):**
Professor Jenny Morgan

**Participants:**

<table>
<thead>
<tr>
<th>Name</th>
<th>Position</th>
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<tbody>
<tr>
<td>Patricia Brophy</td>
<td>Manager, Critical Incident Advisory Unit</td>
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<tr>
<td>Felicity Broughton</td>
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<td>Office of Public Prosecutions</td>
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<td>Anne Goldsbrough</td>
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<tr>
<td>Norma Seip</td>
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<tr>
<td>Jan Thompson</td>
<td>Senior Policy and Program Advisor</td>
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<td>Vicky Trethowan</td>
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<tr>
<td>Carolyn Worth</td>
<td>Coordinator</td>
<td>South Eastern Centre Against Sexual Assault</td>
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## Appendix 2—Submissions

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<td>Arthur McEwan</td>
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<td>2.</td>
<td>14 April 2005</td>
<td>Bandula Abeysinghe</td>
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<td>3.</td>
<td>22 April 2005</td>
<td>Anonymous</td>
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<td>4.</td>
<td>22 April 2005</td>
<td>Cathy Moore</td>
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<td>5.</td>
<td>25 April 2005</td>
<td>Yanis Zole</td>
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<td>6.</td>
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<td>M Douglas</td>
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<td>7.</td>
<td>2 May 2005</td>
<td>Chris Murray</td>
<td>Victoria Police, Organised Crime Squad</td>
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<tr>
<td>8.</td>
<td>3 May 2005</td>
<td>Sammy Mehanni</td>
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<td>10 May 2005</td>
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<td>Open Family Australia (Hume)</td>
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<td>10.</td>
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<td>17 May 2005</td>
<td>Year 12 Legal Studies class</td>
<td>Emmanuel College</td>
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<td>12.</td>
<td>Undated</td>
<td>Alan English</td>
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<td>13.</td>
<td>18 May 2005</td>
<td>A D P Dyer</td>
<td>Ballarat Catholic Justice, Development and Peace Commission</td>
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<td>14.</td>
<td>21 May 2005</td>
<td>Alan Stephens</td>
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<td>15.</td>
<td>22 May 2005</td>
<td>Rowena</td>
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<td>16.</td>
<td>23 May 2005</td>
<td>Anonymous</td>
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<td>17.</td>
<td>24 May 2005</td>
<td>Frank &amp; Anne Waites</td>
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<td>18.</td>
<td>25 May 2005</td>
<td>Tresse Heselwood</td>
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<td>25 May 2005</td>
<td>Deb Homburg</td>
<td>The Buoyancy Foundation of Victoria</td>
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<td>20.</td>
<td>27 May 2005</td>
<td>Wayne Atkinson</td>
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<td>21.</td>
<td>28 May 2005</td>
<td>Jane Belinda</td>
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<td>30 May 2005</td>
<td>Katrina Bryant</td>
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<td>23.</td>
<td>30 May 2005</td>
<td>Laura Francis</td>
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<td>30 May 2005</td>
<td>Roland Williams</td>
<td>County Court of Victoria</td>
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<td>25.</td>
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<td>Mervyn Roach</td>
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<td>Richard Thomas</td>
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<td>27.</td>
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<td>2 June 2005</td>
<td>Kim Martin</td>
<td>Mal Ryan and Glen</td>
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<td>29.</td>
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<td>Professor John Van Groningen</td>
<td>RMIT, School of International and Community Studies</td>
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<td>John Laidlaw</td>
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<td>31.</td>
<td>3 June 2005</td>
<td>Jocelyn Bignold</td>
<td>Melbourne Citymission</td>
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<td>32.</td>
<td>3 June 2005</td>
<td>Anonymous1</td>
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<td>33.</td>
<td>6 June 2005</td>
<td>John Black</td>
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<td>Steven Tudor</td>
<td>La Trobe University</td>
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<td>35.</td>
<td>9 June 2005</td>
<td>Judge Graham Anderson</td>
<td>County Court of Victoria</td>
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<td>36.</td>
<td>10 June 2005</td>
<td>Ian Gray – Chief Magistrate</td>
<td>Magistrates’ Court of Victoria</td>
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<td>37.</td>
<td>14 June 2005</td>
<td>Anthony Avery</td>
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<td>38.</td>
<td>15 June 2005</td>
<td>Tonye Lee</td>
<td>Victoria Legal Aid</td>
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<td>39.</td>
<td>20 June 2005</td>
<td>Pauline Spencer</td>
<td>Federation of Community Legal Centres</td>
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<td>21 June 2005</td>
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<td>YouthLaw</td>
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<td>42.</td>
<td>24 June 2005</td>
<td>Janine Bush</td>
<td>Victorian Alcohol and Drug Association Inc</td>
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<td>43.</td>
<td>24 June 2005</td>
<td>Robin Inglis</td>
<td>Victorian Aboriginal Legal Service Inc</td>
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<td>44.</td>
<td>29 June 2005</td>
<td>Stan Winford</td>
<td>Fitzroy Legal Service Inc</td>
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<td>45.</td>
<td>5 July 2005</td>
<td>Vivienne Topp</td>
<td>Mental Health Legal Service</td>
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<td>46.</td>
<td>28 May 2005</td>
<td>Bob Pringle</td>
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<td>47.</td>
<td>30 May 2005</td>
<td>Anonymous</td>
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<td>48.</td>
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<td>K Davey</td>
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<td>49.</td>
<td>8 June 2005</td>
<td>Jacinta Maloney</td>
<td>St Kilda Legal Service Co-Operative Ltd</td>
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<td>50.</td>
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<td>Victoria Strong</td>
<td>Law Institute of Victoria</td>
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<td>52.</td>
<td>6 July 2005</td>
<td>Carolyn Worth</td>
<td>South Eastern Centre Against Sexual Assault</td>
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<td>53.</td>
<td>6 June 2005</td>
<td>Darren Green</td>
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<td>54.</td>
<td>7 June 2005</td>
<td>Confidential</td>
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</table>
## Appendix 3—Summary of Orders under the Criminal Justice Act 2003 (UK)

Table 4  Orders available under the *Criminal Justice Act 2003* (UK)

<table>
<thead>
<tr>
<th>Principal Order</th>
<th>Associated Order(s)</th>
<th>Purpose</th>
<th>Punishment</th>
<th>Rehabilitation</th>
<th>Reparation</th>
<th>Protection</th>
</tr>
</thead>
<tbody>
<tr>
<td>Community Work</td>
<td>Activity requirement</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Low — 40 to 80 hours</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Medium — 80 to 150 hours</td>
<td></td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>High — 150 to 300 hours</td>
<td></td>
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<tr>
<td>Activity Requirement</td>
<td>Community Work Supervision</td>
<td>✓</td>
<td>✓</td>
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</tr>
<tr>
<td>Medium—20 to 30 days</td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>High—up to 50 days</td>
<td></td>
<td></td>
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<td></td>
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</tr>
<tr>
<td>Program Requirement (Medium-High)</td>
<td>Supervision</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Description: A groupwork or individual program accredited by the Correctional Services Accreditation Panel and designed to address attitudes and behaviour that contribute to offending. Programs fall into five categories: • general offending; • violence; • sex offending; • substance misuse; • domestic violence</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Prohibited Activity Requirement (Low, Medium and High to a maximum of 36 months)</td>
<td>Supervision</td>
<td>✓</td>
<td></td>
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</tr>
<tr>
<td>Description: The offender must refrain from participating in activities on a particular day or days or</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
</tr>
</tbody>
</table>

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235 This information was sourced from the National Probation Service, National Offender Management Service (2005), *Probation Bench Guide: Information for Magistrates’ Courts in England and Wales*. 
<table>
<thead>
<tr>
<th>Principal Order</th>
<th>Associated Order(s)</th>
<th>Purpose</th>
<th>Punishment</th>
<th>Rehabilitation</th>
<th>Reparation</th>
<th>Protection</th>
</tr>
</thead>
<tbody>
<tr>
<td>during a period of up to 36 months. Examples include prohibition from: entering any licensed premises; attending any football match; communicating with any minor without the approval of the responsible officer.</td>
<td>Supervision</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<tr>
<td>Curfew</td>
<td>Supervision</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<tr>
<td>Low—a few weeks</td>
<td>Unpaid work</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<tr>
<td>Medium—2 to 3 months</td>
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<td></td>
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<tr>
<td>High—4 to 6 months</td>
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<tr>
<td>Description: The offender must remain at a specified place for certain periods (between 2–12 hours in any one day) and limited to up to 6 months of the order being made. The curfew can be at different places and/or different periods on different days. The court must impose electronic monitoring unless it is not available.</td>
<td></td>
<td></td>
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<tr>
<td>Exclusion Requirement</td>
<td>Supervision</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Low—a few months</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Medium—6 months</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>High—12 months</td>
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<td></td>
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<td></td>
</tr>
<tr>
<td>Description: The offender may not enter a specified place or places for a period of up to 24 months. The exclusion can be limited to particular periods specified and at different places for different periods or days. The court must impose electronic monitoring unless it is not available.</td>
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<tr>
<td>Residence</td>
<td>Supervision</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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</tr>
<tr>
<td>Medium–High up to 36 months</td>
<td></td>
<td></td>
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<tr>
<td>Description: The offender must reside at the place specified, either an approved hostel or private address.</td>
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<tr>
<td>Mental Health Treatment</td>
<td>Supervision (provided treatment is non-residential)</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
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<tr>
<td>Medium–High (6 to 36 months)</td>
<td></td>
<td></td>
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<tr>
<td>Principal Order</td>
<td>Associated Order(s)</td>
<td>Purpose</td>
<td>Rehabilitation</td>
<td>Reparation</td>
<td>Protection</td>
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</tr>
<tr>
<td></td>
<td></td>
<td>Punishment</td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Treatment by or under the direction of a medical practitioner and/or chartered psychologist with a view to the improvement of the offender’s mental condition. The offender must be unsuitable for a hospital or guardianship order, and the condition must be susceptible to treatment.</td>
<td></td>
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</tr>
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</table>

**Drug Rehabilitation**

- **Low**—up to 6 months
- **Medium**—6 to 12 months
- **High**—12 to 36 months

Description: A Requirement of at least 6 months to have treatment to reduce or eliminate dependency on or propensity to misuse drugs, and to be regularly tested for drug use. Progress reviews by the court at intervals of not less than one month are optional for requirements of up to 12 months and are mandatory over 12 months.

Programs

- Supervision (Med–High seriousness)
- Program (substance misuse program)

**Supervision**

- **Low** — up to 12 months
- **Medium** — 12 to 18 months
- **High** — 12 to 36 months

Description: Requires the offender to attend regular appointments with the responsible officer or another person determined by the officer to promote rehabilitation. During the
period of supervision, the NPS will undertake work with the offender to change attitudes and behaviour, for example:
- monitor and review patterns of behaviour;
- increase motivation;
- provide practical support to increase compliance with other Requirements;
- support and reinforce learning;
- deliver pre and post work for accredited programs.

<table>
<thead>
<tr>
<th>Principal Order</th>
<th>Associated Order(s)</th>
<th>Purpose</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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<td>Punishment</td>
</tr>
<tr>
<td>Attendance Centre</td>
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<tr>
<td>(18–24 yr olds only)</td>
<td>Low—12 to 36 hrs</td>
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<tr>
<td>Description: The offender must attend an attendance centre for 12 to 36 hours, with a maximum of 3 hours per attendance and one attendance per day.</td>
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