

# Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders Discussion Paper

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# Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders Discussion Paper

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# Contents

**Contributors** ix

Acknowledgments ix

**Family violence assistance** x

**Abbreviations** xi

**Glossary** xi

**Call for submissions** xiv

**Executive summary** xv

Terms of reference xv

What is a ‘swift, certain and fair’ approach? xvi

Do ‘swift, certain and fair’ programs work? xvi

Would a ‘swift, certain and fair’ approach be appropriate and effective for family violence offenders in Victoria? xvii

    Appropriateness and effectiveness xvii

    Consistency with the Victorian criminal justice system xvii

Options for implementing a ‘swift, certain and fair’ approach in Victoria xviii

    Swift and certain prosecution of community correction order contraventions xviii

    Increased use of judicial monitoring xviii

    Expanding alcohol exclusion powers xviii

    A new sentencing order for high-risk family violence offenders xix

    Improving swiftness and certainty generally xix

**Summary of questions** xx

**1. Terms of reference: introduction, background and scope** 1

Overview 1

Terms of reference 2

Background to the terms of reference 3

    Submission of the Magistrates’ Court and Children’s Court 3

    Submission of RMIT’s Centre for Innovative Justice 3

    Submission of the Foundation for Alcohol Research and Education 4

    Submission of the Chair of the Sentencing Advisory Council 4

    Conclusions of the Royal Commission regarding sentencing 4

Scope of the reference and the Council’s approach 5

    Defining ‘swift, certain and fair’ approaches 5

    Family violence offenders 6

        Early intervention for family violence offenders 7

    Focus on sentencing 8

        Limitations of an SCF approach 8

    Evidence-based approach 8

    Human rights considerations 9

|  |           |
|--|-----------|
| Preliminary consultation   | 9         |
| Suitability  | 9         |
| Capacity   | 9         |
| Relationship with other Royal Commission recommendations   | 10        |
| <b>2. Defining ‘swift, certain and fair’ approaches</b>  | <b>11</b> |
| Overview   | 11        |
| Theoretical underpinnings of ‘swift, certain and fair’   | 11        |
| Swift, certain and fair programs in the United States  | 13        |
| Hawaii’s Opportunity Probation with Enforcement Program  | 13        |
| Background   | 13        |
| Key elements of HOPE   | 15        |
| Other HOPE-like SCF programs   | 18        |
| Evaluations of HOPE and HOPE-like SCF programs   | 20        |
| HOPE Demonstration Field Experiment  | 22        |
| Criticisms of HOPE and HOPE-like SCF programs  | 25        |
| Effectiveness  | 25        |
| Focus on deterrence  | 26        |
| Swift, certain and fair programs targeting family violence offenders                               | 27        |
| Michigan Domestic Violence Swift and Sure Sanctions Probation Program                              | 27        |
| Indirect targeting of family violence offenders  | 28        |
| Application of SCF programs in jurisdictions outside the United States                             | 28        |
| Northern Territory’s COMMIT pilot program  | 28        |
| Distinguishing SCF programs from problem-solving courts  | 29        |
| <b>3. Sentencing and managing family violence offenders in Victoria</b>                            | <b>31</b> |
| Overview   | 31        |
| Data on family violence offenders in Victoria  | 32        |
| Offenders sentenced for contravention of a family violence intervention order or safety notice     | 32        |
| Cases sentenced in the Magistrates’ Court with a family violence ‘flag’                            | 34        |
| Cases sentenced in the higher courts with a Director of Public Prosecutions family violence ‘flag’ | 35        |
| Reoffending rates of family violence offenders in Victoria   | 35        |
| The current framework for sentencing family violence offenders in Victoria                         | 36        |
| Family violence intervention orders and safety notices   | 36        |
| Obtaining an FVIO or an FVSN   | 37        |
| Penalties and procedure for contravention of FVIOs and FVSNs                                       | 38        |
| Arrest   | 39        |
| Magistrates’ Court family violence programs  | 40        |
| Family violence fast-tracking listing process  | 41        |
| Family Violence Court Division   | 42        |
| Specialist Family Violence Service   | 43        |
| Other court programs   | 43        |
| Assessment and Referral Court List   | 43        |
| Court Integrated Services Program  | 44        |
| CISP Remand Outreach Program   | 45        |
| CREDIT/Bail Support Program  | 46        |

|  |           |
|--|-----------|
| Victoria's sentencing framework  | 46        |
| Sentencing family violence offenders   | 47        |
| Sentencing dispositions and managing family violence offenders under sentence                                  | 48        |
| Diversion  | 48        |
| Deferred sentence  | 49        |
| Adjourned undertakings   | 49        |
| Community correction orders  | 50        |
| Conditions of a community correction order   | 50        |
| Community correction orders and family violence offending  | 52        |
| Current use of community correction orders for family violence offending                                       | 52        |
| Recent changes to community correction orders  | 53        |
| Managing offender compliance with community correction orders  | 53        |
| Reforms to Corrections Victoria's service delivery model for managing offenders on community correction orders | 54        |
| Case management approach to non-compliance with community correction order conditions                          | 55        |
| Administrative review hearings   | 56        |
| Formal charge for community correction order contravention   | 57        |
| Prevalence of contravention of community correction order charges  | 57        |
| Research on effective sentencing of family violence offenders  | 58        |
| Evidence of effectiveness of sentencing interventions for family violence offenders                            | 58        |
| Measuring the effectiveness of sentences   | 58        |
| Adjourned undertakings   | 59        |
| Fines  | 59        |
| Short terms of imprisonment  | 60        |
| Other approaches to reducing reoffending by family violence offenders  | 60        |
| Evidence of the effectiveness of perpetrator intervention programs   | 61        |
| Supervision and failure to complete programs   | 63        |
| SCF approaches to compel attendance?   | 63        |
| Managing risk to victim survivors or protected persons   | 63        |
| <b>4. Applying an SCF approach to sentencing and management of family violence offenders in Victoria</b>       | <b>65</b> |
| Overview   | 65        |
| Context for proposed recommendations   | 65        |
| Transferability of an SCF approach to jurisdictions outside the United States                                  | 65        |
| Options for the introduction of an SCF approach in Victoria  | 67        |
| An SCF approach to managing family violence offenders on a community correction order                          | 67        |
| An administrative SCF approach by Corrections Victoria   | 67        |
| Imposition of an SCF program condition by the sentencing court   | 68        |
| Elements of an SCF approach  | 68        |
| Judicial monitoring  | 70        |
| A new family violence offender compliance order  | 71        |
| Which offenders would best be targeted by an SCF approach?   | 73        |
| Risk of net-widening and sentence escalation   | 73        |
| Targeting family violence offenders with substance-abuse issues  | 74        |
| Alcohol exclusion  | 75        |

|  |           |
|--|-----------|
| Offenders for whom the application of ‘swift, certain and fair’ approaches may raise specific issues | 77        |
| Low-risk offenders with pro-social ties to the community   | 77        |
| Offenders with cognitive disabilities  | 77        |
| Indigenous offenders   | 78        |
| Female offenders   | 79        |
| Offenders with primary carer responsibilities  | 79        |
| Challenges to integrating an SCF approach to sentencing family violence offenders in Victoria        | 80        |
| Importance of judicial leadership and ‘buy-in’ of stakeholders                                       | 80        |
| Procedural fairness implications   | 80        |
| Prosecuting contraventions within 72 hours   | 80        |
| A sanction-before-hearing process  | 81        |
| Longer sanctions for refusal to admit condition violation  | 82        |
| Disputable violations: contestable evidence  | 82        |
| Disputable violations: exceptional circumstances   | 83        |
| Equal justice: consistent punishment   | 83        |
| Parsimony  | 84        |
| Determining the appropriate sanction   | 84        |
| What contraventions should trigger swift, certain and fair responses?                                | 85        |
| Capacity and demand implications   | 86        |
| Overview   | 86        |
| Where would offenders be held within Victoria’s current custody infrastructure?                      | 86        |
| Custody capacity determined by composition of persons held   | 86        |
| Other issues with police custody   | 87        |
| Implications of lack of capacity to house offenders in police cells                                  | 87        |
| Capacity questions for agencies  | 88        |
| Courts   | 88        |
| Corrections Victoria   | 88        |
| Victoria Police  | 89        |
| Other agencies   | 89        |
| Applying the principles informing SCF approaches   | 90        |
| Other reforms to promote swiftness, certainty and fairness   | 90        |
| <b>Appendix: Preliminary consultation</b>  | <b>91</b> |
| Meetings/events  | 91        |
| <b>References</b>  | <b>92</b> |
| Bibliography   | 92        |
| Case law   | 105       |
| Australia  | 105       |
| International  | 106       |
| Legislation and Bills  | 106       |
| Victoria   | 106       |
| Northern Territory   | 106       |
| International  | 106       |
| Quasi-legislative materials  | 107       |



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# Family violence assistance

This discussion paper contains material concerning family violence offending.

If you have personal concerns about family violence, you can contact the safe steps Family Violence Response Centre for support, information and referral to services on **1800 015 188**, 24 hours a day seven days a week.

# Abbreviations

- CCO:** community correction order
- DFE:** demonstration field experiment
- DTO:** drug treatment order
- FVIO:** family violence intervention order
- FVSN:** family violence safety notice
- FVOCO:** family violence offender compliance order
- HOPE:** Hawaii's Opportunity Probation with Enforcement
- HOPE DFE:** Honest Opportunity Probation with Enforcement Demonstration Field Experiment
- SCF:** 'swift, certain and fair'

# Glossary

- Accused** A person who is charged with a criminal offence.
- Adjourned undertaking** A sentence type that involves the adjournment of a criminal matter and the release of an offender, with or without conviction, for a specified period provided the offender gives an undertaking with attached conditions.
- Affected family member** A person who is the subject of an application for a family violence intervention order under the *Family Violence Protection Act 2008* (Vic) made to protect them or their property.
- Breach** In this discussion paper, a term used to refer to a person's non-compliance with an order. Unless referring to a specific offence, the terms 'breach' and 'contravene' are used interchangeably.
- Case** In this discussion paper, one or more charges against a person sentenced at one hearing.
- Charge** In this discussion paper, a single proven count of an offence.
- Community correction order (CCO)** A sentencing order available since 16 January 2012 that may require the offender to comply with a range of conditions including undertaking unpaid community work, undergoing treatment, and being supervised by a community corrections officer. A community correction order may also include curfews and restrictions on the offender's movements and whom the offender may associate with (*Sentencing Act 1991* (Vic) pt 3A).

|   |   |
|---|---|
| <b>Contravene</b>                             | In this discussion paper, a term used to refer to a person's non-compliance with an order. Unless referring to a specific offence, the terms 'contravene' and 'breach' are used interchangeably.  |
| <b>Fine</b>                                   | A sentence that involves a court-ordered monetary penalty requiring an offender to pay a sum of money to the state.   |
| <b>Higher courts</b>                          | In this discussion paper, the County Court of Victoria and the Supreme Court of Victoria.   |
| <b>Imprisonment</b>                           | A sentence of imprisonment that is served immediately, as distinct from a sentence of imprisonment that is partially or wholly suspended.   |
| <b>Offender</b>                               | A person who has been found guilty of an offence.   |
| <b>Parole</b>                                 | Supervised and conditional release of an offender from prison before the end of their prison sentence. While on parole, the offender is still serving the sentence and is subject to conditions designed to help them rehabilitate and reintegrate into the community, and reduce their risk of reoffending.  |
| <b>Protected person</b>                       | A person who is protected by a family violence intervention order or a family violence safety notice.   |
| <b>Randomised controlled trial</b>            | A study design that randomly assigns participants into an experimental group or a control group. As the study is conducted, the only expected difference between the control and experimental groups in a randomised controlled trial (RCT) is the outcome variable being studied.  |
| <b>Reoffending</b>                            | The extent to which an adult person, having been sentenced in any Victorian court, returns to court and is convicted for a subsequent offence or subsequent offences.   |
| <b>Respondent</b>                             | A person against whom there has been a family violence intervention order, a family violence safety notice or an application for a family violence intervention order.  |
| <b>Swift, certain and fair (SCF) approach</b> | In this discussion paper, an approach characterised by such measures as zero-tolerance responses, contravention detection measures, quick responses to condition contraventions and the imposition of fixed sanctions for contravention.  |
| <b>Swift, certain and fair (SCF) program</b>  | In this discussion paper, a term used to collectively refer to programs that utilise a 'swift, certain and fair' approach, such as Hawaii's Opportunity Probation with Enforcement (HOPE) program, South Dakota's 24/7 Sobriety Project and the Washington Intensive Supervision Program (WISP). The Council acknowledges that there are differences between the HOPE program and other SCF programs in operation in the United States. These differences are discussed in detail in Chapter 2. |

- Statistical significance** In this discussion paper, differences in values – described as 'statistically significant' – indicating the likelihood that the difference between two or more numbers has not occurred by chance. The most widely used threshold of statistical significance, and the threshold used in this discussion paper, is 0.05, which means that there is a 5% probability that the observed difference occurred by chance alone. Statistical significance is often expressed as a 'p-value'. A statistically significant result does not necessarily mean that the magnitude of the difference between groups is large, as relatively small differences may be statistically significant.
- Suspended sentence** A term of imprisonment that is suspended (that is, not activated) wholly or in part for a specified period (the 'operational period'). If the offender reoffends during this period, they could be imprisoned for the total duration of the sentence. Suspended sentences have been abolished in the higher courts for all offences committed on or after 1 September 2013 and in the Magistrates' Court for all offences committed on or after 1 September 2014.
- Victim survivor** In this discussion paper, the Council has adopted the term 'victim survivor' to describe a person who has been a victim of a family violence offence. The use of this term is intended to ensure consistency with other documents concerning family violence published by the Department of Justice and Regulation, Victoria.

# Call for submissions

The Sentencing Advisory Council ('the Council') is seeking submissions on the issues raised and questions posed in this discussion paper.

The deadline for submissions is **Friday 31 March 2017**.

The Council intends to use submissions received – and the results of consultations undertaken – to provide advice to the Attorney-General in relation to terms of reference requesting advice on the desirability of 'swift and certain' approaches to sentencing family violence offenders in Victoria. The Council welcomes submissions from stakeholders and the broader community in relation to any of the questions raised in this discussion paper, as well as any other matter arising from the terms of reference.

When making a submission to the Council, please identify how you would like your submission to be treated, based on the following three categories:

- **Public submission:** the Council may refer to – or quote directly from – the submission, and name the source of the submission in relevant publications. Public submissions may also be published on the Council's website and provided to any person or organisation that requests a copy, at the completion of the reference.
- **Anonymous submission:** the Council may refer to – or quote directly from – the submission in relevant publications, but will not identify the source of the submission. Anonymous submissions, with all identifying information removed, may also be published on the Council's website and provided to any person or organisation that requests a copy, at the completion of the reference.
- **Confidential submission:** the Council will not refer to – or quote directly from – the submission in any report or publication. Confidential submissions will only be used to inform the Council generally in their deliberations of the particular issue under investigation. Confidential submissions will not be published on the Council's website and will not be provided to any person outside the Sentencing Advisory Council.

The Council reserves the right to not use or publish any submission that it considers may be defamatory or offensive.

To make a submission, please use one of the following methods:

Email: [contact@sentencingcouncil.vic.gov.au](mailto:contact@sentencingcouncil.vic.gov.au)

Post: Sentencing Advisory Council  
3/333 Queen Street  
Melbourne VIC 3000

Fax: 03 9908 8777

Phone: 1300 363 196

# Executive summary

In March 2016, the Royal Commission into Family Violence released its report, with 227 recommendations to improve responses to family violence. The Victorian Government subsequently committed to adopting all of these recommendations. The Royal Commission recommended that the Sentencing Advisory Council be asked to review whether a 'swift and certain' approach to sentencing family violence offenders would be desirable in Victoria (Recommendation 83).

## Terms of reference

In September 2016, the Council received terms of reference from the Attorney-General requesting advice on the desirability of 'swift and certain' approaches to sentencing family violence offenders in Victoria, having regard to the available empirical evidence.

The Royal Commission described the principles of 'swift and certain' approaches to include:

- a clearly defined behavioural contract – that is, rules setting out the conditions of compliance and consequences of non-compliance in a way that is clearly understandable to an offender;
- consistent application of those rules;
- swift delivery of the consequences of non-compliance; and
- parsimonious use of punishment – that is, the least amount of punishment necessary to bring about the desired change.

The Council was also asked, in the event that the government introduces some form of 'swift and certain' approach, to advise on the following matters:

- which specific approaches are preferred within the Victorian context;
- whether there are particular groups of family violence offenders at which swift and certain approaches should be focused;
- whether modifications to current laws and sentencing practice and procedure are needed to support preferred swift and certain approaches;
- whether additional sentencing options are needed to support preferred swift and certain approaches;
- the broad demand implications of any approach, or approaches, that the Council may consider desirable; and
- any other matter that the Council considers appropriate.

This discussion paper is intended to facilitate consultation on the key issues raised by the terms of reference, and thereby assist in the development of the Council's final advice to the Attorney-General, due in August 2017.

## What is a ‘swift, certain and fair’ approach?

For the criminal justice system to be effective, it must respond to crime in a timely, consistent and fair manner. People who would otherwise engage in criminal behaviour are most effectively deterred when they perceive their chances of being caught as high, and when they believe that sanctions will be imposed sooner rather than later.

The general principles of swiftness, certainty and fairness are not, however, the same thing as a ‘swift, certain and fair’ (SCF) approach. SCF approaches involve a specific type of program, initially developed in the United States. While different SCF programs have different features, common key characteristics include:

1. targeting offenders, under sentence in the community, who are subject to conditions;
2. identifying those conditions that receive non-discretionary (‘zero-tolerance’) responses upon contravention;
3. establishing a behavioural contract with the offender so that they know what is expected of them and what the consequence of non-compliance with a condition will be (usually a fixed sanction);
4. utilising measures to detect condition contraventions on a regular basis (such as regular drug testing);
5. responding to condition contraventions quickly by holding a contravention hearing within 72 hours of a detected contravention; and
6. imposing fixed sanctions at a contravention hearing in accordance with the behavioural contract.

It has also been suggested that one of the key components of an SCF program is that the fixed sanctions imposed are short periods of custody, anywhere from a few hours to a month.

## Do ‘swift, certain and fair’ programs work?

Evidence for the effectiveness of SCF programs is mixed. Initial research published in 2009 found that probationers on Hawaii’s Opportunity Probation with Enforcement (HOPE) program were 72% less likely to have positive drug tests, 55% less likely to be rearrested, 53% less likely to have their probation revoked, and 61% less likely to miss appointments with their probation officers. A follow-up evaluation published in 2016 found similar results.

More recently, researchers seeking to determine whether HOPE’s success could be replicated elsewhere established and evaluated four similar programs across the United States; those programs were designed to mirror HOPE as closely as possible. The results of this study, known as the Honest Opportunity Probation with Enforcement Demonstration Field Experiment (HOPE DFE), did not demonstrate the success of HOPE. Instead, the HOPE-like programs were found to be more resource intensive (in terms of both time and money) than the regular offender programs, without reducing reoffending rates or improving compliance with conditions.

A number of reasons have been suggested for why HOPE may have worked in Hawaii but not elsewhere. First, in Hawaii the judiciary has oversight of the probation department and can closely monitor offender–probation relationships. Second, the positive results of HOPE have tended to involve reductions in drug-related reoffending, not reoffending generally. Third, although HOPE has been characterised as a sanctions-only program, some authors have suggested that, in practice, the program adopts an approach informed by principles of therapeutic jurisprudence.



## Would a ‘swift, certain and fair’ approach be appropriate and effective for family violence offenders in Victoria?

Two of the key questions that the Council is seeking feedback on are whether an SCF approach would be:

1. appropriate and effective for family violence offenders; and
2. consistent with Victoria’s justice system.

### Appropriateness and effectiveness

Traditionally, SCF approaches have been used to target drug and alcohol offenders. There are not currently any SCF programs in operation that specifically target family violence offenders, though some SCF programs have indirectly targeted family violence offenders in the following ways:

- Some SCF programs have targeted a broad enough category of offenders that family violence offenders are captured within the target group. The Washington Intensive Supervision Program (WISP), for example, applies to all felony probationers.
- Other SCF programs have targeted addiction issues, which have a strong correlation with the frequency and severity of family violence offending. South Dakota’s 24/7 Sobriety Project, for example, targets offenders with alcohol abuse issues, and was found to reduce family violence arrests by 9% over a five-year period.

There is likely to be a substantial proportion of offenders who have substance-abuse issues and who have committed family violence offences. However, there are marked differences in the approaches and interventions directed towards family violence offenders compared with offenders who have substance-abuse issues. A paramount consideration for family violence interventions, for example, is the potential risk to any victim survivor and/or protected person, and therefore any offender intervention must be assessed having regard to this issue. In light of these differences, the Council is interested in whether SCF approaches would be appropriate for family violence offenders.

### Consistency with the Victorian criminal justice system

Aside from the Northern Territory’s COMMIT pilot program (which recently commenced trialling an SCF approach), SCF programs have almost exclusively operated in the United States, within very different legal contexts from Victoria, and ones that have included a history of mass incarceration quite distinct from the Australian experience. SCF programs in the United States have also primarily focused on managing offenders under a sentence of probation (a sentence similar to a suspended sentence of imprisonment, which has been abolished in Victoria). Further, the role and powers of probation officers in the United States, and the administrative relationships between courts and correctional services, differ markedly from those within Victoria and have implications for such issues as procedural fairness.

Given these differences, the Council is interested in whether an SCF approach would be consistent with the criminal justice system in Victoria.

## Options for implementing a ‘swift, certain and fair’ approach in Victoria

Alongside the threshold questions of whether an SCF approach would be appropriate and effective, this discussion paper proposes a number of questions around what options might be possible were the government to introduce an SCF approach to the sentencing, and sentence management, of family violence offenders in Victoria.

### Swift and certain prosecution of community correction order contraventions

One option for implementing an SCF approach in Victoria may be to change the way in which high-risk family violence offenders who have been sentenced to a community correction order (CCO) are responded to whenever they contravene the conditions of the CCO. In addition to fast-tracking CCO contravention prosecutions that involve family violence offenders, a reformed approach might involve legislative change. For example, when sentencing, a court might be allowed to prescribe CCO conditions that should be targeted with a ‘zero-tolerance’ approach to prosecution for contravention, thereby requiring particular (or indeed all) condition contraventions to be met with a swift and certain response.

Alternatively, Corrections Victoria could implement a different (administrative) approach to the management of high-risk family violence offenders on a CCO, again requiring condition contraventions to be met with a swift and certain response.

For either scenario, the Council is interested in whether a fixed, and therefore certain, sanction could (or should) be imposed, and whether the offender could (or should) be forewarned of that sanction at the commencement of the sentence, or when placed under a new supervision regime by Corrections Victoria.

The Council is also interested in whether an SCF approach could operate consistently with Corrections Victoria’s new discretion-based offender management model, which commenced in January 2017.

### Increased use of judicial monitoring

Very few CCOs include a ‘judicial monitoring’ condition. This may in part be due to the limited powers available to the court during a judicial monitoring hearing; currently, the only available response to an offender’s non-compliance is to order more regular monitoring hearings.

As a result, one option that aligns with an SCF approach could be to mandate (or strongly recommend) that high-risk family violence offenders receiving a CCO have a judicial monitoring condition imposed, and that the court’s powers at a monitoring hearing are expanded, for example, to allow the court to sanction the offender for non-compliance with the conditions of the CCO.

### Expanding alcohol exclusion powers

Courts are currently empowered to impose an alcohol exclusion order if satisfied that the offender’s intoxication significantly contributed to the commission of particular offences. Courts may also attach an alcohol exclusion condition to a CCO. These powers, however, are rarely exercised, perhaps because of the limited nature of alcohol exclusion orders and conditions and the challenges of enforcement.

Alcohol exclusion orders and conditions only prohibit an offender from purchasing or consuming alcohol at major events and licensed premises; courts do not have the power to prohibit entirely an offender's consumption of alcohol. The Adult Parole Board, however, does have this power, and may require that an offender wear a Secure Continuous Remote Alcohol Monitoring (SCRAM) device, which continuously monitors alcohol use and sends feedback to a central monitoring point.

One option that may align with an SCF approach in Victoria could be to expand courts' powers to impose alcohol exclusion orders or conditions during sentencing (particularly for family violence offenders for whom alcohol abuse is an issue), including the power to order that the offender wear a SCRAM device to detect alcohol use. Detected use of alcohol could then be met with swift and certain prosecution of this order or condition contravention.

## **A new sentencing order for high-risk family violence offenders**

Victoria's Drug Court utilises a model similar to an SCF approach. In particular circumstances, offenders who would otherwise have received a prison sentence may be sentenced to a drug treatment order (DTO), which involves an unactivated term of imprisonment and a community sentence component. While under sentence, offenders on a DTO are monitored intensely by the court and corrections officers; offenders engage with rehabilitation services and are subjected to a reward-and-sanctions regime in which they can gain or lose sanctions (primarily prison days) for their behaviour. If an offender accumulates more than seven prison days, he or she is required to serve that accrued period of imprisonment in custody.

There are two key differences between DTOs and SCF programs. First, Drug Court participants attend regular court hearings, regardless of whether they have contravened any condition of their order. Second, custodial sanctions are not immediately imposed but rather can be lost or gained.

One option for implementing an SCF approach in Victoria could be a new sentencing order, structured on the DTO, but for very serious and/or high-risk family violence offenders. A specialised court could impose a family violence offender compliance order (FVOCO), requiring the offender to comply with particular conditions while in the community. Violation of the order would attract swift and certain sanctions, including short terms of imprisonment based on the 'unactivated' term of imprisonment that forms part of the sentencing order.

Although the FVOCO could adopt the structure of the DTO, it would not necessarily require the same intensity of judicial monitoring or rehabilitative focus. Rather, the unactivated term of imprisonment could provide the legal basis for the imposition of short terms of imprisonment as a sanction for non-compliance. Further, the primary aim of the order could be to address and manage risk by ensuring compliance (through swift and certain sanctions), rather than a primarily therapeutic approach, as taken by the Drug Court, that seeks to rehabilitate the offender through both rewards and sanctions.

If such short terms of imprisonment were one of the available sanctions for non-compliance, an FVOCO would likely be available only if the offending was serious enough to otherwise justify a term of imprisonment (similar to the existing DTO). Consequently, an FVOCO would likely be appropriate only for very serious and/or high-risk family violence offenders.

## **Improving swiftness and certainty generally**

The Council acknowledges that SCF approaches are not synonymous with the principles of swiftness and certainty. Consequently, it may be that an SCF approach to family violence offenders is considered undesirable in Victoria. If that is the case, the Council seeks feedback on any alternative means of improving timeliness and consistency in sentencing, and sentence management of, family violence offenders.

# Summary of questions

## Desirability, suitability and risk

### Question 1: Evidence base

In light of the available research:

- a.** Is there sufficient evidence for the effectiveness of 'swift, certain and fair' (SCF) approaches to warrant their application in Victoria?
  - b.** If so, is there sufficient evidence for the effectiveness of SCF approaches to warrant their application to family violence offenders?
- 

### Question 2: 'Swift, certain and fair' as a response to family violence

Do SCF approaches align with the evidence of best practice for the sentencing, and management under sentence, of family violence offenders?

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### Question 3: Managing risk to victim survivors or protected persons

- a.** Would SCF sanctions, in the form of short periods of custody, increase the short-term risk to victim survivors or protected persons?
  - b.** If so, can this risk be justified by the potential for greater offender accountability, greater offender compliance and a reduced risk to victim survivors or protected persons in the medium to long term?
-

## Options for implementation

### Question 4: ‘Swift, certain and fair’ approaches to managing family violence offenders on a community correction order

Should an SCF approach to the management of a family violence offender on a community correction order (CCO) be implemented in Victoria? If so:

- a. Should the SCF approach operate within the existing sentencing framework and represent a program and/or an administrative response by Corrections Victoria to the prosecution of CCO contraventions?
- b. Should the SCF approach be legislated in the form of a new court-ordered SCF condition (or conditions) that can be attached to a CCO?
- c. Should the SCF approach to compliance with CCO conditions be structured in another way?

For each approach:

- d. What should be the key elements?
- e. Should the approach be used in conjunction with judicial monitoring?
- f. Are there particular groups of offenders on a CCO to whom the approach should be applied?
- g. What factors should be taken into account in deciding whether to impose the approach on an offender?
- h. What conditions (e.g. attendance at a men's behaviour change program) should trigger an SCF response for contravention?
- i. Should contravention of CCO charges by a family violence offender be included within the Magistrates' Court family violence fast-tracking listing process?
- j. What sanctions should be imposed for contravention?
- k. What would be the demand implications for stakeholders, including the courts, Corrections Victoria, Victoria Police and Victoria Legal Aid?
- l. Are there any other issues that would need to be addressed for the SCF approach to be effective in Victoria?

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### Question 5: Reforms to judicial monitoring

- a. Should judicial monitoring form part of an SCF approach to the management of family violence offenders on a CCO, and if so, how?
  - b. Should the powers available to a court at a judicial monitoring hearing be expanded, and if so, how?
-

## Question 6: 'Swift, certain and fair' as a new sentencing order for family violence offenders

Should an SCF approach be implemented in Victoria in the form of a new family violence offender compliance order (FVOCO)? If so:

- a. How should such an order be structured?
  - b. Where should the order fit within Victoria's sentencing hierarchy?
  - c. In which court jurisdiction should the order be available?
  - d. Which group or groups of family violence offenders should be eligible for the order?
  - e. Should certain forms of family violence or offending types be excluded from eligibility for the order?
  - f. What conditions should attach, or be available to attach, to the order?
  - g. What sanctions should be imposed for contravention of a condition of the order?
  - h. What would be the demand implications for stakeholders, including the courts, Corrections Victoria, Victoria Police and Victoria Legal Aid?
  - i. Are there any other issues that would need to be addressed for such an SCF approach to be effective in Victoria?
- 

## Particular issues regarding implementation

### Question 7: Offender identification – level of risk

If an SCF approach were to be implemented in Victoria:

- a. Should it only be directed at family violence offenders who are at high risk of reoffending and/or high risk of non-compliance with a sentencing order?
  - b. How should those offenders be identified?
- 

### Question 8: Offender identification – alcohol and/or substance abuse

If an SCF approach were to be implemented in Victoria, should such an approach target:

- a. offenders with alcohol and/or substance-abuse issues generally who are not necessarily family violence offenders, thereby indirectly targeting family violence offending; or
  - b. family violence offenders generally, regardless of whether they have alcohol and/or substance-abuse issues; or
  - c. only family violence offenders with alcohol and/or substance-abuse issues?
-

### Question 9: Alcohol exclusion orders and conditions

- a. Should courts have expanded powers to prohibit family violence offenders from consuming alcohol entirely (and not just at certain places)?
  - b. If so, should compliance with an alcohol exclusion order or condition be monitored using SCRAM technology?
  - c. Should courts have the discretion to impose an alcohol exclusion order or condition on family violence offenders if alcohol use significantly contributed to the commission of the offence, or should such an order or condition be mandatory?
  - d. If an SCF approach is introduced in Victoria, should that approach encompass alcohol exclusion orders or conditions?
  - e. What would be the resource implications for such expansion of the use of alcohol exclusion orders or conditions and the use of SCRAM technology?
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### Question 10: Suitability for certain groups

Is an SCF approach unsuitable or inappropriate for any group, or groups, of family violence offenders?

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### Question 11: Procedural fairness

If an SCF approach were to be implemented in Victoria, what procedural fairness issues should be considered? For example:

- a. Should it be permissible to hold an offender in custody prior to a contravention hearing? If so, at what point and for how long?
  - b. Should offenders who admit their contravention be entitled to a discounted sanction?
  - c. Should there be an 'exceptional circumstances' and/or 'reasonable excuse' defence to allegations of contravention?
  - d. Is there a risk that an SCF approach could be considered contrary to the principle of equality before the law in the Victorian context?
  - e. Does an SCF approach raise issues concerning the principle of parsimony in the Victorian context?
-

## Question 12: Sanctions

If an SCF approach were to be implemented in Victoria, should the sanctions for condition violations be:

- a. only custodial;
  - b. custodial and non-custodial (and if so, what type or types); or
  - c. only non-custodial (and if so, what type or types)?
- 

## Question 13: Targeted conditions

If an SCF approach were to be implemented in Victoria, what condition contraventions should receive SCF responses?

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## Custodial capacity and resource implications

### Question 14: Custodial capacity and location

If an SCF approach that carries short periods of two to three days in custody as a sanction were to be implemented in Victoria:

- a. Where would offenders subject to such a sanction be held?
  - b. Are there any other operational or resourcing implications in requiring offenders to serve short periods of two to three days in custody?
- 

### Question 15: Demand and resource implications

If an SCF approach were to be implemented in Victoria:

- a. Would affected agencies have the capacity to accommodate SCF responses?
  - b. If not, what further facilities or resources would be required?
- 

## Other reforms

### Question 16: Alternative reforms

Are there alternative reforms to the sentencing, and management under sentence, of family violence offenders that would better promote the principles of 'swiftness', 'certainty' and 'fairness'?

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# 1. Terms of reference: introduction, background and scope

## Overview

- I.1 The purposes of this discussion paper are to:
- provide background information on what is meant by 'swift, certain and fair' (SCF) approaches, as employed in other jurisdictions;<sup>1</sup>
  - provide background information and data on the current approach to sentencing and managing family violence offenders in Victoria;
  - discuss the desirability of introducing SCF approaches to sentencing and managing family violence offenders in Victoria; and
  - seek stakeholder and community responses to broad proposals for the introduction of SCF approaches to sentencing and managing family violence offenders in Victoria.
- I.2 This discussion paper is divided into four chapters. In addition to this introductory chapter:
- Chapter 2 defines SCF approaches, provides an overview of SCF programs in operation in the United States (with a particular focus on Hawaii's Opportunity Probation with Enforcement (HOPE) program) and summarises evaluations of the effectiveness of these programs. The chapter also discusses the recent piloting of an SCF program in the Northern Territory;
  - Chapter 3 discusses the Victorian sentencing framework and the existing sentencing dispositions relevant to both family violence offenders and SCF approaches, and summarises research findings on the effectiveness of perpetrator intervention programs, as well as different approaches to sentencing family violence offenders; and
  - Chapter 4 presents several options for the application of SCF approaches to sentencing and managing family violence offenders in Victoria.

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1. Various terms have been used to describe these approaches, all of them essentially synonymous. Originally, the approach was conceived as 'swift and certain'. Since then it has also been described as 'swift and sure' and 'swift, certain and fair'. In order to effectively convey the key tenets of the approach, and to emphasise the need to ensure procedural fairness and parsimony in sentencing, the Council uses the descriptor 'swift, certain and fair' (SCF).

## Terms of reference

- 1.3 On 9 September 2016, the Council received a request for advice from the Attorney-General, the Hon Martin Pakula, MP, to advise him on the desirability of 'swift and certain' approaches to sentencing family violence offenders in Victoria, having regard to the available empirical evidence. The request for advice followed a recommendation from the Royal Commission into Family Violence.<sup>2</sup>
- 1.4 The Royal Commission described the principles of 'swift and certain' approaches to include:
- a clearly defined behavioural contract – that is, rules setting out the conditions of compliance and consequences of non-compliance in a way that is clearly understandable to an offender;
  - consistent application of those rules;
  - swift delivery of the consequences of non-compliance; and
  - parsimonious use of punishment – that is, the least amount of punishment necessary to bring about the desired change.<sup>3</sup>
- 1.5 For the purposes of this reference, a family violence offender is a person who has been found guilty of committing a criminal offence in a family violence context. Family violence is taken to have the same definition as that given in section 5 of the *Family Violence Protection Act 2008* (Vic).
- 1.6 Further, in the event that the government introduces some form of 'swift and certain' approach, the Council has been asked to advise on the following matters:
- which specific approaches are preferred within the Victorian context;
  - whether there are particular groups of family violence offenders at which swift and certain approaches should be focused;
  - whether modifications to current laws and sentencing practice and procedure are needed to support preferred swift and certain approaches;
  - whether additional sentencing options are needed to support preferred swift and certain approaches;
  - the broad demand implications of any approach, or approaches, that the Council may consider desirable; and
  - any other matter that the Council considers appropriate.
- 1.7 The Council has been asked to consult with government and non-government stakeholders working in criminal justice and family violence, as well as with the Victorian community, in the preparation of its advice.
- 1.8 The Council is required to report back to the Attorney-General by no later than 29 August 2017.

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2. State of Victoria, Royal Commission into Family Violence, *Volume III: Report and Recommendations* (2016) 232 (Recommendation 83).

3. *Ibid* 217.

## Background to the terms of reference

I.9 The report of the Royal Commission into Family Violence was tabled in parliament on 30 March 2016. The report contains 227 recommendations, and the government has committed to adopting all of them. Recommendation 83 is that:

The Sentencing Advisory Council report on the desirability of and methods for accommodating 'swift and certain' justice approaches to family violence offenders within Victoria's sentencing regime [within 12 months].<sup>4</sup>

I.10 There was a range of submissions and evidence before the Royal Commission into Family Violence proposing that a swift and certain approach may be beneficial in sentencing and managing family violence offenders in Victoria.

## Submission of the Magistrates' Court and Children's Court

I.11 The Magistrates' Court of Victoria and the Children's Court of Victoria made a joint submission to the Royal Commission into Family Violence. Among other things, they recommended that the Council be asked to consider the development of a broader range of sentencing tools for use in criminal matters involving family violence.<sup>5</sup> The courts expressed particular concerns about the inadequacy of current systems that monitor compliance with court orders (such as community correction orders (CCOs)), and recommended that courts should have access to a broader range of sentencing options (such as a 'strengthened' CCO) that would better promote compliance with sentencing orders.<sup>6</sup>

## Submission of RMIT's Centre for Innovative Justice

I.12 In March 2015, RMIT's Centre for Innovative Justice (CIJ) published *Opportunities for Early Intervention: Bringing Perpetrators of Family Violence into View*, a report recommending ways that family violence offenders could better be held accountable for their behaviours, with a particular focus on early interventions.<sup>7</sup> The CIJ submitted that report to the Royal Commission into Family Violence.<sup>8</sup>

I.13 In its report, the CIJ concluded that systems that utilised swift and certain sanctioning for non-compliance with court orders had significantly reduced rearrest rates for convicted offenders, and recommended that Australian courts develop swift and certain protocols such as 'flash incarceration' of 24 hours for non-compliance.<sup>9</sup> The CIJ further recommended that a swift and certain approach be coupled with ongoing monitoring and assessment, preferably by the same judge.<sup>10</sup>

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4. Ibid 232.

5. Magistrates' Court of Victoria and Children's Court of Victoria, *Submission to the Royal Commission into Family Violence* (2015) 62 (Recommendation 26).

6. Ibid 38 (Recommendation 3).

7. RMIT Centre for Innovative Justice, *Opportunities for Early Intervention: Bringing Perpetrators of Family Violence into View* (2015).

8. RMIT Centre for Innovative Justice, *Submission to the Royal Commission into Family Violence* (2015) 14.

9. RMIT Centre for Innovative Justice (2015), above n 7, 62, 64, 67, 87, 92.

10. Ibid 7, 34.

## Submission of the Foundation for Alcohol Research and Education

- I.14 The Foundation for Alcohol Research and Education (FARE) submitted that, although alcohol and drug use do not necessarily 'cause' family violence, there is a positive correlation between alcohol and substance use with the rate and severity of family violence incidents.<sup>11</sup> FARE recommended a pilot project in which family violence offenders who are also convicted of alcohol-related offences would be subjected to alcohol restrictions during sentencing, which could be monitored through regular breath-testing or an electronic bracelet, and that any breach of those restrictions should be met with swift, certain and modest sanctions.<sup>12</sup>

## Submission of the Chair of the Sentencing Advisory Council

- I.15 The Chair of the Sentencing Advisory Council, Emeritus Professor Arie Freiberg AM, gave evidence at the Royal Commission. In his evidence, he stated that what is missing in Victoria:
- is not so much the applicability of those prison sentences for serious offences, but ... the ability to provide short, certain, unpleasant sanctions, even if it is in a holding cell ... it might be for a day, it might be two days ... it's the reminder that certain actions will have swift and certain consequences.<sup>13</sup>
- I.16 Although supportive of the underlying principles of SCF approaches, Professor Freiberg noted that there were a range of issues that would need to be explored before an SCF approach could be implemented in the Victorian context, such as prison capacities, due process issues, and the pressure such an approach would place on Victoria Legal Aid, police and courts.<sup>14</sup>

## Conclusions of the Royal Commission regarding sentencing

- I.17 After reviewing the sentencing of family violence-related offending in Victoria,<sup>15</sup> the Royal Commission recommended against a number of options that it had been presented with, including:
- the addition of family violence as a mandatory consideration or aggravating factor in sentencing;
  - the introduction of mandatory minimum sentences, baseline sentences or 'serious offender' provisions for family violence offending; or
  - the introduction of 'Rekiah's law' (a proposed amendment to the criminal law that would prevent someone who killed another person with a firearm, except in self-defence, from being found guilty of manslaughter; instead requiring that they be found guilty of murder).<sup>16</sup>

11. Foundation for Alcohol Research and Education (FARE), *Submission to the Royal Commission into Family Violence* (2015) 8, 61–62. FARE included a recently published report in its submission: Anne-Marie Laslett et al., *The Hidden Harm: Alcohol's Impact on Children and Families* (2015). See also Kathryn Graham et al., 'Alcohol May Not Cause Partner Violence but It Seems to Make It Worse: A Cross National Comparison of the Relationship between Alcohol and Severity of Partner Violence' (2010) 26(8) *Journal of Interpersonal Violence* 1503.

12. Foundation for Alcohol Research and Education (2015), above n 11, 6, 27–28.

13. State of Victoria (2016), above n 2, 218.

14. *Ibid* 219.

15. *Ibid* 189–239.

16. *Ibid* 230.

- I.18 The Royal Commission noted that there was considerable promise in the following sentencing laws and processes, all of which are to some extent already in use:
- using CCO conditions to provide continuing contact with the court and the same judicial officer, as well as compelling the perpetrator to engage with the causes of their offending and holding the perpetrator to account;
  - deferring the sentencing of a perpetrator to allow them to demonstrate a capacity to avoid reoffending and to undertake programs addressing issues related to their offending;
  - expanding the fast-tracking model being trialled at different locations of the Magistrates' Court to other locations, as well as expanding its scope to ensure it applies in relation to a breach of a CCO where it involves family violence; and
  - using electronic monitoring and surveillance technology for monitoring family violence offenders as part of an overall case management approach.<sup>17</sup>
- I.19 Most relevantly for the Council's review, the Royal Commission suggested that although there would be significant obstacles to adopting an SCF approach in Victoria (particularly given that most current iterations were developed in United States jurisdictions), such approaches have been proven valuable elsewhere and are worth investigating further.<sup>18</sup>
- I.20 The Royal Commission suggested that the Council be asked to conduct a review of the usefulness of an SCF approach to family violence offenders in Victoria. The Royal Commission further indicated that the Council should consider not only the usefulness of criminal sanctions as part of an SCF approach but also the use of non-criminal responses such as judicial monitoring and other similar measures in family violence intervention orders.<sup>19</sup>

## Scope of the reference and the Council's approach

### Defining 'swift, certain and fair' approaches

- I.21 Research consistently demonstrates that criminal justice responses that apply the principles of swiftness, certainty and fairness best serve victims and witnesses.<sup>20</sup> They are more likely to hold offenders accountable,<sup>21</sup> are more likely to promote community confidence in the criminal justice system,<sup>22</sup> and are more likely to deter offenders and others from further

17. Ibid 231–232.

18. Ibid 231.

19. Ibid 232.

20. This is generally recognised in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly of the United Nations by resolution 40/34 of 29 November 1985, on which the *Victims' Charter Act 2006* (Vic) is based. See also Mary Beth Ricke, 'Victims' Right to a Speedy Trial: Shortcomings, Improvements, and Alternatives to Legislative Protection' (2013) 41 *Washington University Journal of Law & Policy* 181, 202–203; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (2016) 25.

21. Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment* (Sentencing Project, 2010); Andrew von Hirsch et al., *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999); Daniel S. Nagin and Greg Pogarsky, 'Integrating Celerity, Impulsivity and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence' (2001) 39(4) *Criminology* 865. See also Lana Friesen, 'Certainty of Punishment versus Severity of Punishment: An Experimental Study' (2012) 79(2) *Southern Economic Journal* 399, 416.

22. Anna Butler and Katherine McFarlane, *Public Confidence in the NSW Criminal Justice System*, Crime and Justice Bulletin no. 182 (2009) 10. See also George Zdenkowski, 'Magistrates' Courts and Public Confidence' (Paper presented at the Confidence in the Courts Conference, Canberra, 9–11 February 2007) 6; Jason Payne, *Criminal Trial Delays in Australia: Trial Listing Outcomes* (Australian Institute of Criminology, 2007) 2.

offending.<sup>23</sup> Criminal courts, in particular, have long recognised the importance of timely and certain responses to criminal behaviour.<sup>24</sup>

- 1.22 The discrete principles of swiftness, certainty and fairness – which in and of themselves are worthy goals of any criminal justice system – do not, however, fully explain the specific approaches to offender management represented by SCF programs such as the HOPE program (see [2.11]–[2.29] for a detailed discussion of HOPE).
- 1.23 The Magistrates' Court family violence fast-tracking listing process represents an example of how the discrete principle of swiftness may be incorporated into Victoria's criminal justice response to family violence (see [3.52]–[3.56]). It does not represent, however, the implementation of an SCF approach.
- 1.24 While the key elements that constitute SCF approaches are contested (see [2.20]–[2.29]), the Council has defined a 'swift, certain and fair' approach as one including the principles described by the Royal Commission at [1.4] above.

## Family violence offenders

- 1.25 The terms of reference ask the Council to examine issues relating to sentencing offenders found guilty of committing a criminal offence in a family violence context. A family violence offender is taken to mean an offender found guilty of an offence involving 'family violence', defined in section 5(1) of the *Family Violence Protection Act 2008* (Vic) as including:
  - (a) behaviour by a person towards a family member of that person if that behaviour—
    - (i) is physically or sexually abusive; or
    - (ii) is emotionally or psychologically abusive; or
    - (iii) is economically abusive; or
    - (iv) is threatening; or
    - (v) is coercive; or
    - (vi) in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or
  - (b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).<sup>25</sup>

23. Raymond Paternoster, 'How Much Do We Really Know about Criminal Deterrence' (2010) 100(3) *Journal of Criminal Law and Criminology* 765; Paul H. Robinson and John M. Darley, 'Does Criminal Law Deter? A Behavioral Science Investigation' (2004) 24(2) *Oxford Journal of Legal Studies* 173; Paul H. Robinson and John M. Darley, 'The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best' (2003) 91(5) *Georgetown Law Journal* 949.

24. See for example, *State v Millain* 3 Nev 409, 478 (1867) ('the swift and certain administration of criminal justice is the surest preventive of crime'); *People v Jackson* 114 AD 697, 716 (1906) ('Punishment for crime to be efficacious should be swift and certain, otherwise much of its deterrent effect upon the criminally inclined is lost'); and *People v Stolof* 274 NY 231, 249 (1937) ('Swift and certain punishment of wrongdoers is the most effective protection of society').

25. *Family Violence Protection Act 2008* (Vic) s 5(1).

- I.26 Family violence offenders also include those offenders who have contravened a family violence intervention order (FVIO) or a family violence safety notice (FVSN) made under the *Family Violence Protection Act 2008* (Vic), which are civil orders that carry criminal penalties for contravention.
- I.27 The Council notes that family violence offences are not necessarily constituted by what would traditionally be characterised as *violent* offences. Family violence also involves abuse that is economic, emotional, psychological, controlling, coercive and/or sexual in nature.
- I.28 The Council also notes that family violence offences are not limited to offences committed against current intimate partners. Family violence is also often committed against former partners, against elderly relatives, against children, or against other family members or relatives falling within the broad definition in the *Family Violence Protection Act 2008* (Vic).<sup>26</sup>

### **Early intervention for family violence offenders**

- I.29 A number of organisations submitted to the Royal Commission that the current system fails to quickly and surely respond to family violence offenders who fail to comply with the conditions of a court order, which in turn encourages (or at least fails to discourage) further contraventions.<sup>27</sup> Offenders can be charged with new criminal offences for contravening a condition of a court order, but even a fast-tracked criminal process takes weeks or months to reach determination.<sup>28</sup>
- I.30 Evidence suggests that non-compliance with court orders is one of the key indicators that a person subject to that court order will commit further offences, including family violence.<sup>29</sup>
- I.31 Recent research has also found that the commission of a violent offence in the context of family violence increases the likelihood that the offender will reoffend sooner, in comparison with a person who has committed a violent offence in a non-family violence context. This suggests that early intervention and supervision are likely to be especially important safeguards against family violence recidivism.<sup>30</sup>
- I.32 This discussion paper therefore considers whether an SCF approach could address this key issue: swift intervention intended to reinforce to family violence offenders that contraventions of court orders will not be tolerated, and will result in a certain and proportionate response.

26. *Family Violence Protection Act 2008* (Vic) ss 8–10 (defining family member, domestic partner and relative).

27. See for example, the submissions of the Foundation for Alcohol Research and Education, RMIT's Centre for Innovative Justice, the Chair of the Sentencing Advisory Council, and the Magistrates' and Children's Courts discussed at [1.11]–[1.16]. See also Victoria Police, *Submission to the Royal Commission into Family Violence* (2015) 12 (recommending that responses to family violence need to be swift, proportionate, flexible and safety focused).

28. See for example, the timeline of the Magistrates' Court fast-tracking process at [3.52].

29. Department of Human Services, *Family Violence Risk Assessment and Risk Management Framework and Practice Guides 1–3* (2nd ed., 2012) 27 ('Breaching Intervention Order conditions indicates the defendant is not willing to abide by the orders of a court. Such behaviour should be considered a serious indicator of increased risk of future violence'). See also Sentencing Advisory Council, *Contravention of Family Violence Intervention Orders and Safety Notices: Prior Offences and Reoffending* (2016) 11.

30. Wai Wan and Don Weatherburn, *Violent Criminal Careers: A Retrospective Longitudinal Study*, Crime and Justice Bulletin no. 198 (2016).

## Focus on sentencing

- I.33 An SCF approach does not necessarily represent an approach to sentencing, but it might be more accurately described as an approach to sentence *management*, as it encompasses responses to non-compliance with sentencing orders.
- I.34 Where the Council examines FVIOs and FVSNs, it does so within the context of the potential applicability and likely procedural issues of applying SCF approaches to the management under sentence of offenders who have been convicted of contravening those orders.

## Limitations of an SCF approach

- I.35 SCF approaches cannot address all of the issues with sentencing family violence offenders identified by the Royal Commission into Family Violence, and it is necessary to acknowledge the potentially limited applicability of SCF approaches. In particular, there are four important limiting criteria that narrow the focus of how an SCF approach could contribute to reducing family violence:
- the targeted individual must have been found guilty of, and have been sentenced for, engaging in family violence;<sup>31</sup>
  - the individual must be subject to some form of court-ordered conditions while in the community;
  - the individual must in some way have failed to fully comply with the terms of those court-ordered conditions; and
  - the individual's non-compliance does not necessarily (but may) constitute further offending in and of itself (that is, an offence other than breach of the court order).
- I.36 These factors necessarily limit the reach of SCF approaches, and consequently, any SCF approach must be part of, not representative of, a holistic approach to legal responses designed to reduce family violence.

## Evidence-based approach

- I.37 The terms of reference ask that the Council have regard to the available empirical evidence concerning SCF programs. The Council has adopted an evidence-based approach in considering the application of SCF approaches to family violence offenders in Victoria. In particular, the Council has critically examined emerging evidence that has questioned the effectiveness of SCF approaches.
- I.38 Further, the Council has developed the questions and options in this discussion paper to elicit the views of interested parties as to the best practice for sentencing and managing family violence offenders in Victoria, in order to inform the Council's recommendations in response to the terms of reference.

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31. To clarify, family violence includes but is not synonymous with intimate partner violence. Family violence also includes, for example, any of the behaviours in section 5 of the *Family Violence Protection Act 2008* (Vic) when committed by siblings, step-siblings, children, and anyone else falling within the definition of family member in section 8 of the *Family Violence Protection Act 2008* (Vic). This point will be expanded on in Chapter 4, when discussing the possible groups of offenders who could benefit from an SCF approach.



## Human rights considerations

- I.39 As a public statutory authority, it is unlawful for the Council 'in making a decision, to fail to give proper consideration to a relevant human right'.<sup>32</sup> To that end, in developing its advice, the Council will have regard to the rights contained in the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
- I.40 In this respect, the Council considers consultation particularly important for this reference, given that an SCF approach may have a disproportionate effect on certain groups, including, for example, Aboriginal and Torres Strait Islander peoples<sup>33</sup> and individuals with mental illnesses.

## Preliminary consultation

- I.41 Prior to the publication of this discussion paper, the Council conducted preliminary consultation with a number of stakeholders, as detailed in the appendix.
- I.42 During preliminary consultation, the Council was concerned with exploring two threshold issues, namely:
- the suitability of SCF approaches in the context of family violence offenders; and
  - the capacity of the criminal justice system in Victoria to accommodate SCF approaches.

## Suitability

- I.43 First, SCF approaches have been used in the management of drug and alcohol offenders (and, indirectly, in the management of family violence offenders who fall within that group), but they have not yet been used to directly target family violence offenders. It cannot be assumed, therefore, that evidence that SCF approaches have been effective in changing offender behaviour (and increasing compliance) for drug and alcohol offenders will also work for family violence offenders.
- I.44 Indeed, the Council is particularly concerned that an SCF approach might exacerbate or escalate the risk that a contravening offender might pose to a victim survivor or protected person.

## Capacity

- I.45 Second, an SCF approach is likely to increase the demand on the resources of a number of organisations, such as the courts, Corrections Victoria and Victoria Police. For example, Corrections Victoria would likely need to closely monitor offender non-compliance, courts would need to respond quickly to allegations of non-compliance, and offenders in contravention would need to be housed in a secure custody facility for a short term (most likely police custody).
- I.46 The challenges to integration of any SCF approach in Victoria, as well as feedback received during preliminary stakeholder consultations, are discussed in Chapter 4. The options for implementation of SCF approaches in Victoria discussed in that chapter have been developed taking into account feedback received during the Council's preliminary consultations.

32. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(1).

33. Lorana Bartels, 'Swift and Certain Sanctions: Is It Time for Australia to Bring Some HOPE into the Criminal Justice System?' (2015) 39(1) *Criminal Law Journal* 53, 65 ('Any pilot program that includes a significant number of indigenous offenders should be developed with relevant community representatives'). The Council is cautious of the interaction of SCF principles with recommendations from the Royal Commission into Aboriginal Deaths in Custody. See [4.72]–[4.74] for further discussion of these issues.

## Relationship with other Royal Commission recommendations

I.47 The Council is conducting its review on the assumption that all of the recommendations from the Royal Commission will be implemented. Some of the key recommendations that will impact the landscape of family violence responses in Victoria include:

- implementing a government-endorsed family violence risk assessment tool;<sup>34</sup>
- improving information-sharing between relevant government agencies;<sup>35</sup>
- improving access to safe housing for victim survivors of family violence;<sup>36</sup>
- Victoria Police piloting the use of body-worn cameras at family violence incident scenes;<sup>37</sup>
- all headquarter Magistrates' Court locations in Victoria having similar functions and powers to the Family Violence Court Division of the Magistrates' Court, including an integrated list in which all family violence matters can be heard, not just criminal matters;<sup>38</sup>
- courts being empowered to, during criminal proceedings, issue an interim family violence intervention order on their own motion;<sup>39</sup>
- a committee of experts advising the government on best-practice approaches to perpetrator intervention programs such as men's behaviour change programs (MBCPs), and an accreditation process being implemented for such programs;<sup>40</sup>
- improving access to men's behaviour change programs, with as much funding as necessary to ensure access, including programs in languages other than English;<sup>41</sup>
- improving monitoring of offenders' participation in men's behaviour change programs;<sup>42</sup> and
- ensuring sufficient funding for all family violence-related services and programs in Victoria.<sup>43</sup>

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34. State of Victoria, Royal Commission into Family Violence, *Volume I: Report and Recommendations* (2016) 45–46 (Recommendations I–4).

35. *Ibid* 46–47 (Recommendations 5–9); see also Recommendation 66.

36. *Ibid* 49–50 (Recommendations 13–20).

37. *Ibid* 61 (Recommendation 58).

38. *Ibid* 62–63 (Recommendations 60–62).

39. *Ibid* 67 (Recommendation 79).

40. *Ibid* 69 (Recommendation 86).

41. *Ibid* 69–70 (Recommendations 87–89).

42. *Ibid* 70 (Recommendation 90).

43. *Ibid* 104–106 (Recommendations 217–227).

## 2. Defining ‘swift, certain and fair’ approaches

### Overview

- 2.1 This chapter defines what is meant by a swift, certain and fair (SCF) approach. It provides a brief overview of SCF programs in operation in the United States (with a particular focus on Hawaii’s Opportunity Probation with Enforcement (HOPE) program) and discusses the recent piloting of an SCF approach in the Northern Territory.
- 2.2 As discussed at [1.3], the terms of reference ask that the Council have regard to available empirical evidence concerning SCF programs. This chapter therefore includes an overview of the evaluations of SCF programs and discusses some criticisms of those evaluations.

### Theoretical underpinnings of ‘swift, certain and fair’

- 2.3 The concepts that underpin SCF programs are not new. Economist Mark Kleiman has noted that:
 

in the eighteenth century, Cesare Beccaria ... identified three characteristics that determine the deterrent efficacy of a threatened punishment: its swiftness, its certainty, and its severity. Of the three, severity is the least important. If punishment is swift and certain, it need not be severe to be efficacious. If punishment is uncertain and delayed, it will not be efficacious even if it is severe.<sup>44</sup>
- 2.4 There is a compelling body of research suggesting that offenders’ behaviour is most profoundly influenced by the speed with which sanctions are delivered, and the certainty that those sanctions will follow the prohibited behaviour. In addition, procedural justice – which refers to the fairness of the procedures that lead to criminal justice outcomes – is considered to be an important element in effective deterrence. A procedure that is perceived as fair is more likely to encourage compliance than one that is perceived as unfair.<sup>45</sup> Conversely, studies show that the severity of sanctions has relatively little effect in deterring an offender from committing a crime.<sup>46</sup> Sanctions can therefore be moderate and still achieve the purposes of deterrence.
- 2.5 The idea that swift, certain and fair criminal justice responses are effective at increasing compliance with court orders and reducing recidivism is supported by a number of criminological theories, including:<sup>47</sup>
  - *deterrence theory*, which suggests that individuals will avoid a given action if they fear perceived consequences;<sup>48</sup>

44. Mark A. R. Kleiman, ‘Smart on Crime’ (Spring 2013) 28 *Democracy: A Journal of Ideas* <<http://democracyjournal.org/magazine/28/smart-on-crime/>> at 28 October 2016.

45. See Josh Bowers and Paul H. Robinson, ‘Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility’ (2012) 47 *Wake Forest Law Review* 211. Indeed, research shows that procedural justice is often more important than the actual outcome in determining whether a legal procedure is viewed as legitimate. See also Faye S. Taxman et al., ‘Graduated Sanctions: Stepping into Accountable Systems and Offenders’ (1999) 79(2) *The Prison Journal* 182, 186.

46. For a summary of the evidence, see Sentencing Advisory Council, *Does Imprisonment Deter? A Review of the Evidence* (2011).

47. For a detailed discussion of these theories, see Ronald L. Akers and Christine S. Sellers, *Criminological Theories: Introduction, Evaluation and Application* (2013).

48. The principles of deterrence theory date to Cesare Beccaria’s *On Crimes and Punishments* (1764). For a discussion of deterrence theory in Victoria, see Sentencing Advisory Council (2011), above n 46. For a more general summary of deterrence theory and its impact on modern community corrections, see Daniel O’Connell et al., ‘Decide Your Time: Testing Deterrence Theory’s Certainty and Celerity Effects on Substance-Using Probationers’ (2011) 39(3) *Journal of Criminal Justice* 261; Kevin Lockyer, *Swift and Certain: A New Paradigm for Criminal Justice* (2014) 23–24.

- *rational choice theory*, which suggests that individuals choose to engage in criminal behaviour after making a rational and calculated determination as to the risks and rewards of a specific act;<sup>49</sup> and
  - *social learning theory*, which suggests that people learn behaviour from their immediate environment, through reinforcement, punishment and observation. Therefore, behaviours that result in punishment are less likely to occur in the future, whereas behaviours that result in reward are more likely to occur in the future.<sup>50</sup>
- 2.6 The theories that underpin swift, certain and fair criminal justice responses have also been criticised, however.<sup>51</sup>
- 2.7 The concept of an SCF approach emerged in the United States in response to a perception that 'probation as usual' was not working. Mark Kleiman has described probation as usual as involving:
- a multiplicity of rules being imposed on offenders during sentencing, many of which are weakly related to reducing the chances of an offender reoffending;
  - inconsistent monitoring of compliance with those rules, resulting in a low probability of any individual violation being detected;
  - slow and unpredictable sanction processes when violations are detected; and
  - sporadic use of revocation (of probation), leading to incarceration for months or even years as a response to repeated violations, even if those violations do not involve new crimes or direct threats to public safety.<sup>52</sup>
- 2.8 The way 'probation as usual' operates is contrary to what is scientifically known about the shaping of human behaviour.<sup>53</sup> Research consistently shows that the effect that potential consequences have on our decision-making diminishes depending on how far in the future those consequences are perceived to be. It also shows that immediate consequences disproportionately influence our current decisions and that the perceived probability of a particular consequence actually occurring influences the subjective value we place on those consequences.<sup>54</sup> SCF approaches are designed to harness this evidence about how to effectively encourage behavioural change by linking swift, certain and fair consequences to negative behaviour.
- 2.9 The underlying principles of swiftness, certainty and fairness inform, but do not constitute, the key elements of SCF approaches.

49. For a discussion of some of the limitations of rational choice theory, see Sentencing Advisory Council (2011), above n 46, 8–9; see also Ronald L. Akers, 'Rational Choice, Deterrence, and Social Learning Theory in Criminology: The Path Not Taken' (1990) 81(3) *Journal of Criminal Law and Criminology* 653, 654.

50. Akers (1990), above n 49, 660.

51. For example, rational choice theory has been extensively criticised by scholars of behavioural economics for failing to recognise the limitations of human cognition and the idea that rationality is 'bounded': Herbert A. Simon, 'A Behavioral Model of Rational Choice' (1955) 69(1) *Quarterly Journal of Economics* 99, 114.

52. Mark A. R. Kleiman, 'Swift–Certain–Fair: What Do We Know Now, and What Do We Need to Know?' (2016) 15(4) *Criminology & Public Policy* 1185, 1186.

53. See for example, Donald A. Andrews and James Bonta, *The Psychology of Criminal Conduct* (3rd ed., 2003); Adele Harrell and John Roman, 'Reducing Drug Use and Crime among Offenders: The Impact of Graduated Sanctions' (2001) 31(1) *Journal of Drug Issues* 207; Phillip J. Cook, 'Behavioral Science Critique of HOPE' (2016) 15(4) *Criminology & Public Policy* 1155.

54. Cook (2016), above n 53, 1157.

## Swift, certain and fair programs in the United States

- 2.10 Over approximately the last 20 years, a number of programs have been developed in various jurisdictions in the United States that are premised on the principles of swiftness, certainty and fairness. The most notable of these programs is the HOPE program. Most other similar programs in the United States are based on HOPE.

### Hawaii's Opportunity Probation with Enforcement Program

- 2.11 Hawaii's Opportunity Probation with Enforcement (HOPE) Program is a probation<sup>55</sup> compliance regime that requires swift, certain and fair responses to every breach of a condition of probation. That is, once a HOPE participant is found to have breached a condition of their probation, they immediately receive a sanction (most often, a few days in custody). The program primarily targets 'drug offenders and others at high risk of recidivism',<sup>56</sup> though it has over time been extended to include a number of sex offenders, violent offenders, and domestic violence offenders.<sup>57</sup>

### Background

- 2.12 In 2004, Judge Steven Alm of the First Judicial Circuit in Honolulu, Hawaii, observed that the existing process for probation as usual was failing. Probation officers were routinely disregarding non-compliance with conditions (such as a positive drug test or failing to attend an appointment), and they were doing so primarily because their only options for responding to non-compliance were to file a motion to revoke probation entirely<sup>58</sup> or to give the probationer a warning with no further punishment.<sup>59</sup>
- 2.13 Judge Alm concluded that offenders had come to believe that probation did not have to be taken seriously because there were no immediate consequences for their actions, and because the decision about when to subject an offender to a sanction was arbitrary and unfair.<sup>60</sup> Rather than consistently sanctioning probation violations, the system tended to allow repeated violations to go unpunished. Then, when a sanction for violation was eventually imposed, the response, which had been delayed by as long as a year,<sup>61</sup> was severe and costly.
- 2.14 Judge Alm has said that he drew on his experience as a parent in approaching the problem:
- If your child breaks one of [the] rules, you do something about it right away. If you give the child a consequence that is swift, certain, consistent and proportionate to the misbehaviour, he or she can tie together the bad behaviour with the consequence and learn not to do it again.<sup>62</sup>

55. In the United States, probation is a form of community supervision imposed as a sentence upon a convicted offender in lieu of incarceration. Probation allows offenders to serve a sentence while remaining in the community and complying with various conditions. In Australia, supervised release orders (such as community-based orders and intensive correction orders) had their origins in a form of probation that differed from probation in the United States. For a discussion of this history, see Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Australia* (2nd ed., 1999) 601–603.

56. Bartels (2015), above n 33, 53–54. See also Angela Hawken, 'HOPE: Theoretical Underpinnings and Evaluation Findings' (Testimony prepared for the Oregon State Legislature, 10 April 2009).

57. Michael D. Campbell et al., *State of the Art of HOPE Probation* (2015) 12.

58. This would require the court to resentence the offender to either a new probationary order or a prison sentence of some length.

59. Steven S. Alm, 'HOPE Probation and the New Drug Court: A Powerful Combination' (2015) 99(5) *Minnesota Law Review* 1665, 1669–1670.

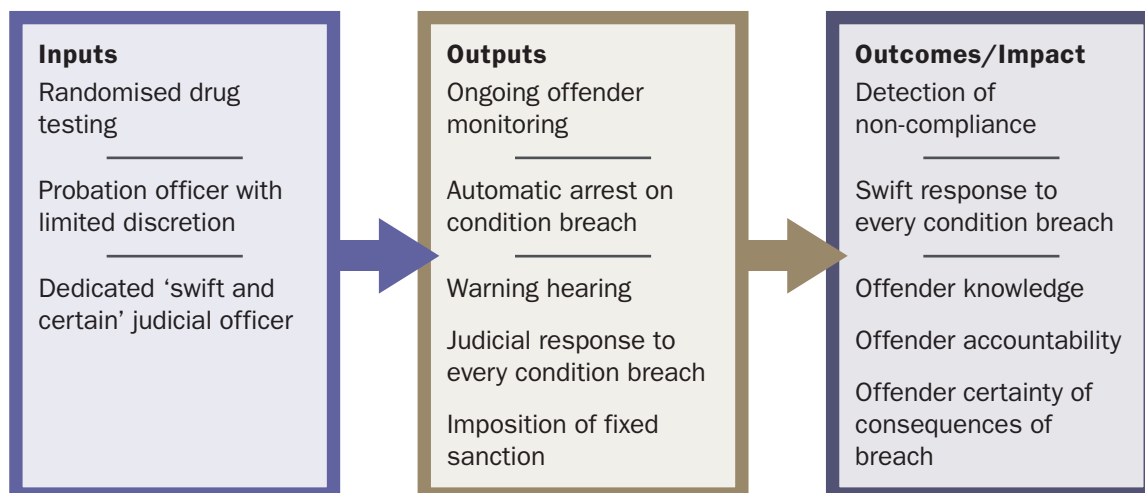
60. Michigan Supreme Court, *Developing and Implementing a Swift and Sure Sanctions Probation Program in Michigan* (2016) 3; Tiffany Hill, 'Tough Love', *Honolulu* (Hawaii) 1 June 2010 <<http://www.honolulumagazine.com/Honolulu-Magazine/June-2010/Tough-Love/>> at 28 October 2016.

61. Richard Kiyabu et al., *Hawaii's Opportunity Probation with Enforcement (HOPE): An Implementation Analysis* (2010) 5.

62. Alm (2015), above n 59, 1671–1672.

- 2.15 The HOPE program was therefore designed to promote behavioural change by creating a strong and immediate relationship between a probationer's actions and the system's responses to those actions.<sup>63</sup>
- 2.16 Under Hawaii's probation law, the court had the power to modify the terms of an individual's probation in order to impose a jail term.<sup>64</sup> Therefore, the pilot was able to be implemented without changes to the existing legislation. Jail was considered to be the only appropriate sanction, as it is 'impactful, unpleasant, and [can] be imposed immediately'.<sup>65</sup>
- 2.17 The HOPE program was initially trialled on 34 offenders (18 sex offenders and 16 drug offenders) and has since expanded to include over 2,200 participants.<sup>66</sup>
- 2.18 HOPE Probation is now one level (the middle tier) of Hawaii's 'continuum of supervision' model in which an offender's level of risk determines which level of supervision is most appropriate while they are on probation. Low-risk offenders are subject to routine probation (minimal supervision). Medium- to high-risk offenders, particularly those who have performed poorly on routine probation, are subject to HOPE Probation. Those who are even higher risk (perhaps because they have had their HOPE Probation revoked) are subject to Drug Court supervision, which is more intensive than HOPE supervision (maximum supervision).
- 2.19 Figure 1 briefly summarises the logic model for HOPE Probation, identifying the inputs, outputs and outcomes/impact of the program. Implicit in the model is the expectation that the outcomes/impact of the program will result in greater offender compliance.

**Figure 1: Logic model for HOPE Probation**



63. Judge Alm writes that he thought that 'if a probationer was using drugs, tested positive at the probation office, was arrested on the spot, transported to jail, and then brought back to court in two days for a hearing on that violation, this could be a real teachable moment for that offender': Ibid 1672.

64. Under Hawaii's probation law, judges have the authority to modify the terms of an individual's probation, including imposing jail terms, if the judge feels that it would help the offender 'in leading a more law abiding life': Kiyabu et al. (2010), above n 61, 5, citing *Hawai'i Revised Statutes* (HRS) § 706–625 (2013).

65. Alm (2015), above n 59, 1672.

66. Angela Hawken et al., *HOPE II: A Follow-Up to Hawai'i's HOPE Evaluation* (2016) 2.

### Key elements of HOPE

- 2.20 Cecilia Klingele has described the three elements most responsible for the deterrent effect of HOPE at a general level: the detection of condition violations, a quick response to condition violations and modest but unwavering punishment for condition violations.<sup>67</sup>
- 2.21 There have, however, also been a number of attempts to discern the specific key elements of HOPE. Judge Alm has outlined what he refers to as 12 benchmarks for the success of HOPE (which he suggests should be replicated if other jurisdictions expect to achieve similarly positive results).<sup>68</sup> Researchers at the Institute for Behavior and Health (IBH), under the guidance of Judge Alm, have identified 16 essential and three recommended elements of HOPE.<sup>69</sup> Independent researchers at the Penn State Justice Center for Research have identified what they believe are the 11 essential criteria of HOPE during a demonstration field experiment (DFE).<sup>70</sup> Table 1 compares these three distinct attempts to distil the key elements of HOPE.
- 2.22 There are a number of similarities between how Judge Alm, the IBH researchers and the DFE researchers have framed the key elements of HOPE. The elements that all three seem to agree are essential include the importance of:
- leadership;<sup>71</sup>
  - cohort identification, especially medium- to high-risk offenders;
  - an initial warning hearing to establish the behavioural contract;<sup>72</sup>
  - establishing a randomised drug testing regime;<sup>73</sup>
  - violation hearings being held soon after the violating behaviour; and
  - low-grade imprisonment sanctions being available.<sup>74</sup>

67. Cecilia Klingele, 'What Are We Hoping For? Defining Purpose in Deterrence-Based Correctional Programs' (2015) 99(5) *Minnesota Law Review* 1631, 1648.

68. BOTEC Analysis, *Swift Certain & Fair: Ingredients for Success* (BOTEC Analysis, 2016) <<http://www.swiftcertainfair.com/ingredients-for-success/>> at 11 November 2016.

69. The Institute for Behavior and Health published three consecutive reports on other jurisdictions' fidelity to these elements: Campbell et al. (2015), above n 57, 28–35; Helen DuPont et al., *HOPE-Like Probation and Parole: 2015 Survey Summary* (2015); Michael D. Campbell et al., *The HOPE Probation Strategy and Fidelity to It: A Summary* (2015) 26–33.

70. Pamela K. Lattimore et al., *Summary Findings from the National Evaluation of the Honest Opportunity Probation with Enforcement Demonstration Field Experiment: The HOPE DFE Evaluation* (2016) 2.

71. Two factors often cited as being crucial to Hawaii's effective implementation of HOPE have been Judge Alm's championing of the HOPE model and the administrative structure in Hawaii, in which probation is under the direction of the judiciary, which assists in ensuring adherence to the model: Stephanie A. Duriez et al., 'Is Project HOPE Creating a False Sense of Hope? A Case Study in Correctional Popularity' (2014) 78(2) *Federal Probation* 57, 61; Gary Zajac et al., 'All Implementation Is Local: Initial Findings from the Process Evaluation of the Honest Opportunity Probation with Enforcement (HOPE) Demonstration Field Experiment' (2015) 79(1) *Federal Probation* 31, 35; Campbell et al. (2015), above n 57, 9.

72. Warning hearings are generally conducted in groups (to promote a perception of equal treatment as well as facilitate efficient use of court time) and last for approximately 15 minutes. The judge follows a script that initiates probationers into the program by encouraging them to succeed and take responsibility for their actions, and clearly explaining what the sanctions are for violation. See Steven S. Alm, 'A New Continuum for Court Supervision' (2013) 91(4) *Oregon Law Review* 1181, 1185; Hawken et al. (2016), above n 66, 16, 80–83 (providing a copy of the warning hearing script).

73. Hawken et al. (2016), above n 66, 16–17.

74. If an offender is employed, they are usually able to serve their sentence over successive weekends: Bartels (2015), above n 33, 55.

**Table 1: Comparison table: key elements of a HOPE-like program**

| Key element  | Judge Alm's benchmarks for success | IBH researchers' essential and recommended elements | HOPE DFE researchers' key elements |
|--|------------------------------------|---|------------------------------------|
| 1. Shared leadership (especially between judge and probation)                  | ✓                                  | ✓   | ✓                                  |
| 2. Integration of HOPE into existing probation system                          | ✓                                  | ✓   |                                    |
| 3. Statutes allow for sufficient (short) prison terms for non-compliance       | ✓                                  | ✓   | ✓                                  |
| 4. Buy-in from all key stakeholders  | ✓                                  | ✓   |                                    |
| 5. Staff training in HOPE principles   | ✓                                  | ✓   |                                    |
| 6. Identification of appropriate medium- to high-risk target population        | ✓                                  | ✓   | ✓                                  |
| 7. Identification of appropriate violations that should receive zero tolerance | ✓                                  | ✓   |                                    |
| 8. Warning hearing by judge (initiation into program)                          | ✓                                  | ✓   | ✓                                  |
| 9. Drug testing strategy (with immediate results)                              | ✓                                  | ✓   | ✓**                                |
| 10. Reduced frequency of drug tests over time                                  | ✓                                  | ✓   | ✓                                  |
| 11. Means to effect immediate arrest and custody for detected violations       | ✓                                  | ✓   |                                    |
| 12. Expedited warrant service (for absconders)                                 | ✓                                  | ✓   |                                    |
| 13. Means to hold violation hearings swiftly (within two to four days)         | ✓                                  | ✓   | ✓                                  |
| 14. Means to send violation reports to court swiftly                           | ✓                                  | ✓   |                                    |
| 15. Consistent and proportionate sanctions strategy                            | ✓                                  | ✓   | ✓                                  |
| 16. Continuum of treatment services available for offenders                    | ✓                                  | ✓   |                                    |
| 17. Quality assurance for fidelity monitoring and feedback                     | ✓                                  | ✓   |                                    |
| 18. Pilot period (30–50 offenders)   | ✓                                  | ✓*  |                                    |
| 19. Probation officers trained in recidivism reduction principles              | ✓                                  | ✓*  |                                    |
| 20. Evaluation component   | ✓                                  | ✓*  |                                    |
| 21. Average prison time while on program is 19 days or less                    | ✓                                  |   | ✓                                  |
| 22. Sanction imposed within three days of violation hearing                    | ✓                                  |   | ✓                                  |

\*The IBH researchers described these three elements as recommended rather than essential.

\*\*The HOPE DFE researchers included 'Consequences for missed tests' as a separate identified element of the drug testing strategy.



- 2.23 In contrast, both the IBH researchers and Judge Alm identified the following key elements that the DFE researchers did not:
- the importance of HOPE being integrated into an existing probation system;<sup>75</sup>
  - the need for the sanctions regime to be supported by a corresponding continuum of treatment for participants;<sup>76</sup>
  - the importance of establishing an expedited warrant system for probationers that have absconded;<sup>77</sup> and
  - the importance of a quality assurance strategy to monitor each stakeholder's compliance with the model.
- 2.24 Further, the IBH researchers (notably, under the supervision of Judge Alm) also identified several key elements that the DFE researchers did not, such as the need to achieve buy-in from all stakeholders and the importance of training relevant staff (prosecutors, defence counsel, clerical staff, drug testers, law enforcement, judges and probation officers) in HOPE principles.
- 2.25 In addition, the DFE researchers interpreted a number of the key elements of HOPE differently from how both Judge Alm and the IBH researchers interpreted them:
- the IBH researchers generally emphasised that sanctions (whatever they are) need to be consistent and proportionate,<sup>78</sup> while the DFE researchers identified jail or confinement as the only available sanction;<sup>79</sup>
  - the IBH researchers emphasised the importance of identifying which violations are most appropriately subject to zero tolerance (which might include missed appointments), while the DFE researchers described HOPE as being characterised by SCF responses to *any* condition violations;<sup>80</sup> and
  - the IBH researchers described HOPE as a sanction-based program that not only punishes but also supports the offender;<sup>81</sup> while the DFE researchers only focused on the punitive nature of the program<sup>82</sup> ('emphasizing the stick over the carrot'<sup>83</sup>).

75. Although the DFE researchers agreed that integration is important, they did not use this as a measure of model fidelity (while the IBH researchers did).

76. In HOPE, drug treatment is provided to those who request it or those who cannot stop using alcohol or drugs on their own (as indicated by repeated violations): Alm (2013), above n 72, 1185; Hawken et al. (2016), above n 66, 10.

77. Hawken et al. (2016), above n 66, 17.

78. HOPE judges may also impose assessment for substance abuse, placement in a treatment/rehabilitation facility, and assessment for a mental health evaluation or participation in domestic violence batterer cases: Campbell et al. (2015), above n 57, 21–22.

79. Lattimore et al. (2016), above n 70.

80. *Ibid* 1.

81. Campbell et al. (2015), above n 57, 2, 4 ('HOPE provides swift, certain, consistent and proportionate consequences for misbehaviour in an environment of caring support ... HOPE is much more than just a sanctions strategy').

82. See for example, the 11 criteria used to assess HOPE-like programs' fidelity to the HOPE model: Lattimore et al. (2016), above n 70, 1.

83. James C. Oleson, 'HOPE Springs Eternal: New Evaluations of Correctional Deterrence' (2016) 15(4) *Criminology & Public Policy* 1163, 1174.

- 2.26 The Council also notes two additional elements that seem to have been integral to HOPE and HOPE-like programs. The first is a focus on 'binary' conditions. Most HOPE-like programs target non-compliance that can be easily ascertained, such as missing an appointment or failing a drug test. This is likely because such binary outcomes are difficult to dispute (therefore avoiding a contested hearing and consequential delay), and this likely explains why such programs have typically been applied to drug and alcohol offending. Binary conditions may therefore be an important consideration in any attempt to use a HOPE-like program to target offenders other than those with substance-abuse issues. Conversely, such programs may not be effective if the violation of the condition is contestable or difficult to prove, such as breaching a no-contact requirement.
- 2.27 The second additional element is the use of HOPE for offenders on conditional release orders. Most HOPE-like programs apply to offenders who are on orders allowing their conditional release into the community, such as the Northern Territory's conditional suspended sentence order.<sup>84</sup> Under this type of order, the offender's conditional liberty is temporarily revoked when they receive an SCF sanction.
- 2.28 Lastly, the Council notes that there is disagreement over whether SCF programs should only use custodial sanctions, or whether custodial sanctions should be but one of the sanctions (if included at all) in an SCF program. For example, HOPE Probation is defined by a policy that every detected violation will result in a swift jail sanction of a few hours or two, 15 or 30 days (depending on the violation),<sup>85</sup> but HOPE judges are also able to respond to condition violations with a variety of non-custodial options.<sup>86</sup>
- 2.29 Angela Hawken recently described the issue of custody-only sanctions as a 'bone of contention' between HOPE researchers and Judge Alm: although Judge Alm is a firm believer that jail sanctions are a strong deterrent capable of motivating behavioural change,<sup>87</sup> there is not yet any empirical evidence that short periods of custody are the optimal response in an SCF program.<sup>88</sup>

## Other HOPE-like SCF programs

- 2.30 There are now a number of jurisdictions in the United States that have piloted or introduced SCF programs, some of which were developed in an attempt to replicate HOPE while others were developed independently of HOPE. Estimates vary, but Hawken asserted in early 2014 that there were at least 40 jurisdictions in 18 states that had adopted SCF programs,<sup>89</sup> and in January 2015 Judge Alm and Hawken separately asserted that there were SCF programs in 21<sup>90</sup> and 28<sup>91</sup> states. Table 2 summarises some of the key features of some selected SCF programs in operation.
- 2.31 Notably, none of these programs was designed to specifically target family violence offenders.

84. *Sentencing Act 1995* (NT) ss 40–43.

85. Campbell et al. (2015), above n 57, 47–50, 56.

86. Such non-custodial options include assessment for substance abuse, placement in a treatment or rehabilitation facility, assessment for a mental health evaluation, and participation in domestic violence batterer programs: *ibid* 21–22.

87. Alm (2015), above n 59, 1672.

88. Angela Hawken, 'All Implementation Is Local' (2016) 15(4) *Criminology & Public Policy* 1229, 1235.

89. Beth Pearsall, 'Replicating HOPE: Can Others Do It As Well As Hawaii?' (2014) 273 *National Institute of Justice Journal* 1.

90. There are 160 distinct SCF programs: Bartels (2015), above n 33, 54.

91. In addition, there was one Indian nation and one Canadian province: Hawken et al. (2016), above n 66, 24.

**Table 2: Comparison of selected SCF programs operating in different jurisdictions in the United States**

|   | 24/7 Sobriety Project   | Washington Intensive Supervision Program (WISP)                      | Probation Accountability with Certain Enforcement (PACE)                            | Decide Your Time (DYT)   | Swift and Sure Sanctions Probation Program  | Supervision with Intensive Enforcement (SWIFT)   | Supervision, Monitoring, Accountability, Responsibility and Treatment (SMART) |
|---|---|--|---|--|---|--|---|
| <b>Jurisdiction</b>                       | South Dakota  | Washington   | Alaska  | Delaware   | Michigan  | Texas  | Kentucky  |
| <b>Active since</b>                       | 2005  | 2010   | 2010  | 2010   | 2011  | 2011   | 2011  |
| <b>Eligible offenders</b>                 | Offenders with numerous convictions for driving under the influence | All offenders under correctional supervision (currently over 15,000) | All offenders under correctional supervision  | Probationers requiring intensive supervision after testing positive for drugs while on probation | All offenders under correctional supervision, especially those with previous probation violations | All felony offenders on probation except sex offenders, offenders receiving disability benefits and offenders with severe mental impairments | All offenders on probation, but primarily targeted at drug-related offenders  |
| <b>Randomised drug and alcohol tests?</b> | ✓   | ✓  | ✓   | ✓  | ✓   | ✓  | ✓   |
| <b>Binary conditions?</b>                 | ✓   | ✓  | ✓   | ✓  | ✓   | ✓  | ✓   |
| <b>Fixed sanctions?</b>                   | ✓   | ✓  | Warning hearing, but no fixed sanctions   | ✓  | ✓   | ✓  | ✓   |
| <b>Graduated sanctions?</b>               | ✓   | ✓*   | Two to three days' imprisonment   | ✓**  | ✓**   | ✓**  | ✓   |
| <b>Timeframes for response?</b>           | Immediate incarceration   | Immediate arrest, and violation hearing within 72 hours              | Immediate arrest or bench warrant for arrest, and violation hearing within 72 hours | Immediate incarceration  | Violation hearing within 72 hours   | Next-day arrest or violation hearing   | 'Immediate' (no fixed timeframe)  |

\*The first violation leads to a stipulated agreement, and the second to fifth violations result in one to three days' imprisonment.

\*\*The progressive sanctions in these jurisdictions include not only imprisonment but also variously changes to curfew, additional treatment requirements, additional reporting requirements, additional community service hours and extensions of the supervision period.

### Evaluations of HOPE and HOPE-like SCF programs

- 2.32 There have been a number of positive evaluations of both HOPE and HOPE-like programs over the last decade. The Council notes, however, the recent publication of results from four evaluations of HOPE-like programs across the United States that have significantly shifted the evidence base for the effectiveness of HOPE-like programs. There is now strong evidence that, compared with 'probation as usual', HOPE-like programs do not necessarily reduce recidivism, rearrests, probation revocations or time spent in jail.
- 2.33 HOPE itself has been positively evaluated several times. The first was an internal review of the pilot stage of the program in 2004. The second was a randomised controlled trial (RCT)<sup>92</sup> and process evaluation in 2009. The third was a 76-month follow-up of the 2009 evaluation. The results of these evaluations are outlined in Table 3.
- 2.34 There have also been a number of positive evaluations of HOPE-like programs in other United States jurisdictions. For example, a randomised controlled trial of the Washington Intensive Supervision Program (WISP) compared 35 offenders on 'probation as usual' with 35 offenders on WISP, and found that WISP probationers demonstrated reduced drug use, reduced incarceration and reduced criminal activity.<sup>93</sup> Similar evaluations also yielded positive findings for Anchorage's Probation Accountability with Certain Enforcement (PACE) program,<sup>94</sup> Michigan's Swift and Sure Sanctions Probation Program<sup>95</sup> and Kentucky's Supervision, Monitoring, Accountability, Responsibility and Treatment (SMART) program.<sup>96</sup> Evaluations of South Dakota's 24/7 Sobriety Project found that the program reduced repeat instances of participants driving under the influence,<sup>97</sup> reduced arrest rates for participants by 12% and notably also reduced subsequent arrests for family violence by 9%.<sup>98</sup>
- 2.35 There have also, however, been a number of evaluations of HOPE-like programs that have not generated successful results. An evaluation of Delaware's Decide Your Time (DYT) program, for example, found that there was little difference in the reoffending rates and probation violation rates at six, 12 and 18 months between DYT probationers and those on 'probation as usual'.<sup>99</sup> In fact, the reoffending rates were slightly higher for DYT probationers.
- 2.36 Most recently, researchers published the results of what is currently the most significant evaluation of HOPE-like programs outside Hawaii, the Honest Opportunity Probation with Enforcement Demonstration Field Experiment (HOPE DFE), discussed below.

92. Randomised controlled trial evaluations have been described as 'the gold standard for this sort of research' because 'you don't have selection bias where you are only picking the people who are likely to succeed': ABC Radio National, 'Hawaii Shows Way in "Swift and Certain Justice"', *The Law Report*, 30 June 2015 (Lorana Bartels) <<http://www.abc.net.au/radionational/programs/lawreport/swift-and-certain-justice/6581718#transcript>>.

93. Angela Hawken and Mark Kleiman, *Washington Intensive Supervision Program: Evaluation Report* (2011) 22. In 2015 other researchers reached similar conclusions using a quasi-experimental design: Zachary Hamilton et al., *Evaluation of the Washington State Department of Corrections (WADOC) Swift and Certain (SAC) Policy: Process, Outcome and Cost-Benefit Evaluation* (2015) 7–8. A recent larger-scale study found similar findings: Zachary Hamilton et al., 'Impact of Swift and Certain Sanctions: Evaluation of Washington State's Policy for Offenders on Community Supervision' (2016) 15(4) *Criminology & Public Policy* 1009.

94. Teresa W. Carns and Stephanie Martin, *Anchorage PACE: Probation Accountability with Certain Enforcement: A Preliminary Evaluation of the Anchorage Pilot PACE Project* (2011).

95. Kristen DeVall et al., *Evaluation of Michigan's Swift & Sure Sanctions Probation Program* (2015).

96. Kentucky Justice & Public Safety Cabinet Criminal Justice Council, *HB463 Implementation Report* (2015) 3–5; Kentucky Justice & Public Safety Cabinet Criminal Justice Council, *HB463 Implementation Report* (2014) 3–5; Lisa M. Shannon et al., 'Implementation of an Enhanced Probation Program: Evaluating Process and Preliminary Outcomes' (2015) 49 *Evaluation and Program Planning* 50.

97. Roland Loudenburg et al., *South Dakota 24/7 Sobriety Program Evaluation Supplemental Findings Report* (2012) 4, 21.

98. Beau Kilmer et al., 'Efficacy of Frequent Monitoring with Swift, Certain, and Modest Sanctions for Violations: Insights from South Dakota's 24/7 Sobriety Project' (2013) 103(1) *American Journal of Public Health* e37, e39.

99. Daniel O'Connell et al., 'Utilizing Swift and Certain Sanctions in Probation: Final Results from Delaware's Decide Your Time Program' (Paper presented at the annual meeting of the American Society of Criminology, Atlanta, 21 November 2013) slides 14, 20. O'Connell and colleagues recently published similar null results from the Decide Your Time program: Daniel J. O'Connell et al., 'Decide Your Time: A Randomized Trial of a Drug Testing and Graduated Sanctions Program for Probationers' (2016) 15(4) *Criminology & Public Policy* 1073.

**Table 3: Evaluations of HOPE**

| Year | Study                       | Method  | Findings   |
|------|-----------------------------|---|--|
| 2004 | Quasi-experimental          | Comparison of outcomes for 940 probationers on HOPE with 77 probationers on routine probation at three and six months.  | Probationers not on HOPE were significantly more likely to have a positive drug test at both the three-month (28%) and six-month (15%) follow-ups. <sup>a</sup>  |
| 2009 | Randomised controlled trial | Comparison of outcomes for 330 probationers on HOPE with 163 probationers on routine probation over 12 months.  | After 12 months on the program, HOPE probationers were 55% less likely to be arrested for a new crime, 53% less likely to have their probation revoked, 72% less likely to test positive for illegal drugs and 61% less likely to miss appointments with their probation officers, and they spent 48% fewer days in prison. <sup>b</sup> |
| 2009 | Process evaluation          | Survey of stakeholders, including 211 HOPE probationers, 20 probation officers, 11 public defenders, 12 prosecutors, 11 court staff and seven judges.             | Program implementation was rolled out largely as intended, variation between judges diminished over time (initial inconsistency had caused some discontent among probation officers and probationers) and despite increased workload for prosecutors and court staff, stakeholders remained enthusiastic about the program. <sup>c</sup> |
| 2016 | Randomised controlled trial | 76-month follow-up of all probationers included in the first randomised controlled trial (330 probationers on HOPE with 163 probationers on routine probation)    | Probationers not on HOPE had 22% more new charges per offender (an average of 1.12 charges) than HOPE probationers (an average of 0.91 charges), and probationers not on HOPE were more likely to return to prison (27%) than HOPE probationers (13%). <sup>d</sup>  |
| 2016 | Process evaluation          | Survey of 11 out of 16 HOPE Probation officers in the Integrated Community Sanctions Unit, and 10 of the 15 probation officers in the Adult Client Services Unit. | HOPE probationers perceived the risk of punishment for violation as very high (suggesting high deterrent value), and probation officers considered that HOPE made them more effective at their job. <sup>e</sup>   |

a Angela Hawken and Mark Kleiman, *Managing Drug Involved Probations with Swift and Certain Sanctions: Evaluating Hawaii's HOPE* (2009) 18–19; Lorana Bartels, 'Swift and Certain Sanctions: Is It Time for Australia to Bring Some HOPE into the Criminal Justice System?' (2015) 39(2) *Criminal Law Journal* 53, 55–57.

b Angela Hawken and Mark Kleiman, *Managing Drug Involved Probations with Swift and Certain Sanctions: Evaluating Hawaii's HOPE* (2009) 64.

c *Ibid* 5, 27–50. At the time of the process evaluation, HOPE had been expanded to all nine judges in the Oahu court: at 38.

d Angela Hawken et al., *HOPE II: A Follow-Up to Hawaii's HOPE Evaluation* (2016) 12–13.

e *Ibid* 3.

### **HOPE Demonstration Field Experiment**

2.37 Until recently, it was acknowledged that, despite some of the positive results of HOPE, there had not yet been any rigorous demonstration that HOPE could be replicated in other jurisdictions in the United States, let alone overseas:

no demonstration has been given that probation/parole monitoring systems designed along the lines of Project Hope [could] be replicated generally in settings outside the small island state of Hawaii ... The failure of intensive supervision probation to reduce recidivism rates ... should lead to circumspection in claiming that Project Hope can be extrapolated to the rest of the United States.<sup>100</sup>

2.38 In order to determine whether HOPE-like SCF programs could be effective – in reducing drug use, probation revocations, arrests and convictions – in jurisdictions other than Hawaii, a number of researchers from the Penn State Justice Center for Research conducted an Honest Opportunity Probation with Enforcement Demonstration Field Experiment (HOPE DFE), evaluating four programs around the United States modelled on HOPE. The programs were set up in four counties in Arkansas, Massachusetts, Oregon and Texas. The HOPE DFE began in 2011 and incorporated randomised controlled trials, a process evaluation and a cost-effectiveness evaluation. A brief summary of the initial results of the randomised controlled trials was released in September 2016, with a more detailed paper published in November 2016.<sup>101</sup> The initial findings of the process evaluation were released in 2015.<sup>102</sup>

2.39 The preliminary findings of the HOPE DFE show that HOPE's effectiveness in Hawaii (in reducing recidivism and encouraging compliance with court-ordered conditions) has not been replicated in any of the four DFE sites.<sup>103</sup> Overall:

- HOPE probationers and individuals under 'probation as usual' performed equally in terms of new arrests and new convictions;
- in one site (Arkansas), HOPE probationers were *more* likely than those on 'probation as usual' to be convicted for a new offence; and
- probation revocations were higher in Arkansas and Oregon for HOPE probationers than those on 'probation as usual', with similar findings in the other two sites.<sup>104</sup>

2.40 The DFE researchers concluded that these results could not be explained by poor fidelity to the HOPE model. They assessed each sites' fidelity to what they identified as the 11 key requirements of the HOPE model (see Table I) and found fidelity to almost all of those requirements to be 'very good to excellent' at every site. The only area that did not achieve that high fidelity rating was 'swiftness' of response, primarily because of absconders being difficult to locate.<sup>105</sup>

100. Steven N. Durlauf and Daniel S. Nagin, 'Imprisonment and Crime: Can Both Be Reduced?' (2011) 10(11) *Criminology & Public Policy* 13, 39.

101. Pamela K. Lattimore et al., 'Outcome Findings from the HOPE Demonstration Field Experiment: Is Swift, Certain, and Fair an Effective Supervision Strategy?' (2016) 15(4) *Criminology & Public Policy* 1103.

102. Zajac et al. (2015), above n 71, 31.

103. Lattimore et al. (2016), above n 70, 8; Lattimore et al. (2016), above n 101.

104. *Ibid.*

105. Lattimore et al. (2016), above n 70, 8.

- 2.41 The DFE process evaluation found there to be a number of challenges to implementing HOPE-like programs in other jurisdictions, including:
- deterrence-based sanctions contradicting the underlying principles of corrections management in a particular jurisdiction<sup>106</sup> (this will be particularly important to consider in the Victorian context as Corrections Victoria uses a risk–needs–responsivity (RNR) framework that attempts to address the underlying causes of offending behaviour);<sup>107</sup> and
  - differing levels of strength and formality in relationships between corrections and the judiciary (for example, Hawaii's probation department is under the direction of the judiciary, and the judge can more easily ensure that all violations are brought to the attention of the court).<sup>108</sup>
- 2.42 Judge Alm has described these challenges as crucial considerations in any attempt to replicate HOPE,<sup>109</sup> recommending that an SCF approach should mesh with the jurisdiction's existing system and that there should be a similar relationship between the judiciary and corrections officials.
- 2.43 Similarly, the DFE researchers concluded that the effectiveness of implementation of a HOPE-like SCF program in other jurisdictions is associated with three key conditions:
- probation being organisationally linked to the court at the state or county levels, and/or having sufficient latitude to choose to collaborate with the court on innovations like HOPE;
  - the HOPE judge being able to closely direct the management of HOPE through oversight of probation officers; and
  - the probation department being centrally involved in the decision to participate in the HOPE DFE.<sup>110</sup>
- 2.44 The Council notes that Victoria does not share the same common administrative arrangements between the courts and Corrections Victoria.
- 2.45 The final results of the HOPE DFE are due to be published in March 2017.<sup>111</sup>
- 2.46 A number of authors have now had an opportunity to review and respond to the initial HOPE DFE results, the majority arguing against the continued implementation of HOPE-like programs:
- In a meta-analysis of five separate studies of HOPE and HOPE-like programs, covering eight distinct jurisdictions, Cullen and his colleagues found the results to be 'weak to dismal'. They recommended reclassifying HOPE-like programs as zero-tolerance supervision rather than swift, certain and fair programs.<sup>112</sup>

106. Zajac et al. (2015), above n 71, 32–34.

107. See [3.132]–[3.158] for further discussion of Corrections Victoria's approach to the management of offenders; see also [4.75].

108. Zajac et al. (2015), above n 71, 32–35.

109. Alm (2015), above n 59, 1676–1677.

110. Zajac et al. (2015), above n 71, 35.

111. ClinicalTrials.gov, *HOPE Demonstration Field Experiment Multisite Evaluation* (ClinicalTrials.gov, 2016) <<https://clinicaltrials.gov/ct2/show/NCT01670708>> at 2 November 2016.

112. Francis T. Cullen et al., 'It's Hopeless: Beyond Zero-Tolerance Supervision' (2016) 15(4) *Criminology & Public Policy* 1215.

- Former commissioner of probation in New York City, Vincent Schiraldi, explained that the reason a HOPE-like program was never implemented in New York City was because it was inconsistent with the reforms that were working, such as allowing greater discretion for probation officers.<sup>113</sup> He also expressed concern over HOPE-like programs reverting to 'probation as usual', and therefore contributing to mass incarceration by allowing risk-averse responses to be justified by 'evidence-based' policies.<sup>114</sup>
- Behavioural researcher Phillip Cook expressed concern over the use of language like 'swift' and 'certain' in programs like HOPE. Although behaviour can be deterred by consequences that are swift and certain, sanctions in HOPE-like programs are neither swift nor certain, and are instead soon and probable.<sup>115</sup>
- Criminologist James Oleson expressed concern over the use of threats of criminal punishment in programs like HOPE to address drug use, as drug use is better characterised as a public health problem.<sup>116</sup>

2.47 In contrast, Judge Alm criticised the DFE researchers for classifying HOPE as a sanctions-only program, arguing that sanctions are just one component of the program; it also includes a caring and therapeutic component, with judge–probationer dialogues in the courtroom, and probation officers trained in using evidence-based practices.<sup>117</sup> Judge Alm has suggested that mischaracterising HOPE as a sanctions-only strategy may explain the poor results of the HOPE DFE. That is, cherry-picking certain elements for implementation would not achieve the positive results that maximum fidelity would,<sup>118</sup> because 'very few ideas work if not properly implemented'.<sup>119</sup>

2.48 The reticence to allow elements of the program to be 'cherry-picked' suggests that implementation of a HOPE-like model within a very different jurisdiction (such as Victoria) is likely to be challenging, particularly if some elements of HOPE are incompatible with the criminal justice system of the jurisdiction in question.

2.49 Mark Kleiman also suggested that the HOPE DFE results do not lead to the conclusion that SCF programs should be scrapped entirely, but rather suggest that it is a mistake to rely excessively on fidelity to the original HOPE model. He argues that programs like HOPE are not 'homogenous, manualized, "program[s]-in-a-box"'; they must be flexible and respond to jurisdictional particularities.<sup>120</sup> Therefore, whereas Judge Alm suggested that the poor results of the HOPE DFE might be the product of *not enough* fidelity to the HOPE model, Kleiman instead suggested that the poor results might be the product of *too much* fidelity to the HOPE model.

113. Vincent Schiraldi, 'Confessions of a Failed "HOPE-er"' (2016) 15(4) *Criminology & Public Policy* 1143, 1149.

114. *Ibid* 1150.

115. Cook (2016), above n 53.

116. Oleson (2016), above n 83.

117. Steven S. Alm, 'HOPE Probation: Fair Sanctions, Evidence-Based Principles, and Therapeutic Alliances' (2016) 15(4) *Criminology & Public Policy* 1195. For a description of the eight evidence-based principles, see: Crime and Justice Institute, *Implementing Evidence-Based Practice in Community Corrections: The Principles of Effective Intervention* (2004).

118. One study found, for example, that randomised drug testing without SCF sanctions had no effect on relapse or recidivism, whereas randomised drug testing coupled with SCF sanctions did reduce relapse and recidivism rates: Eric Grommon et al., 'Alternative Models of Instant Drug Testing: Evidence from an Experimental Trial' (2013) 9 *Journal of Experimental Criminology* 145, 164.

119. Mark A. R. Kleiman et al., 'Response to Stephanie A. Duriez, Francis T. Cullen, and Sarah M. Manchak: Theory and Evidence on the Swift–Certain–Fair Approach to Enforcing Conditions of Community Supervision' (2014) 78(2) *Federal Probation* 71, 72.

120. Kleiman (2016), above n 52, 1189.



### **Criticisms of HOPE and HOPE-like SCF programs**

2.50 HOPE and HOPE-like programs have been subjected to two distinct criticisms: the first addresses the strength of the evidence supporting the effectiveness of such programs, particularly in light of the HOPE DFE results, and the second is a critique of HOPE's underlying reliance on a deterrence-based approach.

#### **Effectiveness**

2.51 The main criticisms directed at the evidence supporting the effectiveness of HOPE are:

- the evidence base is very limited;<sup>121</sup>
- many of the studies conducted in other jurisdictions have had mixed results, such that there is limited evidence that HOPE can be replicated outside Hawaii;<sup>122</sup>
- HOPE (and SCF approaches more broadly) has been presented as a general model for probation supervision but has only been applied to substance-abusing offenders who can be subjected to randomised testing regimes or program conditions with similar 'binary' outcomes;<sup>123</sup>
- the randomised controlled trials conducted on HOPE test the outcomes of HOPE probationers against those on 'probation as usual', but probation as usual has been established as a relatively ineffective approach – therefore it would have been more useful to compare the effects of HOPE against the effects of other evidence-based interventions;<sup>124</sup>
- it remains unclear whether the HOPE program has achieved positive results because of its swift and certain sanctions, or because of other factors present in the program such as its adherence to risk–needs–responsivity (RNR) principles;<sup>125</sup>
- even if HOPE-like programs can achieve compliance with conditions, there is limited evidence that such compliance represents an identity shift in a positive direction for the offender, or whether it is because the offender is cowed into submission, is only temporarily and superficially acquiescent or grows content to let others order the detail of their days;<sup>126</sup> and
- HOPE is intended to promote fairness by applying sanctions in a consistent manner, thereby improving the perceived legitimacy of the program, but it may have the opposite effect if probationers are given no meaningful opportunity to explain the reasons for their violations and are sanctioned irrespective of their culpability.

2.52 In relation to this last point, Cecilia Klingele highlights the potential unfairness of a fixed sanction that ignores the circumstances of each violation, stating that:

While in many cases, the explanations probationers will offer will not justify deviation from the usual punishment ... in other cases, the violation will be mitigated by life circumstances that matter in terms of culpability. A relapse triggered by contact with a former assailant or by a fresh assault

121. There have only been two randomised controlled trials for Hawaii's HOPE program and one for Washington's WISP program. Neither of the HOPE randomised controlled trials was peer-reviewed. Other studies are limited by their methodological approach or small size of the groups of offenders examined. See further Duriez et al. (2014), above n 71, 59–60.

122. Duriez et al. (2014), above n 71, 60; Lattimore et al. (2016), above n 70. See also Hawken (2016), above n 88; Kleiman et al. (2014), above n 119, 71.

123. Frances T. Cullen et al., 'Before Adopting Project HOPE, Read the Warning Label: A Rejoinder to Kleiman, Kilmer, and Fisher's Comment' (2014) 78(2) *Federal Probation* 75, 76.

124. Duriez et al. (2014), above n 71, 60.

125. *Ibid* 64.

126. Klingele (2015), above n 67, 1655.

is qualitatively different from a relapse precipitated by a night of partying with friends. Similarly, the probationer who misses an appointment because of a sick child or mandatory overtime at work should be entitled to explain [their] situation to the court.<sup>127</sup>

- 2.53 HOPE has also been accused of experiencing unjustified 'correctional popularity' due to factors such as its 'catchy' acronym, the charismatic leadership provided by Judge Alm (as well as his unique relationship with most key stakeholders) and the strong advocacy role played by researchers Angela Hawken and Mark Kleiman, who have conducted the key evaluations of HOPE.<sup>128</sup>
- 2.54 Kleiman and two other HOPE researchers have responded to some of these criticisms, suggesting that there is indeed empirical support for SCF approaches, such as the positive results from similar programs in South Dakota and Texas.<sup>129</sup>

### **Focus on deterrence**

- 2.55 The second criticism often levelled at HOPE-like programs is that such programs focus on punitive responses to act as a deterrent and neglect efforts to address the underlying issues and the offender's circumstances that may contribute to their offending or drug addiction. Professor Michael Tonry for example has argued that programs that focus on reducing recidivism rather than promoting rehabilitation are short-sighted:
- [Programs like HOPE] are not seen as good because they enhance offenders' life chances, address deficits, or provide tools that may enable offenders to live more satisfying or productive lives, but because they reduce risks of reoffending. This puts the cart before the horse ... They are concerned only with the offender's compliance with conditions and do little except offer legal threats of what will happen if conditions are violated rather than attempt to address the circumstances in the offender's life that brought him or her into court.<sup>130</sup>
- 2.56 Critics further state that, although enforcing rules is justified from a behavioural perspective, it is only justified if enforcement occurs within the context of a broader treatment model:
- The use of [HOPE-like programs] might well be integrated into a supervision framework, but their use must involve a higher ratio of positive reinforcers to punishers. Shaping behaviour through punishment yields only short-term compliance and does little to teach offenders the skills necessary for sustained behavioral change. The emphasis must be on teaching offenders what to do, not just what not to do.<sup>131</sup>
- 2.57 Judge Alm has responded to this criticism by stating that HOPE-like programs create an environment – with probationers 'showing up for their appointments more often [and] sober' – in which probation officers can have the space to work with offenders to address other risk factors.<sup>132</sup>
- 2.58 More recently, Dr Lorana Bartels from the University of Canberra has suggested that the HOPE model may be more therapeutic than originally perceived.<sup>133</sup>

127. Ibid 1657, 1659.

128. Duriez et al. (2014), above n 71, 61–63.

129. Kleiman et al. (2014), above n 119, 71. Texas's SCF program is now called 'SWIFT' (Supervision with Intensive Enforcement). Clete Snell, *Fort Bend County Community Supervision and Corrections Special Sanctions Court Program: Evaluation Report* (2007).

130. Michael Tonry, 'Legal and Ethical Issues in the Prediction of Recidivism' (2014) 26(3) *Federal Sentencing Reporter* 167, 174.

131. Cullen et al. (2014), above n 123, 77.

132. ABC Radio National (2015), above n 92.

133. Lorana Bartels, 'Looking at Hawaii's Opportunity with Probation Enforcement (HOPE) Program through a Therapeutic Jurisprudence Lens' (2016) 16(3) *QUT Law Review* 30.

## Swift, certain and fair programs targeting family violence offenders

- 2.59 Although HOPE-like or SCF programs have primarily targeted offenders with substance-abuse issues, some SCF programs have also included family violence offenders within the target group. For example:
- in Oahu, Hawaii, all felony domestic violence offenders are now supervised under the HOPE program;<sup>134</sup>
  - in Washington, the WISP program encompasses all probationers, regardless of what type of offending they have committed; and
  - in Michigan, the Swift and Sure Sanctions Probation Program is not restricted to probationers with substance-abuse disorders, and anecdotally the program has been reported to be successful with the family violence offender group.<sup>135</sup>

### Michigan Domestic Violence Swift and Sure Sanctions Probation Program

- 2.60 For an 18-month period, Michigan piloted a specific Domestic Violence Swift and Sure Sanctions Probation Program. That pilot ceased in 2015 when funding was not continued.<sup>136</sup> The program was treatment-based and participation was voluntary. Offenders were eligible for the program if they had a history of domestic violence and they were also diagnosed with a substance-abuse disorder that contributed to the domestic violence. Once in the program, offenders received both substance-abuse and domestic violence treatment services (such as anger management therapy or mental health treatment where necessary). Failure to attend an appointment or a failed drug test resulted in immediate and certain jail sanctions.<sup>137</sup>
- 2.61 Although Michigan's program was targeted at family violence offenders, its focus was offender compliance with binary conditions (such as drug and alcohol tests, as well as missed appointments), and the swift and certain response to breach of these conditions was separate from the response to further family violence offending.<sup>138</sup>
- 2.62 No evaluation of the Michigan program is available. Further, the Council has not been able to identify an SCF program that has targeted family violence offenders that did not have randomised drug and alcohol testing as a core element of the program.

134. Pearsall (2014), above n 89. See also Hawken et al. (2016), above n 66, 45, which states that '200 domestic-violence misdemeanants' are supervised under the HOPE program following its expansion.

135. Email correspondence with Thomas Myers, Michigan Supreme Court (30 July 2016).

136. Lorne Fultonberg, *Domestic Abuse Grant Fails in City Council* (WILX, 14 July 2014) <<http://www.wilx.com/home/headlines/Domestic-Abuse-Grant-Fails-in-City-Council-267108601.html>> at 16 November 2016.

137. Email correspondence with Thomas Myers, Michigan Supreme Court (30 July 2016).

138. Further offending (as in HOPE and other SCF programs) results in cancellation of probation and likely imprisonment.

## Indirect targeting of family violence offenders

2.63 In addition to some SCF programs including offenders that have been found guilty of offending in a family violence context, there is also evidence to suggest that traditional SCF programs, which primarily target substance-abuse issues, also have the potential to indirectly reduce family violence. In South Dakota, for example, as discussed above, the 24/7 Sobriety Project was found to have reduced family violence arrests by 9% over a five-year period.<sup>139</sup> Researcher Beau Kilmer has said that this result is surprising because most people in the 24/7 program are not there for family violence-related issues.<sup>140</sup>

## Application of SCF programs in jurisdictions outside the United States

2.64 Even within the United States, there can be great disparity in the criminal justice systems of the various state jurisdictions, and there is limited evidence that SCF principles are consistently effective across diverse contexts and populations. Hawken has suggested that some of the unique social, correctional and even geographical characteristics of Hawaii may have been central to the success of the HOPE program.<sup>141</sup>

2.65 These differences become even greater when comparing the United States and Australia, such as differences in incarceration rates, sentencing approaches, the appointment procedures for judges and the custodial facilities and management of those facilities (for further discussion of these differences, see [4.7]–[4.11]).

2.66 A question arises as to whether an initiative that was developed in a vastly different social, correctional and political context can be implemented effectively in Australia. These issues will be discussed in detail in Chapter 4.

## Northern Territory's COMMIT pilot program

2.67 The Northern Territory has initiated a pilot program (COMMIT) to trial SCF responses to breaches of conditional suspended sentences of imprisonment.<sup>142</sup> It is anticipated that the results of this pilot program will provide some guidance on whether an SCF approach can be successfully implemented in an Australian context.

2.68 COMMIT is a 12-month Darwin-based trial that commenced in June 2016, and it is used to manage medium- to high-risk offenders who have been sentenced to a conditional suspended sentence of imprisonment.<sup>143</sup> It is intended that the pilot will include 30 to 50 offenders who have previously served a term of imprisonment, and the pilot will be evaluated at the end of the 12-month period.<sup>144</sup>

139. Kilmer et al. (2013), above n 98, e39.

140. Layla Tucak, 'US Trial Sees Drink-Driving Offenders Who Can't Pass Twice-Daily Breathalyser Test Jailed' ABC News (Melbourne) 8 November 2015 <<http://www.abc.net.au/news/2015-11-08/us-drink-driving-program-jails-those-who-cant-pass-breathalyser/6922728>> at 17 November 2016.

141. Pearsall (2014), above n 89.

142. *Sentencing Act 1995* (NT) ss 40–43 provides Northern Territory courts with the power to impose suspended sentences with conditions attached.

143. Northern Territory Department of Correctional Services, *The HOPE Strategy and the COMMIT Program Manual* (2016).

144. These are the exact numbers (30–50) that Judge Alm recommended as ideal for a pilot program.

- 2.69 If an offender on the pilot program violates the conditions of their suspended sentence (such as failure to abstain from alcohol), they will be required to serve short terms of imprisonment. If the offender continually breaches their conditions, the entire suspended sentence will be activated and the offender will have to serve the remainder of their sentence, less any time already served under the COMMIT program.<sup>145</sup>
- 2.70 The aim of COMMIT is to encourage behavioural change through short sanctions for breach, reduce the number of violations of suspended sentence conditions and, in turn, reduce the number of wholly reactivated sentences.<sup>146</sup> The cost savings from fewer reactivated sentences are expected to make up for the immediate cost of short terms of imprisonment imposed as a sanction for breach of conditions.
- 2.71 The timing of this reference prevents reliance on the results of the Northern Territory's pilot. However, any preliminary findings will need to be considered in light of the Northern Territory's unique correctional context. The Northern Territory has the highest incarceration rates in Australia<sup>147</sup> and has a mandatory sentencing scheme.<sup>148</sup> This may lead to a greater readiness from key stakeholders to accept an initiative that involves fixed sanctions in the form of a 'sanctions matrix'.<sup>149</sup> There is also an existing order (a conditional suspended sentence) that allows for an offender to serve short terms of imprisonment for condition violations, and as a result, no legislative reform was required in order to pilot the program.

## Distinguishing SCF programs from problem-solving courts

- 2.72 Problem-solving (or 'solution-focused') courts such as drug courts and family violence courts aim to address the underlying issues that result in criminal behaviour, and divert participants away from involvement in the traditional criminal legal system.
- 2.73 Generally speaking, problem-solving courts put judges at the centre of supervising offender rehabilitation. They usually operate out of existing courts and combine the authority of the court with the services necessary to reduce offending behaviours (integrating rehabilitation and punishment). The key features of problem-solving courts are specialisation of a court model around a targeted group, collaborative intervention and supervision, accountability through judicial monitoring, procedural fairness and a focus on outcomes.<sup>150</sup>
- 2.74 While some problem-solving courts may have SCF elements in their models – such as mandating attendance at certain programs and swiftly punishing failure to attend – there are differences in the underlying philosophies and operation of the two distinct interventions:
- first, problem-solving courts use a more therapeutic approach, while SCF programs tend to emphasise deterrence over rehabilitation; and
  - second, SCF programs are less resource intensive, both because drug treatment tends to be optional and because attendance at court is generally only triggered by a condition violation.<sup>151</sup>

145. Other than a drug treatment order, there is no sentencing order in Victoria that combines community supervision conditions with an unactivated term of imprisonment. The sentencing dispositions available in Victoria are discussed in Chapter 3.

146. Northern Territory Department of Correctional Services (2016), above n 143, 4.

147. Australian Bureau of Statistics, *Corrective Services, Australia, September Quarter 2016* (Australian Bureau of Statistics, 2016) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4512.0>> at 6 January 2017.

148. See for example, *Sentencing Act 1995* (NT) div 6A. For further discussion of standard sentence schemes in the Northern Territory, see Sentencing Advisory Council, *Sentencing Guidance in Victoria: Report* (2016) 162–163.

149. Northern Territory Department of Correctional Services (2016), above n 143, 7.

150. Centre for Justice Innovation (UK), *Problem-Solving Courts: An Evidence Review* (2016) iii.

151. Angela Hawken and Mark Kleiman, *Managing Drug Involved Probations with Swift and Certain Sanctions: Evaluating Hawaii's HOPE* (2009) 10, 32–33 ('HOPE does not mandate formal treatment for every probationer, and does not require regularly scheduled meetings with a judge').

- 2.75 The Marin County Family Violence Court in California, for example, is a therapeutic court that aims to assist convicted family violence offenders to address the underlying issues that may be contributing to their offending, providing intensive judicial supervision of cases, access to treatment programs (as well as court-mandated treatment programs) and swift responses to non-compliance with orders. 'Flash incarceration without a hearing' is just one of the 15 possible sanctions for non-compliance with a term of the order imposed by that court.<sup>152</sup>
- 2.76 The Council could not identify any published evaluations of the Marin County Family Violence Court.

### Question 1: Evidence base

In light of the available research:

- a. Is there sufficient evidence for the effectiveness of 'swift, certain and fair' (SCF) approaches to warrant their application in Victoria?
  - b. If so, is there sufficient evidence for the effectiveness of SCF approaches to warrant their application to family violence offenders?
- 

152. Superior Court of California (Marin), *Marin County Integrated Family Violence Court Program: Policies and Procedures* (2012) 23.

# 3. Sentencing and managing family violence offenders in Victoria

## Overview

- 3.1 This chapter presents data on family violence offenders in Victoria and examines the current framework for sentencing – and managing under sentence – family violence offenders in Victoria. It also examines the available evidence from Australia and overseas for what is best practice in sentencing and managing family violence offenders.
- 3.2 There are a number of existing frameworks in place in Victoria intended to monitor, deter and sanction family violence offenders. These include:
- family violence intervention orders (FVIOs) and family violence safety notices (FVSNs) made under the *Family Violence Protection Act 2008* (Vic), which are civil orders that carry criminal penalties for contravention;
  - police arrest powers;
  - bail conditions;
  - specialist family violence court programs;
  - sentencing dispositions, including diversion, deferred sentencing, adjourned undertakings, fines, community correction orders (CCOs) and imprisonment; and
  - parole conditions.
- 3.3 A number of these systems are outside the scope of the present review. These include:
- bail and parole (because they are not relevant to a review of sentencing of family violence offenders); and
  - fines and imprisonment (because they do not involve supervising or managing offenders in the community).
- 3.4 This chapter discusses the Victorian sentencing framework and the existing sentencing dispositions relevant to SCF approaches. It also includes a discussion of FVIOs and FVSNs, arrest powers and specific court programs. While FVIOs and FVSNs are civil orders, it is a criminal offence to violate the conditions of these orders. Further, such conditions often interrelate with (and can overlap with) conditions imposed as part of a sentencing order. Similarly, police arrest powers can be used as a means of ensuring compliance with sentencing orders. Finally, a number of specific court programs affect the manner in which family violence offenders are monitored and sentenced.
- 3.5 This chapter also presents data estimating the proportion of cases that relate to family violence offending sentenced in the Magistrates' Court or the higher courts in the 2015–16 financial year. The estimated number of family violence offenders that come within each sentencing order examined is also presented, where such data is available.

## Data on family violence offenders in Victoria

- 3.6 This section presents data on the estimated numbers of family violence offenders sentenced in the Magistrates' Court, as well as in the higher courts, in order to provide an overview of the sentencing of family violence offenders in Victoria.
- 3.7 An accurate estimate of the number of family violence offenders in Victoria is difficult to determine. Although Victoria Police and, more recently, the Magistrates' Court of Victoria have introduced family violence 'flags', it is unlikely that all incidents or Magistrates' Court cases involving family violence are identified.
- 3.8 For the higher courts (the County and Supreme Courts) there is currently no flag in the primary data source available to the Council (the higher courts sentencing database) that identifies a case as involving family violence.
- 3.9 Further, the identified data is likely to underestimate significantly the actual prevalence of family violence offenders sentenced in Victoria, as some of the databases from which the data has been sourced rely on manual identification that an offence occurred within a family violence context.<sup>153</sup>
- 3.10 This section presents data from three different sources:
- data on the number of unique offenders sentenced for FVIO or FVSN contravention offences in the Magistrates' Court and higher courts;
  - data on the number of cases sentenced in the Magistrates' Court for 2015–16 that had a family violence flag; and
  - data on the number of cases sentenced in the higher courts for 2015–16 that had a Director of Public Prosecutions family violence flag or was otherwise identified by the Council as occurring in a family violence context.

## Offenders sentenced for contravention of a family violence intervention order or safety notice

- 3.11 One measure that can identify a large proportion of family violence offenders sentenced in the Magistrates' Court is offenders sentenced for contravention of an FVIO – including the new aggravated forms of this offence – or contravention of an FVSN.
- 3.12 For the higher courts, in most instances, FVIO/FVSN contravention charges are likely to be summary charges that have been uplifted and are sentenced alongside more serious offending, which may or may not be related to family violence.
- 3.13 In addition, the number of FVIO/FVSN contravention charges sentenced in the higher courts is likely to represent only a small proportion of the overall number of cases involving family violence.
- 3.14 Table 4 presents data on the number of unique offenders sentenced for contravention of an FVIO or an FVSN between July 2011 and June 2016 (inclusive). Over that period, there were 24,348 cases sentenced in the Magistrates' Court (4,870 per year on average) and 206 cases sentenced in the higher courts (41 per year on average) for charges of FVIO/FVSN contravention offences.

153. It is also unclear what definitions of family violence are applied by various data sources in identifying whether a matter has occurred in a family violence context.



- 3.15 There were 18,020 unique identifiable offenders in the Magistrates' Court and 187 in the higher courts, in total. Some offenders were sentenced multiple times across the five years in the Magistrates' Court. In the higher courts, just one unique identifiable offender was sentenced more than once in the five-year period (the offender was sentenced twice). Sixty-seven offenders were sentenced in both the Magistrates' Court and the higher courts in this period.
- 3.16 Table 4 counts every identified unique offender sentenced in each year with at least one charge of each individual contravention offence sentenced in that year. Offenders with any combination of contravention offences are counted once for each different offence sentenced within their cases in that year. Offenders with multiple cases are counted once for each year that they had a case sentenced.
- 3.17 In order to determine an offender-based count, data in Table 4 is drawn from the Council's reoffending database, with information sourced from the higher courts sentencing database as at 1 January 2017.

**Table 4: Number of unique offenders sentenced for contravention of an FVIO/FVSN, by court and contravention offence, 2011–12 to 2015–16<sup>154</sup>**

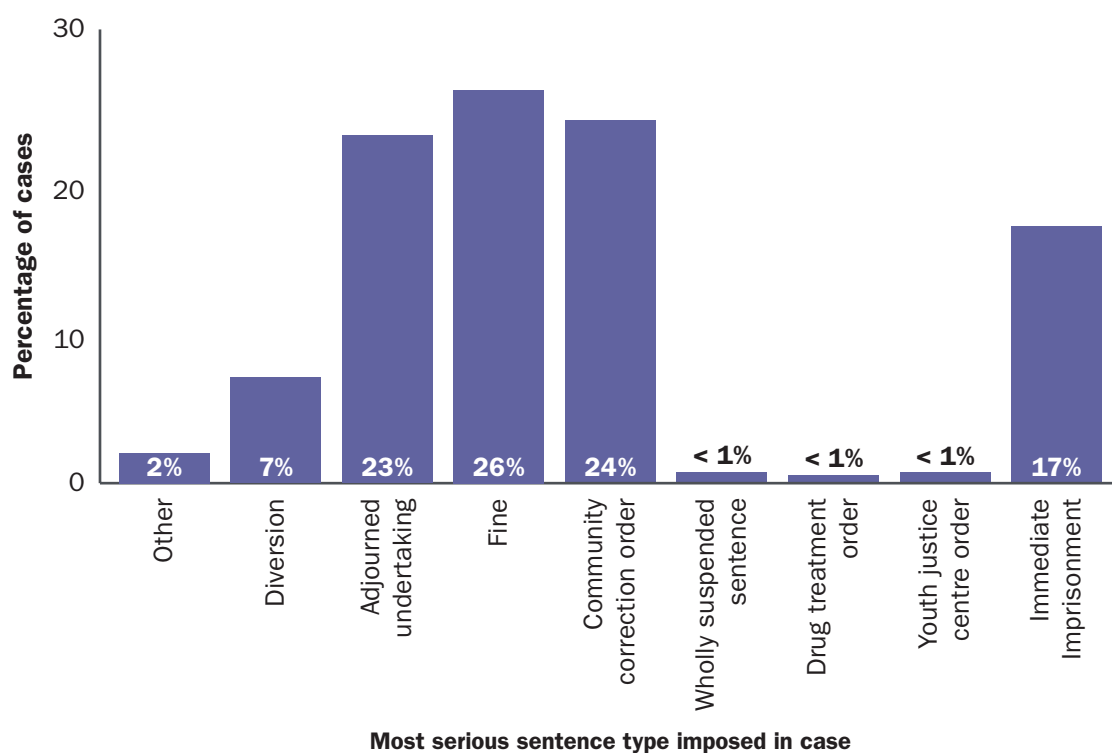
| Court and offence  | 2011–12      | 2012–13      | 2013–14      | 2014–15      | 2015–16      |
|--|--------------|--------------|--------------|--------------|--------------|
| <b>Higher courts</b>   |              |              |              |              |              |
| Contravention of family violence intervention order                | 29           | 31           | 31           | 24           | 32           |
| Contravention of order intending to cause harm or fear for safety  | –            | –            | 3            | 4            | 12           |
| Contravention of family violence safety notice                     | –            | 1            | 3            | 5            | 4            |
| Contravention of notice intending to cause harm or fear for safety | –            | –            | –            | –            | 1            |
| Persistent contravention of notices and orders                     | –            | –            | 2            | 2            | 17           |
| <b>Total offenders in higher courts</b>                            | <b>29</b>    | <b>31</b>    | <b>37</b>    | <b>34</b>    | <b>56</b>    |
| <b>Magistrates' Court</b>  |              |              |              |              |              |
| Contravention of family violence intervention order                | 2,733        | 3,349        | 3,687        | 4,080        | 4,399        |
| Contravention of order intending to cause harm or fear for safety  | –            | 11           | 395          | 809          | 885          |
| Contravention of family violence safety notice                     | 179          | 250          | 302          | 364          | 465          |
| Contravention of notice intending to cause harm or fear for safety | –            | 1            | 29           | 54           | 73           |
| Persistent contravention of notices and orders                     | –            | 17           | 408          | 897          | 1,383        |
| <b>Total offenders in Magistrates' Court</b>                       | <b>2,862</b> | <b>3,535</b> | <b>4,252</b> | <b>5,136</b> | <b>5,870</b> |

154. This table contains data available to the Council as at 3 February 2017. Offenders may have been sentenced in multiple courts in multiple years for multiple offences.

## Cases sentenced in the Magistrates' Court with a family violence 'flag'

- 3.18 A family violence flag has been recorded with Magistrates' Court sentencing outcomes since 2009. The flag had been inserted manually by Court Services when entering a physical charge-sheet into their system. Since 16 April 2015, the flag has been automatically linked to data from Victoria Police's LEAP system when a charge-sheet is filed. A case flagged as involving family violence indicates the context of the entire case, not individual charges. This means that there may be charges within the case that have not occurred in a family violence context.
- 3.19 In preparing this discussion paper, the Council examined all manual and automatic indications of family violence in cases sentenced between July 2015 and June 2016. When comparing cases with family violence flags with cases without family violence flags, it is possible that some family violence cases are missing flags (causing false negatives), particularly when the case has not been initiated by police. For both categories of cases (family violence and non-family violence), human and technical errors are a factor in recording the true nature of a case.
- 3.20 Between July 2015 and June 2016 in the Magistrates' Court, 11,270 sentenced cases were identified as occurring in a family violence context. This represents 11% of the 99,723 cases sentenced in the Magistrates' Court during that time.
- 3.21 Figure 2 shows the types of sentences imposed in these cases. The conclusions that can be drawn from this data are limited, given the range of offending that is classified as occurring within a context of family violence. However, it provides a snapshot of the range of sentence types imposed for family violence offending, in particular, the proportion of family violence offenders receiving non-custodial sentences who may be best targeted by an SCF approach. It is also notable that over one-quarter of sentences imposed for family violence cases were fines.

**Figure 2: Sentence type imposed for family violence cases sentenced in the Magistrates' Court of Victoria, 2015-16**



## Cases sentenced in the higher courts with a Director of Public Prosecutions family violence ‘flag’

- 3.22 The Office of Public Prosecutions’ electronic case management system allows the solicitor with conduct of the file to identify prosecutions ‘with a family violence nexus’.<sup>155</sup>
- 3.23 In the 2015–16 financial year, there were 477 matters received that were noted to have occurred in circumstances of family violence; this amounts to approximately 17% of all prosecutions initiated by the Office of Public Prosecutions.<sup>156</sup> Approximately 270 to 280 offenders were sentenced in the 2015–16 financial year where the matter was noted to have occurred in circumstances of family violence.<sup>157</sup> For these 270 to 280 offenders, there were 211 matters for which the sentence type could be determined. The available data is presented in Table 5.

**Table 5: Sentence types imposed in cases identified as family violence matters, higher courts, 2015–16<sup>158</sup>**

| Sentence type                    | Number of cases with sentencing order |
|----------------------------------|---------------------------------------|
| Imprisonment                     | 119                                   |
| Imprisonment combined with a CCO | 50                                    |
| CCO                              | 39                                    |

## Reoffending rates of family violence offenders in Victoria

- 3.24 In a previous report, the Council studied factors associated with reoffending and prior offending over an 11 year period (from 2004–05 to 2014–15) for an index group of 1,898 offenders sentenced for contravening an FVIO or an FVSN in Victoria in the financial year 2009–10. The Council found that offenders sentenced for contravening an FVIO or an FVSN had a higher five-year reoffending rate (53%) than offenders in general (37%).<sup>159</sup>
- 3.25 Other findings from the Council’s report were that:
- almost half of the family violence offenders were sentenced for violent offending before or at their 2009–10 sentence, and prior violence was associated with a higher reoffending rate. Of the 61 offenders with four or more prior convictions for assault-related offences or threat to kill/injure offences, 90% reoffended;
  - the two most common types of reoffending were further contravention of an FVIO or an FVSN (24% of offenders reoffended with this offence type) and assault/cause injury (22%); and
  - 86% of people sentenced for contravening FVIOs and FVSNs were male.

155. Witness Statement of John Ross Champion SC, Director of Public Prosecutions, Victorian Public Prosecutions Service to the Victorian Royal Commission into Family Violence (11 August 2015) 3. These numbers are likely to underestimate the actual numbers of cases with a family violence nexus, as they rely on manual entry of the data by the solicitor with conduct of the file.

156. Data provided to the Council by the Office of Public Prosecutions (29 September 2016).

157. Data provided to the Council by the Office of Public Prosecutions (29 September 2016).

158. Data was provided to the Council by the Office of Public Prosecutions. A further three offenders received a supervision order imposed under Part 2 of the *Serious Sex Offenders (Detention and Supervision Orders) Act 2009* (Vic).

159. Sentencing Advisory Council (2016), above n 29, xiii–xvi.

## The current framework for sentencing family violence offenders in Victoria

- 3.26 As discussed at [1.47], the Council is conducting its review on the basis that all recommendations of the Royal Commission into Family Violence will be implemented.
- 3.27 The changes, alongside others already in train, will significantly alter the current landscape for criminal justice responses to family violence offending, including:
- the expansion of the Family Violence Court Division, so that all headquarter Magistrates' Court locations in Victoria will have similar functions and powers to the Family Violence Court Division of the Magistrates' Court, including the power to make counselling orders and to hear matters associated with family violence (such as family law matters);<sup>160</sup>
  - increased resourcing of legal services for family violence matters;<sup>161</sup>
  - amendments to the intervention order system<sup>162</sup> and amendments to the bail process to promote victim survivor safety;<sup>163</sup>
  - the fast-tracking of family violence matters in the Magistrates' Court;<sup>164</sup>
  - improvements to the accessibility and safety of Magistrates' Court facilities;<sup>165</sup> and
  - improvements to perpetrator interventions as well as increased access to men's behaviour change programs.<sup>166</sup>
- 3.28 The Council notes that these reforms (in particular the fast-tracking of family violence criminal matters) are likely to address a number of the issues that prompted calls for a swift, certain and fair approach in sentencing family violence offenders.

## Family violence intervention orders and safety notices

- 3.29 Since 1987, a victim survivor of family violence<sup>167</sup> in Victoria has been able to apply to the Magistrates' Court (or the Children's Court)<sup>168</sup> for a family violence intervention order (FVIO).<sup>169</sup> FVIOs are intended to protect affected family members from further family violence by prohibiting the respondent to the order from engaging in certain behaviours or by excluding the respondent from the family residence.<sup>170</sup>

160. State of Victoria (2016), above n 2, 160 (Recommendation 60).

161. Ibid 170 (Recommendation 69).

162. See for example, ibid 105 (Recommendations 55–56), 162 (Recommendation 62), 166 (Recommendation 66), 227 (Recommendation 79).

163. Ibid 228 (Recommendation 80).

164. Ibid 231; State of Victoria, *Ending Family Violence: Victoria's Plan for Change* (2016) 50. The current fast-tracking system is described at [3.52]–[3.56].

165. State of Victoria (2016), above n 2, 170.

166. Ibid 294–300 (Recommendations 85–92).

167. 'Family violence' is defined at [1.25]–[1.28], and further detail is contained in Sentencing Advisory Council, *Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention: Monitoring Report* (2013) 7.

168. If the affected family member, the protected person or the respondent is a child at the time that the application is made, the Children's Court and the Magistrates' Court each have jurisdiction to deal with the application. However, if the respondent is a child, the application should be dealt with by the Children's Court, if practicable: *Family Violence Protection Act 2008* (Vic) s 146.

169. Family violence intervention orders were introduced by the *Crimes (Family Violence) Act 1987* (Vic) pt 2. The orders are now made under the *Family Violence Protection Act 2008* (Vic).

170. Intervention orders represent what some have called a 'two-step prohibition': Andrew Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (2011) 213. The first step involves issuing a civil prohibitory order against a person who is considered to be at risk of engaging in undesired conduct. The second step involves charging that person with a criminal offence if they violate that civil order. Importantly, prior to that order being in place, the undesirable conduct need not have been necessarily criminal.

- 3.30 In 2008, the *Family Violence Protection Act 2008* (Vic) was introduced, broadening the definition of family violence to include behaviours such as economic abuse and coercive behaviour; extending the grounds on which an FVIO could be obtained. The *Family Violence Protection Act 2008* (Vic) also introduced police-issued family violence safety notices (FVSNs), enabling police to provide short-term protection for a victim survivor until an FVIO is obtained.
- 3.31 The purposes of the new legislation were to maximise safety for those experiencing family violence, to prevent and reduce family violence and to promote accountability for family violence perpetrators.<sup>171</sup>

### **Obtaining an FVIO or an FVSN**

- 3.32 An FVSN is issued by a police officer of the rank of sergeant or above if they reasonably believe that an FVSN is necessary to protect a person, child or property from family violence.<sup>172</sup> Prior to November 2014, police were only empowered to issue FVSNs outside court hours. If an immediate protection measure was required within court hours, the police were to consider applying for an interim FVIO.<sup>173</sup> This is no longer the case; police may now issue FVSNs at any time.<sup>174</sup> The FVSN then continues until a court adjourns the application for an FVIO, refuses to issue an FVIO or issues an FVIO.<sup>175</sup> The first mention date must be no later than five working days after the FVSN was served on the respondent, or as soon as practicable if it includes an exclusion condition.<sup>176</sup>
- 3.33 An FVIO, on the other hand, can be issued by a court if:
- the court is satisfied that it is necessary to ensure the safety of the affected family member, to protect any property of the affected family member or to protect a child (interim order);<sup>177</sup>
  - the parties consent to the order (interim order);<sup>178</sup>
  - an FVSN is already in place and there are no circumstances that would justify discontinuing the FVSN pending a final decision (interim order);<sup>179</sup> or
  - on the balance of probabilities, the court is satisfied that the respondent has committed family violence against the affected family member and is likely to do so again (final order).<sup>180</sup>
- 3.34 There are a number of conditions that can be attached to either an FVIO or an FVSN: prohibiting the respondent from committing family violence (which as noted above, is defined expansively), excluding the respondent from the protected person's residence, prohibiting the respondent from contacting the protected person or any other condition the court thinks necessary or desirable in the circumstances.<sup>181</sup>

171. *Family Violence Protection Act 2008* (Vic) s 1.

172. *Family Violence Protection Act 2008* (Vic) ss 24, 26.

173. *Family Violence Protection Act 2008* (Vic) s 24(f) (since repealed).

174. *Family Violence Protection Amendment Act 2014* (Vic) s 5(b).

175. *Family Violence Protection Act 2008* (Vic) s 30.

176. *Family Violence Protection Act 2008* (Vic) s 31(3).

177. *Family Violence Protection Act 2008* (Vic) s 53(1)(a).

178. *Family Violence Protection Act 2008* (Vic) s 53(1)(b).

179. *Family Violence Protection Act 2008* (Vic) s 53(1)(c).

180. *Family Violence Protection Act 2008* (Vic) s 74.

181. *Family Violence Protection Act 2008* (Vic) s 81.

- 3.35 In some specified jurisdictions, when the court is issuing a final FVIO, they may order that a respondent be assessed for eligibility for counselling, and if the respondent is found eligible, the court may require that they attend counselling.<sup>182</sup> The Magistrates' Court in both Frankston and Moorabbin has implemented the Family Violence Counselling Orders Program to facilitate the expansion of court-directed men's behaviour change programs.<sup>183</sup>

### **Penalties and procedure for contravention of FVIOs and FVSNs**

- 3.36 Although FVIOs and FVSNs are civil orders, contravention of their conditions is a criminal offence with a maximum penalty of two years' imprisonment and/or a fine of 240 penalty units.<sup>184</sup> There are also three indictable aggravated contravention offences:
- contravention of notice intending to cause harm or fear for safety;
  - contravention of order intending to cause harm or fear for safety; and
  - persistent contravention of notices and orders.<sup>185</sup>
- 3.37 These offences each carry a maximum penalty of five years' imprisonment and/or a fine of 600 penalty units.<sup>186</sup>
- 3.38 It is also an offence to fail to attend counselling when ordered to do so, carrying a maximum penalty of 10 penalty units.<sup>187</sup> The offender can only be prosecuted once for failing to attend (even if it involves multiple occasions), and parliament has previously indicated that a criminal sanction should not be the first response for failures to attend counselling sessions.<sup>188</sup>
- 3.39 According to the Victoria Police Family Violence Code of Practice, all contraventions of FVIOs should be taken seriously:
- FVIOs and FVSNs must be strictly enforced. There is no such lawful term as a 'technical' contravention and police must lay charges for any contravention.
- A contravention should not be ignored; the family could be unsafe and lack of attention conveys to the respondent and the [affected family member] that the order is not taken seriously. It could lead to continued abuse, further police involvement in subsequent contraventions, and possible harm to the [affected family member] and/or their children.<sup>189</sup>

182. *Family Violence Protection Act 2008* (Vic) ss 129, 130. The power to issue a counselling order is currently available at four locations in Victoria, including the Magistrates' Court in Heidelberg and Ballarat (as Family Violence Court Divisions) and the Magistrates' Court in Moorabbin and Frankston (as courts specifically gazetted to make such orders): *Family Violence Protection Act 2008* (Vic) s 126; State of Victoria, *Victorian Government Gazette*, No G 41, 10 October 2013, 2511.

183. Magistrates' Court of Victoria and Children's Court of Victoria (2015), above n 5, 11.

184. *Family Violence Protection Act 2008* (Vic) ss 37, 123.

185. These offences came into effect on 17 April 2013, inserted by the *Justice Legislation Amendment (Family Violence and Other Matters) Act 2012* (Vic). For further discussion of the indictable FVIO and FVSN offences, see Sentencing Advisory Council, *Sentencing for Contravention of Family Violence Intervention Orders and Safety Notices: Second Monitoring Report* (2015) 17–19.

186. *Family Violence Protection Act 2008* (Vic) ss 37A, 123A, 125A.

187. *Family Violence Protection Act 2008* (Vic) s 129(5).

188. Judicial College of Victoria, *Family Violence Bench Book* (2010–) [4.1.5.2], citing the Second Reading Speech for the *Magistrates' Court (Family Violence) Bill 2004* (Vic): Victoria, *Parliamentary Debates*, Legislative Assembly, 26 August 2004, 191 (Rob Hulls, Attorney-General).

189. Victoria Police, *Code of Practice for the Investigation of Family Violence* (3rd ed., 2014) 28. The Code of Practice was amended in 2014. Whereas the first and second edition of the Code of Practice only required police to 'consider' laying charges for contravention of an FVIO or an FVSN, laying charges for contravention is now mandatory. Consultation with Victoria Police clarified, however, that this change simply reflected a practice that had been in place for a number of years and did not coincide with any significant changes to police procedures: Sentencing Advisory Council (2015), above n 185, 23.

## Arrest

- 3.40 A family violence offender can be lawfully arrested in a number of circumstances. Police have the power to arrest a person who has been found committing further offences,<sup>190</sup> who has violated any conditions of a CCO,<sup>191</sup> who has violated any conditions of an FVIO or an FVSN<sup>192</sup> or who has failed to attend court as required while subject to an adjourned undertaking<sup>193</sup> or deferred sentence.<sup>194</sup> A warrant is ordinarily required, unless the person violates an FVIO or an FVSN or is found committing further offences.
- 3.41 Arrest, in and of itself, does not constitute a condemnation of the offender's behaviour. The only permissible purposes of arrest in Victoria are to ensure the attendance of the offender before a court, to preserve public order, to prevent the continuation or repetition of an offence or to protect the safety or welfare of the public or the offender him- or herself.<sup>195</sup>
- 3.42 When a person is arrested and charged with an offence, there are a number of possible avenues that determine whether the person is held in custody or released:
- the police may issue a summons requiring the person to appear at a particular court at a specified date and time;<sup>196</sup>
  - if it is not practicable to bring the person before a court within 24 hours, a police officer of or above the rank of sergeant may grant the person bail;<sup>197</sup>
  - if it is not practicable to bring the person before the court but the police officer refuses to discharge the person from custody, they must be brought before a bail justice as soon as practicable;<sup>198</sup> or
  - if it is practicable, the person must be brought before a court within 24 hours after they are taken into custody to determine whether they should be granted bail.<sup>199</sup>
- 3.43 Further, if the person is arrested and remains a suspect but has not been charged with an offence, police may issue a notice to appear, which like a summons requires the person to appear at a particular court at a specified date and time but does not constitute the commencement of criminal proceedings.<sup>200</sup>

190. *Crimes Act 1958* (Vic) s 458.

191. *Sentencing Act 1991* (Vic) ss 48L(3) ('If an offender fails to re-appear before a court for review in accordance with the terms of a judicial monitoring condition, the court may issue a warrant to arrest the offender'), 83A1 (empowers courts to issue either a summons or an arrest warrant after a charge-sheet has been filed alleging that the offender has contravened a condition of their CCO).

192. *Family Violence Protection Act 2008* (Vic) ss 38, 124. That is, if a police officer believes on reasonable grounds that a person has contravened either an FVSN or an FVIO, they may arrest that person without a warrant.

193. *Sentencing Act 1991* (Vic) ss 83AC, 83AG, 83A1(2) (an offender subject to an adjourned undertaking is required to attend court when requested to do so, and failure to attend is a punishable offence that empowers the court to issue an arrest warrant).

194. *Sentencing Act 1991* (Vic) s 83A(5) ('The court may order that a warrant to arrest be issued against the offender if he or she does not attend before the court on the adjourned hearing').

195. *Crimes Act 1958* (Vic) s 458(1)(a).

196. *Criminal Procedure Act 2009* (Vic) ss 14–15.

197. *Bail Act 1977* (Vic) s 10(1).

198. *Bail Act 1977* (Vic) s 10(2). If the bail justice refuses bail, the person must then be brought before a court on the next working day, or if that is not practicable, within two working days: *Bail Act 1977* (Vic) s 12(1A).

199. *Bail Act 1977* (Vic) s 4(1).

200. *Criminal Procedure Act 2009* (Vic) pt 2.3 div 2.

- 3.44 In each of these circumstances, unless bail is refused, an arrested person should generally be released within 24 hours. This need for a timely decision about whether to detain or release an arrested person is reflected elsewhere in legislation.<sup>201</sup>
- 3.45 In certain circumstances, someone who has been arrested may be put in a 'show cause' position, meaning that they must demonstrate why their continued detention in custody is *not* justified (as opposed to the burden of proof being on the prosecuting agency to demonstrate why their continued detention is justified).<sup>202</sup> Any accused charged with contravening an FVIO or an FVSN may fall within this 'show cause' category where the court is satisfied that the accused has, on a previous occasion, used or threatened to use violence against the person who is the subject of the order (regardless of whether the accused has been convicted or found guilty of that behaviour).<sup>203</sup>
- 3.46 When a person is arrested, they are taken to a police station or custody centre.
- 3.47 During preliminary consultation, it was noted that, as a matter of course, Victoria Police arrest offenders who have committed family violence offences and, where appropriate, oppose bail where there is escalated risk to victim survivors or protected persons, or where there is a risk of further offending.

## Magistrates' Court family violence programs

- 3.48 Deputy Chief Magistrate Felicity Broughton (also the Supervising Magistrate of Family Violence and Family Law) recently estimated that between 30% and 40% of all criminal matters heard by the Magistrates' Court involve family violence in some form.<sup>204</sup>
- 3.49 There are a number of specialist court programs in the Magistrates' Court designed to facilitate a more efficient and effective management of family violence proceedings. These programs reduce delay for hearings, employ specialised family violence court staff, provide courts with the ability to conduct integrated lists (which can hear civil and criminal matters in the same courtroom) and offer more specific remedies to address the underlying factors contributing to family violence.
- 3.50 In November 2014, the Magistrates' Court released a planned response to family violence over the 2015–17 period involving six key components:
- expanding specialised family violence services within the court;
  - enabling FVIO applicants to appear via videolink from remote locations;
  - dealing with criminal family violence matters as early as possible;
  - ensuring appropriate professional development in family violence for all court staff;
  - developing a new website for easily accessible information on the FVIO process; and
  - improving information-sharing between family violence stakeholders.<sup>205</sup>
- 3.51 A number of the initiatives below have been introduced to help achieve these six objectives, while other initiatives were already in place.

201. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 21(5) ('A person who is arrested or detained on a criminal charge ... must be promptly brought before a court'); *Crimes Act 1958* (Vic) s 464A(1) ('Every person taken into custody for an offence ... must be (a) released unconditionally; or (b) released on bail; or (c) brought before a bail justice or the Magistrates' Court—within a reasonable time of being taken into custody'). In determining what constitutes a reasonable time, section 464A(4) of the *Crimes Act 1958* (Vic) outlines 12 matters that may be taken into account.

202. *Bail Act 1977* (Vic) s 4(4).

203. *Bail Act 1977* (Vic) s 4(4)(ba).

204. Felicity Broughton, 'Improving Court Practice in Family Violence Cases: Implications of the Report of the Royal Commission into Family Violence on the Improvement of Court Practice in FV Cases' (Paper presented at Improving Court Practice in Family Violence Cases, Australasian Institute of Judicial Administration, Melbourne, 15–17 June 2016).

205. Magistrates' Court of Victoria, *Response to Family Violence 2015–2017* (2014).



### **Family violence fast-tracking listing process**

3.52 The Magistrates' Court has implemented a new fast-tracking listing process for criminal cases involving family violence.<sup>206</sup> The system commenced in the Dandenong Magistrates' Court on 1 December 2014. The current timelines for hearing are:

- one week from the date of release to the first listing where the accused is on bail, or four weeks from the date of the interview by police where the accused has been summonsed;
- four weeks from the date of the first listing to the date of the second listing;
- four weeks from the date of the second listing to the contest mention; and
- four weeks from the date of the contest mention to the hearing.<sup>207</sup>

3.53 Therefore, the longest time between police interview and trial, under the fast-tracking model, is 16 weeks. Although there is still a delay of up to four months before an offender is held accountable for their behaviour, this is significantly faster than standard offence-to-hearing timeframes.

3.54 The aim of the fast-tracking model is to increase perpetrator accountability for their behaviour by bringing them before the court in a more timely manner. Research underpinning the pilot demonstrated the importance of early intervention when holding perpetrators accountable for their actions, in order to better ensure that their behaviour changes and that the victim survivor is safe.<sup>208</sup>

3.55 Early indications suggest that the model has caused a significant increase in the number of complainants not seeking to withdraw their complaints, an increase in successful prosecutions and a resolution within 30–45 days to most criminal cases involving family violence.<sup>209</sup> It is not yet known whether these changes will affect family violence recidivism.

3.56 With the intention being to eventually have the program implemented state-wide, the fast-tracking listing program has progressively expanded to Magistrates' Court locations at:

- Broadmeadows and Shepparton (effective 3 August 2015);<sup>210</sup>
- Ballarat and Ringwood (effective 12 October 2015);<sup>211</sup>
- Frankston and Moorabbin (effective 1 May 2016);<sup>212</sup>
- Bendigo and Geelong (effective 1 September 2016);<sup>213</sup> and
- Heidelberg, Melbourne and the Neighbourhood Justice Centre (effective 2 January 2017).<sup>214</sup>

206. Magistrates' Court of Victoria, *Practice Direction No. 10 of 2014: Fast Tracking of the Hearing and Determination of Criminal Offences Arising out of Family Violence Incidents* (2014).

207. Magistrates' Court of Victoria, *Practice Direction No. 8 of 2015: Expansion of the Fast Tracking Listing Process to the Court at Ballarat and Ringwood* (2015).

208. Magistrates' Court of Victoria and Children's Court of Victoria (2015), above n 5, 15.

209. Kate Hawkins and Felicity Broughton, 'Sentencing in Domestic Violence Cases' (Paper presented at Current Issues in Sentencing Conference, National Judicial College of Australia, Canberra, 6–7 February 2016) 21.

210. Magistrates' Court of Victoria, *Practice Direction No. 7 of 2015: Expansion of the Fast Tracking Listing Process to the Court at Broadmeadows and Shepparton* (2015).

211. Magistrates' Court of Victoria (2015), above n 207.

212. Magistrates' Court of Victoria, *Practice Direction No. 3 of 2016: Expansion of the Fast Tracking Listing Process to the Court at Frankston and Moorabbin* (2016).

213. Magistrates' Court of Victoria, *Practice Direction No. 8 of 2016: Expansion of the Fast Tracking Listing Process to the Court at Bendigo and Geelong* (2016).

214. Magistrates' Court of Victoria, *Practice Direction No. 13 of 2016: Expansion of the Fast Tracking Listing Process to the Court at Heidelberg and Melbourne* (2016); Magistrates' Court of Victoria, *Practice Direction No. 12 of 2016: Expansion of the Fast Tracking Listing Process to the Neighbourhood Justice Division of the Court* (2016).

### **Family Violence Court Division**

- 3.57 The Family Violence Court Division (FVCD) was established by legislation commencing in 2005 and is currently limited to Ballarat and Heidelberg.<sup>215</sup> The jurisdiction of the Family Violence Court Division broadly includes almost any proceedings involving family violence: proceedings relating to FVIOs or counselling orders (and contraventions/breaches of these orders), victims of crime compensation hearings, child support hearings, any matter arising under the *Family Law Act 1975* (Cth) and summary or indictable criminal matters.<sup>216</sup> Despite this broad jurisdiction, the Family Violence Court Division has tended to deal primarily with civil protection orders and not criminal breach charges.<sup>217</sup>
- 3.58 The Family Violence Court Division has been described as the ‘closest example of a “one stop shop” model for victims of family violence in Australia’.<sup>218</sup>
- 3.59 Some of the key elements of the Family Violence Court Division include:
- dedicated family violence staff (magistrates, registrars, specialised police prosecutors, security officers, support workers and duty lawyers);
  - special training for all participants;
  - a coordinated approach (with daily coordination meetings, local management meetings, court user meetings and a monitoring committee);
  - integrated lists (mainly dealing with criminal charges, intervention orders and victims’ compensation);
  - alternative arrangements for giving evidence (such as via videolink or through the use of screens in the courtroom);
  - access to family violence outreach services; and
  - the power to order male respondents to participate in men’s behaviour change programs.<sup>219</sup>
- 3.60 The Family Violence Court Division generally only requires a respondent to attend counselling<sup>220</sup> if the family violence occurred in the context of an intimate partner relationship. The program provides for both group-based and individual counselling, and where it is safe to do so, the service provider maintains regular contact with the affected partner in order to continuously assess the risk to them and validate the men’s self-reports during counselling.<sup>221</sup>
- 3.61 A respondent who, without reasonable excuse, fails to attend counselling as ordered by the Family Violence Court Division may be charged with an offence, and if found guilty is liable to a fine of up to 10 penalty units.<sup>222</sup>

215. *Magistrates’ Court Act 1989* (Vic) s 4H.

216. *Magistrates’ Court Act 1989* (Vic) s 4I.

217. Hawkins and Broughton (2016), above n 209, 22.

218. Australian Law Reform Commission, *Family Violence – A National Legal Response: Final Report*, ALRC Report 114 (2010) 1499.

219. Magistrates’ Court of Victoria and Children’s Court of Victoria (2015), above n 5, 11; Magistrates’ Court of Victoria, *Family Violence Court Programs* (2016) <<https://www.magistratescourt.vic.gov.au/jurisdictions/intervention-orders/family-violence-court-programs>> at 28 October 2016.

220. This is pursuant to sections 129 and 130 of the *Family Violence Protection Act 2008* (Vic).

221. Magistrates’ Court of Victoria and Children’s Court of Victoria (2015), above n 5, 11.

222. *Family Violence Protection Act 2008* (Vic) s 130(4).

### **Specialist Family Violence Service**

- 3.62 The Specialist Family Violence Service (SFVS), which currently operates at the Magistrates' Court in Melbourne, Frankston, Sunshine and Werribee,<sup>223</sup> is similar to the Family Violence Court Division, in that both have specialist family violence court staff (including specially trained magistrates, support workers, duty lawyers and police prosecutors), and both provide special training for all participants.<sup>224</sup>
- 3.63 One key difference is that the Specialist Family Violence Service does not, in principle, host an integrated list to simultaneously deal with matters associated with FVIO applications (such as breach proceedings and child support), though matters involving the same parties or incidents as those involved in FVIO proceedings are routinely dealt with in the same list.<sup>225</sup>
- 3.64 Further, magistrates in most Specialist Family Violence Service courts do not have the same power as magistrates in the Family Violence Court Division to direct male respondents to participate in men's behaviour change programs.<sup>226</sup> A number of Specialist Family Violence Service venues have, however, established relationships with voluntary men's referral services.<sup>227</sup>

### **Other court programs**

- 3.65 In addition to the specific family violence court programs, a number of other court programs indirectly involve managing family violence offenders.
- 3.66 According to the Magistrates' Court's most recent annual report, 26% of participants in three court programs (the Assessment and Referral Court (ARC) List, the Court Integrated Services Program (CISP) and the CREDIT/Bail Support Program) are alleged family violence offenders.<sup>228</sup>

### **Assessment and Referral Court List**

- 3.67 If an accused has a mental illness, they may be eligible for participation in the Assessment and Referral Court List (ARC List). The ARC List, which operates at the Magistrates' Court in Melbourne,<sup>229</sup> was established in 2010 to meet the needs of accused persons with a mental illness or cognitive impairment.<sup>230</sup> The ARC List is increasingly dealing with family violence-related offending in a way that addresses underlying issues that may contribute to the offending.<sup>231</sup>
- 3.68 In order to be eligible for participation in the ARC List, an accused must meet certain diagnostic criteria and have reduced functioning in certain areas, and it must be likely that they would benefit from any of a broad range of treatment services.<sup>232</sup>

223. Magistrates' Court of Victoria (2016), above n 219.

224. Ibid.

225. Magistrates' Court of Victoria and Children's Court of Victoria (2015), above n 5, 11.

226. Magistrates' Court of Victoria (2016), above n 219.

227. Magistrates' Court of Victoria and Children's Court of Victoria (2015), above n 5, 11.

228. Magistrates' Court of Victoria, *Annual Report 2014–2015* (2015) 51.

229. Magistrates' Court of Victoria and Children's Court of Victoria (2015), above n 5, 40.

230. *Magistrates' Court Act 1989* (Vic) s 4S.

231. Magistrates' Court of Victoria and Children's Court of Victoria (2015), above n 5, 36.

232. *Magistrates' Court Act 1989* (Vic) s 4T.

- 3.69 Participation in the ARC List is not strictly a 'sentencing' option, but it can result in a final disposition. If the accused participates in an individual support plan to the satisfaction of the court, the court has the power to either discharge the accused without any finding of guilt or allow the proceedings to continue and then take successful participation in the program into account during sentencing.<sup>233</sup> If the accused fails to participate in an individual support plan to the satisfaction of the court, the court cannot take that failed participation into account during sentencing if the accused is ultimately found guilty of the alleged offending.<sup>234</sup>
- 3.70 In the 2014–15 financial year, there were 206 referrals to the ARC List.<sup>235</sup>

### **Court Integrated Services Program**

- 3.71 In 2006, the Magistrates' Court established the Court Integrated Services Program (CISP) in the Latrobe Valley, Sunshine and Melbourne, with the aim of:
- providing short-term assistance for accused persons with health and social needs before sentencing;
  - identifying and addressing the causes of offending through individualised case management support (with measures such as drug and alcohol treatment, accommodation assistance and mental health services); and
  - reducing reoffending rates and contributing to a safer community.<sup>236</sup>
- 3.72 In the 2014–15 financial year, 1,890 people were referred to CISP, though this number also includes people referred to the in-remand counterpart program, the CISP Remand Outreach Program (CROP), which is discussed below.<sup>237</sup>
- 3.73 Prospective participants in CISP are referred (often by their legal representatives) using the CISP Referral Form, which contains the accused's details, the status of their criminal proceedings, possible areas of risk or need (such as alcohol or drug issues or homelessness) and whether there are any family violence issues.<sup>238</sup>
- 3.74 Upon receiving the application from a prospective participant, a CISP case worker conducts a detailed assessment of the accused, and then makes a recommendation to the court about whether an accused is a good candidate for CISP and what sort of program they would benefit from. The magistrate then determines whether the accused should be ordered to participate in CISP. If the accused is eventually sentenced by the court for the alleged offending, the quality of their participation in CISP is taken into account.<sup>239</sup>

233. *Magistrates' Court Act 1989* (Vic) ss 4Y(2), (4)–(5).

234. *Magistrates' Court Act 1989* (Vic) s 4Y(6).

235. Magistrates' Court of Victoria (2015), above n 228, 51.

236. Magistrates' Court of Victoria and Children's Court of Victoria (2015), above n 5, 13.

237. Magistrates' Court of Victoria (2015), above n 228, 51.

238. CISP is not available at all locations. See Magistrates' Court of Victoria, *Court Integrated Services Program (CISP)* (2016) <<https://www.magistratescourt.vic.gov.au/court-support-services/court-integrated-services-program-cisp>> at 28 October 2016.

239. Department of Justice, *Court Integrated Services Program: Tackling the Causes of Crime* (2010) 4.

- 3.75 By the end of 2009, two independent reviews had been conducted on the effectiveness of the CISP program. CISP was found to have saved up to \$5.90 for every \$1 invested in it (over a 30-year period),<sup>240</sup> reduced the average time spent in prison by 32.6 days per offender and resulted in a 14% reduction in recidivism.<sup>241</sup>
- 3.76 While the primary motivations for a referral to CISP were mental health (in 79% of cases), drugs (in 83% of cases) and alcohol (in 54% of cases), magistrates quickly began using the program with accused persons in family violence matters as well.<sup>242</sup> Today, the program continues to be accessed by accused persons presenting with family violence issues.<sup>243</sup> Indeed, in response to the increasing number of accused persons accessing CISP who present with family violence issues, accused persons are now – in addition to participating in programs such as drug and alcohol counselling – accessing men’s behaviour change programs through CISP.<sup>244</sup>
- 3.77 Most contraventions of bail conditions constitute a breach of bail offence.<sup>245</sup> However, it is not an offence to contravene a condition of bail when that condition requires the accused to attend and participate in bail support services, such as CISP.<sup>246</sup> Police are, however, permitted to arrest an accused if they reasonably believe that they have failed, or will fail, to participate in the program. Section 24(1) of the *Bail Act 1977* (Vic) permits police and protected services offices to arrest (without a warrant) any person released on bail if the police reasonably believe that the person has contravened, or will contravene, a condition of their bail (regardless of whether that contravention constitutes an offence).
- 3.78 Since 2002, the Magistrates’ Court has also offered an Indigenous-specific iteration of CISP, the Koori Liaison Officer Program. It is located at the Magistrates’ Court in Melbourne but is a state-wide program.<sup>247</sup>

### **CISP Remand Outreach Program**

- 3.79 In the past, CISP was offered exclusively to accused persons in the community (on bail or summons), but in February 2014 the Magistrates’ Court introduced the CISP Remand Outreach Program (CROP), offering relevant community services to prisoners on remand, such as drug and alcohol services and accommodation services.
- 3.80 Given that violations of CROP could not result in an SCF response of immediate imprisonment (as the offender is already in custody), CROP is not as relevant to the current inquiry. It is noteworthy, however, that effective participation in the CROP program increases a prisoner’s chances of being released into the community pending the outcome of their criminal proceedings, such that they may require further monitoring.<sup>248</sup>

240. PricewaterhouseCoopers, *Economic Evaluation of the Court Integrated Services Program (CISP): Final Report on Economic Impacts of CISP* (2009) 20. Shorter-term returns were \$1.70 at two years and \$2.60 at five years.

241. *Ibid* 113.

242. Stuart Ross, *Evaluation of the Court Integrated Services Program: Final Report* (2009) 100.

243. Magistrates’ Court of Victoria and Children’s Court of Victoria (2015), above n 5, 13.

244. *Ibid* 13.

245. *Bail Act 1977* (Vic) s 30A(1).

246. *Bail Act 1977* (Vic) s 30A(2).

247. Magistrates’ Court of Victoria, *Koori Liaison Officer Program* (2016) <<https://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions/court-support-services/koori-liaison-officer-program>> at 28 October 2016.

248. Magistrates’ Court of Victoria (2015), above n 228, 59. In the 2014–15 financial year, 899 prisoners received assistance from CROP, and of those, 273 were subsequently successful in applying for bail.

### **CREDIT/Bail Support Program**

- 3.81 The CREDIT/Bail Support Program (CBSP), a combination of two programs that existed prior to being merged, is a very similar pre-sentence program to CISP, but it is offered at all Magistrates' Court locations where CISP is not available.<sup>249</sup>
- 3.82 Participants in the CREDIT/Bail Support Program receive individualised case management intended to increase the likelihood that the accused is granted bail and successfully completes that bail period. This can include drug and alcohol treatment, accommodation and welfare services or other community supports, including referrals to specific family violence programs.<sup>250</sup>
- 3.83 One key difference from CISP is that participation in the CREDIT/Bail Support Program is voluntary;<sup>251</sup> therefore, failure to successfully participate in treatment cannot be used as a condition of bail or as an aggravating factor in the sentencing process.

### **Victoria's sentencing framework**

- 3.84 The sentencing of adults in Victoria is governed by the provisions of the *Sentencing Act 1991* (Vic) and sentencing principles developed at common law.
- 3.85 A sentence may only be imposed to punish the offender, to denounce the offender's conduct, to facilitate the offender's rehabilitation, to protect the community by reducing the offender's capacity to commit further offences and/or to deter the offender or other people from committing the same or similar offences.<sup>252</sup>
- 3.86 In seeking to achieve these purposes, a court must ordinarily apply sentencing principles such as totality (which requires that the sentence imposed on an offender convicted of multiple offences takes into account the overall criminality of the offender's behaviour), proportionality (which requires the overall punishment imposed to be proportionate to the seriousness of the offender's behaviour), parity (which requires that co-offenders' sentences are relatively similar) and parsimony (which requires that the sentence be no more severe than necessary to achieve its purpose/s).<sup>253</sup>
- 3.87 In determining sentence, courts in Victoria are required to use an 'instinctive synthesis' approach, which involves the court identifying all of the factors that are relevant to the sentence, discussing the significance of each factor and then deciding on an appropriate sentence to impose given all the facts of the case.<sup>254</sup>
- 3.88 There are a large number of factors that must be taken into account during the sentencing process, including the maximum penalty for the offence, current sentencing practices, the nature and gravity of the offence, the offender's culpability and degree of responsibility, the impact on the victim, the personal circumstances of the victim, any injuries, loss or damage incurred by the victim, whether the offender pleaded guilty (and if so, how soon), the offender's previous character and any other aggravating or mitigating circumstances.<sup>255</sup>

249. Magistrates' Court of Victoria and Children's Court of Victoria (2015), above n 5, 9.

250. Ibid 14.

251. Department of Human Services, *The CREDIT Bail Support Program: A Guide to Working with the CREDIT Bail Support Program* (2005) 9.

252. *Sentencing Act 1991* (Vic) s 5.

253. *Sentencing Act 1991* (Vic) s 5(3).

254. *Markarian v The Queen* (2005) 228 CLR 357. See also *Hili v The Queen* (2010) 242 CLR 520.

255. *Sentencing Act 1991* (Vic) s 5(2).

### Sentencing family violence offenders

- 3.89 If an offence takes place in a 'domestic context', this will generally be an aggravating factor during sentencing, on the basis that the offending constitutes an 'abuse of power' or 'breach of trust'.<sup>256</sup>
- 3.90 When considering which sentencing principles are most important in the family violence context, especially for offenders convicted of contravening an FVIO, courts have consistently held that protection of the victim and general deterrence are paramount.<sup>257</sup> In *Filiz v The Queen*, for example, the Court of Appeal stated that:
- general deterrence is a significant sentencing factor ... in relation to violent offending against a former domestic partner. Of particular significance is the fact that the applicant was already subject to a Family Violence Intervention Order ... This Court has made it clear that such offending will attract serious consequences and even harsher penalties where it involves the breach of an order which exists for the victim's protection.<sup>258</sup>
- 3.91 In relation to repeat offenders generally, there is no particular principle requiring an escalation of penalty for repeat contraventions, though the High Court has commented that repeat contraventions should inform a court's assessment of how sentencing principles apply:
- The antecedent criminal history is relevant ... to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted.<sup>259</sup>
- 3.92 In the specific context of repeat offenders who contravene FVIOs, the Victorian Court of Appeal has said on numerous occasions that deterrence principles should result in higher penalties for repeat contraventions:
- Intervention orders must be strictly adhered to, and it is very much in the interests of the community that those against whom such orders are made be under no misapprehension that the courts will punish severely those who breach such orders. The applicant's actions suggest that he believed he could breach the intervention order with impunity. Only by appropriately severe penalties can the courts make clear to the applicant and the broader community that such conduct will not be tolerated.<sup>260</sup>
- 3.93 Further, if the contravention of the FVIO is due to the respondent engaging in the commission of criminal offences (in addition to a contravention offence), this may be treated as an aggravating factor upon sentence.<sup>261</sup>

256. *Director of Public Prosecutions v Huynh* [2010] VSC 37 (19 February 2010); *R v Earl* [2008] VSCA 162 (25 August 2008); *Director of Public Prosecutions v Smeaton* [2007] VSCA 256 (15 November 2007); *Director of Public Prosecutions v Muliaina* [2005] VSCA 13 (2 February 2005); *R v MFP* [2001] VSCA 96 (15 June 2001); *R v Parker* (Unreported, Tasmanian Court of Criminal Appeal, Green CJ, Underwood and Zeeman JJ, 21 July 1994). See also Judicial College of Victoria (2010–), above n 188, [4.2.1].

257. Sentencing Advisory Council, *Sentencing Practices for Breach of Family Violence Intervention Orders: Final Report* (2009) ix, 38; Heather Douglas, 'Not a Crime Like Any Other: Sentencing Breaches of Domestic Violence Protection Orders' (2007) 31(4) *Criminal Law Journal* 220, 233.

258. *Filiz v The Queen* [2014] VSCA 212 (11 September 2014) [21]. See also *Portelli v The Queen* [2015] VSCA 159 (22 June 2015) [29]–[30]; *Director of Public Prosecutions v Meyers* (2014) 44 VR 486, 497–498; *Pasinis v The Queen* [2014] VSCA 97 (22 May 2014) [57]; *Director of Public Prosecutions v Neve* [2013] VSC 488 (13 September 2013); *R v Earl* [2008] VSCA 162 (25 August 2008); *R v Hester* [2007] VSCA 298 (29 November 2007). See also Katherine Farrell, 'Let the Sentence Fit the Crime' (2015) 89(10) *Law Institute Journal* 32, 35; Judicial College of Victoria (2010–), above n 188, [4.2].

259. *Veen v The Queen [No 2]* (1988) 164 CLR 465, 477–478 (Mason CJ, Brennan, Dawson and Toohey JJ).

260. *Director of Public Prosecutions v Johnson* (2011) 35 VR 25, 34, citing *R v Cotham* [1998] VSCA 111 (17 November 1998) [14].

261. *Marrah v The Queen* [2014] VSCA 119 (18 June 2014) 8, 10. See also Hawkins and Broughton (2016), above n 209, 10. This aggravation of sentence is likely only permissible if the offender has not also been separately charged with the offence of contravening an FVIO, in order to avoid double punishment. This principle does not prevent the sentencing court from ordering that the sentences for the further offending and the contravention of an FVIO be served at least partly cumulatively, because breaching an intervention order is a uniquely distinct wrong in that it involves disobedience of a court order: *Maher v The Queen* [2011] VSCA 136 (12 May 2011) 13–14.

## Sentencing dispositions and managing family violence offenders under sentence

### *Diversion*

- 3.94 The *Criminal Procedure Act 2009* (Vic) provides offenders with an opportunity to avoid having a finding of guilt recorded through a disposition referred to as 'diversion', although this is not a sentencing order.<sup>262</sup>
- 3.95 For an accused to be eligible for diversion, the alleged offence must be triable summarily, the prosecution must consent, the accused needs to take responsibility for the offence and the accused must comply with certain conditions imposed by the court. These conditions might include attending counselling or treatment, completing unpaid community work, apologising to the victim or any other condition the sentencing officer deems appropriate.
- 3.96 The court then has the ability to adjourn the proceedings for no longer than 12 months in order to enable an accused to undertake the diversion program.<sup>263</sup>
- 3.97 If the accused successfully completes the diversion program, the court must discharge the accused without any finding of guilt. If, on the other hand, the accused fails to comply with the conditions of the diversion program and is subsequently found guilty of the charge, the matter reverts to the court for sentencing. When sentencing, the court must, however, take into account the extent to which the accused complied with the diversion program.<sup>264</sup>
- 3.98 In an effort to make the diversion program more accessible by accused persons who identify as Koori, the Koori Court in Melbourne and Mildura commenced hearing diversion matters before Elders and Respected Persons on Koori Court hearing days on 3 August 2016 and 1 September 2016 respectively.<sup>265</sup>
- 3.99 An evaluation from 2004 found that 94% of participants successfully completed the diversion program, and that the reoffending rates were between 0% and 7% in the 12 months following their commencement of the program.<sup>266</sup>
- 3.100 The Council's 2015 review of sentencing for contraventions of FVIOs and FVSNs found that the use of diversion as a sentencing disposition for offenders convicted of these offences had declined, although this is not necessarily representative of the use of diversion for offending in a family violence context more generally.<sup>267</sup>
- 3.101 During preliminary consultation, Victoria Police noted that diversion is only appropriate for family violence offenders in very limited circumstances. Further, it is the policy of Victoria Police prosecutors that consent to diversion is not given for any case that involves physical violence.<sup>268</sup>

262. *Criminal Procedure Act 2009* (Vic) s 59.

263. *Criminal Procedure Act 2009* (Vic) s 59(2).

264. *Criminal Procedure Act 2009* (Vic) s 59(5). The last opportunity for diversion is generally the date fixed for contest mention: Magistrates' Court of Victoria, *Practice Direction No. 1 of 2003: Criminal Justice Diversion* (2003) 1–2.

265. Magistrates' Court of Victoria, *Practice Direction No. 10 of 2016: Diversion of Koori Accused before Their Elders and Respected Persons* (2016).

266. Silvia Alberti et al., *Court Diversion Program Evaluation: Overview Report: Final Report* (2004) 6.

267. Sentencing Advisory Council (2015), above n 185, 32.

268. Meeting with Victoria Police (8 November 2016).



### **Deferred sentence**

- 3.102 A person found guilty of an offence in the Magistrates' Court may, if they agree, have sentencing deferred in order to demonstrate their rehabilitation, have their capacity for rehabilitation assessed or participate in a certain program.<sup>269</sup> Sentencing cannot be deferred for longer than 12 months, and the court may (but is not required to) specify the date for review.
- 3.103 During the time between deferral and sentencing, the offender can be released on their own undertaking, be granted bail or have their bail extended. If during that time the offender is found guilty of another offence, the court can relist the deferred sentencing hearing to an earlier date. If the offender fails to appear, the court may issue an arrest warrant.<sup>270</sup>
- 3.104 Of the available sentencing options for a court, this is the least intensive means of monitoring a family violence offender during or after the sentencing process.

### **Adjourned undertakings**

- 3.105 A person convicted of an offence may have their proceedings adjourned for up to five years and be released into the community in the meantime. This is known as an adjourned undertaking. The court has discretion whether or not to record a conviction in the process.<sup>271</sup>
- 3.106 An adjourned undertaking must include the conditions that the offender:
- attend court if called on to do so;
  - be of good behaviour; and
  - if relevant observe any special conditions imposed by the court, such as participation in certain services designed to reduce the likelihood of committing further offences.<sup>272</sup>
- 3.107 It is an offence to contravene a condition of an adjourned undertaking. An offender who does not comply with the conditions of their adjourned undertaking without a reasonable excuse can receive a fine of up to 120 penalty units.<sup>273</sup>
- 3.108 In the context of offenders who are being sentenced for contravening an FVIO, the Council has previously noted that adjourned undertakings may be a suitable sentencing option if rehabilitative conditions are attached, such as attendance at a men's behaviour change program, and if the offender's participation in any such program is supervised. Alternatively, adjourned undertakings do not necessarily require the completion of a men's behaviour change program and may simply require the offender to comply with the conditions of the FVIO.<sup>274</sup>

269. *Sentencing Act 1991* (Vic) s 83A.

270. *Sentencing Act 1991* (Vic) s 83A(5).

271. *Sentencing Act 1991* (Vic) ss 72, 75.

272. *Sentencing Act 1991* (Vic) ss 72, 75. See also *Sentencing Act 1991* (Vic) s 80 (definition of 'justice plan condition').

273. *Sentencing Act 1991* (Vic) s 83AC.

274. Sentencing Advisory Council (2009), above n 257, 56–60.

- 3.109 Since 2009, courts have increasingly moved away from the use of adjourned undertakings for contraventions of FVIOs, and have increasingly used CCOs, which offer the additional mechanisms of (for example) pre-sentence reports and judicial monitoring.<sup>275</sup>
- 3.110 In order to commence proceedings against an offender for contravening a condition of an adjourned undertaking, a charge-sheet must generally be filed in the Magistrates' Court.<sup>276</sup> However, there are also a number of circumstances in which a higher court has jurisdiction over an offence of contravention of an adjourned undertaking.<sup>277</sup>
- 3.111 If a court finds a person guilty of contravening an adjourned undertaking, the court must take into account the person's past compliance and confirm, vary or cancel the order.<sup>278</sup>

### **Community correction orders**

- 3.112 Community correction orders (CCOs) were introduced as a sentencing option in Victoria in January 2012,<sup>279</sup> their purpose being to provide a non-custodial sentencing option for a wide range of offences, including family violence offences.<sup>280</sup>
- 3.113 A CCO can be the sole sentence, or it can be concurrently imposed with a fine or a term of imprisonment<sup>281</sup> that does not exceed two years.<sup>282</sup> Recent amendments, not yet in operation, will reduce the maximum term of imprisonment that can be combined with a CCO to 12 months.<sup>283</sup>
- 3.114 The Magistrates' Court may impose a CCO for a maximum period of two years for a single charge, four years for two charges or five years for three or more charges.<sup>284</sup> The County and Supreme Courts may impose a CCO for a maximum period of two years for a single offence or the maximum period of imprisonment available for the offence, whichever is greater.<sup>285</sup>

### **Conditions of a community correction order**

- 3.115 A wide range of conditions can be attached to a CCO.
- 3.116 A number of conditions (sometimes described as 'core conditions') are attached to all CCOs, such as a requirement to not commit an offence while subject to a CCO and to notify the Department of Justice and Regulation of any change of address or employment within two working days.<sup>286</sup>

275. Sentencing Advisory Council (2015), above n 185, xii.

276. *Sentencing Act 1991* (Vic) s 83AG.

277. *Sentencing Act 1991* (Vic) ss 83AL, 83AJ, 83AM.

278. *Sentencing Act 1991* (Vic) s 83AS.

279. *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic), inserting Part 3A of the *Sentencing Act 1991* (Vic).

280. *Sentencing Act 1991* (Vic) s 36.

281. *Sentencing Act 1991* (Vic) ss 43–44.

282. *Sentencing Act 1991* (Vic) s 44(1B). However, these provisions will be amended: see [3.126]–[3.128].

283. *Sentencing (Community Correction Orders) Act 2016* (Vic).

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

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

286. *Sentencing Act 1991* (Vic) s 45.

- 3.117 Other conditions are optional and may be attached at the discretion of the court.<sup>287</sup> These optional conditions include:
- unpaid community work;
  - treatment and rehabilitation;
  - supervision;
  - non-association with certain persons or classes of persons;
  - mandatory or prohibited places of residence;
  - exclusion from certain places or areas;
  - curfew;
  - exclusion from consuming alcohol or attending certain licensed places or events;
  - payment of a bond;
  - judicial monitoring;
  - electronic monitoring;<sup>288</sup> and
  - any other order that the court thinks fit, other than restitution, costs or damages.<sup>289</sup>
- 3.118 In deciding which of these optional conditions to attach to a CCO, the court must consider the principle of proportionality, the purposes of sentencing and the purpose of a CCO.<sup>290</sup>
- 3.119 If the court imposes a CCO of six months or longer, the court may fix an intensive compliance period (a period shorter than the duration of the entire CCO), within which specific CCO conditions must be met.<sup>291</sup>
- 3.120 The court may not impose a CCO unless an offender consents to the order.<sup>292</sup> To that end, a court is required to explain to the offender, or cause to be explained to the offender, in language likely to be readily understood by them:
- the purpose and effect of the proposed order (including the length and proposed conditions);
  - the consequences that may follow if they fail to comply; and
  - the manner in which the proposed order may be varied.<sup>293</sup>
- 3.121 The Council notes that there is potential to increase the use of the existing available conditions (for example, judicial monitoring and electronic monitoring) in order to target family violence offenders.

287. *Sentencing Act 1991* (Vic) pt 3A div 4.

288. This optional condition cannot be attached to a CCO imposed in the Magistrates' Court: *Sentencing Act 1991* (Vic) s 48LA(1).

289. *Sentencing Act 1991* (Vic) ss 48–48LA.

290. *Sentencing Act 1991* (Vic) s 48A. These purposes are specified in sections 5 and 36. The court must impose at least one optional condition on a CCO: *Sentencing Act 1991* (Vic) s 47(1).

291. *Sentencing Act 1991* (Vic) s 39.

292. *Sentencing Act 1991* (Vic) s 37(c).

293. *Sentencing Act 1991* (Vic) s 95.

### **Community correction orders and family violence offending**

- 3.122 In addition to the conditions described above, a number of conditions that can be attached to a CCO directly or indirectly relate to the prevention of family violence:
- a *residence* restriction or exclusion condition to a CCO must be consistent with an FVIO,<sup>294</sup> and the court may have regard to the risk such a condition poses to any person who is likely to reside with the offender;<sup>295</sup>
  - a *place or area* exclusion condition to a CCO must not be inconsistent with an FVIO;<sup>296</sup> and
  - a *curfew* condition to a CCO must not be inconsistent with an FVIO,<sup>297</sup> and the court may have regard to the risk such a condition poses to the safety of any person who is likely to reside with the offender.<sup>298</sup>
- 3.123 It is not mandatory for a sentencing court in Victoria to attach a rehabilitation program condition to a CCO for offenders convicted of family violence-related offences. Such programs are similarly optional conditions in Hawaii.<sup>299</sup> In contrast, it is mandatory for a court at the federal level in the United States to order attendance at an offender rehabilitation program if it is the offender's first conviction for a family violence offence and such a program is readily available within a 50-mile radius of the offender's legal residence.<sup>300</sup>

### **Current use of community correction orders for family violence offending**

- 3.124 To date, the Council has published four reports examining the use of CCOs by Victorian courts generally.<sup>301</sup> While this research is not limited to family violence offending, it demonstrates that courts are increasingly sentencing offenders to CCOs, either as a principal sentence or in combination with imprisonment. In 2015, for example, the Council found that since its previous report, there had been a significant increase in the number of CCOs imposed, both as a principal sentence and in combination with a term of imprisonment.<sup>302</sup>
- 3.125 This increase in the number of CCOs is the product of a number of developments. First, in September 2014 suspended sentences were abolished as a sentencing option.<sup>303</sup> Second, the maximum term of imprisonment that could be combined with a CCO increased from

294. *Sentencing Act 1991* (Vic) s 48G(5).

295. *Sentencing Act 1991* (Vic) s 48G(2). The provision requires the court to take into account the safety of persons likely to reside with the offender; section 48B defines 'safety' to include safety from family violence.

296. *Sentencing Act 1991* (Vic) s 48H(4).

297. *Sentencing Act 1991* (Vic) s 48I(4).

298. *Sentencing Act 1991* (Vic) s 48I(2). The provision requires the court to take into account the safety of persons likely to reside with the offender; section 48B defines 'safety' to include safety from family violence.

299. HI Rev Stat § 706-624 (2013).

300. 18 U.S.C. § 3563(a)(4) (2012).

301. Sentencing Advisory Council, *Community Correction Orders: Monitoring Report* (2014); Sentencing Advisory Council, *Community Correction Orders in the Higher Courts: Imposition, Duration, and Conditions* (2014); Sentencing Advisory Council, *Community Correction Orders: Second Monitoring Report (Pre-Guideline Judgment)* (2015); Sentencing Advisory Council, *Community Correction Orders: Third Monitoring Report (Post-Guideline Judgment)* (2016). See [3.129] below, describing recent legislative amendments that reduce the maximum term of imprisonment that can be combined with a CCO.

302. Between 2014 and 2015, there was a 36% increase in the number of CCOs imposed as the principal sentence in the Magistrates' Court (to 10,508), a 100% increase in the number of CCOs imposed combined with a term of imprisonment in the Magistrates' Court (to 2,028), a 15% increase in the number of CCOs as the principal sentence in the higher courts (to 393) and a 370% increase in the number of CCOs imposed combined with a term of imprisonment in the higher courts (to 356); Sentencing Advisory Council (2016), above n 301, 12.

303. *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic) ss 1(a)(i), 3, 22. The *Sentencing Act 1991* (Vic) was amended to state that CCOs may be considered an appropriate sentence in cases in which a wholly suspended sentence might have been imposed prior to that order being abolished: *Sentencing Act 1991* (Vic) s 36(2).

three months to two years.<sup>304</sup> Third, in December 2014 the Court of Appeal delivered a guideline judgment that clarified the circumstances in which a sentencing court should impose a CCO.<sup>305</sup>

- 3.126 The Council has also noted that in the period between 2009–10 and 2014–15, there was an increase in the use of imprisonment and community sentences (including CCOs) for FVIO contravention charges, following the phased abolition of suspended sentences.<sup>306</sup>

### **Recent changes to community correction orders**

- 3.127 The Victorian Parliament recently enacted the *Sentencing (Community Correction Orders) Act 2016* (Vic), limiting the availability of CCOs.<sup>307</sup> The legislation entirely prohibits courts from imposing CCOs for 11 specific serious offences, including murder and rape, and further prohibits courts from imposing CCOs for nine other serious offences, including manslaughter and kidnapping, unless special reasons apply (such as the accused suffering impaired mental functioning).<sup>308</sup>
- 3.128 The legislation also reduces the length of imprisonment that can be imposed in a combined order from a maximum of two years to a maximum of one year. The maximum length of a CCO is also now limited to five years (whereas higher courts were previously able to impose a CCO for as long as the maximum term of imprisonment available for the particular offence).
- 3.129 Unless proclaimed to come into effect earlier, the legislation will come into effect on 2 October 2017.<sup>309</sup>

### **Managing offender compliance with community correction orders**

- 3.130 It is an offence to contravene a condition of a CCO without a reasonable excuse,<sup>310</sup> punishable by up to three months' imprisonment.<sup>311</sup> In addition to sentencing an offender for the contravention offence, the court may also resentence an offender for the original offence that received the CCO, the conditions of which were the subject of the contravention offence.<sup>312</sup>
- 3.131 Corrections Victoria has responsibility for monitoring offenders' compliance with CCO conditions.

304. *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic) s 13(1), amending *Sentencing Act 1991* (Vic) s 44(1), as inserted by the *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic).

305. *Boulton v The Queen* (2014) 46 VR 308. In that guideline judgment, the Court of Appeal stated that unless 'nothing short of an immediate term of imprisonment will suffice to satisfy the requirements of just punishment' the court should not impose an immediate term of imprisonment (app I [4]). In making that decision, sentencing courts should consider whether a CCO (alone or in conjunction with a term of imprisonment) might be capable of satisfying the requirements of just punishment (app I [4]).

306. Sentencing Advisory Council (2015), above n 185, xii.

307. *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic); Premier of Victoria, 'Tough New Laws: Tightening Community Correction Orders to Keep Victorians Safe', Media Release (12 October 2016) <<http://www.premier.vic.gov.au/tightening-community-correction-orders-to-keep-victorians-safe/>> at 28 October 2016.

308. *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic) s 4.

309. *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic) s 2(3).

310. *Sentencing Act 1991* (Vic) s 83AD. According to Corrections Victoria's internal policies, missing a bus, helping a friend and sleeping in do not constitute a reasonable excuse: Corrections Victoria, *Community Correctional Services Administrative Review Hearing Guidelines* (3rd ed., 2015) 17.

311. *Sentencing Act 1991* (Vic) s 83AD(1).

312. *Sentencing Act 1991* (Vic) s 83AS.

### Reforms to Corrections Victoria's service delivery model for managing offenders on community correction orders

- 3.132 Corrections Victoria has reformed their Community Correctional Services (CCS) service model, following significant growth in the number of offenders sentenced to a CCO.<sup>313</sup> These changes were rolled out from 16 January 2017.<sup>314</sup>
- 3.133 The reforms introduce a new framework for case management that aims to utilise evidence-based practices to reduce reoffending. Research shows that intensive intervention with high-risk offenders reduces their risk of reoffending, while intensive intervention with lower-risk offenders can increase their risk of reoffending.<sup>315</sup> Intensive interventions can draw low-risk offenders away from the pro-social supports that have led to their assessment as low risk, such as stable employment and positive community or family relationships, and instead bring them into contact with higher-risk offenders and increase their risk of moving into social groups for which offending behaviours are normalised.
- 3.134 Under the reformed correctional model, Corrections Victoria will continue to assess an offender's risk level using an actuarial risk assessment tool – the Level of Service/Risk, Need, Responsivity (LS/RNR) Scoring Guide – which provides an indication of the risk of general reoffending based on a comparison of an individual offender's characteristics with the characteristics of offenders who reoffend at particular rates.<sup>316</sup> There are also targeted reoffending tools for particular categories of offenders. For family violence offenders, Corrections Victoria administers the Spousal Assault Risk Assessment (SARA), but this only applies to family violence offenders who engage in physical assault, not for other kinds of family violence offending.<sup>317</sup>
- 3.135 An offender's assessed risk level informs the level of case management and supervision that they receive. Advanced case managers will now handle offenders who have been sentenced to a CCO in combination with a term of imprisonment, sex offenders on CCOs and high-risk or complex offenders. Advanced case managers are more experienced and have lower caseloads so that they are able to provide more intensive case management. Low-risk offenders will be managed by case officer staff, who meet with offenders on commencement of the CCO, but otherwise manage offenders administratively.<sup>318</sup>
- 3.136 Unlike under the previous service model, high-risk offenders will be given prioritised access to treatment or programs, such as men's behaviour change programs, under the reformed model.<sup>319</sup>
- 3.137 At a broad level, Corrections Victoria has indicated that higher-risk offenders will be subject to 'swift' responses for non-compliance with a condition of their CCO, though there are no fixed consequences for non-compliance with a CCO condition. Corrections Victoria's aim is to support the offender to continue on their CCO where appropriate, rather than immediately returning the offender to court upon any contravention. Nevertheless, if a high-risk offender were to contravene a CCO condition and it was the advanced case manager's

313. Meeting with Corrections Victoria (7 November 2016). For further discussion of the increase in the numbers of CCOs being imposed, including sentences of imprisonment combined with a CCO, see Sentencing Advisory Council, *Parole and Sentencing: Research Report* (2016); Sentencing Advisory Council (2016), above n 301.

314. Meeting with Corrections Victoria (7 November 2016); State of Victoria, 'Stronger Community Corrections System to Keep Victorians Safe', Media Release (16 January 2017) <<http://www.premier.vic.gov.au/stronger-community-corrections-system-to-keep-victorians-safe/>> at 8 February 2017.

315. See for example, Clifford R. O'Donnell et al., 'The Buddy System: Review and Follow-Up' (1971) 1(2) *Child Behavior Therapy* 161; James Bonta et al., 'A Quasi-Experimental Evaluation of an Intensive Rehabilitation Supervision Program' (2000) 27 *Criminal Justice and Behavior* 312; Brian Lovins et al., 'Applying the Risk Principle to Sex Offenders: Can Treatment Make Some Sex Offenders Worse?' (2009) 89(3) *The Prison Journal* 344.

316. Corrections Victoria, *Fact Sheet – Assessing the Risk of Reoffending* (2015) 1.

317. Meeting with Corrections Victoria (12 October 2016).

318. Meeting with Corrections Victoria (7 November 2016).

319. Meeting with Corrections Victoria (7 November 2016).

assessment that their risk level had increased to the extent that they could not continue on the CCO, contravention proceedings could commence.<sup>320</sup>

- 3.138 Under the new model, prosecutions of CCO contraventions will be undertaken by specialist staff from the Court Assessment and Prosecutions Service. Specialist staff are anticipated to be in a position to objectively determine whether to initiate contravention proceedings, and they may propose that other steps be taken prior to initiating contravention proceedings (such as initiating an administrative review hearing).<sup>321</sup>

### **Case management approach to non-compliance with community correction order conditions**

- 3.139 In line with the reforms discussed above, Corrections Victoria also intends to reduce the level of prescriptiveness in their approach to managing an offender's non-compliance with CCO conditions. Staff are provided with a decision-making framework within which the staff member will use their professional judgment to make ongoing assessments about appropriate responses to an offender's non-compliance.
- 3.140 Under the previous system, when an offender failed to comply with a CCO condition (such as failing to attend an appointment), it was generally expected that the non-compliance event would be investigated within five working days of notification and would be 'resolved' within three weeks of the instance of non-compliance.<sup>322</sup>
- 3.141 There were no fixed responses to non-compliance events. Decisions have been guided by the Offender Management Framework, as well as by guidelines issued by the Deputy Commissioner.<sup>323</sup> Consequently, an offender may accrue a number of instances of non-compliance with the terms of their CCO before there is a consequence. The decision about 'how many' instances of non-compliance trigger that event was informed by an assessment of the reasons for an offender's non-compliance, whether non-compliance was likely to escalate to reoffending and considerations relevant to the offender's risk level.<sup>324</sup>
- 3.142 Under both the previous service model and the reformed model, Corrections Victoria follows a case management approach to non-compliance. Case managers take a holistic approach to offender management and aim to achieve offender compliance with the CCO by proactive modelling of good behaviour, as opposed to taking a punitive, or strict, approach to CCO management.<sup>325</sup>
- 3.143 There are a number of possible responses once Corrections Victoria has discovered non-compliance with a CCO condition, including (in order of escalating seriousness):
- calling a 'compliance meeting' with an offender to review their compliance and the consequences of non-compliance;
  - having a senior staff member issue a warning to the offender;
  - initiating an administrative review hearing (ARH); or
  - formally initiating proceedings for contravention of a CCO.
- 3.144 Corrections Victoria's approach to management of offenders on CCOs therefore differs significantly from an SCF approach, which demands consistent responses to every non-compliance event.

320. Meeting with Corrections Victoria (7 November 2016).

321. Meeting with Corrections Victoria (7 November 2016).

322. Corrections Victoria, *Deputy Commissioner's Instruction 10.3: Non-Compliance Management – Court Orders* (2016).

323. For example, see *ibid.* Other policies may also apply to an individual offender's circumstances, such as Corrections Victoria, *Correctional Management Standards for Women Serving Community Correctional Orders* (2009). These guidelines will be updated to align with the reforms to case management discussed at [3.132]–[3.138].

324. Meeting with Corrections Victoria (12 October 2016).

325. Meeting with Corrections Victoria (12 October 2016).

### Administrative review hearings

- 3.145 One of the possible responses to non-compliance with a CCO is to conduct an administrative review hearing (ARH). During the hearing, senior Corrections Victoria or Department of Justice and Regulation staff hear allegations of contraventions of sentencing orders, and in some circumstances impose minor penalties.<sup>326</sup>
- 3.146 Offenders are not permitted legal representation during an administrative review hearing, but they may invite a support person, subject to the ARH Chair's approval. Offenders are also permitted to request a formal review if they are dissatisfied with the outcome.<sup>327</sup>
- 3.147 The objective of the administrative review hearing is to provide a 'structured, swift and tangible' response to low-level, 'conditions only' non-compliance, that is, contraventions that are not serious, are not persistent and do not consist of further offending.<sup>328</sup>
- 3.148 If the CCO has an unpaid community work condition attached and the offender fails to comply with a provision of the CCO without reasonable excuse, the Secretary of the Department of Justice and Regulation may order up to an additional 16 hours of unpaid community work.<sup>329</sup> Similarly, if the CCO has a curfew condition attached and the offender fails to comply with a provision of the CCO without reasonable excuse, the Secretary of the Department of Justice and Regulation may direct that the offender is to remain in that place for up to an additional two hours per day, or direct that the curfew condition is to apply for up to an additional 14 days.<sup>330</sup>
- 3.149 These sanctions are available irrespective of which CCO condition the offender contravened. The sanctions can only be imposed if the contravention is sufficiently serious to warrant the additional hours but not so serious that a CCO contravention charge should be filed.<sup>331</sup>
- 3.150 Finally, an offender can receive a fine of up to 60 penalty units if they leave a place that they are required to be, fail to attend a place that they are required to attend or enter an unauthorised area of the community corrections centre.<sup>332</sup> Corrections Victoria has indicated that these fines are rarely, if ever, imposed.<sup>333</sup>
- 3.151 Initial consultations with Corrections Victoria suggest that it is not currently possible to determine standard timeframes between a contravention and a response to that contravention.<sup>334</sup>
- 3.152 In a review of the first 12 months of ARH operations, Corrections Victoria found that there were 353 referrals to an administrative review hearing.<sup>335</sup> The most common outcome from a hearing involved case management strategies (84%). Warnings were given in around half of

326. Corrections Victoria, *Community Correctional Services Administrative Review Hearing Guidelines: Sentencing Reform Implementation Team* (2013) 4. These powers were introduced following a recommendation by the Council that Corrections Victoria could have a specific body established to deal with more serious technical breaches in lieu of a court hearing: Sentencing Advisory Council, *Suspended Sentences and Intermediate Sentencing Orders: Suspended Sentences Final Report – Part 2* (2008) 252.

327. Corrections Victoria, *Administrative Review Hearings in Community Correctional Services: A 12-Month Review* (2015) 4, 9, 11, 47–50.

328. The power to impose penalties for these low-level contraventions was introduced by the *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic).

329. *Sentencing Act 1991* (Vic) s 83AU.

330. *Sentencing Act 1991* (Vic) s 83AV.

331. *Sentencing Act 1991* (Vic) s 83AU(2)(b); *Sentencing Act 1991* (Vic) s 83AV(2)(b).

332. *Sentencing Act 1991* (Vic) s 83AE.

333. Meeting with Corrections Victoria (7 November 2016).

334. Meeting with Corrections Victoria (12 October 2016). The *Deputy Commission's Instruction* suggests that the non-compliance event should be investigated within five working days of notification and should be 'resolved' within three weeks of the instance of non-compliance: Corrections Victoria (2016), above n 322, 3.

335. Corrections Victoria (2015), above n 327, 4, 11.



the hearings (47%), and sanctions such as additional community work (2%) and fines (0.5%) were only used in very select cases.<sup>336</sup> Most importantly, administrative review hearings were found to be effective in encouraging compliance with court orders, the number of non-compliance incidents decreasing from 3.8 in the 60 days before the hearing to 2.6 in the 60 days after the hearing (a drop of nearly one-third).<sup>337</sup>

#### Formal charge for community correction order contravention

- 3.153 The most severe response to an offender's non-compliance is to formally charge them with a contravention offence, especially if the non-compliance is persistent, is serious or involves further offending.
- 3.154 In order to commence proceedings against an offender for contravening a CCO condition, generally a charge-sheet must be filed in the Magistrates' Court.<sup>338</sup> There are, however, also a number of circumstances in which a higher court has jurisdiction over a CCO contravention offence.<sup>339</sup>
- 3.155 If the behaviour constituting the contravention is a punishable offence in and of itself, the charge-sheet must be filed within six months of the accused being convicted or found guilty of that contravention. Alternatively, if the contravention is not a punishable offence in and of itself, the charge-sheet must be filed within one year after the CCO ceases to be in force.<sup>340</sup>
- 3.156 If a court then finds an accused guilty of contravening a CCO, it must then confirm, vary or cancel the order, taking into account the offender's past compliance with the CCO<sup>341</sup> (that is, the court may resentence the offender for the original offences for which they received the CCO).
- 3.157 In addition to possibly being resentenced for the original offending, the offender may also be liable to up to three months' imprisonment for the CCO contravention offence,<sup>342</sup> as well as any other applicable term of imprisonment for a contravention resulting from new offending.
- 3.158 The court, however, must avoid punishing the offender twice for the same contravention (that is, with an aggravated penalty for the new offending behaviour *and* a sentence for the contravention).<sup>343</sup>

#### Prevalence of contravention of community correction order charges

- 3.159 In the 2015–16 financial year, there were 87 cases involving at least one CCO contravention charge heard in the County Court of Victoria. Over the same period, there were 5,200 cases involving at least one CCO contravention charge heard in the Magistrates' Court.
- 3.160 It is not known what proportion of these cases involved contravention charges for a CCO that was imposed for offending in a family violence context.

336. Ibid 4, 15.

337. Ibid 4, 17.

338. *Sentencing Act 1991 (Vic)* s 83AG.

339. *Sentencing Act 1991 (Vic)* ss 83AJ (if the Magistrates' Court did not issue the original CCO, it must transfer the proceedings to the court that did), 83L (if the contravening behaviour is a punishable offence in and of itself and a higher court imposed the original CCO, the charge-sheet may be filed directly with the higher court), 83M (if the contravening behaviour is a punishable offence in and of itself but a higher court did not impose the original CCO, the higher court may treat the contravention as an unrelated summary offence).

340. *Sentencing Act 1991 (Vic)* s 83AH.

341. *Sentencing Act 1991 (Vic)* s 83AS.

342. *Sentencing Act 1991 (Vic)* s 83AD.

343. *R v Sanerive* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Southwell, Ormiston and McDonald JJ, 23 June 1995) 41.

## Research on effective sentencing of family violence offenders

- 3.161 As discussed in Chapter 2, SCF approaches were developed to address non-compliance with a probation sentence by offenders with identified drug and alcohol issues. While one jurisdiction in the United States has piloted an SCF program directed at family violence offenders, this program focused on offenders with additional drug and alcohol issues.<sup>344</sup>
- 3.162 An important consideration is therefore whether SCF approaches align with what the existing evidence suggests is best practice for the sentencing, and management under sentence, of family violence offenders.
- 3.163 This section briefly summarises research findings on the effectiveness of different approaches to sentencing family violence offenders and the management of such offenders while under sentence.
- 3.164 It is necessary to draw a distinction between the evidence for the effectiveness of different sentencing orders on the one hand, and the evidence for the efficacy of perpetrator intervention programs aimed at preventing family violence reoffending on the other hand. While the former may facilitate the latter – for example, where an offender is ordered to attend a men’s behaviour change program as part of a sentence – most evaluations consider each separately.

## Evidence of effectiveness of sentencing interventions for family violence offenders

- 3.165 In their recent study on short terms of imprisonment and family violence reoffending, Trevena and Poynton highlight the limited evidence (both from Australia and from overseas) on the effectiveness of various family violence initiatives and interventions.<sup>345</sup> In particular, the past inability to distinguish family violence-related offending within most sentencing datasets means that there has been a lack of research on sentencing and reoffending in relation to family violence.<sup>346</sup>

### *Measuring the effectiveness of sentences*

- 3.166 An ongoing challenge in sentencing criminology is evaluating the effectiveness of different sentencing orders. The question ‘Is a CCO more effective at preventing reoffending than a term of imprisonment?’, for example, is an important one to consider, but it cannot be answered by simply comparing the reoffending rates of offenders sentenced to either order.
- 3.167 Courts do not arbitrarily impose a particular sentence. Instead, sentencing orders exist within a hierarchy, and subject to several express exceptions, Victorian courts are required to impose the least severe penalty that achieves the purpose or purposes of sentencing, in accordance with the principle of parsimony. Further express provisions in the *Sentencing Act 1991* (Vic) require the court to consider a custodial sentence as a sentence of last resort.<sup>347</sup>

344. Michigan had a domestic violence Swift and Sure Sanctions Probation Program that targeted domestic violence offenders. Admission into the program was voluntary for the participants, and all participants had a history of domestic violence and were diagnosed with a substance-abuse disorder that contributed to the domestic violence: email correspondence with Thomas Myers, Michigan Supreme Court (30 July 2016).

345. Judy Trevena and Suzanne Poynton, *Does a Prison Sentence Affect Future Domestic Violence Reoffending?* Crime and Justice Bulletin no. 190 (2016) 1.

346. *Ibid* 1–2.

347. *Sentencing Act 1991* (Vic) s 5(4).

3.168 As a result, an offender who receives a CCO and an offender who receives a sentence of imprisonment, for example, are very likely to have different antecedents and different mitigating characteristics, and the offending for which each offender is sentenced is likely to differ in seriousness. Taken together, these circumstances mean that an offender sentenced to a term of imprisonment is more likely than an offender sentenced to a CCO to exhibit characteristics that increase the likelihood of their reoffending, quite apart from any influence on reoffending resulting from the sentence of imprisonment.

### **Adjourned undertakings**

3.169 As discussed at [3.108], in the context of offenders who are sentenced for contravening an FVIO, the Council has previously noted that adjourned undertakings may be a suitable sentencing option if rehabilitative conditions are attached, such as attendance at a men's behaviour change program, and the offender's participation in any such program is supervised.<sup>348</sup>

### **Fines**

3.170 In a 2009 report, the Council specifically cautioned against the use of fines as a sentencing disposition in the context of contravention of FVIOs and FVSNs, concluding that fines are generally unable to fulfil the purposes of community protection and rehabilitation in relation to contravention of an FVIO. Further, fines may compound the harm experienced by the victim survivor by withdrawing resources from the family as a whole.<sup>349</sup>

3.171 Fines may be particularly inappropriate where family law property disputes also exist; in those circumstances, the imposition of a fine may exacerbate the risk of further violence if the offender is already aggrieved about financial matters.<sup>350</sup> The Council's *Guiding Principles for Sentencing Contraventions of Family Violence Intervention Orders* ('the Guiding Principles') state that when considering imposing a fine in the context of FVIO/FVSN contravention, courts should consider any likely impact of a fine on the victim survivor.

3.172 For a 2015 report, the Council consulted with stakeholders who noted that fines have a limited potential to influence behavioural change.<sup>351</sup> However, in some cases the use of fines may be explained by the offender's pre-sentence rehabilitation efforts, which may have been accompanied by the use of deferred sentencing.<sup>352</sup>

3.173 The Council recently found that offenders who were fined in 2009–10 for contravening a family violence order were less likely to pay their fines (48% paid) than the general offender population who were fined in the same year (56% paid).<sup>353</sup> Similarly, non-payment of fines by family violence offenders is associated with an increased risk of reoffending: 57% of those who did not pay their fine reoffended, compared with 44% of those who fully paid.<sup>354</sup>

348. Sentencing Advisory Council (2009), above n 257, 60.

349. Ibid 51–55, 134.

350. Sentencing Advisory Council (2013), above n 167, 47. Further examination of the issues around the use of fines in this area of sentencing is contained in the Council's 2009 report: Sentencing Advisory Council (2009), above n 257, 51–55.

351. Sentencing Advisory Council (2015), above n 185, 26.

352. Sentencing Advisory Council (2016), above n 29, 64–65.

353. Ibid 69.

354. Ibid xx.

### **Short terms of imprisonment**

- 3.174 Recent research by the New South Wales Bureau of Crime Statistics and Research (BOCSAR) found that family violence offenders who received a first-time prison sentence took, on average, the same length of time to reoffend upon release from custody as family violence offenders who served a suspended sentence in the community.<sup>355</sup> After one year, 20.3% of people given a suspended sentence and 20.3% of people given a sentence of imprisonment had at least one new family violence-related offence, and after three years the proportions were 34.2% and 32.3% respectively. This result was consistent with previous findings by Trevena and Weatherburn on the deterrent effect of short prison sentences for all offenders, irrespective of the type of offending committed.<sup>356</sup>
- 3.175 The findings suggest that increasing the proportion of family violence offenders who serve short prison sentences (less than 12 months) is unlikely to have an impact on their likelihood of reoffending.
- 3.176 The effectiveness of short terms of imprisonment (where that is the entire sentence) can be contrasted with an SCF approach where short periods of custody are used to enforce compliance with a community-based sentence. Nevertheless, the findings suggest custody (in the absence of treatment) may not reduce the likelihood of reoffending.

### **Other approaches to reducing reoffending by family violence offenders**

- 3.177 In 2013, researchers from the Washington State Institute for Public Policy conducted a meta-study examining 'promising' approaches to reducing reoffending by family violence offenders.<sup>357</sup>
- 3.178 A number of approaches were regarded as being promising (and justifying further research) including:
- family violence courts;
  - judicial monitoring;
  - specialised supervision;
  - GPS monitoring;
  - coordinated community response; and
  - risk assessment.<sup>358</sup>
- 3.179 Notably, aspects of all these approaches exist in the current Victorian system but are limited by the group of offenders targeted or by geographical location. The implementation of a number of the recommendations of the Royal Commission is likely to improve this and provide a more coordinated and comprehensive set of approaches and services, including the introduction of a network of support and safety hubs.<sup>359</sup>
- 3.180 The researchers also examined other treatments and programs that are effective at reducing recidivism among the general offender population and may help to indirectly reduce rates of family violence.<sup>360</sup> One such program is case management for substance-abusing offenders that utilises swift and certain sanctions. The researchers found that these programs are associated with statistically significant reductions in recidivism.<sup>361</sup>

355. Trevena and Poynton, above n 345.

356. Ibid 8, citing Judy Trevena and Don Weatherburn, *Does the First Prison Sentence Reduce the Risk of Further Offending?* Crime and Justice Bulletin no. 187 (2015).

357. Marna Miller et al., *What Works to Reduce Recidivism by Domestic Violence Offenders?* (2013) 7.

358. Ibid 8–9.

359. State of Victoria (2016), above n 164, 36.

360. Miller et al. (2013), above n 357, 10.

361. Ibid.

- 3.181 Other sentencing programs associated with statistically significant reductions in recidivism include:
- the offender re-entry community safety program (for dangerous mentally ill offenders);
  - drug offender sentencing alternatives that target drug and property offenders;
  - supervision with risk–needs–responsivity principles (for moderate and high-risk offenders);
  - electronic monitoring (radio frequency or GPS);
  - mental health courts;
  - drug courts;
  - drug treatment in the community involving therapeutic communities;
  - cognitive behaviour therapy (for moderate and high-risk offenders);
  - work release programs; and
  - employment training/job assistance programs.<sup>362</sup>

## Question 2: ‘Swift, certain and fair’ as a response to family violence

Do SCF approaches align with the evidence of best practice for the sentencing, and management under sentence, of family violence offenders?

### Evidence of the effectiveness of perpetrator intervention programs

- 3.182 Researchers have cautioned that perpetrator intervention programmes remain controversial for a number of reasons, including:
- the lack of conclusive evidence regarding the effectiveness of the programs;
  - the fear that the programs put victims in greater danger if the intervention fails;
  - the concern that the programs may dilute the effect of criminal justice interventions; and
  - the concern that perpetrator programs may be funded at the expense of family violence victim projects.<sup>363</sup>
- 3.183 Evaluating perpetrator intervention programs is a complex task in light of the different program approaches and methodologies employed. In general terms, there are two primary approaches taken by perpetrator intervention programs:
- psychoeducational programs*—the most common approach, and usually employing a feminist perspective of domestic violence that places the responsibility for the violence with the perpetrator and highlights the contribution of patriarchal gender relations in contributing to domestic violence by explicitly and implicitly sanctioning men’s use of power and control over women. The Duluth approach ... typically employs a feminist psychoeducational approach; and
- cognitive behavioural groups*—a more traditionally psychological approach, these groups focus on violence as a learned behaviour. The groups teach participants how to recognise the antecedents of their own use of violence and how to substitute violent with non-violent strategies. This approach is also commonly used to treat other forms of behaviour such as sexual offending.<sup>364</sup>

362. Ibid.

363. Marianne Hester and Nicole Westmarland, *Tackling Domestic Violence: Effective Interventions and Approaches*, Home Office Research Study 290 (2005), citing Audrey Mullender and Sheila Burton, *Reducing Domestic Violence ...What Works? Perpetrator Programmes*, Policing & Reducing Crime Briefing Note (2000) 3.

364. Janet Phillips et al., *Domestic Violence: Issues and Policy Challenges* (2015) 12, citing Julia C. Babcock et al., ‘Does Batterers’ Treatment Work? A Meta-Analytic Review of Domestic Violence Treatment’ (2004) 23(8) *Clinical Psychology Review* 1023.

3.184 The Royal Commission comprehensively examined the limited evidence for the effectiveness of perpetrator intervention programs (specifically, men's behaviour change programs) based on these two approaches. The Royal Commission found that 'the efficacy of both in regards to intimate partner violence perpetrators appears to be broadly similar' and that 'the empirical research finds that both models have an almost equal, small impact on stopping subsequent intimate partner violence'.<sup>365</sup>

3.185 The Royal Commission also cited Hall McMaster and Associates, who stated that:

Although [family violence] is a major social problem, there have been few rigorous outcome evaluations undertaken. What has emerged, suggests that [family violence] programs – whether based on the Duluth or CBT model (or some combination of these) – have a small, positive impact on reoffending. There seems to be no solid evidence to date which would provide confidence that either model should be favoured over the other. However, the research evidence does provide optimism that [family violence] programs can work where men complete the full intervention.<sup>366</sup>

3.186 The Royal Commission noted that, in the absence of strong positive effects from these programs, the men's behaviour change programs have been justified on the basis that 'some intervention is better than none' and that the alternatives, including punishment-based responses, are an ineffective way of changing behaviour (unless some very specific conditions are in place).<sup>367</sup>

3.187 The Royal Commission made explicit recommendations in relation to perpetrator intervention programs, and in particular, men's behaviour change programs, including the following:

Recommendation 86

The Victorian Government convene a committee of experts on perpetrator interventions and behaviour change programs [within 12 months] to advise the government on the spectrum of programs, services and initiatives that should be available in Victoria—in the justice system and in the community—to respond to all perpetrators across varying forms and risk levels of family violence. The committee should consider men's behaviour change programs, clinical models such as cognitive behaviour therapy, strengths-based programs and fathering-specific models, online programs, and services for perpetrators from diverse communities. The expert advisory committee should consist of members with expertise in a variety of disciplines and practice approaches and with experience in working directly with perpetrators and victims of family violence, including those from diverse communities.

...

Recommendation 90

The Victorian Government, working with the courts and providers of men's behaviour change programs, establish an improved process for monitoring the attendance of perpetrators who are ordered to participate in behaviour change programs and the outcomes of their participation in those programs [within 12 months].<sup>368</sup>

365. State of Victoria (2016), above n 2, 259.

366. Ibid 260, citing Statement of Andrew Reaper (Deputy Commissioner, Offender Management, Corrections Victoria).

367. Ibid 259–260, citing Statement of Andrew Day (Professor of Psychology, Deakin University).

368. Ibid 297, 299.

### **Supervision and failure to complete programs**

- 3.188 While some non-controlled, non-randomised evaluations have found that men who complete intervention programs often have lower levels of recidivism, drop-out rates are very high.<sup>369</sup>
- 3.189 The issue of failure to complete programs was also noted in a 2010 Australian study that examined a Queensland program delivered to men who perpetrate family violence and are legally obliged to participate.<sup>370</sup> Only 20 (53%) of the 38 men in the study successfully completed the program. Other research has shown non-completion rates between 45%<sup>371</sup> and 75%.<sup>372</sup> Participants who are older, more educated, and more likely to be employed are more likely to complete programs.<sup>373</sup>
- 3.190 Commenting on attendance at UK perpetrator programs, Mullender and Burton concluded that sanctions for non-completions were required, stating:
- Action should be taken by the police, Crown Prosecution Service, courts and probation service to minimise non-completion rates by referring men through to programmes as quickly as possible and by actively pursuing non-compliance with realistic sanctions.<sup>374</sup>

### **SCF approaches to compel attendance?**

- 3.191 While the evidence for the effectiveness of perpetrator intervention programs is mixed, the likelihood of the success of any intervention is necessarily diminished in circumstances where the perpetrator fails to complete the program, or fails to attend in the first place.
- 3.192 In light of the available data showing very low completion rates with perpetrator intervention programs by offenders, a more swift and punitive response to non-compliance with an order to attend a program may be justified.
- 3.193 The issue of what conditions violations may warrant an SCF approach is discussed at [4.108]–[4.111].

### **Managing risk to victim survivors or protected persons**

- 3.194 There are particular concerns for the application of SCF sanctions in the context of family violence offending, given the complexities and dynamics of family violence. In preliminary consultation, a number of stakeholders raised the issue of SCF sanctions increasing the risk to victim survivors' safety, as the offender may externalise the blame for the sanction to the victim survivor of family violence. This risk is heightened where detection of the offender's contravention of a condition relies on a victim survivor's reporting of the contravention.

369. Mullender and Burton, above n 363, 3.

370. Andrew Day et al., *Integrated Responses to Domestic Violence: Legally Mandated Intervention Programs for Male Perpetrators*, Trends and Issues in Crime and Criminal Justice no. 404 (2010).

371. Edward D. Gondolf, 'Program Completion in a Specialized Batterer Counseling for African-American Men' (2008) 23(1) *Journal of Interpersonal Violence* 94.

372. Frederick P. Buttell and Michelle Mohr Carney, 'A Large Sample Investigation of Batterer Intervention Program Attrition: Evaluating the Impact of State Program Standards (2008) 18(3) *Research on Social Work Practice* 177.

373. Phillips et al. (2015), above n 364, 12, citing Rachel Jewkes, 'Evidence Review of the Effectiveness of Response Mechanisms in Preventing Violence Against Women and Girls' in Department for International Development, *What Works to Prevent Violence Against Women and Girls?* (2014) Appendix H.

374. Mullender and Burton, above n 363, [3].

- 3.195 Where targeted conditions involve independent monitoring and testing by law enforcement agencies (such as drug and alcohol conditions), the risk of an offender placing blame for either the detection of the contravention or the consequences that flow from it on another person is somewhat minimised. This is not so in the family violence context, where offenders can often consider the victim survivor responsible for their offending.
- 3.196 The sanctions that are imposed should be carefully considered in light of the potential escalation of risk to victim survivors. A short period of custody may have the sole consequence of angering an offender, who is then released, placing a victim survivor in a situation of increased risk.
- 3.197 Some stakeholders noted that any intervention may pose a short-term risk to victim survivors or protected persons, and this must be weighed against the medium- to long-term benefit that such an intervention may generate. Other stakeholders, however, noted that short periods of custody (which may occur when the offender is arrested for family violence offending, held in custody prior to a bail hearing or denied bail) may act as a 'circuit breaker' in a family violence context.
- 3.198 It is likely that the response of a family violence offender to the SCF approach will depend on which condition violation triggered the sanction. For example, where the sanction is directed at a condition violation solely related to the offender's own behaviour (for example, a positive drug test or failure to attend an appointment or course) the risk may be diminished.
- 3.199 This raises questions about what kind of conditions should be targeted by any SCF approach given the dynamics of family violence, as well as about the types of penalties that ought to be imposed.

### Question 3: Managing risk to victim survivors or protected persons

- a. Would SCF sanctions, in the form of short periods of custody, increase the short-term risk to victim survivors or protected persons?
  - b. If so, can this risk be justified by the potential for greater offender accountability, greater offender compliance and a reduced risk to victim survivors or protected persons in the medium to long term?
-



# 4. Applying an SCF approach to sentencing and management of family violence offenders in Victoria

## Overview

- 4.1 As discussed in Chapter 2, the Council distinguishes between the principles that underpin swift, certain and fair (SCF) approaches – such as the promotion of swift justice-system responses – and SCF models that align themselves with Hawaii's Opportunity Probation with Enforcement (HOPE) program (see [2.3]–[2.9] for further discussion of this distinction).
- 4.2 In order to facilitate discussion, this chapter presents some options for the introduction of an SCF approach to sentencing and management of family violence offenders, *without concluding that an SCF approach would be desirable in Victoria*.
- 4.3 Discussions during preliminary consultation have suggested that there is a limited range of options for the integration of an SCF approach into Victoria's existing framework for the sentencing, and management under sentence, of family violence offenders.

## Context for proposed recommendations

- 4.4 In examining the different options for the introduction of an SCF approach in Victoria, the Council has proceeded on the basis of the Victorian Government's acceptance of all 227 recommendations of the Royal Commission into Family Violence.<sup>375</sup>
- 4.5 Recommendations of particular relevance to consideration of an SCF approach include those relating to court-based responses to family violence, such as the recommendation that all headquarter Magistrates' Court locations and specialist family violence courts have the functions of the Family Violence Court Division within two years.<sup>376</sup>
- 4.6 The Council anticipates that any proposed SCF approach would need to operate within, and therefore be consistent with, the changed landscape following implementation of the Royal Commission's recommendations.

## Transferability of an SCF approach to jurisdictions outside the United States

- 4.7 The Council notes that SCF approaches have been developed in the United States. The application of any SCF approach in Australia would need to occur with careful consideration of the differences between the two jurisdictions.

375. State of Victoria, *Response to Royal Commission into Family Violence* (2016) <<http://www.vic.gov.au/familyviolenceresponse.html>> at 4 November 2016. The timeframes for adoption of the various recommendations of the Royal Commission into Family Violence differ.

376. State of Victoria (2016), above n 2, 160 (Recommendation 60).

4.8 Duriez et al., for example, have cautioned that:

the “transfer of technology” from one jurisdiction to another—from Hawaii to Delaware and elsewhere—is a daunting challenge. The context in each system potentially differs in meaningful ways, including court personnel, justice system coordination, legal restrictions, offender populations, resource capacity, and sanctioning practices. If Hawaii and Project HOPE offered a perfect storm of favorable conditions, this intersection of conditions may not be possible in other locations. Before jumping on the HOPE bandwagon, it would be prudent to wait for positive replications elsewhere—even assuming that they will be forthcoming.<sup>377</sup>

4.9 Even within the United States, there can be great disparity in the criminal justice systems of the various state jurisdictions. Critics have suggested that some of the unique social, correctional and even geographical characteristics of Hawaii may have been central to the success of the HOPE program,<sup>378</sup> and there is limited evidence that SCF principles are consistently effective across diverse contexts and populations.<sup>379</sup>

4.10 There are a number of fundamental differences between the United States and Australia that must be considered when examining whether a program developed in the United States would be effective in the Australian, and indeed in the Victorian, context. These differences include:

- *incarceration rates* – the United States has one of the highest prison population rates in the world (with more than 750 per 100,000 people in the United States incarcerated).<sup>380</sup> Despite these high incarceration rates, crime rates have not fallen,<sup>381</sup> and the costs of maintaining such high levels of incarceration are leading to financial strain.<sup>382</sup> In Victoria, on the other hand, the incarceration rate is 138.3 prisoners per 100,000 adults,<sup>383</sup> in part because imprisonment is only used as a sentence of last resort.<sup>384</sup>
- *focus on rehabilitation* – some authors have argued that rehabilitation plays only a minor role in United States punishment theory, to the point of even being formally rejected in some circumstances.<sup>385</sup> In contrast, as mentioned at [3.85], rehabilitation is a legislated purpose of sentencing in Victoria.
- *elected officials* – in the United States, local prosecutors and state judges are elected, often on ‘tough on crime’ platforms that may encourage over-punishing offenders.<sup>386</sup> In Australia, such positions are not filled by election.
- *sentencing discretion* – a number of United States jurisdictions use prescriptive sentencing guidelines that limit judicial discretion.<sup>387</sup> Victorian sentencing is based on a system

377. Duriez et al. (2014), above n 71, 66.

378. Ibid 65; Pearsall (2014), above n 89.

379. See for example, Lattimore et al. (2016), above n 70.

380. Carol Steiker, ‘Criminalization and the Criminal Process: Prudential Mercy as a Limit on Penal Sanctions in an Era of Mass Incarceration’ in Robin A. Duff et al. (eds), *The Boundaries of the Criminal Law* (2010) 31.

381. See for example, The Pew Charitable Trusts, *Prison and Crime: A Complex Link* (2014) <<http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/prison-and-crime>> at 7 November 2016.

382. Christian Henrichson and Ruth Delaney, *The Price of Prisons: What Incarceration Costs Taxpayers* (2012) 2.

383. Sentencing Advisory Council, *Victoria’s Prison Population: 2005 to 2016* (2016) 9.

384. See for example, *Boulton v The Queen* (2014) 46 VR 308, 335. Section 5(4) of the *Sentencing Act 1991* (Vic) provides that a sentence of imprisonment must not be imposed unless the purposes for which the sentence is being imposed cannot be achieved by other means.

385. See for example, Steiker (2010), above n 380, 46–47 (‘For example, Congress explicitly rejected rehabilitation as a goal of incarceration in the 1984 Act that established the Federal Sentencing Commission’).

386. Ibid 39.

387. Judge Alm has stated that many offenders were facing sentences of ‘5 to 10 years’ for drug offending following failure on probation: ABC Radio National (2015), above n 92. For further information on the length of sentences for various offences in Hawaii, see Hawaii Paroling Authority, *2016 Annual Statistical Report* (2016).

of structured discretion, allowing judicial officers to exercise a significant amount of discretion in determining a just and proportionate sentence (see Chapter 3 for a discussion of Victoria's sentencing framework).

- *custodial facilities* – in the United States, offenders serving shorter sentences can be held in county jails administered by local sheriffs' departments.<sup>388</sup> In Victoria, there are no equivalent mid-level custodial facilities, only police (and court) cells and prisons.

- 4.11 A question arises as to whether an initiative that was developed in a vastly different social, correctional and political context can be implemented effectively in Victoria.
- 4.12 Nevertheless, prior to the release of the Honest Opportunity Probation with Enforcement Demonstration Field Experiment (HOPE DFE) findings, a number of Australian researchers and criminal justice advocates suggested that SCF approaches may be appropriate in the Australian, and even in the Victorian, context.<sup>389</sup>

## Options for the introduction of an SCF approach in Victoria

- 4.13 Adoption of an SCF approach to the sentencing of family violence offenders would entail introducing a program that adheres to SCF principles as defined at [2.20]–[2.29]. Several options are considered below.

### An SCF approach to managing family violence offenders on a community correction order

- 4.14 One option to introduce an SCF approach to family violence offenders is an SCF response to prosecuting contraventions of community correction order (CCO) conditions. This could be introduced:
- administratively, through changes in the way in which Corrections Victoria manages and prosecutes condition contraventions by family violence offenders on a CCO; or
  - through legislative reform, allowing a court to attach an SCF condition (prescribing an SCF response to non-compliance) to a CCO.

### An administrative SCF approach by Corrections Victoria

- 4.15 One avenue for the promotion of the principles of swiftness, certainty and fairness in the management of family violence offenders on CCOs could be to identify high-risk family violence offenders and apply particular case management strategies to those offenders, in line with the reforms to Corrections Victoria's service delivery model for managing offenders on CCOs (see [3.132]–[3.138] for further discussion of these reforms).
- 4.16 If a family violence offender is assessed as a high-risk offender and is managed by an advanced case manager (see [3.135]), that offender could be subject to an SCF approach, involving zero tolerance to non-compliance with all (or particular) conditions and a forewarning that Corrections Victoria will charge the offender with contravention whenever there is non-compliance.

388. The length of time that an offender can be held in a county jail varies by state. In Florida, inmates serving 364 days or less serve their time in jail: Broward County Sheriff's Office, *Frequently Asked Questions: What's the Difference Between Jail and Prison?* (2016) <<http://sheriff.org/faqs/displayfaq.cfm?id=4f892698-5c5d-40f8-b159-c9a0b6ed66f3>> at 14 October 2016.

389. Bartels (2015), above n 33, 53; ABC Radio National (2015), above n 92; Don Weatherburn, *Arresting Incarceration: Pathways out of Indigenous Imprisonment* (2014) 109–111.

- 4.17 In addition, further steps could be taken to ensure both offender compliance with their order and the safety of any victim survivors or protected persons.
- 4.18 Initiatives that could increase family violence offender compliance with a CCO might include:
- Corrections Victoria ensuring that the offender is enrolled in a men's behaviour change program within an agreed timeframe;
  - Victoria Police immediately informing Corrections Victoria of any new family violence allegation relating to the offender, so that Corrections Victoria may consider whether any additional interventions are required to manage risks; and
  - all subsequent matters for a family violence offender being returned before the same judicial officer who imposed the original CCO, to promote offender accountability to the court.
- 4.19 The safety of any victim survivor or protected person and close monitoring of the offender would be assisted by increased inter-agency communication, so that Corrections Victoria is provided with a copy of any family violence intervention order (FVIO) or family violence safety notice (FVSN) relating to a family violence offender under their management.
- 4.20 Compliance with the conditions of a CCO could be monitored closely by the advanced case manager. Where judicial monitoring has not been ordered by the court, a standard condition of a CCO could be that offenders attend judicial monitoring hearings as directed by Corrections Victoria. This would enable the court to oversee management of high-risk family violence offenders and lend the court's authority to discussions with the offender following non-compliance with conditions of the order.
- 4.21 Where non-compliance with the order continues, Corrections Victoria could charge the offender with contravention of a CCO, which would return the offender before the court for resentencing.

### ***Imposition of an SCF program condition by the sentencing court***

- 4.22 Alternatively, an SCF approach could be legislated as a new optional condition of a CCO. This condition could stipulate the elements of the SCF approach to be taken by Corrections Victoria in relation to a response to non-compliance (such that all or specific contraventions must be prosecuted by Corrections Victoria).
- 4.23 Failure to comply with the SCF program condition would then require Corrections Victoria to request a court hearing within an expedited timeframe<sup>390</sup> and the court to impose a sanction swiftly.
- 4.24 Given that a court may not impose a CCO unless an offender consents to the order,<sup>391</sup> the offender would need to consent to being subject to the SCF program condition. This may raise issues with regard to participation in the program.

### ***Elements of an SCF approach***

- 4.25 The degree to which a response by Corrections Victoria, or an SCF program condition, should follow the HOPE structure would need to be carefully considered. For example, while the HOPE program involves fixed sanctions for specific contraventions, an SCF approach in Victoria might involve swift responses that allow more discretion as to what sanction would follow the contravention.

390. Proceedings are commenced by the filing of a charge-sheet in the Magistrates' Court: *Sentencing Act 1991* (Vic) s 83AG. The court then issues a summons or warrant to arrest: *Sentencing Act 1991* (Vic) s 83AI.

391. *Sentencing Act 1991* (Vic) s 37(c).

- 4.26 An SCF program condition could be attached to a CCO imposed for family violence offending, or it could be triggered by a family violence offender's non-compliance with a CCO. In other words, a program condition could be added to a CCO following an offender being sentenced for CCO contravention, or otherwise on application by Corrections Victoria to vary the CCO. This would allow the condition to be reserved for offenders who are unable to adhere to the conditions of the CCO, rather than being applied to offenders who may be compliant with the order, regardless of the threat of immediate sanctioning.
- 4.27 Attaching a new SCF program condition following CCO contravention by non-compliance (rather than by new offending) would also allow the judicial officer to provide the offender with a warning hearing specific to the new condition, in addition to the explanation of the operation of the CCO.
- 4.28 The SCF program condition on a CCO could be primarily supervised by Corrections Victoria, with the sanctions for contravention imposed by the court after fast-tracked contravention proceedings. Alternatively, the sanctions for contravention could be imposed by Corrections Victoria (although this could not extend to sentencing offenders to terms of imprisonment).<sup>392</sup>

#### Question 4: 'Swift, certain and fair' approaches to managing family violence offenders on a community correction order

Should an SCF approach to the management of a family violence offender on a community correction order (CCO) be implemented in Victoria? If so:

- a. Should the SCF approach operate within the existing sentencing framework and represent a program and/or an administrative response by Corrections Victoria to the prosecution of CCO contraventions?
- b. Should the SCF approach be legislated in the form of a new court-ordered SCF condition (or conditions) that can be attached to a CCO?
- c. Should the SCF approach to compliance with CCO conditions be structured in another way?

For each approach:

- d. What should be the key elements?
- e. Should the approach be used in conjunction with judicial monitoring?
- f. Are there particular groups of offenders on a CCO to whom the approach should be applied?
- g. What factors should be taken into account in deciding whether to impose the approach on an offender?
- h. What conditions (e.g. attendance at a men's behaviour change program) should trigger an SCF response for contravention?
- i. Should contravention of CCO charges by a family violence offender be included within the Magistrates' Court family violence fast-tracking listing process?
- j. What sanctions should be imposed for contravention?
- k. What would be the demand implications for stakeholders, including the courts, Corrections Victoria, Victoria Police and Victoria Legal Aid?
- l. Are there any other issues that would need to be addressed for the SCF approach to be effective in Victoria?

392. *Sentencing Act 1991* (Vic) s 48K.

### Judicial monitoring

- 4.29 If an SCF program condition were to be implemented in the current CCO framework, the relationship between the SCF approach and judicial monitoring might need to be considered. Courts currently have the power to attach a judicial monitoring condition to a CCO, which requires offenders to, at certain points in time, report back before the court on their progress while still under sentence.<sup>393</sup>
- 4.30 At the judicial monitoring hearing, the court has the power to demand the production of certain information or the attendance and evidence of certain witnesses, including the offender, the offender's medical practitioner, a corrections officer, a prosecutor or any other person.<sup>394</sup> If an offender fails to appear at a review hearing, the court may issue a warrant to arrest the offender.<sup>395</sup>
- 4.31 Following the judicial monitoring hearing, the court may cancel the judicial monitoring condition, vary the condition to increase or decrease the time between review hearings, set a date for a further review hearing, order that more information be provided at a later review hearing or take no further action.<sup>396</sup>
- 4.32 Victorian Magistrate Pauline Spencer has written about the way in which judicial monitoring, as a form of judicial supervision, may be used as part of a 'web of accountability' to surround family violence offenders. Her Honour suggested that, alongside other case management tools, judicial supervision may be a useful component in the management of family violence offenders under sentence.<sup>397</sup>
- 4.33 Her Honour noted that there is currently no settled framework for the most effective approach to supervision of family violence offenders, and different approaches to supervision are often taken, depending on the judicial officer.<sup>398</sup> Some judicial officers favour an 'accountability approach', which 'seeks to deter further reoffending using judicial supervision hearings to set expectations and to deliver timely, consistent and escalating consequences for non-compliance or reoffending'.<sup>399</sup> Others use a 'solution-focused' approach to supervision, linking the offender to the 'necessary treatment and supports to build the motivation of the offender to engage in these interventions'. Others employ a combination of these two strategies.<sup>400</sup>
- 4.34 Currently, relatively few family violence offenders in Victoria (receiving a CCO or combined sentence) have a judicial monitoring condition imposed. Of the 3,560 cases in the Magistrates' Court in which a family violence offender received a CCO or combined sentence in 2015–16, a judicial monitoring condition was ordered in 510 cases (14%).

393. *Sentencing Act 1991* (Vic) s 48K.

394. *Sentencing Act 1991* (Vic) s 48L(1).

395. *Sentencing Act 1991* (Vic) s 48L(3).

396. *Sentencing Act 1991* (Vic) s 48L(2).

397. Pauline Spencer, 'Strengthening the Web of Accountability: Criminal Courts and Family Violence Offenders' 2016 41(4) *Alternative Law Journal* 225, 227.

398. The development of a framework for supervising family violence offenders is, however, underway, through a project of the Centre for Forensic Behavioural Science in partnership with the Magistrates' Court: Victoria Legal Service Board, *Victorian Legal Services Board Grants Program 2016* (2016), cited in *ibid* 227.

399. Spencer (2016), above n 397, 227.

400. *Ibid* 228.

- 4.35 While judicial monitoring hearings are generally only triggered by the passage of a certain period, one proposal might be for a judicial monitoring hearing to be triggered by non-compliance, in order to use the court's authority to ensure the offender's compliance with the CCO. This could assist Corrections Victoria in escalating their response to an offender's non-compliance, keeping the offender in view of the court without necessarily commencing contravention proceedings.
- 4.36 The Council is therefore interested in how judicial monitoring (either as it currently operates or with possible reforms) may form part of an SCF approach to family violence offenders.
- 4.37 The Council also seeks feedback as to whether the courts' powers at a judicial monitoring hearing should be expanded, for example, whether it would be appropriate for courts to have the power to impose sanctions for non-compliance evidenced at a judicial monitoring hearing or the power to amend all of the conditions on a CCO, not simply the judicial monitoring condition. Further, the Council is interested in what consequential safeguards would be necessary to ensure procedural fairness for all parties, if changes were implemented.

### Question 5: Reforms to judicial monitoring

- a. Should judicial monitoring form part of an SCF approach to the management of family violence offenders on a CCO, and if so, how?
- b. Should the powers available to a court at a judicial monitoring hearing be expanded, and if so, how?

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### A new family violence offender compliance order

- 4.38 Another possible option for an SCF approach in Victoria for family violence offenders might be to introduce a new sentencing order, described in this discussion paper as a 'family violence offender compliance order' (FVOCO).
- 4.39 The FVOCO could be applied to offenders who would otherwise be sentenced to a term of imprisonment, or a term of imprisonment in combination with a CCO, in order to provide close supervision of and increased accountability for those offenders who may benefit from an opportunity to complete an order in the community.
- 4.40 The primary aim of the order could be to address and manage risk by ensuring compliance (through swift and certain sanctions), rather than a primarily therapeutic approach (as taken by the Drug Court) that seeks to rehabilitate the offender through both rewards and sanctions.

- 4.41 The FVOCO could comprise two parts:
1. a custodial component of relatively short length (for example, a period of up to three months) that would be unactivated, in a similar manner to the unactivated custodial component of the drug treatment order;<sup>401</sup> and
  2. a community component with conditions based on the existing conditions of a CCO (see [3.115]–[3.121]), including such conditions as requiring the offender to attend a men’s behaviour change program and drug and/or alcohol treatment.
- 4.42 The custodial sentence would remain unactivated unless an offender contravenes any of the conditions of the order. Contravention of the order could trigger the imposition of a short term of imprisonment, which could be deducted from the custodial component of the sentence. The unactivated imprisonment term would therefore provide the legal basis for the imposition of short periods of custody.<sup>402</sup>
- 4.43 The order could require either regular attendance before the court, irrespective of contravention (similar to the DTO), or could be modelled more closely on HOPE, where the offender is only brought back before the court upon contravention, for hearing and, if proven, the imposition of a sanction.

### Question 6: ‘Swift, certain and fair’ as a new sentencing order for family violence offenders

Should an SCF approach be implemented in Victoria in the form of a new family violence offender compliance order (FVOCO)? If so:

- a. How should such an order be structured?
- b. Where should the order fit within Victoria’s sentencing hierarchy?
- c. In which court jurisdiction should the order be available?
- d. Which group or groups of family violence offenders should be eligible for the order?
- e. Should certain forms of family violence or offending types be excluded from eligibility for the order?
- f. What conditions should attach, or be available to attach, to the order?
- g. What sanctions should be imposed for contravention of a condition of the order?
- h. What would be the demand implications for stakeholders, including the courts, Corrections Victoria, Victoria Police and Victoria Legal Aid?
- i. Are there any other issues that would need to be addressed for such an SCF approach to be effective in Victoria?

401. *Sentencing Act 1991* (Vic) ss 18ZC–18ZE.

402. This would allow the order to operate in a similar way to the Northern Territory’s COMMIT pilot program (discussed at [2.68]–[2.72]), which requires offenders who breach the conditions of their suspended sentence to serve a short term of imprisonment.



## Which offenders would best be targeted by an SCF approach?

- 4.44 A question arises as to which family violence offenders would be best targeted by an SCF approach. There is a broad range of family violence offending,<sup>403</sup> as reflected in the range of behaviours potentially captured by the definition of family violence in section 5 of the *Family Violence Protection Act 2008* (Vic). There is also a broad range of family violence offenders, some of whom may be more receptive to an SCF approach than others.<sup>404</sup>
- 4.45 Given the resource implications (and evidence regarding the efficacy of interventions), it would be undesirable to introduce an SCF approach intended to target all family violence offenders. Instead, research into rates of reoffending and condition contraventions by family violence offenders suggests some ways in which an SCF approach may be better targeted.
- 4.46 First, an SCF approach should preferably target only high-risk family violence offenders. This would not only maximise the use of limited criminal justice resources but also reduce the criminogenic effect of intensive supervision of low-risk offenders (see [3.133]). Second, an SCF approach might only target offenders with criminogenic issues that are particularly receptive to treatment and supervision programs, such as family violence offenders with substance-abuse issues.
- 4.47 Corrections Victoria may also face difficulties in identifying family violence offenders for any SCF program condition. As discussed at [3.7], there are difficulties in developing a full picture of family violence offenders and offending, due to limitations in identifying incidents occurring in a family violence context.<sup>405</sup> Further, currently Corrections Victoria does not necessarily know whether an offender sentenced to a CCO has committed their offending in a family violence context, or otherwise whether the offender is the respondent to an FVIO or FVSN or whether there are family violence offences in their criminal histories.<sup>406</sup>

## Risk of net-widening and sentence escalation

- 4.48 Given the range of family violence offenders potentially captured by an SCF approach, the Council is concerned that introducing an intervention may inadvertently lead to more people being drawn into the court system and made subject to its supervision (net-widening). The Council is also concerned about sentence escalation.
- 4.49 Net-widening can occur when new justice system initiatives are treated as supplements to existing practice, rather than as alternatives to higher-level sanctions. Net-widening can be further compounded when new initiatives grow to encompass larger or different groups of people than they were initially intended to deal with.<sup>407</sup> Targeting an SCF approach at high-risk offenders is one avenue to avoid net-widening, as high-risk offenders are more likely to already have criminal histories.
- 4.50 Similarly, sentence escalation can occur when offenders who would otherwise receive sentences at the lower end of the sentencing hierarchy (such as adjourned undertakings) are instead subjected to more severe sentences due to the availability of a more restrictive sentence. This issue requires careful consideration, as the use of some sanctions (such as suspended sentences) have, in some circumstances, inadvertently increased prison populations over time.<sup>408</sup>

403. See for example, Hayley Boxall et al., *Domestic Violence Typologies: What Value to Practice?* Trends and Issues in Crime and Criminal Justice no. 494 (2015) 3.

404. See for example, *ibid.*

405. Meeting with Corrections Victoria (12 October 2016).

406. Meeting with Corrections Victoria (12 October 2016).

407. For a discussion of the concept of net-widening, see Centre for Justice Innovation (2015), above n 150, 29.

408. See the discussion in Patricia Menéndez and Don Weatherburn, *The Effect of Suspended Sentences on Imprisonment*, Crime and Justice Statistics Bureau Brief: Issue Paper no. 97 (2014) 4–5.

## Question 7: Offender identification – level of risk

If an SCF approach were to be implemented in Victoria:

- a. Should it only be directed at family violence offenders who are at high risk of reoffending and/or high risk of non-compliance with a sentencing order?
- b. How should those offenders be identified?

## Targeting family violence offenders with substance-abuse issues

- 4.51 Although substance abuse (of both illicit drugs and alcohol) is not considered to cause family violence,<sup>409</sup> research has shown that substance abuse is associated with both the likelihood of family violence occurring and increased severity of the harms that result from the violence.<sup>410</sup> For example, the Crime Statistics Agency's analysis of over 121,000 family violence incidents recorded by Victoria Police over a recent two-year period found that one in five incidents involved definite alcohol use by the victim survivor, the perpetrator or both parties.<sup>411</sup> The Crime Statistics Agency's research further found that where perpetrators' alcohol use was recorded, police were more likely to record that the perpetrator had choked the victim survivor and/or made threats to kill them, or that there had been a recent escalation in the severity and/or frequency of violence.<sup>412</sup>
- 4.52 It may therefore be appropriate to consider whether sentencing courts should have wider discretion to address alcohol-related issues with family violence offenders. This could involve including alcohol-related conditions as part of an SCF approach, or alternatively it could involve expanding the courts' current powers in dealing with family violence offenders with substance-abuse issues outside an SCF approach.
- 4.53 In either case, this may result in reduced recidivism, reduced severity and frequency of family violence and improved compliance with other court-ordered conditions such as attendance at a men's behaviour change program.<sup>413</sup> Indeed, a number of the Royal Commission's recommendations directly relate to targeting alcohol abuse by family violence offenders, particularly the importance of coordinating men's behaviour change programs with substance-abuse treatment.<sup>414</sup> In addition, the National Drug Law Enforcement Research Fund (NDLERF) recently released a report on the role of alcohol and drugs in family violence offending, finding a consistent association between recidivism and drug and alcohol use. Referring specifically to Hawaii's HOPE program and South Dakota's 24/7 Sobriety Project, the NDLERF suggested that mandatory sobriety SCF programs 'can reduce ... violent behaviour in the home'.<sup>415</sup>

409. National Drug and Law Enforcement Research Fund, *Alcohol/Drug Involved Family Violence in Australia: Final Report* (2016).

410. See the discussion in VicHealth, *Preventing Violence Before It Occurs: A Framework and Background Paper to Guide the Primary Prevention of Violence Against Women in Victoria* (2007) 17; Gaby Marcus and Rochelle Braaf, *Domestic and Family Violence Studies, Surveys and Statistics: Pointers to Policy and Practice* (2007) 6.

411. Crimes Statistics Agency, *Family Violence, Alcohol Consumption and the Likelihood of Criminal Offences*, In Brief no. 7 (2016) 4.

412. *Ibid* 5.

413. This was raised by a stakeholder in preliminary consultation, who noted that offenders with substance-abuse issues have little chance of effectively participating in treatment programs or regularly attending appointments when in the grips of an addiction.

414. State of Victoria (2016), above n 34 (Recommendations 87, 89, 99, 100).

415. National Drug and Law Enforcement Research Fund (2016), above n 409, 324.

### Question 8: Offender identification – alcohol and/or substance abuse

If an SCF approach were to be implemented in Victoria, should such an approach target:

- a. offenders with alcohol and/or substance-abuse issues generally who are not necessarily family violence offenders, thereby indirectly targeting family violence offending; or
- b. family violence offenders generally, regardless of whether they have alcohol and/or substance-abuse issues; or
- c. only family violence offenders with alcohol and/or substance-abuse issues?

#### Alcohol exclusion

- 4.54 Courts in Victoria currently have the power, in certain circumstances, to impose an alcohol exclusion order that prohibits an offender from entering or remaining in licensed premises or the area surrounding major events.<sup>416</sup> An alcohol exclusion order can be included as a specific condition of a CCO,<sup>417</sup> or it can be imposed as a separate order in addition to sentence.<sup>418</sup> In either form, it is an offence to contravene an alcohol exclusion order. Contravention of an alcohol exclusion order as a condition of a CCO carries a maximum penalty of three months' imprisonment,<sup>419</sup> while contravention of an alcohol exclusion order imposed in addition to sentence carries a maximum penalty of two years' imprisonment.<sup>420</sup>
- 4.55 Courts sentencing an offender to a CCO have discretion as to whether to attach an alcohol exclusion condition if it believes that it would address the role of alcohol in the offending behaviour.
- 4.56 Upon application by the prosecutor, the court must make an alcohol exclusion order if an offender has been convicted of a relevant offence,<sup>421</sup> the court is satisfied (on the balance of probabilities) that the offender was intoxicated at the time of the offending, and this significantly contributed to the commission of the offence.
- 4.57 Alternatively, in the absence of an application, a sentencing court may, of its own motion, make an alcohol exclusion order where the relevant circumstances apply.<sup>422</sup>
- 4.58 Despite the strong relationship between family violence offending and alcohol use, alcohol exclusion conditions are currently utilised very infrequently in Victoria. In the Magistrates' Court, alcohol exclusion conditions were imposed in only 33 family violence cases (1%) in which a CCO was imposed in 2015–16.
- 4.59 It is likely that the limited nature of the order (which does not prevent consumption of alcohol in the home) and the challenges of enforcement may explain why it is seldom imposed.

416. *Sentencing Act 1991* (Vic) s 89DD.

417. *Sentencing Act 1991* (Vic) s 48(1).

418. *Sentencing Act 1991* (Vic) s 89DE(1).

419. *Sentencing Act 1991* (Vic) s 83AD.

420. *Sentencing Act 1991* (Vic) s 89DF.

421. *Sentencing Act 1991* (Vic) ss 89DD–89DE.

422. *Sentencing Act 1991* (Vic) s 89DE(4).

- 4.60 The Council is interested in whether the scope of a court's powers when imposing an alcohol exclusion order should be expanded – whether as part of, or separate from, the introduction of an SCF approach in Victoria – so that it can mandate abstinence by a family violence offender from alcohol generally, not just at licensed premises and major events.
- 4.61 Alcohol consumption can be quickly detected using Secure Continuous Remote Alcohol Monitoring (SCRAM) technology. This is a wearable device, such as an ankle bracelet, that measures alcohol consumption through perspiration. The device sends results to a remote computer monitored by (for example) police or corrections officials. Monitoring an offender's alcohol use may also raise issues with regard to the right to privacy under the *Charter of Human Rights and Responsibilities Act 2006* (Vic).<sup>423</sup>
- 4.62 The Adult Parole Board already has the power to require a parolee to wear a SCRAM monitor and to prohibit the parolee from consuming alcohol entirely.<sup>424</sup>
- 4.63 In November 2014, the Northern Territory Government announced that it would be trialling the use of SCRAM technology to address alcohol-related offending,<sup>425</sup> and in May 2016 in response to the success of the program, it significantly expanded the program (from a \$1 million budget to \$4.2 million).<sup>426</sup>

### Question 9: Alcohol exclusion orders and conditions

- a. Should courts have expanded powers to prohibit family violence offenders from consuming alcohol entirely (and not just at certain places)?
- b. If so, should compliance with an alcohol exclusion order or condition be monitored using SCRAM technology?
- c. Should courts have the discretion to impose an alcohol exclusion order or condition on family violence offenders if alcohol use significantly contributed to the commission of the offence, or should such an order or condition be mandatory?
- d. If an SCF approach is introduced in Victoria, should that approach encompass alcohol exclusion orders or conditions?
- e. What would be the resource implications for such expansion of the use of alcohol exclusion orders or conditions and the use of SCRAM technology?

423. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13.

424. Adult Parole Board of Victoria, *Parole Manual* (5th ed, 2015) <[http://assets.justice.vic.gov.au/corrections/resources/e55ff13c-c723-42e6-8e18-c6171a5c96c3/apb\\_parole\\_manual|june15.pdf](http://assets.justice.vic.gov.au/corrections/resources/e55ff13c-c723-42e6-8e18-c6171a5c96c3/apb_parole_manual|june15.pdf)> at 6 January 2017.

425. James Dunlevie, 'Northern Territory Alcohol Offenders to be Monitored by Ankle Bracelet like Lindsay Lohan' (ABC News, 26 November 2014) <<http://www.abc.net.au/news/2014-11-26/alcohol-offenders-to-share-hollywood-stars-ankle-bracelet/5919460>> at 6 January 2017.

426. Sally Brooks, 'New Anklet for NT Offenders Enable Authorities to Track Blood Alcohol' (ABC News, 10 May 2016) <<http://www.abc.net.au/news/2016-05-10/alcohol-monitoring-bracelets-introduced-in-the-nt/7401866>> at 6 January 2017.

## Offenders for whom the application of ‘swift, certain and fair’ approaches may raise specific issues

### *Low-risk offenders with pro-social ties to the community*

- 4.64 One risk of subjecting offenders who are classed as low risk to SCF approaches is that the custodial intervention may disrupt the pro-social factors, such as employment or education,<sup>427</sup> that likely contributed to their initial assessment as a low-risk offender. Further, custodial interventions would bring lower-risk offenders into contact with higher-risk offenders, which is likely to draw those offenders away from positive social ties and into social relationships in which criminal behaviour is normalised.
- 4.65 Similarly, a risk in imposing a custodial penalty on offenders who have never before served a term of imprisonment is that the penalty may have a criminogenic effect. It may also risk net-widening, drawing more people into the criminal justice system and impacting their ability to gain employment in the future due to their criminal record.
- 4.66 In preliminary consultation, however, a number of stakeholders noted that offenders who have not yet served an imprisonment sentence (or who have had less exposure to custodial environments) are more likely to be deterred by the threat of a short custodial sanction upon contravention of a condition of an order.
- 4.67 There is also an issue with the hierarchy of penalties. In relation to an offender who has never before served a term of imprisonment and has been sentenced to a CCO for family violence offending, if the sanction for contravention of a CCO condition is a period of incarceration, it may seem that the penalty for contravention of the CCO condition is far greater than the penalty for the original offending.

### *Offenders with cognitive disabilities*

- 4.68 Research has shown that offenders with cognitive disabilities<sup>428</sup> face greater difficulties in dealing with the criminal justice system than other offenders.<sup>429</sup> Furthermore, people with cognitive impairments are overrepresented in the criminal justice system, both as perpetrators and as victims of crime.<sup>430</sup>
- 4.69 Issues that offenders with cognitive impairments may face include difficulties with communication and basic living skills, which is likely to impact on their ability to comply with certain conditions on orders, such as diarising and attending appointments.

427. In the HOPE program, if an offender is employed, they are usually able to serve their sentence over successive weekends: Bartels (2015), above n 33, 55. The risk of disruption of employment might be mitigated if custodial sanctions could be imposed around an offender's employment or educational commitments.

428. The term 'cognitive disability' is used to refer to an intellectual disability or an acquired brain injury (ABI).

429. Suzanne Brown and Glenn Kelly, *Issues and Inequities Facing People with Acquired Brain Injury in the Criminal Justice System* (2012) 4.

430. Eileen Baldry et al., 'Reducing Vulnerability to Harm in Adults with Cognitive Disabilities in the Australian Criminal Justice System' (2013) 10(3) *Journal of Policy and Practice in Intellectual Disabilities* 222; Ruth McCausland et al., *People with Mental Health Disorders and Cognitive Impairment in the Criminal Justice System: Cost–Benefit Analysis of Early Support and Diversion* (2013).

- 4.70 A recent discussion paper released by RMIT's Centre for Innovative Justice noted that the fact that an offender contravenes a CCO may be an indication that they have a cognitive impairment (or other complex needs).<sup>431</sup>
- 4.71 At least one SCF program specifically excludes persons with cognitive impairments,<sup>432</sup> due to the difficulties that these offenders have in understanding and adhering to conditions on orders.

### **Indigenous offenders**

- 4.72 The Council is cautious of the potential conflict between SCF approaches and a number of recommendations made by the Royal Commission into Aboriginal Deaths in Custody, including that:
- imprisonment should be utilised only as a sanction of last resort (Recommendation 92);
  - all police services should adopt and apply the principle of arrest being the sanction of last resort in dealing with offenders (Recommendation 87);
  - in the first instance, proceedings for a breach of a non-custodial order should ordinarily be commenced by summons or attendance notice and not by arrest of the offender (Recommendation 102);
  - the abolition of the offence of drunkenness should be accompanied by adequately funded programs to establish and maintain non-custodial facilities for the care and treatment of intoxicated persons (Recommendation 80); and
  - legislation decriminalising drunkenness should place a statutory duty upon police to consider and utilise alternatives to the detention of intoxicated persons in police cells. Alternatives should include the options of taking the intoxicated person home or to a facility established for the care of intoxicated persons (Recommendation 81).<sup>433</sup>
- 4.73 The Council notes that SCF programs as they operate in the United States respond to breaches of abstinence conditions on probation orders with custodial sanctions, which would likely conflict with the recommendations from the Royal Commission into Aboriginal Deaths in Custody relating to the incarceration of intoxicated persons, such as Recommendations 80 and 81 above.
- 4.74 The Royal Commission into Family Violence made a number of recommendations concerning Aboriginal and Torres Strait Islander communities' ability to participate in family violence prevention and response, including enabling the provision of culturally safe services.<sup>434</sup> Consequently, the implications of any SCF approach for Aboriginal and Torres Strait Islander offenders need to be carefully considered.<sup>435</sup> Nevertheless, it has been suggested an SCF approach has the potential to reduce Aboriginal over-incarceration.<sup>436</sup>

431. Jesuit Social Services and RMIT Centre for Innovative Justice, *Enabling Justice Consultation Paper* (2016) 6.

432. Texas's Supervision with Intensive Enforcement (SWIFT) program: Kelli D. Stevens-Martin, 'The Supervision with Immediate Enforcement (SWIFT) Court: Tackling the Issue of High-Risk Offenders and Chronic Probation Violators' (2014) 76(5) *Corrections Today* 74, 75.

433. Commonwealth of Australia, Royal Commission into Aboriginal Deaths in Custody, *Final Report of the Royal Commission into Aboriginal Deaths in Custody* (1991).

434. State of Victoria, Royal Commission into Family Violence, *Volume V: Report and Recommendations* (2016) 3.

435. Bartels (2015), above n 33, 65.

436. Weatherburn (2014), above n 389, 109–111.

### Female offenders

- 4.75 Corrections Victoria's policy relating to correctional management standards for women serving CCOs acknowledges that there are particular considerations relevant to the appropriate management of female offenders. These considerations follow the *Better Pathways* strategy, which aimed to address an increase in women's imprisonment in Victoria by reducing rates of female offending, reoffending, custodial sentences and levels of victimisation of women in contact with the criminal justice system.<sup>437</sup>
- 4.76 This policy suggests that there are particular considerations that apply to the management of female offenders, and that primary carer responsibilities can impact on an offender's ability to complete an order.<sup>438</sup> This may be because of the difficulties in attending appointments when caring for dependants.
- 4.77 SCF sanctions may disrupt women's supportive relational networks, beyond those women with dependants. In addition, research and evidence have shown that women in prison – and those who are in contact with the criminal justice system, although they may not have been incarcerated – have experienced family violence at much higher rates than women in the rest of the community.<sup>439</sup>

### Offenders with primary carer responsibilities

- 4.78 The notion of imposing SCF sanctions on offenders serving their sentence in the community with dependent children or other carer responsibilities would likely have significant, adverse impacts on the offender's dependants. For children, it may mean a period of time in care, mirroring the period of incarceration served by their guardian. As discussed above, primary carer responsibilities can impact on an offender's ability to complete an order,<sup>440</sup> due to the difficulties in managing competing responsibilities. Careful consideration would need to be given to the application of SCF sanctions in such circumstances.

## Question 10: Suitability for certain groups

Is an SCF approach unsuitable or inappropriate for any group, or groups, of family violence offenders?

437. State of Victoria, *Better Pathways: An Integrated Response to Women's Offending and Reoffending: A Four-Year Strategy to Address the Increase in Women's Imprisonment in Victoria 2005–2009* (2005).

438. Corrections Victoria (2009), above n 323, 8.

439. State of Victoria (2016), above n 434, 237.

440. Corrections Victoria (2009), above n 323, 8.

## Challenges to integrating an SCF approach to sentencing family violence offenders in Victoria

### Importance of judicial leadership and ‘buy-in’ of stakeholders

- 4.79 Adopting any new court program – particularly one that relies greatly on the cooperation and support of the judiciary, Corrections Victoria, Victoria Police and Victoria Legal Aid – must only be done with the support of those who would be required to implement it.<sup>441</sup>
- 4.80 Further, the fact that swift, certain and fair programs use mandatory sentencing (although on a small scale) may cause concern for sentencing judges, as it curtails their discretion in application of penalties for contravention of the order within the scheme.
- 4.81 The importance of consultation and stakeholder support for the program has been noted in several evaluations of SCF programs in the United States.<sup>442</sup>

### Procedural fairness implications

- 4.82 Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR) provides that no one may be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law. Professor Kate Warner has suggested that an SCF approach may be incompatible with Australia’s international obligations as a signatory to the ICCPR, especially in relation to due process.<sup>443</sup>
- 4.83 Procedural fairness is one of the hallmarks of an effective criminal justice system, requiring that all persons charged with a punishable offence be treated fairly. A number of procedural fairness rights are enumerated in the *Charter of Human Rights and Responsibilities Act 2006* (Vic), such as the right to:
- be presumed innocent until proven guilty;
  - prompt and detailed notice of the charges against a person;
  - adequate time and facilities to prepare a defence;
  - communicate with a lawyer or advisor; and
  - be tried in person, and to defend oneself personally or through legal assistance.<sup>444</sup>

### Prosecuting contraventions within 72 hours

- 4.84 There are a number of procedural fairness issues raised by expediting prosecution of contraventions of orders into short (72 hour) timeframes, as proposed by most SCF programs.<sup>445</sup>
- 4.85 Under the existing provisions of the *Criminal Procedure Act 2009* (Vic), it would be very difficult to prosecute a breach of an order within a 72-hour timeframe.<sup>446</sup> This is due to the legislative provisions that ensure that accused persons are provided with notice of the charges laid against them<sup>447</sup> and details of the prosecution’s case.<sup>448</sup> This enables the accused person

441. As noted in Bartels (2015), above n 33, 60.

442. See for example, Zajac et al. (2015), above n 71, 32; Adele Harrell et al., *Evaluation of Breaking the Cycle* (2004) 5.

443. Kate Warner, ‘Sentencing Review 2012–2013’ (2013) 37(6) *Criminal Law Journal* 390, 404.

444. *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 23–25.

445. See Chapter 2 for a discussion of the timeframes in HOPE and other SCF programs.

446. *Criminal Procedure Act 2009* (Vic).

447. *Sentencing Act 1991* (Vic) pt 2.3.

448. These details are in the form of the brief of evidence: *Criminal Procedure Act 2009* (Vic) ss 37, 41.



to engage legal representation and to prepare a defence. It is highly unlikely that either the prosecution or the defence could prepare their cases for a contested hearing within such timeframes.<sup>449</sup> Similarly, it is unlikely that the purpose of giving notice to the accused of the charges against them could be achieved within such a timeframe.

- 4.86 One commentator, discussing the potential for an SCF program to be introduced in New Zealand, noted that 'judicial creativity' could be used in order to effect sentencing within compressed timelines, but such an approach would not be considered 'ethical or just'.<sup>450</sup>

### **A sanction-before-hearing process**

- 4.87 One of the changes made to the HOPE program in Hawaii since its inception has been to allow probation officers to take probationers – with straightforward condition violations that have predictable sanctions – into custody to serve their sanction prior to the court holding a violation hearing within 72 hours. This change was motivated by a desire for administrative efficiency, particularly in relation to prisoner transport.<sup>451</sup>

- 4.88 For the purpose of considering whether to implement an SCF approach in Victoria modelled on the HOPE program, this process of sanction-before-hearing raises three interrelated issues, namely whether:

- non-judicial officers should be permitted to detain an offender in custody without judicial approval;
- serving a sanction prior to judicial hearing conflicts with the presumption of innocence; and
- the process conflicts with the right to fair notice.

- 4.89 It is also worth noting that this process of imposing a sanction prior to the violation hearing may have contributed to the lack of contested hearings in the HOPE program, as there is less incentive to challenge the allegation if the time in custody has already been served.

- 4.90 The first issue is whether having an offender serve their sanction for a violation prior to a hearing – even when the allegation is uncontested and the sanction is predictable – conflicts with the right to have a fair and public hearing by a court or tribunal.

- 4.91 The power to take a person into custody (including someone who is on a CCO or is subject to an FVIO or an FVSN) is a limited one.<sup>452</sup> Once a person is taken into custody, the *Bail Act 1977* (Vic) ensures that continued detention is only permitted with judicial approval, which should be sought (in most circumstances) within 24 hours of the person being taken into custody.<sup>453</sup> It would be highly unusual in Victoria for a body other than a court to be given the power to order someone into custody for two or more days. As Professor Kate Warner has said in relation to the potential applicability of South Dakota's 24/7 Sobriety Project in Australia:

Making detention an automatic sanction rather than a means of ensuring a court appearance for a suspected offence or breach of an order sits uneasily with Australia's common law traditions.<sup>454</sup>

449. During preliminary consultation, the Council was advised that, generally speaking, 28 days are required to prepare a full brief of evidence.

450. Ben Hehir, 'Swift, Certain and Fair Sanctions: An Innovative New Programme or False HOPE?' (2016) 4(1) *The New Zealand Corrections Journal* 42.

451. Hawken et al. (2016), above n 66, 44 ('This practice saves the burden of transferring the probationer to the court for the violation and then back to the jail').

452. Section 459(1) of the *Crimes Act 1958* (Vic) provides for apprehension without warrant of a person reasonably believed to have committed an indictable offence. However, there are limits on how long someone can be held in custody prior to being released (either unconditionally or on bail), or remanded: *Crimes Act 1958* (Vic) s 464A; *Bail Act 1977* (Vic) s 4.

453. *Bail Act 1977* (Vic) s 4.

454. Warner (2013), above n 443, 403.

- 4.92 On this point, the Council also notes that the custodial sanction for admitted drug use in the HOPE program is intended to be two days in custody, but the violation hearing need only be held within 72 hours of the offender's arrest. Even then, only 70% of HOPE hearings have been found to actually be heard within 72 hours of arrest.<sup>455</sup> As a result, it is theoretically possible that offenders have spent more time in custody than the sanction eventually imposed by the court. Hawken has suggested, though, that court staff tend to schedule the violation hearing for the end of the expected jail stay.<sup>456</sup>
- 4.93 The second issue is whether a sanction-before-hearing process conflicts with the presumption that an offender is innocent until proven guilty by an independent court or tribunal. If SCF sanctions are imposed on an order with an 'unactivated' custodial component from which short terms of imprisonment can be deducted, this may be justifiable. However, if the SCF sanction is imposed in the absence of a sentencing order of imprisonment, this may equate to offenders being subject to a presumption of guilt.

### **Longer sanctions for refusal to admit condition violation**

- 4.94 It is impermissible in Victoria to punish someone for asking that the prosecution prove its case,<sup>457</sup> but offenders can receive discounts on their punishment if they plead guilty to the offence.<sup>458</sup> The plea discount is intended to encourage earlier pleas and reflect the utility of resources saved by the offender's plea.<sup>459</sup> By contrast, aggravating a penalty on the basis that the offender refused to plead guilty is tantamount to punishing the offender for exercising their right to silence and threatens the presumption of innocence.<sup>460</sup>
- 4.95 Under the HOPE model, an offender who denies drug use despite a positive test result is permitted to challenge the initial finding and remain in the community while a second test is run. However, if that second test returns a positive result, the court imposes a 10-day sanction rather than the two-day sanction that the offender would have received had they admitted use. The reason for this distinction, according to Judge Alm, is to encourage probationers to take responsibility for their actions.<sup>461</sup>

### **Disputable violations: contestable evidence**

- 4.96 As discussed at [4.108]–[4.111], one of the key issues in implementing an SCF response to family violence offenders' compliance with conditions will be to determine which conditions should be subjected to a fixed response. Positive drug and alcohol test results are very difficult to challenge, as is evidence of a missed appointment. There may, however, be a number of conditions specific to family violence offenders that are not so clear-cut.
- 4.97 For example, during preliminary consultations stakeholders raised the problematic issue of applying SCF sanctions to non-contact conditions. This is because there is greater scope to challenge such violations. The evidence of such a violation is often the testimony or statement of the victim survivor, which could easily be contradicted by the offender. In the absence of independent evidence of contravention of the order, the offender ought to be able to challenge evidence of the contravention, and any allegations arising out of it, prior to the imposition of a sanction.

455. Hawken and Kleiman (2009), above n 151, 28.

456. Hawken et al. (2016), above n 66, 10.

457. *Cameron v The Queen* (2002) 209 CLR 339, 361.

458. *Sentencing Act 1991* (Vic) s 6AAA.

459. *Cameron v The Queen* (2002) 209 CLR 339, 360–361, cited with approval in *Phillips v The Queen* (2012) 37 VR 594, 608 (Redlich JA, Curtain AJA with Maxwell P agreeing).

460. See *Cameron v The Queen* (2002) 209 CLR 339, 352–353, 361.

461. Alm (2013), above n 72, 1185.

### **Disputable violations: exceptional circumstances**

- 4.98 There is also greater scope for 'exceptional circumstances' to excuse non-compliance with conditions imposed on family violence offenders. Even in alcohol and drug-related programs, situations can arise that arguably qualify as 'exceptional circumstances' so that an offender should not be sanctioned despite non-compliance, such as an accused driving intoxicated:
- in order to follow an officer's direction to get into their car and drive away;<sup>462</sup>
  - after being subjected to a practical joke where they could not taste alcohol surreptitiously put in their drinks;<sup>463</sup> and
  - in order to escape an attack.<sup>464</sup>
- 4.99 This issue of excusable violations is likely to be even more prevalent if SCF sanctions were to be applied to the more common condition types given to family violence offenders. If there is a residential exclusion condition, an area exclusion condition or a no-contact condition, allegations of contravention may be complicated by (for example) any ongoing relationship between the offender and the victim survivor; any shared custody of children between the offender and the victim survivor or any contact initiated by the victim survivor rather than by the offender.

### **Equal justice: consistent punishment**

- 4.100 Consistency in sentencing offenders is a fundamental aspect of Victoria's criminal justice system. It is the first purpose of the *Sentencing Act 1991* (Vic),<sup>465</sup> and it has been described by the High Court as crucial to the notion of equal justice:
- Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community.<sup>466</sup>
- 4.101 There is an argument to be made that short custodial sanctions are less severe than other sentencing orders, such as lengthy community work hours or hefty fines; however, Victoria's current sentencing hierarchy considers imprisonment of any length to be the most severe sentencing option.<sup>467</sup> Therefore, if some offenders (such as family violence offenders) were to be punished with short terms of imprisonment for violating a condition of a CCO, while other offenders engaging in the same conduct were to receive lesser forms of punishment, this may conflict with the principle of equality before the law. This risk would be mitigated, however, if SCF sanctions were imposed in circumstances where a court had determined that a term of imprisonment was otherwise justified (for example, under the proposed family violence offender compliance order – see [4.38]–[4.43]).

462. *State v Fogarty* 128 NJ 59 (1992).

463. *State v Romano* 355 NJ Super 21 (2002).

464. *State v Hammond* 118 NJ 306 (1987).

465. *Sentencing Act 1991* (Vic) s 1(a).

466. *R v Lowe* (1984) 154 CLR 606, 610–611.

467. *Sentencing Act 1991* (Vic) s 5(4).

### Parsimony

- 4.102 The *Sentencing Act 1991* (Vic) requires that a court not impose a sentence that is more severe than that which is necessary to achieve the purposes of punishment in the instant case.<sup>468</sup> It is arguable that activating a period of imprisonment equates to the imposition of punishment, in which case even a brief period in custody may contravene the principle of parsimony.
- 4.103 Researchers at the Institute for Behavior and Health (IBH) have suggested that HOPE-like programs can still promote the principle of parsimony because heavier sanctions in the short term can result in lesser punishment in the long term:
- If short jail sentences seem too harsh for [condition] violations, recall that the randomized control trial of HOPE in Honolulu showed that the strategy reduced the likelihood of a long prison term by half, which is clearly a much harsher and more expensive punishment.<sup>469</sup>
- 4.104 This is less persuasive in the Victorian context, given that the sentences faced by offenders are generally far shorter than those imposed in Hawaii.

## Question 11: Procedural fairness

If an SCF approach were to be implemented in Victoria, what procedural fairness issues should be considered? For example:

- a. Should it be permissible to hold an offender in custody prior to a contravention hearing? If so, at what point and for how long?
- b. Should offenders who admit their contravention be entitled to a discounted sanction?
- c. Should there be an 'exceptional circumstances' and/or 'reasonable excuse' defence to allegations of contravention?
- d. Is there a risk that an SCF approach could be considered contrary to the principle of equality before the law in the Victorian context?
- e. Does an SCF approach raise issues concerning the principle of parsimony in the Victorian context?

### Determining the appropriate sanction

- 4.105 A key question is whether short terms of imprisonment are the only effective sanctions to create the desired behaviour change under the SCF model, or whether other forms of sanction would be effective.
- 4.106 As discussed at [3.174]–[3.176], research suggests that increasing the proportion of family violence offenders who serve short prison sentences (less than 12 months) is unlikely to have an impact on their likelihood of reoffending. However, the effectiveness of short terms of imprisonment can be contrasted with the approach under the SCF model, where short periods of custody are used to enforce compliance with a community-based sentence. Nevertheless, the findings suggest custody (in the absence of treatment) may not reduce the likelihood of reoffending.
- 4.107 If a HOPE-like program in Victoria were to have sanctions other than imprisonment, two further issues would warrant attention. First, there are some practical difficulties in implementing sanctions such as community work as 'swiftly' as incarceration, though a number of SCF programs (including Michigan's Swift and Sure Sanctions Probation Program,<sup>470</sup>

468. *Sentencing Act 1991* (Vic) s 5(3). See also *R v Milne* (1982) 4 Cr App R (S) 397.

469. Campbell et al. (2015), above n 69, 19–20.

470. Michigan Supreme Court (2016), above n 60, 5–6.

Delaware's Decide Your Time Program<sup>471</sup> and Texas's Supervision with Intensive Enforcement (SWIFT) program<sup>472</sup> utilise other sanctions in addition to imprisonment. Second, there is some evidence that non-custodial responses can undermine the effectiveness of the HOPE program because the sanction is no longer 'certain' imprisonment.<sup>473</sup>

## Question 12: Sanctions

If an SCF approach were to be implemented in Victoria, should the sanctions for condition violations be:

- a. only custodial;
- b. custodial and non-custodial (and if so, what type or types); or
- c. only non-custodial (and if so, what type or types)?

## What contraventions should trigger swift, certain and fair responses?

- 4.108 If Victoria were to implement an SCF approach to family violence offenders on a community order, one of the key questions would be 'Which conditions should trigger the SCF sanction?' The HOPE program in Hawaii, for example, now includes swift, certain and fair responses to non-binary conditions for family violence offenders such as failure to 'satisfactorily participate' in programs and unlawfully contacting victim survivors.<sup>474</sup> While the former represents violation of a condition, the latter, in Victoria, could constitute further criminal offending.
- 4.109 As discussed at [4.84]–[4.86], applying SCF approaches to contestable, non-binary conditions of orders is likely to pose difficulties for the short timeframes envisioned in the SCF model. This is difficult in the family violence context, where almost all condition contraventions have the potential to be contested.<sup>475</sup>
- 4.110 As discussed at [3.194]–[3.199], the potential to increase risk to victim survivors must be carefully considered. Relying on victim survivors to report contraventions of any order would place them in a position where they are tasked with monitoring the offender's compliance with the order. This could be seen to place undue stress on victim survivors, requiring them to engage in procedural matters such as providing statements to police within SCF timeframes.
- 4.111 In order to impose sanctions within an expedited timeframe, the conditions to which SCF sanctions apply are likely to need to be 'binary'. (For further discussion of the application of SCF sanctions to binary conditions, see [2.26].)

## Question 13: Targeted conditions

If an SCF approach were to be implemented in Victoria, what condition contraventions should receive SCF responses?

471. Daniel O'Connell et al. (2011), above n 48, 264.

472. Snell (2007), above n 129, 2.

473. See Kleiman et al. (2014), above n 119, 72 (discussing Maryland's Break the Cycle program, which provides 'mere warnings' as the sanctions for the first five violations).

474. Campbell et al. (2015), above n 57, 12.

475. In preliminary consultation, a number of stakeholders noted that even seemingly incontrovertible contraventions of FVIOs and FVSNs can be contested.

## Capacity and demand implications

### Overview

- 4.112 The HOPE program has been estimated to cost US\$2,500 per offender per year, compared with US\$1,000 for standard probation. However, it has been described as cost effective on the whole, noting the costs saved from decreased drug use by offenders and the benefits gained from decreases in reoffending rates.<sup>476</sup>
- 4.113 An important question flowing from the terms of reference is whether Victoria has the capacity to implement such a program within its existing resources (most notably, whether there is the capacity to house offenders on short terms of imprisonment within the current custodial infrastructure) or whether there are likely demand implications of the introduction of SCF approaches in Victoria.
- 4.114 This section provides some information drawn from initial consultation with stakeholders on the current capacity of agencies to implement SCF approaches and sets out the Council's questions regarding the capacity and demand implications of the introduction of SCF approaches in Victoria.

### Where would offenders be held within Victoria's current custody infrastructure?

- 4.115 During preliminary consultations, a number of stakeholders raised concerns about where and how offenders could be held on short periods of custody of two to three days' duration within Victoria's current criminal justice infrastructure.
- 4.116 Prison facilities, which are managed by Corrections Victoria, require offenders to undergo a reception process – of around two to three days' duration – upon their arrival at the prison. This would make it difficult, if not entirely unfeasible, for offenders who are on short stays to be held at prison facilities, as the reception process is likely to make up a significant portion of the short stay. Therefore, it is likely that for short periods of custody, offenders would serve their sentences in police cells.
- 4.117 In recent years, police cells in Victoria have often been operating at very close to, or beyond, capacity and are currently used to hold prisoners on remand, as well as sentenced prisoners.<sup>477</sup> The demand for Melbourne Custody Centre regularly exceeds capacity, which has a flow-on effect for police facilities and courts.<sup>478</sup>

### *Custody capacity determined by composition of persons held*

- 4.118 Despite there being 373 police cell beds in Victoria, there are several limitations on capacity. Generally, there are three beds in each cell, but certain prisoners (such as women, children or protected prisoners) cannot be placed in cells with certain other prisoners.<sup>479</sup> Therefore, the availability of beds is limited by the composition of prisoners and the attendant safety concerns.

476. Paul J. Larkin Jr. 'Swift, Certain and Fair Punishment: 24/7 Sobriety and HOPE: Creative Approaches to Alcohol- and Illicit Drug-Using Offenders' (2015) 105(1) *Journal of Criminal Law and Criminology* 39, 75.

477. The Victorian Auditor-General found that prisoners were not being accepted into court-located police cells because those cells were 'being used to detain sentenced and remand prisoners' and had no spare capacity: Victorian Auditor-General's Office, *Prisoner Transportation* (2014) 29. In August 2016, the *Herald Sun* reported that there were 255 people on remand being held in local police cells: Staff Writer, 'Cells Still Overflow' *Herald Sun* (Melbourne) 24 August 2016.

478. Victoria Police, *Annual Report 2015–2016* (2016) Appendix Q; see also Shannon Deery, 'No Room in Melbourne Magistrates' Court to Hear Ex-Mongols Bikie Case', *Herald Sun* (Melbourne) 8 November 2016 <<http://www.heraldsun.com.au/news/law-order/no-room-in-melbourne-magistrates-court-to-hear-mongols-bikie-case/news-story/09261711f8275faff1cdeac83286cdc0>> at 6 January 2017.

479. Victorian Auditor-General's Office, *Prison Capacity Planning* (2012) 11.

- 4.119 In addition, while those 373 police cell beds represent the total in the State of Victoria, over 70% of prisoners are held in metropolitan cells.<sup>480</sup>
- 4.120 Police cells cannot properly operate at, or even near, full capacity for two further reasons. First, Victoria Police requires spare police cells to hold newly arrested detainees. Second, during the day, police cells must accommodate those persons who are being held in prison (whether on remand or awaiting sentence) but are required to appear in court.

### **Other issues with police custody**

- 4.121 Housing drug-affected offenders in police custody creates safety issues for Victoria Police members, as well as for the offenders, given the fact that the facilities in police holding cells are more basic than those at custodial facilities built to hold offenders for longer periods of time.<sup>481</sup>
- 4.122 Offenders held in police custody necessarily do not have access to the same treatment or rehabilitation programs offered in prison.
- 4.123 There are also issues about the distance that an offender may need to travel to serve the short sanction. For example, if an offender breaches a condition of an SCF order in Mildura and is sentenced to a three-day prison term, they would need to be either transferred to a prison facility in another part of the state or held in the police holding cells locally. This may pose difficulties for regional areas with limited police holding cell capacity.

### **Implications of lack of capacity to house offenders in police cells**

- 4.124 There is very limited capacity for prisons to hold people for short stays of the length envisaged by an SCF model that involves custodial sanctions.
- 4.125 If Victoria Police were to hold people for short stays, this would raise a number of operational issues, such as:
- likely mixing of sentenced and unsentenced persons in custody;
  - risk to the safety of the offender and Victoria Police staff if the offender is affected by or in withdrawal from drugs or alcohol;
  - overcrowding issues; and
  - consequential difficulties in transportation of accused persons to and from court hearings.

## **Question 14: Custodial capacity and location**

If an SCF approach that carries short periods of two to three days in custody as a sanction were to be implemented in Victoria:

- a. Where would offenders subject to such a sanction be held?
- b. Are there any other operational or resourcing implications in requiring offenders to serve short periods of two to three days in custody?

480. Ibid 12.

481. For a general background on the differences between police cells and prisons managed by correctional facilities in Victoria, see Office of Police Integrity, *Update on Conditions in Victoria Police Cells* (2010) 6–7.

## Capacity questions for agencies

### Courts

- 4.126 Depending on the type of model, the adoption of an SCF approach in Victoria may have workload implications for judicial and court staff, as a result of increased matters requiring urgent listing.
- 4.127 The process evaluation of the HOPE program found that court staff were one stakeholder group who expressed dissatisfaction with the program, citing that the program had increased their workloads, with most suggesting the increase had been a large one.<sup>482</sup> Hawken and Kleiman observed that 'from the perspective of court employees the burdens are obvious and the benefits hidden'.<sup>483</sup> However, given the experiences of other staff who had been working with the HOPE program for a longer period of time, it was suggested that the workload issues were likely to decrease over time.<sup>484</sup>
- 4.128 An additional potential resourcing implication for the courts would be the increased demands on the judiciary and magistracy. There may need to be dedicated judicial officers who sentence offenders to an SCF sanction (potentially a family violence offender compliance order as discussed at [4.38]–[4.43]) and apply sanctions in accordance with the terms of the order. Alternatively, if the order or SCF sanction is not centralised to a particular location or jurisdiction, training may be required for judicial officers to apply the new sentencing order in accordance with an SCF approach.

### Corrections Victoria

- 4.129 As discussed at [3.132]–[3.144], under Corrections Victoria's reformed service delivery model for managing offenders on CCOs, an offender's assessed risk level will inform the level of case management and supervision that they receive, with higher-risk offenders receiving higher levels of supervision and intervention and lower-risk offenders receiving more limited intervention. Community corrections officers will have non-prescriptive guidelines that inform their decisions about responses to non-compliance with CCO conditions, and community corrections officers will be encouraged to exercise their professional discretion and knowledge of the offender to tailor responses.
- 4.130 An approach that requires the removal of community corrections officers' discretion in responding to every breach with a fixed sanction may contradict Corrections Victoria's current policies and overall approach to offender management. (See also the discussion at [2.46] on the experience of the former commissioner of probation in New York City.)
- 4.131 The requirement that responses occur within fixed timeframes may have operational and resourcing implications. However, if the program were directed at a limited group of offenders, it may be that these operational demands could be managed.

482. However, it should be noted that only 11 respondent court staff workers were surveyed: Hawken and Kleiman (2009), above n 151, 45.

483. *Ibid* 40.

484. *Ibid* 41.



- 4.132 There are also resourcing issues relating to the housing of prisoners and the transportation of prisoners to court hearings,<sup>485</sup> which may be further exacerbated by any SCF approach that increases the demand for court hearings for a group of offenders. Given that the costs of imprisonment increase when the system is at capacity,<sup>486</sup> an SCF approach may carry significant cost implications for both Corrections Victoria and Victoria Police.

### Victoria Police

- 4.133 As discussed at [4.115]–[4.125], Victoria Police are likely to be affected by the need to hold offenders on short periods of custody.
- 4.134 Furthermore, if offenders contravene their orders and fail to appear for an appointment, drug testing or other condition, Victoria Police may be required to arrest that person to be brought before the court within a limited timeframe. The need to execute warrants quickly, and bring offenders before the court within strict timeframes, places operational demands on Victoria Police's resources.
- 4.135 Any program that mandates alcohol or drug testing of offenders may require Victoria Police to carry out such testing services, and to respond accordingly where an offender fails a drug or alcohol test.

### Other agencies

- 4.136 There are a range of other agencies that may experience increased demand for services or programs as a result of an SCF approach, such as service providers of men's behaviour change programs, drug and alcohol testing providers, drug and alcohol treatment providers and other related agencies that provide treatment programs to persons subject to court orders.

## Question 15: Demand and resource implications

If an SCF approach were to be implemented in Victoria:

- a. Would affected agencies have the capacity to accommodate SCF responses?
- b. If not, what further facilities or resources would be required?

485. See for example Adam Cooper, 'Courts in Confusion After Corrections Officers Fail to Deliver Hit-Run Accused', *The Age* (Melbourne) 3 August 2016 <<http://www.theage.com.au/victoria/courts-in-confusion-after-corrections-officers-fail-to-deliver-hitrun-accused-20160803-gqjxjo.html>> at 6 January 2017.

486. According to written responses to questions without notice asked in the Victorian Legislative Council, costs were awarded against Corrections Victoria for failing to present prisoners at court in 689 matters between September 2013 and 7 June 2016, amounting to \$528,928.64 in costs: Victoria, 'Prisoner Transport: Written Responses to Questions Without Notice', *Parliamentary Debates*, Legislative Council, 9 June 2016, 2905 (Steve Herbert, Minister for Corrections); Victoria, 'Community Correction Orders: Written Responses to Questions Without Notice', *Parliamentary Debates*, Legislative Council, 26 May 2016, 2537 (Steve Herbert, Minister for Corrections).

## Applying the principles informing SCF approaches

- 4.137 The Council has distinguished between the implementation of an SCF approach and application of the principles of 'swiftness', 'certainty' and 'fairness' more generally, as discussed at [1.21]–[1.24].
- 4.138 If the implementation of an SCF approach as discussed above is not desirable or feasible within the Victorian context, however, there may still be further reforms that could improve sentencing, and management under sentence, of family violence offenders through the general application and furtherance of these principles.

## Other reforms to promote swiftness, certainty and fairness

- 4.139 If the various SCF approaches discussed in this discussion paper are considered inappropriate, undesirable or simply unfeasible within the Victorian context, the Council invites stakeholders to consider other alternative reforms to the sentencing, and management under sentence, of family violence offenders that may promote the underlying principles of swiftness, certainty and fairness.

### Question 16: Alternative reforms

Are there alternative reforms to the sentencing, and management under sentence, of family violence offenders that would better promote the principles of 'swiftness', 'certainty' and 'fairness'?

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# Appendix: Preliminary consultation

## Meetings/events

| Date              | Meeting/event   |
|-------------------|---|
| 28 September 2016 | Meeting with the Dandenong Magistrates' Court   |
| 6 October 2016    | Meeting with the Chief Magistrate, Magistrates' Court of Victoria   |
| 12 October 2016   | Meeting with Corrections Victoria   |
| 24 October 2016   | Meeting with Deputy Chief Magistrate Broughton and Magistrate Hawkins, Magistrates' Court of Victoria               |
| 24 October 2016   | Meeting with Victoria Police  |
| 25 October 2016   | Meeting with Magistrate Parsons and Observation of the Drug Court, Dandenong Magistrates' Court                     |
| 3 November 2016   | Presentation to the Magistrates' Court Family Violence Taskforce  |
| 3 November 2016   | Meeting with Magistrates of the Heidelberg Magistrates' Court and Observation of the Family Violence Court Division |
| 7 November 2016   | Meeting with Corrections Victoria   |
| 7 November 2016   | Meeting with Judge Hannan and Judge Taft, County Court of Victoria  |
| 8 November 2016   | Meeting with Victoria Police  |
| 9 November 2016   | Teleconference with Dr Lorana Bartels   |
| 6 December 2016   | Meeting with Prisoner Management Unit, Victoria Police  |
| 4 January 2017    | Meeting with Victoria Legal Aid   |
| 12 January 2017   | Meeting with Corrections Victoria   |

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